FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00FK/HNA/2018/0006**
Property	**:**	**50-52 Hartington Street, Derby, DE23 8EA**
Applicant	**:**	**Mr. Kwai Pang**
Applicant's Representative	**:**	**Smith Bowyer Clarke Solicitors**
Respondent	**:**	**Derby City Council**
Type of Application	**:**	**Appeals against financial penalties. S249 & Schedule 13A Housing Act 2004**
Tribunal	**:**	**Tribunal Judge P. J. Ellis. Tribunal Member Mr Peter Wilson BSc (Hons) LLB MRICS MCIEH CEnvH**
Date of Hearing	**:**	**31 May 2019**
Date of Decision	**:**	**3 July 2019**

DECISION

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a. ***The final penalty notice issued by the Respondent to the Appellant on 22 October 2018 imposing a civil penalty of £9120.00 for failing to licence a house in multiple occupation contrary to s72 Housing Act 2004 is varied to the sum of £8,000.00***

b. ***The final penalty notice issued by the Respondent to the Appellant on 22 October 2018 imposing a civil penalty of £4620.00for failing to comply with the duty to provide information to occupiers contrary to Regulation 3 Management of Houses in Multiple Occupation (England) Regulations 2006 (the HMO Regulations) is varied to the sum of £500.00***

c. ***The final penalty notice issued by the Respondent to the Appellant on 22 October 2018 imposing a civil penalty of £19120.00 for failing to comply with the duty to take safety measures contrary to Regulation 4 HMO regulations is varied to £7,500.00***

d. ***The final penalty notice issued by the Respondent to the Appellant on 22 October 2018 imposing a civil penalty £15,370.00 for failing to comply with the duty to comply with the duty to supply and maintain gas and electricity contrary to Regulation 6 HMO regulations is varied to £2,500.00***

e. ***The final penalty notice issued by the Respondent to the Appellant on 22 October 2018 imposing a civil penalty of £14,120.00 for failing to comply with the duty to maintain***

common parts fixtures fittings and appliance contrary to Regulation 7 HMO regulations is varied to £2,500.00

f. The final penalty notice issued by the Respondent to the Appellant on 22 October 2018 imposing a civil penalty of £9120.00 for failing to comply with the duty to maintain living accommodation contrary to Regulation 8 HMO regulations is varied to £2,500.00

Introduction

1. This is an appeal by way of rehearing from a decision of the Derby City Council to impose civil penalties upon the Appellant for an offence of having control of a house in multiple occupation contrary to s72 Housing Act 2004 (the 2004 Act)and five alleged breaches of The Management of Houses in Multiple Occupation (England) Regulations 2006 (the HMO Regulations). The total sum of the financial penalties imposed was £71,740.00.

2. The decision to impose financial penalties followed an inspection of 50 &52 Hartington Road, Derby, DE23 8EA (the Property) on 13 February 2018 by officers of the Respondent.

3. The Respondent is Mr Kwai Choi Pang who does not deny he is the owner of the relevant property and the person with control of and responsibility for its management.

4. The notices of intention to impose financial penalties pursuant to s249a of the Act 2004 were served on 24 August 2018. The notices invited the Appellant to submit a response which he made on 20 September 2018. After considering

the Respondents submissions the final notices were issued on 22 October 2018.

5. The unsigned appeal dated 23 November 2018 was received by the Tribunal office on 23 November 2018. A signed notice of appeal was received on 30 November 2018. The Tribunal notified the parties it was minded to accept the appeal out of time unless either party objected. The Respondent lodged an objection. After an oral hearing on 20 February 2019 the Tribunal granted retrospective extension of time for bringing an appeal against the issue of financial penalties and issued for direction for the hearing.

6. The matter was listed for an inspection and hearing by this Tribunal on 31 May 2019. At the hearing the Appellant was represented by Miss Helen Newbold of counsel instructed by Smith Bowyer Clarke Solicitors of Derby. The Respondent was represented by Mr M Cullen of counsel instructed by the Respondent's solicitor.

The Property

7. The Tribunal inspected the Property on 31 May 2019 in the presence of Mr Pang, his surveyor Mr T Pendenque, Mr Steven Odudu and Miss Helen Newbold for the Appellant. Mrs Dawn Deakin attended on behalf of the Respondent. Mr Odudu described himself as the property manager although Mr Pang had not retained him to carry out formal management duties. As Mr Pang resides in Belfast Mr Odudu performs a function of intermediary between the occupiers and the Appellant.

