



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

<b>Case Reference</b>	:	CHI/00HE/HNA/2018/0011
<b>Property</b>	:	14 River Street, Truro, Cornwall, TR1 2SQ.
<b>Applicant Representative</b>	:	Kam Tao Restaurants Ltd. Tyson Tao (Director).
<b>Respondent Representative</b>	:	Cornwall Council. Sancho Brett (Counsel).
<b>Type of Application</b>	:	Appeal against a decision to impose a financial penalty; Section 249A Housing Act 2004, (the Act).
<b>Tribunal Members</b>	:	Judge C A Rai (Chairman). Judge D Agnew.
<b>Date and venue of Hearing</b>	:	24 July 2019. Bodmin County Court, Launceston Road, Bodmin, PL31 2AL.
<b>Date of Decision</b>	:	28 August 2019.

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**DECISION**

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**Summary of Decision**

- 1 The Tribunal confirms the Respondent's decision to impose a financial penalty on the Applicant and the amount of the penalty of Twelve Thousand Seven Hundred and Twenty Nine Pounds and Thirty Pence, (£12,729.30). The reasons for its decision are set out below.

## **Background**

- 2 This appeal was lodged by the Applicant, against the financial penalty imposed on it by Cornwall Council in respect of its failure to comply with two Improvement Notices. It has appealed against the financial penalties imposed. (It did not appeal against the issue of the Improvement Notices). Both the Improvement Notices relate to the upper floors of 14 River Street, Truro, Cornwall, (the Property).
- 3 The Application to the Tribunal, dated 12 November 2018, was submitted by Mr Tyson Tao, on behalf of the Applicant.
- 4 Directions, dated 3 January 2019, were issued by the Tribunal requiring that the parties exchange statements of their respective cases by 22 February 2019 and proposed a target date for an oral hearing of the week commencing the 1 April 2019.
- 5 Direction 1 stated that if the Applicant so wished it could include details of its financial position when supplying the Respondent with its statement of case. The Applicant did not provide a statement of case or any financial information.
- 6 Prior to the Hearing the Respondent provided a bundle with numbered pages. The Tribunal has referred to documents within the bundle using those numbers.

## **The Hearing**

### **Preliminary matters**

- 7 Mr Tao a director of the Applicant represented it. The Respondent was represented by its barrister, Mr Brett. Mr Stuart Kenney, a Chartered Environmental Health Officer and Mr Stuart Hutchinson from the Legal Department of Cornwall Council were also present. Prior to the Hearing Mr Hutchinson provided the Tribunal and Mr Tao with copies of the skeleton argument prepared by Mr Brett and a copy of the Act with an extract of section 16 of the Local Government (Miscellaneous Provisions) Act 1976. With the agreement of the both parties Mr Tao was given time, before the commencement of the Hearing, to read the skeleton argument.

### **Evidence and witness statements**

- 8 Mr Tao explained to the Tribunal that he was not familiar with the usual format of a Hearing so the Tribunal asked Mr Brett to present the Respondent's case first.
- 9 Mr Brett asked Mr Kenney to explain the background which gave rise to the issue of the Improvement Notices and imposition of the Financial Penalty. Mr Kenney gave oral evidence in support of his written statement and responded to questions from the Applicant and the Tribunal.

