FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HH/HNA/2018/0014
Property	:	15 Esplanade Road, Paignton, Devon. TQ4 6EB.
Applicant	:	Kay Godstchalk
Representative	:	Barry Cawsey (Counsel)
Respondent	:	Torbay Council
Representative	:	Robert Kelly BSc (Hons) (Housing Standards and Environmental Protection Manager)
Type of Application	:	Appeal against a decision to impose a financial penalty; Section 249A Housing Act 2004 (The Act)
Tribunal Members	:	Judge C A Rai (Chairman) T E Dickinson BSc FRICS (Chartered Surveyor) W H Gater FRICS ACIArb (Chartered Surveyor)
Date and venue of Hearing	:	16 April 2019 Torquay County Court, The Willows, Nicholson Road, Torquay Devon. TQ2 7AZ.
Date of Decision	:	30 April 2019

DECISION

Summary of Decision

1 The Tribunal confirms the Respondent's decision to impose a financial penalty on the Applicant and confirms the amount of the penalty of Three Thousand Five Hundred and Six Pounds (£3,506) The reasons for its decision are set out below.

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Background

2 This appeal was lodged on behalf of the Applicant, by her representative, against the financial penalty imposed on her by Torbay Council in respect of six alleged breaches of section 234 of the Act. Six separate notices made under section 249A of the Act were served by Torbay Council on the Applicant, who has appealed against the validity of all of the notices and against the financial penalties imposed. All of the notices relate to 15 Esplanade, Torquay, Devon TQ4 6EB, (the Property), and identified alleged breaches of the Licencing and Management of Houses in Multiple Occupation (Additional Provisions) England Regulations 2007 [SI 2007 No1903] (the Management Regulations).

3 It does not appear that the Applicant subsequently engaged directly with Torbay Council. She appears to have appointed Obiter Dicta Consultancy Limited (Obiter Dicta) to act on her behalf, but although correspondence with Torbay Council, mostly sent by email, was sent by it to the Respondent, it omitted to supply an authority from the Applicant, in a form which satisfied the Respondent, which confirmed that it had been instructed to represent her. Consequently the Respondent corresponded intermittently with Obiter Dicta and also with the Applicant.

4 The Application to the Tribunal, dated 19 November 2018, was submitted by Obiter Dicta.

5 Directions dated 16 January 2019 were issued by the Tribunal requiring that the parties exchange statements of their respective cases by stated dates and it was directed that an oral hearing would be arranged for the week commencing the 15 April 2019. The hearing was later scheduled to take place at 1030 on 16 April 2019. From the statements within that bundle it is clear that there was an absence of engagement either by the Applicant or Obiter Dicta on her behalf with Torbay Council. Statements of claim do not appear to have been exchanged as directed.

6 The hearing bundle, (the bundle), prepared by the Respondent, was sent to the Tribunal and Obiter Dicta on 1 April 2019 by Torbay Council. In an email sent to the Tribunal on Sunday 14 April Obiter Dicta applied to adjourn the hearing because it said that the bundle which it had sent to its client's Counsel had been mislaid in the document exchange. It had not retained a copy of the bundle so could not duplicate it. Following consultation with the Respondent the Tribunal notified Obiter Dicta that it would not adjourn the hearing and the Respondent emailed copies of some of the documents in the bundle to Obiter Dicta.

The Hearing

7 The Tribunal loaned its "office" copy of the bundle to the Applicant's counsel Mr Cawsey before the start of the Hearing. At 1030, the scheduled time for the Hearing to commence, he and Mr Kelly both addressed the Tribunal. Mr Cawsey repeated the Applicant's request for an adjournment. He had only received emails with some of the documents attached during the preceding evening. Whilst the Tribunal expressed sympathy for Counsel's predicament, for which it accepted he

was not to blame, it was not willing to adjourn the Hearing to another day; neither was the Respondent. It however suggested by the Tribunal that the Hearing could be delayed by half an hour and the Respondent agreed to this proposal. Both Mr Cawsey and Mr Kelly also agreed to discuss the application prior to the commencement of the Hearing and endeavour to narrow the issues to be determined by the Tribunal since some of the issues referred to in the Applicant's written statement of case appeared to be outside the Tribunal's jurisdiction.