8. 50 & 52 Hartington Road are a pair of semi-detached three storey villa type properties built probably in the mid nineteenth century and located in the Hartington Street Conservation Area. They are constructed of solid brick under pitched roofs now with concrete tile covering. There are stone cills and a stone lintel band to the first floors. There is an attic storey to both properties with front dormers. Originally there was a two storey wing to both properties; both have been extensively modified and extended over time including the building of a single storey rear addition with part flat roof and

extension at second floor level. The former rear gardens are now given over to car parking for residents.

9. At the time of inspection by the Respondent's officer in February 2018 the Respondent stated that the two houses were linked at first floor level by an arch or opening which had been cut through the party wall. During the inspection, it was noted that there was an area to the party wall to the first floor landings which sounded hollow when tapped, consistent with the Appellant having since closed the opening and restoring the buildings once more to two semi detached properties The parties agreed that the properties were interconnected at first floor level at the time of the February 2018 inspection.

10. The ground and second floors of both properties have been converted to self contained flats some years ago (probably in the 1980s and certainly before acquisition by the Applicant) with two such flats to the ground floor of each property and one such flat to the second floor (attic) of both properties. At the time of the inspection by the Respondent in February 2018 it was stated that the first floor to each property was in multiple occupation with four bedsits, a shared kitchen and shared bathroom to each. With an opening present in the party wall at first floor level. In effect the combined first floor was being operated as one house in multiple occupation.
11. The Appellant has carried out further work since the inspection in February 2018. During the Tribunal inspection it was noted that work to convert the first floor of No. 50 into self contained flats was part complete but the first floor to No. 52 was still set out for bedsit use, although no bedsit was occupied in anticipation of conversion work starting.

12. Hartington Road is close to the city centre and is within a conservation area.

The Chronology

13. The Appellant acquired the Properties in July 2016 having decided to dispose of his restaurant business and acquire properties for development. At the time of acquisition, the properties were occupied by two one bedroom apartments

on the ground floor of each property and one single bedroom apartments on the second floor. Each of the apartments was self-contained with kitchen and bathroom for the sole use of the occupiers of the apartments. Each of the apartments was either occupied by a single tenant or a couple.

14. There were four bedsits in each property on the interconnected first floor each fitted with a sink and served by a shared fitted kitchen and bathroom. Each of the bedsits was occupied by a single occupier.

15. The two three storey properties each provided seven units of accommodation. Access from the street for all units was by the original front door. Occupiers of upper floors used the common staircase. There was a basement in each property for use by all occupiers.

16. Space and water heating was by a gas boiler which served both properties and all occupiers. Each property was served by a single fire alarm.

17. The Respondent was satisfied at the time of the inspection in February 2018 that 50 & 52 Hartington Road was a house in multiple occupation because it satisfied the standard test set out in s254(3) of the Act 2004.

18. The Respondent decided to inspect the properties after receiving a complaint of excess cold, mould and damp from the occupier of flat 1 52 Hartington Road (52) on 17 January 2018. A notice under s16 Local Government (Miscellaneous Provisions) Act 1976 (s16 Notice) requiring information relating to 52 was served on 5 February 2018. A further s 16 Notice relating to 50 was served on 23 February 2018.

19. The inspection took place on 13 February 2018 without notice to the Appellant. It was conducted by Mrs Dawn Deakin a senior environmental health officer and Amanda Rose an environmental health officer both employed by the Respondent. According to the Respondent's unchallenged evidence it was found that numbers 50 and 52 were being run as one large property as arches between the addresses had been knocked through. Mr Steven Odudu was present at the inspection but not the Appellant.

20. As a result of the inspection the Respondent concluded there were a number of breaches of the Management of Houses in Multiple Occupation Regulations 2006 (then in force) (the HMO Regulations). Upon receipt of replies to the requests for information submitted on 5 February and 23 February 2018 the Respondent learned that Property was occupied by seven tenants in six flats and six tenants in eight bedsits. Accordingly the Respondent concluded the Property should have been licensed in accordance with the HMO regulations but found no license was in force in respect of the Property. The Appellant did not deny the Property was unlicensed.

21. The Respondent's officers took photographs of the condition of the common parts of the Property and the kitchen serving the bedsits. Copies of the photographs were produced at the hearing.

22. On 23 February 2018 Amanda Rose wrote to the Appellant notifying him that she had discovered category one hazards and very high scoring category two hazards. The Respondent was told to take action to remove or reduce the hazards by 16 March 2018 otherwise the Respondent would serve an Improvement Notice formally requiring remedial works. A schedule of the hazards deficiencies and required remedial actions to make the Property safer was served with the letter.