- 10 He said that following an inspection of the Property on 30 November 2017, prompted by a referral from a Police Community Support Officer, (PCSO), the Respondent had identified hazards at the Property, which were later classified by it as category 1 and category 2 hazards..
- 11 During that inspection, carried out by Mr Kenney and Mr Care, (PCSO), Mr Kenney identified “serious high risk housing deficiencies including an absence of fire detection, two rooms sub-divided into small compartments with some living spaces measuring less than 4.5 M<sub>2</sub> (grossly undersized), lack of fire doors, commercial freezers containing food connected with the Xen Noodle Bar restaurant in Truro, a lack of fire separation between the shop areas on the ground floor and the accommodation, defective and boarded up windows electrical safety deficiencies and a lack of any fire safety management”. This was recorded in his witness statement.[B3].
- 12 Mr Kenny explained that the Respondent was legally obliged, because of the serious nature of the identified hazards, to take action and require that the Applicant carry out works at the Property to eliminate the hazards.
- 13 Following its inspection the Respondent investigated who was responsible for the Property. It contacted Mr Chris To because he was connected with the restaurant which employed some of the occupants of the Property. Mr To told Mr Kenney that the property owner would undertake improvement works. Subsequently the Respondent served a “Requisition for Information” on Mr Tyson Tao. The Respondent also obtained copies of the land registry titles which confirmed that the Property was owned by the Applicant. It was satisfied that the upper floors were not let to a third party. Copies of the land registry titles are in the hearing bundle. [B13].
- 14 Mr Kenney visited the Property again on 11 December 2017 at which time it was unoccupied. He was told that builders and an electrician would commence work the following week. Works eventually commenced but when Mr Kenney visited the Property again, on 13 March 2018, having given prior notice, Mr Tao was unavailable.
- 15 Eventually Mr Kenney gained access to the Property with the help of Mr To, who told him that he had been given permission to use the upper floors of the Property by Mr Jon XB Lau, from whom he had purchased Xen Noodle Bar. He said he had not visited the Property but that the staff from Xen Noodle Bar had lived there prior to his purchase of the Noodle Bar, and Mr Lau had given permission for this occupation to continue. He said he did not know Mr Tao before the preceding December, (2017), but that he was arranging for the necessary improvement works to be done for Mr Tao. He said that he did not think that Mr Tao had known that the Property was occupied when the Applicant purchased it.
- 16 Although some works had been carried out at the Property Mr Kenney was not satisfied that the works had been carried out in a way which would fully address the deficiencies identified by him on his first

inspection. Evidence such as toothpaste in the bathrooms and shoes outside doors to locked rooms led him to believe that the Property is still regularly occupied.

- 17 On 20 March 2018 the Respondent served two Improvement Notices on the Applicant. These were served by first class post on the Applicant and were copied to Mr Tao by email. The compliance date was 1 July 2018, [B38]. The administrative charges referred to in the letter sent with the Notices were paid by the Applicant on 20 April 2019.
- 18 Responding to Mr Kenney's statement, Mr Tao denied receiving copies of the letter with which the Notices had been sent. He suggested that the administrative charges imposed were paid because he had received that information separately but could not explain why he had not received the letter which accompanied the Notices.
- 19 The denial was significant because of the content of the letter, also dated 20 March 2018, [B36], which stated that a failure to comply with the Improvement Notices by the compliance date without any reasonable excuse was a summary offence which would result in liability, on conviction, to a fine not exceeding level 5 on the standard scale (unlimited). The Act enables the Respondent to issue a Civil Penalty Notice **as an alternative to prosecution**, the maximum amount of which penalty is £30,000 per notice breached. The Demand for Expenses, (administrative costs), and the Improvement Notices were enclosed with the letter. The letter also stated that as the Respondent had not been able to inspect all of the Property it was likely that further enforcement notices "will be served in the future. Notably I am aware that there is an issue with the roof, and there is currently no kitchen in the house." Although Mr Tao said that he had never received the letter, he conceded it was sent to the correct address.
- 20 He told the Tribunal that some works have been carried out to improve the Property but because he lived some distance away he had relied on Mr To to co-ordinate works and find tradesmen. He said no formal arrangement existed between them but that Mr To "helped him out". Fire doors have been installed. He said he was unaware that the gas supply had been disconnected until the Notices were served. Radiators and a boiler were always in situ. The reconnection of the gas supply had taken much longer than anticipated and with hindsight he accepted that he had failed to keep Mr Kenney fully informed of the progress and the obstacles which had impeded the progress of the intended works.
- 21 Whilst the Respondent acknowledged that substantial works have been carried out to improve the Property Mr Kenney stated that the standard of much of the work was unsatisfactory. In response Mr Tao admitted that insufficient numbers of screws had been used to secure the hinges to some fire doors. He was not willing to accept that a can of foam filler, which Mr Kenney had removed from the Property, and which was later found to be unsuitable for use because of its lack of fire retardant properties was used. [B123].