8 When Tribunal reconvened the Applicant and her husband were present and Mr Kelly was accompanied by Neil Palmer a building control officer employed by the Respondent.

9 Mr Cawsey confirmed that he and Mr Kelly agreed that the Applicant's case relates to three issues on which he would address the Tribunal and which were:-

   a. Is the Property a house in multiple occupation, (HMO)? If that is established:
   b. Are the defects identified by the Respondent in the six notices breaches of the Management Regulations? If that is established:
   c. Are the amounts of the financial penalties appropriate?

The HMO issue

10 The Applicant submitted that the Property is not an HMO. It is apparent, from the copies of the land registers contained in the bundle, that the Applicant was registered as the proprietor of the Property on 3 December 2004. The Respondent's evidence, which was not disputed by the Applicant, is that the Property was converted into 12 self-contained flats prior to December 2004. The Applicant stated that all the flats have self-contained facilities such as kitchens and bathrooms. No amenities are shared and there is no owner occupation. These facts were not disputed by the Respondent.

11 The Respondent stated that the Property is considered to be an HMO under section 257 of the Act. He said it was a converted block in respect of which conversion there is no building regulation final certification. Nor could such certification be obtained as the Property is non-compliant. Copies of emails exchanged with Jim Beer the senior building control surveyor are at pages 13 – 16 of the bundle. One of the particular defects identified as evidencing non-compliance with building regulations, discussed at the Hearing, is the absence of mechanical ventilation in the bathrooms of some of the flats. The Applicant stated that mechanical ventilation is not a requirement in bathrooms which have opening windows but the Respondent did not accept this, stating that it is a functional requirement that mechanical ventilation is required in all bathrooms, albeit not in a separate w/c with a washbasin. Furthermore, at the time of the initial inspection in 2016, no adequate fire alarm system was present within the building, which omission would also have prevented the issue of building regulation certification.

12 Mr Cawsey repeated that the Respondent had failed to engage with the Applicant and that it is for the Respondent to prove that the Property is an HMO; Furthermore the Respondent must establish this beyond

reasonable doubt. It was confirmed by the Applicant that Flats 1, 3, 8 & 9 have bathrooms without mechanical extractor fans. This is also the case with Flat 2, which is neither occupied, nor currently in a condition suitable for immediate occupation.

13 In response Mr Kelly said that it is difficult to establish a negative, but the Respondent is satisfied that that Property is within the definition of an HMO within section 257 of the Act. He maintained that there has been engagement with the Applicant since the first visit to the Property, a multi-agency visit, which took place on 14 March 2016. Following that visit action was taken by Devon and Somerset Fire and Rescue which eventually resulted in the Applicant being prosecuted for offences committed under the Regulatory Reform (Fire Safety) Order 2005. [Page 255 of bundle is a copy press release].

14 It is not disputed by the Respondent that the Applicant advised the Respondent that she was unable to manage the Property herself following a serious assault on her partner which resulted in her having to care for him. Subsequently she employed Connells as managing agent who do not appear to have carried out any significant management of the Property. No evidence has been submitted by the Applicant about the terms of the management agreement or whether Connells was employed to do anything more than find tenants. Evidence in the bundle, not disputed by the Applicant, suggested that she had visited the Property regularly to collect rents. She told the Tribunal that occasionally she and her partner occupied a vacant flat within the Property.

The defects identified in the Notices of Intent to Issue a Financial Penalty

15 Mr Cawsey referred to each of the notices which are at pages 167, 169, 171, 173, 175, and 177 of the bundle. All are headed Notice of intent to Issue a Financial Penalty and refer to 24 April 2018 as the date of the offence.

16 The first notice refers to the Respondent visiting the Property on 24 April 2018 and finding that rain water guttering discharged directly into the rear yard and did not meet the gully until the yard was compromised. It was stated that this was in contravention of Regulation 5(4)(a) of the Management Regulations. The intended penalty was stated as £501.