23. Following the inspection and receipt of the information supplied in answer to the s16 notices the Respondent decided to conduct an interview under caution of the Appellant. The interview was conducted by Mrs Deakin on 7 March 2018 although her transcription of the interview states the interview occurred on 7 May 2018. Also present at the interview were Miss Rose and Mr Timothy Pendenque. The interview covered the various allegations being investigated by the Respondent. A further interview was conducted with Stephen Odudu on 13 March 2018 when his relationship to the Property and Mr Pang was questioned. No proceedings were taken against Mr Odudu.

24. On 24 August 2018 Mrs Deakin on behalf of the Respondent wrote to the Appellant stating the Respondent council was satisfied it had proved beyond reasonable doubt that he was guilty of six separate offences and that it

intended to impose six separate civil penalties. Six separate Notices of Intention to Impose a Financial Penalty under s249A Housing Act 2004 were served with the letter.

25. The Notices invited a response from the Appellant who instructed his solicitors to prepare a response on his behalf on 20 September 2018. By his response the Appellant denied that he had committed the offences alleged and put the Respondent to proof that the offences had been committed. In particular he asserted:

    A) in relation the failure to license the Property as an HMO, he was not told at the time of purchase the Property was classed as an HMO; that a planning application for change of use of the Property was served on 19 March 2018 and that there were fewer than five occupiers on that day.
    B) In relation to breach of duty to maintain living accommodation and maintain the common parts he asserted he had complied or was in the process of complying with the schedule of works annexed to the schedule attached to the letter of 23 February 2018
    C) In relation to the remaining alleged offences he asserted that action had been taken since the inspection of 13 February 2018 and that he denied committing the offences.

26. After receiving the Appellant's response the Respondent served final notices to impose financial penalties on 22 October 2018 each recording the information required by paragraph 8 Schedule 13A 2004 Act.

The method of fixing the level of civil penalties

27. The Notices of Intention to impose financial penalties included particulars of the way in which the penalty was calculated. Paragraph 3 Schedule 13A 2004 Act requires a local housing authority to give reasons for imposing the proposing the financial penalty in it notice of intent.

28. In common with many local housing authorities, and in the absence of express guidance on the setting an appropriate amount from central government or

elsewhere, the Respondent had prepared a matrix for use by its officers in determining the penalty. The matrices are composed of tables and steps to be followed by the officers in applying the tables.

29. The Respondent had set out one matrix for determining the financial penalty for breach of s72, 2004 Act. It has four tables whereas the matrix used for the other offences has six tables. Both matrices provide that the level of a civil penalty shall be decided by the investigating officer and Team Leader in Housing Standards having consulted with the legal section. Each also stated that *"regard shall be had to the factors in Table 1 to help ensure that the civil penalty is set at an appropriate level"*. Table 1 recorded the factors to be considered namely, punishment of the offender, deter the offender from repeating the offence, removal of any financial benefit the offender may have obtained as a result of committing the offence, severity of the offence, culpability and track record of the offender and the harm caused to the tenant.

30. Further each matrix introduces the need to have regard to the overall concept of ensuring that the financial penalty meets in a fair and proportionate way the objectives of punishment, deterrence and removal of financial gain.

31. In the matrix for fixing the penalty for breach of s72, the notice further provided that those factors should be satisfied by using table 2,3 & 4 to determine the appropriate level of penalty.

32. Tables 2,3 & 4 provide a comprehensive approach to decision making in order to deduce the financial penalty to be imposed.

33. Table 2 sets out criteria to be applied to determine the level of culpability. Table 3 identifies the starting point for the penalty charge having determined the offence category from table 1. The offence categories are Deliberate, Reckless, Negligent and Low or No culpability. Each category has a level of fine as the starting point. The starting point for penalty having regard to level of culpability: Deliberate £27,500.00; Reckless £17,500.00; Negligent

£7,500.00; Low/no culpability £3,000.00.. Table 4 is used to highlight any aggravating or mitigating factors.

34. For the other offences the matrices had the information and procedure to be followed in six tables. Table 1 was the same as just described. Table 2 directed that the officer should identify examples of harm that may be caused because of the offence. Table 3 set out suggested levels of harm while leaving the identification of harm to the officers' discretion having regard to the circumstances. Table 4 set the level of culpability being the same as the s72 matrix with the addition of 'Not applicable'. Table 5 set the starting point of the penalty. Each offence category had grades of seriousness. In these cases the relevant offence categories are either Reckless or Negligent.

35. Reckless is defined in the same way in both matrices as *"The offender foresaw the risk of offending but nevertheless went ahead and offended"*. Negligent is defined as "*The offender committed the offence through act or omission which a person exercising reasonable care would not have committed."*

36. The grades of starting point for the penalty in the matrices used for financial penalties under the HMO Management Regulations after a Reckless determination depending upon levels of harm from very high to low level are £22,500.00, £20,000.00, £15,00.00, £10,000.00. The grades for a determination of negligent are £17,500.00, £15,000.00, £10,000.00 and £5,000.00.

The Parties Submissions

37. As this was a rehearing of the decision to impose financial penalties the Tribunal invited the Respondent to open proceedings.

38. Mr Cullen on behalf of the Respondents, went through each of the alleged offences in turn. He emphasised that the date of each offence was 13 February

2018 and that later work to remedy the defects is not a defence nor is ignorance of the duty on landlords of HMOs to obtain necessary licences.

a. **Failure to apply for an HMO contrary to s72.**
The Property was occupied by three or more persons in two or more households with shared amenities being the common parts, a basement and in the case of the bedsits, a kitchen and bathroom. There was no licence in force on the day of inspection. The application for a temporary exemption notice was not made until after the inspection in March 2018. In relation to the allegedly misleading position of the Respondent by issuing a schedule of work in anticipation of the service of an Improvement Notice which never came, he submitted the duty to comply with the HMO regulations was a continuing duty which was not relieved by the Respondent's Notice. Also correspondence from Mrs Deakin advising that an HMO licence was not required in situations of occupation by four or fewer residents was hypothetical and applied to a time after February.

b. **Failing to provide information contrary to regulation 3**.
Mr Cullen noted that the Appellant admitted the offence but he conceded the penalty was wrongly calculated having regard to the the Respondent's own matrix and that a penalty of £550.00 is appropriate. Miss Newbold on behalf of the Appellant agreed that was an appropriate penalty.

c. **Failure to take safety measures contrary to regulation 4.**
The offence involved blocking of escape routes as shown in photographs taken by Mrs Deakin on the day of the inspection. The photographs showed bicycles and abandoned electrical goods barring the route to the means of exit. The specification of the automatic fire detection system was not fully appropriate for the size , layout and use of the building. The Appellant had admitted at interview under caution he had not carried out an assessment of the structure for fire safety. Fire extinguishers had not been tested since the Appellant acquired the

Property. The grade A fire alarm was in fault position as shown on a photograph and not denied or explained by the Appellant at interview.

d. **Failure of duty to maintain gas and electricity contrary to regulation 6**
The Respondent relied upon the failure of the Appellant to produce gas safety certificates until after service of the s16 Notices. Moreover, although the electricity installations may not require certifying at more than five year intervals the Appellant admitted at interview he had not carried out any inspections since acquisition in July 2016.

e. **Failure to maintain common parts contrary to Regulation 7.**
Photographs of all the defects were taken at the inspection and produced to demonstrate the incidents of want of maintenance alleged.

f. **Failure to maintain living accommodation contrary to Regulation 8**
The Respondent relied upon defaults manifested chiefly in connection with the bedsits . A leaking and broken shower was observed. Poor kitchen units were found and illustrated in photographs. Mr Cullen asserted the presence of the bedsits made the Property a licensable HMO and all duties are relevant.

39. Mrs Deakin gave evidence confirming her conduct of the enquiry including the inspection, the photographs, the interview under caution and the decision to impose financial penalties and their calculation. In cross examination Mrs Deakin admitted to making some mistakes in recording the value of financial penalty imposed and the date of the interview under caution.

40. The calculation of financial penalty for each offence was made using guidelines promulgated by the Respondent followed by an appraisal of the total deduced by applying the matrix. It was apparent to the Tribunal that Mrs Deakin was not well used to calculating penalties using the matrices and in cross examination she accepted that this was the first occasion she had used

the matrices.

41. In cross examination Mrs Deakin admitted the only enquiry made into the ability of the Appellant to pay fines was the enquiry at interview under caution regarding the number of other properties owned by the Appellant and implications not put to Mr Pang about his worth. The Tribunal found that she made errors in the preparation of her evidence and had not carried out a satisfactory enquiry into the assets of the Appellant.

42. Miss Newbold on behalf of the Appellant referred to the history of use of the Property and that there had been several engagements with the Respondent and the Property in connection with its various uses which included use as a guest house, an application for use as sheltered accommodation, change of use to a primary school and in 2002 an application for licence as an HMO which was withdrawn.