17 Mr Cawsey said that Regulation 5 is about fire safety although that was subsequently disputed by Mr Kelly. He also said that the hazard was not a sufficient risk likely to cause injury so as to trigger a liability. The Regulation is headed "Duty of manager to take safety measures". The Regulation referred to in the notice states that:- "The manager must take all such measures as are reasonably required to protect the occupier of the HMO from injury, having regard to—(a) the design of the HMO". It was Mr Kelly's submission that the possibility of the yard being full of water because of the absence of a drain would be hazardous to occupiers when crossing the yard. Mr Cawsey submitted that yard was not used by all occupiers and that when crossing the yard occupiers would generally avoid the area into which the drain discharged.

18 It was agreed by Mr Kelly that following the service of the notice the drain had been repaired so that water from the roof now discharges into a pipe and thereafter into the drain, eliminating the risk of an accumulation of water.

19 Mr Cawsey maintained there is no actual evidence of the yard having been slippery or of anyone having been injured as a result of pooling water. Subsequently the Applicant and her partner showed recent photographs to the Tribunal members and the Respondent, which demonstrated that steps led from the rear parking area into the yard which would have to be crossed to gain access to the building. Mr Kelly also stated, and this was not disputed, that all occupiers used the yard when disposing of rubbish into the refuse bins. Mr Kelly explained that evidence of green moss or plant growth visible in the photographs endorsed his submissions that the defect had already compromised the area possibly making it slippery and so unsafe.

20 The second notice refers to Regulation 6.1(a). That regulation states:- "The Manager must ensure that the water supply and drainage system serving the HMO is maintained in good clean and working condition and in particular he must ensure that – (a) any tank, cistern or similar receptacle used for the storage of water for drinking or other domestic purposes is kept in a good, clean and working condition with a cover kept over it to keep the water in a clean and proper condition; and …" The intended penalty was £501. Mr Cawsey said that the identified defect is missing guttering on the side of the building and a blocked gully with a missing cover in the rear yard. He said even if the defect existed it does not fall within this regulation.

21 Mr Kelly told the Tribunal that he had not intended that the notice should refer to regulation 6(1)(a), but to 6(1) and enquired if he could request that an amendment be made to the notice so it was not limited by referring to sub paragraph (a), and be interpreted as referring to the drainage through the guttering and in the yard being kept in good condition. The Tribunal said it had no jurisdiction to do what he requested. Both parties agreed that the defects identified in the notice have now been remedied.

22 The third notice refers to Regulation 8 (1)(a). "That regulations states:- The manager must ensure that all common parts of the HMO are—(a) maintained in good and clean decorative repair;" Photographic evidence within the bundle showed accumulated debris on the hall carpet and a staircase with a missing spindle. The intended penalty was £501. Mr Cawsey said the breach was "de minimis". [A Latin expression meaning insignificant in the specific context]. The balcony of an upper flat was repaired and decoration carried out and the resultant debris had not been cleaned prior to the Respondent taking photographs. The communal stair carpet and hall carpet are now clean and the decoration is in good condition.

23 Mr Kelly stated that the photograph showing the accumulated dirt was indicative of the lack of general management of the Property at that time; More recent photographs were viewed by the Tribunal and the

Respondent on the Applicant's phone but these still showed the missing spindle, although the condition and decoration of the hall has been improved. Mr Cawsey said it is unreasonable to assume that the Applicant can arrange instant repairs. All of the issues identified in the notice are relatively minor. Mr Gater asked him about the trunking on the ceiling visible in one of the photographs which showed that had been installed without the ceiling being repaired and from which it was apparent that the roof repair remained outstanding. The Applicant's partner said there had been a delay because the original work was not "good enough", and had to be done again. It was said that the trunking was installed first to comply with the fire safety regulations.

24 Mr Kelly stated that the recent photographs endorse the Respondents' view that there is no consistent management regime, rather a response to problems as and when they arise. The Applicant has stated that she visits the Property regularly so he would have expected a better and more consistent standard of maintenance.