43. Miss Newbold argues that the evidence of Mrs Deakin had not referred to any of the history of uses which demonstrated that the Respondent was familiar with the Property. The Appellant by contrast had no previous knowledge of the Property and he relied upon the Respondent as local housing authority to inform him of his obligations. Further the Appellant had no knowledge of HMO licensing. Miss Newbold asserted that the information supplied by the Respondent in the email from Mrs Deakin about requirements for a licence when there are four or fewer residents lead the Appellant to believe he had not committed an offence as at the time there were only three residents. The Appellants attention to the schedule of works lead the Appellant to believe he was conforming to the Respondent's requirements and that no further action would be taken.

44. Miss Newbold pointed to the length of time taken by the Respondent to proceed with the financial penalties during which time the Appellant had submitted planning applications for redevelopment of the interior including closing the gap between the two properties. The Appellant had inherited problems of a long standing nature. He admitted at interview the properties

were not in good condition but construction work takes time especially in a conservation area. His conduct has not contributed to the issues. In summary the Respondent had not satisfied the criminal burden of proof required in these cases.

45. In relation to the penalties Miss Newbold asserted they were not properly applied by Mrs Deakin nor had she considered the total effect which was disproportionate. The correct approach was to consider the total deduced for each offence then consider again the total sum deduced for all offences in determining any fine.

The Statutory Framework

46. Section 1 Housing Act 2004 (the 2004 Act) provides a new system for assessing residential housing conditions and enforcing housing standards. Residential premises means an HMO and any common parts of a building containing one or more flats. Section 1(5) defines an HMO to mean a house in multiple occupation as defined by ss 254 to 259.

47. The relevant part of s 254 provides:
" (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.

48. The Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006

(1) An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act where it satisfies the conditions described in paragraph (2).

(2) The conditions referred to in paragraph (1) are that—

(a)the HMO or any part of it comprises three storeys or more;

(b)it is occupied by five or more persons; and

(c)it is occupied by persons living in two or more single households.

(3) The following storeys shall be taken into account when calculating whether the HMO or any part of it comprises three storeys or more—

(a)any basement if—

(i)it is used wholly or partly as living accommodation;

(ii)it has been constructed, converted or adapted for use wholly or partly as living accommodation;

(iii)it is being used in connection with, and as an integral part of, the HMO; or

(iv)it is the only or principal entry into the HMO from the street.

49. Section 61 2004 Act states every HMO to which the Act applies must be licensed authorising occupation of the house concerned by not more than a maximum number of households or persons to be specified in the licence.

50. If an HMO is not licenced then the person having control of the building commits an offence (s72 2004 Act)

51. The enforcement provisions of the 2004 Act also made provision for regulation of houses in multiple occupation by s234 which provides

(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.

52. The local housing authority, in this case Derby City Council has the power to impose financial penalties if it is satisfied to the burden of proof prescribed that an offence has been committed and the First-tier Tribunal has the power to hear appeals following the imposition of a financial penalty. Section 249A provides:

(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.

And Schedule 13A provides

(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.

The Decision

In these cases the Tribunal must be satisfied beyond reasonable doubt that the Appellant's conduct amounts to a relevant housing offence. In all cases the Tribunal is satisfied that the Appellant having acquired the Property committed the offences with which he is charged. His submission that he was inexperienced in housing management and his expectation that the local authority had a responsibility to advise him is not accepted aving acquired the Property with tenants in occupation he should have obtained advice on the responsibilities and duties of a landlord. He did no do so. At the interview, he had little to say to explain the state of the Property at the time of local authority inspection.

53. He did not put forward any evidence which would amount to any defence under s72 subsections 4 & 5 other than to allege that the information given him by Mrs Deakin by email regarding the circumstances when an HMO licence is not required. The Tribunal does not consider the remarks of Mrs Deakin amounted to an indication that he was not required to obtain a licence.

54. Secondly the Tribunal must be satisfied the local housing authority has complied with all necessary requirements and procedures relating to the imposition of penalties.

55. The evidence of the Respondent did contain a number of errors but in the view of the Tribunal the errors are not sufficient to nullify the penalties on the bases that the Respondent as a local housing authority failed to follow the

procedures required of it in deciding to impose penalties.

56. Thirdly is the question of whether the penalty set at an appropriate level having regard to any relevant factors including the offenders means, the severity of the offences, the offenders culpability and track record, the harm to any tenant, the deterrent effect and the financial benefit to the Appellant.

57. The matrix determined by the Respondent au specifically directs the Respondent's officers to consider the totality of the penalty imposed. In each case the Tribunal has reviewed the sentencing decisions of the Respondent and the totality of the conclusions deduced by the Respondent.

58. The Appellant submitted that the total sum deduced for all offences was totally disproportionate. Miss Newbold submitted that the correct approach to the totality of the penalty was to look at each total then the aggregate total deduced. Mr Cullen submitted the Tribunal should be satisfied the total penalty should be just and proportionate.

59. The Tribunal has considered the application of the matrix by the Respondent for each offence and decided whether it could properly be said to be fair and proportionate. The total sum imposed for all offences is £71,470.00. The Tribunal's approach was to have regard to the total sum after reviewing each penalty in order to determine that both the penalties and the overall total were fair and proportionate.

60. The Tribunal is not satisfied that the penalties for each offence are fair and proportionate. They exceed what was required to satisfy the requirement that the penalties punish and deter the offender or to remove any benefit to the offender by committing the offence. Local housing authorities are obliged to determine guidelines for the setting the level of financial penalties and it is general practice for such guidelines to adopt a matrix format. Nonetheless, the Tribunal is of the view that such matrices are clearly internal guides only and local authority officers should not regard them as some form of quasi legislative framework. It would seem wholly inappropriate for there to be a substantial difference between the level of financial penalties levied and the level of fine(s) that might reasonably be expected had the local housing

authority opted for the alternative of prosecution.

61. At the time of the interview the Respondent was aware of the Appellant's intention to refurbish the property and the reduction in the number of occupiers at the property either by occupiers leaving or being the subject of a notice to evict. Although the Appellant was wrong to rely solely on the local authority to inform him of duties of which he should have been aware having elected to buy and manage properties for residential use, the interview also reveals there was no intention to deliberately or recklessly to disregard the welfare of the tenants.

62. The Respondent's allegation that the Appellant behaved in a way which caused tenants to fear him is not made out. It was a bare allegation met with a bare denial.

63. Accordingly the Tribunal will vary by reduction the financial penalties imposed for each offence.

Failure to Licence an HMO contrary to s72 Housing Act 2004

64. In relation to the first offence of failing to licence an HMO the Tribunal was concerned whether the decision in London Borough of Islington v The Unite Group plc [2013]EWHC 508 in which Mr Justice Blake concluded *"It is the HMO that must comprise the three storeys and not the building in which an HMO happens to be found"* was applicable having regard to the peculiar arrangement of the building. There is no dispute that the buildings comprise three or more storeys. However, the ground and third floor are of both properties contain only self-contained flats. It is only the first floors (which at the time of the Respondent's inspection in February 2018 were interconnected and accordingly occupied and managed as one property)which has five or more persons in two or more households by reason of the configuration of accommodation into eight bedsits which shared kitchens and bathrooms.

65. Counsel for both sides gave valuable assistance to the Tribunal by preparing submissions at short notice on the point.

66. Mr Cullen on behalf of the Respondent submitted that there was liability under Section 72 of the 2004 Act as the properties was a house in multiple occupation as the converted building test under Section 254(1)(c)was satisfied; there is a common entrance to the building and a cellar or basement which are used by or are available to all occupiers of the building. He pointed out that in February 2018 the cellar was fitted with washing machines. Also all the units are served by the same boiler and fire alarm system.

67. Miss Newbold submitted the 2004 Act is silent on the effect of storeys and also the Unite case was silent on the issue of fire alarms. The entrance and stairways were common only because there was no other means of access to the upper floors. There was no evidence regarding the use of the cellar by any of the occupiers. As the case was under the 2006 HMO regulations the requirement for three storeys was not satisfied.

68. The Tribunal is grateful to counsel for their submissions. In this case the building has been converted in a way as to make living accommodation for in excess of five people in more than two households. The occupiers of the self-contained flats and the bedsits share the means of entrance and exit. They can all use the basement. There is no restriction on their access to it. Space and water heating were provided by the same boiler fitted by the Appellant in September 2016. The fire safety system, although faulty and of a specification which was not entirely appropriate served the entire building and all units of accommodation within it.

69. Counsel made their submissions at the request of the Tribunal. They, on behalf of the respective parties, were not in dispute that the Property was an HMO. Having seen the Property and considered the submissions the Tribunal is satisfied the building is a licensable HMO.

70. This decision is supported by the publication in November 2004 by the Office of the Deputy Prime Minister, referred to by Blake J in his judgment, of a consultation document "Licensing in the Private Rented Sector" as part of its regulatory impact assessment of Part 2 of the then Housing Bill.