25 The fourth notice refers to a breach of Regulation 8(2)(b) which states that:- "In performing the duty of manager imposed by paragraph (1), the manager must in particular ensure that—(b) such additional handrails or banisters as are necessary for the HMO are provided;". The intended penalty is £1,001. Regulation 8 is headed "Duty of manger to maintain common parts fixtures fittings and appliances". Sub paragraph (1) states that "the manager must ensure that all common parts of the HMO are maintained (a) in good and clean decorative repair; (b) maintained in a safe and working condition; and (c) kept reasonably clear from obstruction". From the photograph in the bundle, at page 48 it can be seen that there are no handrails beside the steps leading from a parking area to the yard. Mr Cawsey stated that the photograph had been taken when works were in progress....and thereafter temporary wooden balustrading was erected. There was a suggestion that the profile of the actual occupants of the Property meant that handrails were unnecessary because the residents' safety had not been compromised. Mr Cawsey also said that he considered the amount of the penalty was disproportionate on account of the Respondent compromising ongoing works of repair.

26 Mr Kelly stated that the photograph did not show ongoing repairs but rather the permanent untidy state of the yard at that time. Given the juxtaposition of the steps leading to the yard, which at the time had a downpipe discharging into it and no gully, safety would have been compromised. It was clear from the more recent photograph, shown to the Tribunal and the Respondent on the Applicant's phone, that the stairs lead into the corner of the yard farthest from the building which would have necessitated users crossing the entire area. Mr Kelly had maintained throughout the Hearing that the yard was also used by all residents as a bin area. The Tribunal was also uncertain that the traffic cone shown on the photograph was intended to be a warning relating to the absence of handrails beside the steps. It seemed more likely it had been placed to prevent vehicles to avoid driving over the edge of the parking area. The Tribunal also expressed its disapproval of the Applicant's suggestion that the age and mobility of the actual residents

should influence the Applicant's duties in relation to the provision of handrails.

27 The fifth notice refers to Regulation 8(4)(a) which states:- "The manager must ensure that—(a) outbuildings, yards and forecourts which are used in common by two or more households living within the HMO are maintained in repair, clean condition and good order". The notice states that during a visit to the Property on 24 April 2018 accumulations of discarded furniture were in the rear yard in contravention of regulation 8(4)(a). The intended penalty was £501. The Applicant's response was that the yard was only used by a one tenant of the Property and the manager cannot prevent a tenant discarding furniture. The items were removed shortly afterwards. Mr Kelly repeated his earlier statement that all bins serving the entire Property are located within the yard. It is the only route of access to four of the flats and needs to be accessible. In any case it is a "common part" of the HMO. The Respondent believed that that the Applicant knew of the problem but had not arranged for the furniture to be removed for several months.

28 The sixth notice refers a contravention of Regulation 9(2)(c) which states that subject to paragraphs (3) and (4), the manager must ensure in relation to each part of the HMO that is used as living accommodation , that—(c) every window and other means of ventilation are kept in good repair. The exclusions in paragraphs (3) and (4) are not relevant to the matters referred to in the notice, which were that Flat 6 had a cracked window pane which had not been repaired, Flat 2 had incomplete window framing with excessive gaps exposing rotting wood and the bedroom window of that Ground floor flat at the rear was ill-fitting with blown seals. The intended penalty was £501.

29 Mr Cawsey said he was instructed that Flat 2 is derelict, unoccupied and not currently available for occupation; it has not been let since 2010; the ground floor flat at the rear is Flat 2. Furthermore the Applicant stated the window in Flat 6 was cracked by a seagull encouraged by the tenant, at the time, feeding wild birds, so the damage was attributable to a tenant and the repair was that tenant's responsibility, although the window had subsequently been replaced by the Applicant.

30 Mr Kelly disputed this and told the Tribunal that the occupier of Flat 6 had told him that the window pane had been cracked from the date he moved into the flat and was not replaced for four years. The photographs at pages 50 – 54 of the bundle show the window at Flat 6, Flat 2 (3 photographs), but the last photograph, [page 54], shows the window of another flat, not Flat 2.

The amount of the financial penalty

31 Mr Cawsey stated that the Respondent's disclosure of its policy relating to the scoring of offences to enable consistency when calculating financial penalties was helpful. A copy of that policy is in the bundle at pages 161 – 165. The offences are listed on page 162 of the bundle with the scores and the calculation of the total penalty of £3,506 which the Respondent has stated to be the "lowest possible". Mr Cawsey submitted

that there should be no penalty with regard to three of the alleged offences being breaches of regulations 5(4)(a), 6(1)(a) and 9(2)(c).

32 He disputed the categorisation of the seriousness of the offence in relation to the three regulation 8 offences and also that the culpability factor, [page 161 of the bundle], is specified as reckless. He said that his client had employed Connells as a managing agent when she was unable to manage the property and was ignorant of its failure to do so, and had not been reckless. In page 5 of the infringement report, [pages 121 – 140 of the bundle], the section relating to harm caused to the tenant lists the vulnerable age groups. No actual harm has resulted from the infringements. On that basis he wants the categorisation reduced to a score of 1- 9 for the breaches, (penalty between £1 - £250). In relation to the missing handrail the Applicant accepts it is a level 3 offence but his client was not reckless, but negligent, which would reduce the score to between 10 – 19 and the penalty to between £251 - £500. He said that the "global punishment" of £3,506 is disproportionate.

33 Mr Kelly said that the Respondent's policy follows the Department of Communities and Local Government guidance closely and that the Respondent transmits the guidance into the scoring system. There are three levels (as compared with the four applied in the Housing Health and Safety Rating System (HHSRS)). Criteria for culpability is replicated in other civil penalty analysis. He considers the identified offences to be "more than negligent". The Applicant's track record is self-explanatory from the information contained in the bundle which has not been disputed. Whilst he does not dispute that actual harm has not occurred, the vulnerability table is taken from the HHSRS guidance and he reminded the Tribunal that the material consideration is potential for vulnerability, not actual vulnerability. The scoring is just a way of enabling the Respondent to co-ordinate the action that it takes and provides checks and balances for consistency. The Respondent uses the scoring as a guide and can adjust the final amount of the penalty. Evidence of financial status can been taken into account as well. He believes that the Respondent has satisfactorily proven all the offences. The yard is used by all occupiers to store rubbish and therefore needs to be maintained in a safe condition and it has been established that the steps without the handrail led into this area. This is why the Respondent considered that the breaches relating to this area merited a higher score.

34 He considered the other offences to be of a lower level. In terms of the fines the premium which used to exist for "multiple households" has been removed from the Management Regulations which is to the Applicant's advantage. The Applicant was aware of the multi-agency concerns and the Respondent wrote to her after that visit, (in 2016), and invited her to engage with it but she did not improve the Property until it took the action last year. This is the reason he considered that her action had been negligent rather than reckless. His reference to "negligence" does not have the same connotation as the term when used in the HHSRS guidance. He could have taken into account the prosecution by the Fire Brigade to increase the amount of the financial penalty imposed which would be in accordance with the Guidance. In his view there is a vulnerable age group in occupation of some of the

Property and the fact that compliance has now been achieved has resulted in the imposition of the lowest level of penalty. Torbay Council generally imposes lower penalties than Plymouth Bristol or Nottingham.

35 In response to a question from the Tribunal, Mr Kelly said that regardless of the alleged breach of building regulations on account of the absence of sufficient mechanical extraction in the bathrooms, no building regulation certification could have been issued because the Property did not comply with fire safety regulations.

36 In concluding Mr Cawsey reminded the Tribunal that it has to be satisfied beyond reasonable doubt, the criminal standard of liability, that the Applicant has committed an offence and is in breach of the Housing Act and in his view it is fundamental that the Respondent prove that the Property is an HMO.

37 Following the conclusion of the Hearing the Applicant confirmed that the Tribunal's decision should be sent to Obiter Dicta.

The Law

38 Extracts from sections Section 234 and 249A of the Act are set out below:-

234 Management regulations in respect of HMOs

(1) The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations—

(a) there are in place satisfactory management arrangements; and

(b) satisfactory standards of management are observed.

(2) The regulations may, in particular—

(a) impose duties on the person managing a house in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it;

(b) impose duties on persons occupying a house for the purpose of ensuring that the person managing the house can effectively carry out any duty imposed on him by the regulations.