71. Paragraph 8 of the consultation document reads:

"We intend to use secondary legislation to apply mandatory licensing to HMO's with 3 or more storeys and 5 or more residents who constitute more than one household (other than where the building comprises self contained blocks or certain exempted categories). We are targeting these properties because:

a. *Physical conditions in some of these HMOs are very poor.*
b. *There is a significantly increased risk of dying or being injured in a fire in such properties. The fatality rate in HMOs of three or more storeys is around four times higher than that for one or two storey HMOs*
c. *A range of health, safety and general welfare problems for residents can arise where structural conditions are unsuitable for the number of persons accommodated, or where conversion has been poorly undertaken."*

72. The mix of self-contained units and bedsits at the Property distinguishes the situation in *Islington* where the subject property was a self-contained block of flats with cluster flats on each floor.

73. Having decided the Property is an HMO the Tribunal is satisfied on the basis of the evidence from the Respondent and the Appellant's admissions in interview that the Appellant has committed an offence contrary to s72 of the 2004 Act of having control of or managing an HMO which is required to be licensed but is not so licensed.

The failure to licence an HMO

74. In the case of the penalty for failure to licence an HMO, the starting point deduced from determining that the Appellant had been negligent rather than deliberate or reckless resulted in a proposed penalty according to the matrix of £7,500.00. There were no aggravating or mitigating circumstances as far as the Respondent was concerned. To that starting point the Respondent added £1500.00 for costs of the entire investigation and a further £120.00 for preparing and serving the notice. The Respondent then made a typing or casting error by stating the penalty charge after adjustments in step 3 is £0 then it made an error of calculation by concluding the penalty charge was

£9,120.00 when it should have been £8,120.00. The error of calculation continued to the Final Notice of 22 October 2018.

75. The Tribunal does not consider the Appellant's reason for failing to licence the Property credible. It is apparent from the unchallenged note of interview that the Appellant gave no thought to the need to licence until it was drawn to his attention in February 2018, over eighteen months since the date of acquisition. As a landlord of residential property he should have obtained advice regarding his duties and responsibilities. Whilst local authorities quite properly advise and assist landlords in understanding their statutory duties and responsibilities, any person electing to let properties out for residential use must take steps to ensure that they are familiar with what is required of them and liabilities cannot be evaded on the basis that they did not know the law.

76. The proposed penalty includes the total sum of £1620.00 costs including the sum of £1500.00 which the Respondent claims as the total sum for all work done in connection with the six penalties. No explanation of the costs was given by the Respondent. The matrix does not explain the justification for or the basis of the costs claim. It states that costs must be calculated then provides that "*if these costs are not already covered in the penalty charge the figure arrived at….make a further upward adjustment"* thereby making costs part of the penalty.

77. Income from the penalties may be retained by the local authority but that does not mean the penalty should be adjusted to cover costs as reimbursement of cost is not one of the factors identified as the purpose of a penalty. In any event the notice then makes a further error by stating the revised penalty charge after adjustment is £120.00, ignoring the apparent costs of £1500.00.

78. Whereas the Tribunal is satisfied the Appellant had control of an unlicensed HMO from July 2016 to at least February 13 2019 and that the Appellant is susceptible of the financial penalty proposed, it does not consider the Respondent is entitled to add its costs to the penalty having regard to the many errors in the notices.

Failure to provide information. Reg 3

79. The Tribunal is satisfied from the admissions made at interview that the Appellant gave no thought to his obligations under regulation 3 of the HMO regulations. Also the Appellant did no challenge the allegation at the hearing.

80. There was a dispute over the amount of the fine which the Respondent conceded. The Notice of Intention to impose a civil penalty and the final notice both record the penalty of £4,620.00. The level of culpability was determined as negligent although the level of harm was identified as having no potential harm to the tenants. The narrative in table 3 which describes suggested levels of potential harm provides that a penalty of £250.00 will be the starting point for the failure of the manager to ensure his make address and contact number is available to each household. It then provides for a further £250.00 for failure to display such details.

81. However, the matrix provides that the starting point is £5,500.00 without explanation for the higher sum. Mr Cullen conceded that was an error and agreed the penalty should be £500.00 and fixed costs of £120.00 for the preparation and service of the notices. The sum of £500.00 was agreed by Miss Newbold.

82. The Tribunal agrees that the penalty should be no more than £500.00 and rejects the claim for costs.

Failure to comply with the duty to take safety measures. Reg 4

83. The Appellant failed to take measures which a prudent landlord would take to ensure the safety of his tenants for over eighteen months after acquiring the Property. He acknowledged his lack of experience in residential property management at interview and it was put forward as a reason for his non-compliance at the hearing. The Tribunal is satisfied beyond reasonable doubt that he failed to comply with his duty to take safety measures.

84. As the Appellant was aware of his inexperience, he should have obtained his own independent advice. It is not reasonable to place a burden on the local housing authority to provide such advice even though the authority may have had some experience of the property through the dealings of its various

agencies.