(3) A person commits an offence if he fails to comply with a regulation under this section.

(4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation.

(5) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

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) - (d) [not relevant to this determination]
(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.

39 Schedule 13 of the Act provides that before imposing a financial penalty the local housing authority must give notice of the authority's proposal to do so and sets out the required content of the notice and the procedure to be followed subsequently. Paragraph 10 of schedule 13 sets out the rights of the person on whom a notice is served to appeal to this Tribunal and paragraph 3 states that 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.

40 There is no dispute between the parties regarding the procedure followed by the Respondent in issuing the initial notices and serving the final notices of intent to impose a financial penalty.

41 The Applicant has submitted that the Property is not an HMO. For the Respondent to be able to rely upon section 234 of the Act the Property must be an HMO within the Act. The Applicant's case is that it is for the Respondent to prove this beyond reasonable doubt.

42 The Respondent referred the Tribunal to Section 257 of the Act. It is helpful to consider collectively sections 254 – 260 of the Act which appear following the sub heading **"Meaning of "house in multiple occupation"** and are clearly intended to clarify which property falls within that definition. Section 254, also headed "meaning of house in

multiple occupation" states that for the purposes of the Act a building or part of a building is a house in multiple occupation if it meets certain tests or criteria one of which is, (subsection 254 (1) (c)), that it is a converted block of flats to which section 257 applies.

43 Section 257 headed **"HMO's: certain converted blocks of flats"** states that for the purposes of this section a "converted block of flats" means a building ......which has been converted into, and consists of self-contained flats." Subsection 2 states that 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. The other sections referred to in paragraph 42 above, although not of direct relevance to this determination, contain further clarification interpretation and guidance on terms and presumptions referred to elsewhere in the Act.

Reasons for the Decision

44 Although the Applicant's statement of case referred to other matters, the only issues raised by her Counsel are those three specifically referred to and identified at the Hearing, and referred to in paragraph 9 above, which can succinctly be described as the HMO issue, the Management Regulations issue and the amounts of any applicable Financial Penalty**.**

The HMO issue

45 It is not disputed by the parties that the Property was at some time converted into a self-contained block of flats. Factually although the Applicant may reside in one flat from time to time ten of the twelve flats are currently let to tenants.

46 The Respondent has stated that no building regulation completion certification has been issued in respect of the conversion of the Property which does not comply with modern building regulations. The Applicant was prosecuted because the Property did not comply with Regulatory Reform (Fire Safety) Order. The Respondent has also identified other defects including lack of mechanical ventilation to the bathrooms within some of the flats which would prevent compliance with current building regulations. Therefore the Property still does not comply with appropriate building standards. The Respondent stated at the Hearing, that although the handrails within the yard are suitable to enable compliance with the Management Regulations they would not necessarily be compliant with current building regulations. For all of these reasons the Tribunal is satisfied beyond reasonable doubt that the Property is an HMO to which the Act applies.

The Management Regulations issue

47 The Respondent alleges breaches of six specific paragraphs within the Management Regulations which apply to HMO's. Dealing with each in turn:-

a. The identified breach related to a drainpipe in the yard from which water flowed across the yard into a drain rather than through a drainage gully. The Respondent said this was in breach

of Regulation 5 and specifically 5(4)(a). Regulation 5 is about the duties of a manager to take safety measures but in the context of the design of the HMO. The Property is a converted building. Although the Applicant's evidence conflicted with that of the Respondent the Tribunal is satisfied from photographs produced by the Applicant and the Hearing and from the Respondent's evidence, which the Applicant did not contradict, that the yard is a common part and used by several if not all of the occupiers of the Property. A photograph in the bundle, [page 41], shows the absence of a drainage gully and deterioration to the surface of the yard. Another photograph, exhibited on the Applicants mobile phone to demonstrate the addition of the handrails, showed that the steps leading from the rear of the Property require users to cross the majority of the yard, to gain access to the rear of the Building. Therefore the Tribunal accepts that this notice was validly served and refers to a breach within the stated Regulation.

b. The identified breach was that part of the guttering was missing and that the drain into which the downpipe discharged was uncovered and blocked. The Applicant stated that the reference to Regulation 6(1)(a) was incorrect and the Respondent agreed that it had intended to refer generally to Regulation 6(1). However whilst subparagraph (a) of Regulation 6 refers to a water tank for the storage of drinking water and or water for domestic use the obligation which precedes it is for the manger to ensure that both the water supply and <u>drainage system</u> are kept in good clean working condition. That was not the case as part of the guttering was missing and the drain cover was also missing. Therefore the Tribunal accepts that this notice identified a defect which breached the Regulation referred to in it.
c. The identified breach was that some the common parts were neither clean nor in good decorative order. This was a breach of Regulation 8(1)(a). It was noted, from a recent photograph produced by the Applicant at the Hearing, that the spindle on the stairs is still missing. The Tribunal therefore accepts that the notice identified a breach of the stated Regulation.
d. Regulation 8(2)(b) required the Applicant to provide additional handrails or banisters. It was not disputed that these were not in place when the Property was inspected and it appears that these may not have been restored for some considerable period of time afterwards. The Tribunal therefore determines that the notice identified a breach of this Regulation.
e. The identified breach related to the storage of rubbish being discarded furniture in the common yard. It was established that this was a common part to which more than one occupier had access and which is used to store bins. The discarded furniture was in situ for too long, possibly several months, and this is in breach of Regulation 8(4)(a).
f. The final breach related to the condition of some of the living accommodation. It was established beyond reasonable doubt that a window in Flat 6 was cracked and not replaced for several years. It was suggested that the condition of Flat 2 was not relevant because it was unoccupied and the Applicant is not currently

seeking to let it. The Regulation referred to which is 9(2)(c) specifically refers to every window .....being kept in good repair. Unlike some of the other paragraphs of that Regulation there is no reference to this only being a requirement prior to a period of occupation. It is the Tribunal's view that the security and safety of the entire building would be compromised if any window is insecure and would be likely to be vulnerable to infiltration by moisture and intruders. The Tribunal finds that none of the Applicant's excuses, for the omissions referred to it, are reasonable. It is satisfied from the evidence disclosed, in the bundle and at the Hearing, that this notice was validly served on the Applicant in respect of a correctly identified breach of the Management Regulations.

The amount of the Financial Penalty

48 Having determined that it is satisfied that the Respondent was entitled to serve the six Final Notices to Issue a Financial Penalty the only matter remaining is for the Tribunal to determine if it should review the amount of the penalty. It has taken into account all Mr Cawsey's submissions with regard to the amount of the penalty on each of the six notices but the Tribunal has concluded that none of the arguments put forward merit it making any reduction in any of the amounts.

49 The Applicant was warned of the defects in the management of the Property in 2016. She was prosecuted for failing to comply with the Fire Safety Order. She has only remedied some of the defects relatively recently. None of the excuses put forward on her behalf are considered to be reasonable explanations for her failing to comply with the Management Regulations. It is not accepted that she believed that the Property was not an HMO's. The preamble to the Act states it is to make provisions about housing conditions and to regulate houses in multiple occupation. The Act is part of a suite of legislation intended to ensure that properties available for letting, and let to tenants, are fit for human habitation and safe to live within, and the evidence it has been given demonstrates adequately that the Applicant failed to ensure that the Property met the required standards contained in the Management Regulations.

50 The Tribunal accepts that the references to an assessment of "negligence" are made within the context Torbay Council's published policy which has been accepted by other local housing authorities. It also accepts the Respondent's evidence that it imposed the minimum amounts of the penalty it could have selected and also decided to take no account of the fact that the Applicant had been prosecuted for the breach of the Regulatory Reform (Fire Safety) Order.

51 The Respondent has provided a full explanation for the methodology used to score the breaches and calculate the financial penalty, and in the absence of disclosure of any compelling reasons as to why the penalties should be reduced the Tribunal confirms the decision of the Respondent to impose a financial penalty of Three Thousand Five Hundred and Six Pounds (£3,506).

Judge C. A. Rai (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.