85. The matrix used by the Respondent to assess the penalty in this case identifies a high risk of harm to the tenants as a consequence of the failure. It describes the potential harm from blocked escape routes and inadequate escape means through sash windows, insufficient fire precautions and faulty alarm and inadequate fire precaution in areas of refurbishment in the Property.

86. The Respondent assessed the level of culpability as Reckless as the Appellant as owner of other properties should have known about routine fire safety precautions, maintenance and certification. The starting point for the financial penalty was assessed at £20,000.00 indicating a high level of harm.

87. Unfortunately, the local housing authority officer again made a casting error in completing the matrix. Having decided mitigating factors justified a reduction in the starting point by the sum of £1,000.00 she entered the revised penalty charge as that sum rather than £19,000.00. The fixed costs for preparation and service of the notices in the sum of £120 was entered. Then the final revised penalty was determined as £19,120.00. The Appellant was not misled by the mistake as the notice of intention to impose a penalty and the final notice both recorded the sum payable as £19,120.00.

88. In this case the Tribunal is satisfied beyond reasonable doubt for the same reasons as before, namely the admitted want of attention to the safety of the tenants and occupiers of the Property that the Appellant is guilty of an offence contrary to regulation 4 of the HMO management regulations.

89. However, it does not consider the Appellant's conduct was reckless. The Tribunal is not satisfied that the conduct of the Appellant can be characterised as reckless which involves some conscious element of carrying on regardless of the consequences. The Tribunal substitutes a finding of Negligence with a medium level of harm justifying a penalty of £10,000.00. The Tribunal also accepts the Respondents description of mitigating factors of a good record of previous behaviour and makes a mitigating deduction of £2,500.00. The penalty for this offence is £7,500.00.

Duty to supply and maintain gas certificates

90. In this case the Respondent determined the penalty as Reckless with a starting point of £15,000.00 because of a medium risk of harm. It then determined there were aggravating factors of failing to obtain a gas certificate for more than twelve months after installing a new boiler (£750) and a further additional penalty for failing to complete an electrical test and obtain a report from the contractor (£250.00 for each factor). It then made the same deduction of £1000,00 for the mitigating factors.

91. For the same reason as above the Tribunal does not regard the Appellant's conduct as reckless but negligent with a low level of harm. The Tribunal substitutes the sum of £5,000.00 for the starting point of the penalty reduced by £2500.00 for the mitigating factors is £2,500.00.

Duty to maintain common parts

92. The penalty imposed for this offence was the total sum of £14120.00 including the fixed costs of preparation and service of notices. The offence category was assessed as Reckless causing a medium level of harm and a starting point of £15,000.00. The Respondent mitigated the penalty by £1000.00 and then added costs of £120.00. The total sum for the penalty was £14,120.00.

93. The reason for deciding the Appellant was reckless was recorded as being because he had other properties and would know about routine maintenance and cleanliness.

94. The Tribunal does not consider the offence category justifies the determination of reckless although the Appellants general lack of attention to the Property is negligent with a low level of harm. The starting point for the penalty in that category is £5,000.00. The mitigating factors are that the Appellant has no previous convictions and no history of penalty notices or non-compliance with previous warnings. There was an allegation of failing to deal with tenant complaints in a timely manner and a suggestion of intimidation of a tenant. However, the Tribunal was unable to decide upon the allegations on the evidence presented. The allegations were vigorously denied and not pressed.

95. The Tribunal considers the mitigating factors justify a reduction of £2,500.00 making the penalty £2,500.00.

Duty to maintain living accommodation

96. The penalty imposed for this offence was the total sum of £9120.00 including the fixed costs of preparation and service of notices. The offence category was assessed as Reckless causing a low level of harm and a starting point of £9,000.00. The Respondent mitigated the penalty by £1000.00 and then added costs of £120.00. The total sum for the penalty was £9,120.00.

97. The reason for deciding the Appellant was reckless was recorded as being because he had other properties and would know about routine maintenance requests.

98. The Tribunal does not consider the offence category justifies the determination of reckless although the Appellants general lack of attention to the Property is negligent with a low level of harm. The starting point for the penalty in that category is £5,000.00. The mitigating factors are that the Appellant has no previous convictions and no history of penalty notices or non-compliance with previous warnings. There was an allegation of failing to deal with tenant complaints about remediation in a timely manner.

99. The Tribunal is satisfied that the mitigating factors justify a higher deduction from the starting point of £2,500.00 making the penalty £2,500.00.

Appeal

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

Judge PJ Ellis

Chair