- 22 Despite the fact that the Applicant had not appealed against the Improvement Notices within the permitted time, Mr Tao suggested repeatedly, throughout the Hearing that the Notices had been served on the wrong person.
- 23 He also admitted that he had not initially disclosed to Mr Kenney that the Property was let to Mr Lau because, at that time, he had been unsure if the lease had been signed. Eventually he provided Mr Kenney with a copy of the lease to Mr Lau which was for a term of two years. Subsequently he was advised by Mr Kenney that the Respondent was entitled to serve Improvement Notices on the freeholder where a tenant was in occupation of the property under a lease with an unexpired term of less than three years.
- 24 Mr Tao brought copies of a document to the Hearing which he said was a copy of a deed of variation extending the lease to Mr Lau to 4 or 5 years. The Respondent refused to agree to the late disclosure of this “additional evidence” because it had not been able to review it before the Hearing. Mr Tao accepted that it may not be relevant since he admitted that “the variation” was recent, (postdating the service of the Improvement Notices). Later during the Hearing he suggested that Mr Lau no longer wished to retain the 2 year lease and that he had surrendered it. He also said that he had now let the Property to Mr To, but was unable to explain how the lease to Mr Lau had been terminated.
- 25 Mr Brett referred the Tribunal to the relevant definition in Schedule 1 of the Act which required that Improvement Notices be served on the freeholder unless there was, at the date of service, an existing lease with an unexpired term of more than three years, (section 262 (5) of the Act). Paragraph 3 of Schedule 1 to the Act states that the local housing authority must serve the notice on the owner and the person who ought to take the action specified or the person managing the property. In each case it was satisfied that this was the Applicant and that notice could be served on Mr Tao as director of the Applicant.
- 26 Although it remains the case that the neither of the two Improvement Notices have been fully complied with Mr Kenney accepted, notwithstanding that he has not been provided with written evidence of the actual expenditure, that the Applicant has spent a substantial amount of money on improvements to the Property. However, he said that despite the installation of the fire alarm there is still no evidence of satisfactory management of the Property or of regular testing of the alarm. Since there is no kitchen there remains a risk of fire if food is prepared in “the bed-sitting rooms”. In response the Applicant stated that the occupiers would not cook but would eat in the Noodle Bar.
- 27 There was no agreement between the parties as to whether anyone is currently in residential occupation of the Property. The Respondent’s written evidence implies that residential occupiers continue to occupy parts of the Property and the Applicant’s statement refers to occupation late in 2018, [B135]. When questioned during the Hearing, Mr Tao suggested there may be “occasional” occupation.

- 28 The Respondent gave the Applicant notice of its intention to issue a Financial Penalty on 2 August 2018. The Applicant was advised that the proposed penalty for the section 11 Improvement Notice would be £15,000 and the for the section 12 Improvement Notice £5,722.40. The Applicant did not respond until after the deadline for him to do so and then requested further time, which request was granted. Following that he submitted a written response by email to Mr Kenney, on 17 September 2018.
- 29 The Respondent considered those representations by reference to the hazards identified in the Improvement Notices and its knowledge of the works completed at that time and reduced the penalty for the section 11 Notice to £11,250.
- 30 Mr Tao's representations dated 17 September 2018, which were emailed to Mr Kenney, [B133], are the only written representations provided to the Respondent. These were sent to the Respondent before the Application to the Tribunal so prior to the issue of its Directions. The Applicant subsequently failed to comply with the Directions by providing Respondent with a written statement of its case.
- 31 In the absence of any written statement from the Applicant the Tribunal reviewed these representations during the Hearing, asking Mr Tao to comment on them.
- 32 Mr Tao suggested that the Applicant should be granted leniency and that the penalty should be reduced.
- 33 His reasons were:-
  - a. It is a first offence;
  - b. It is making steady progress to complete the improvements;
  - c. It has spent in excess of £18,700, (none of which it budgeted for);  
and
  - d. It has been disadvantaged by its lack of experience of this new "summary justice and sentencing type of process" .
- 34 He suggested that in the past the non-compliance process would be clearly and systematically escalated step by step through a "known" legal process. Mr Tao accepted that it was necessary for the Applicant to rectify the hazards identified by the Respondent and suggested that he had taken immediate action to do so. Later he admitted that he had struggled to progress the works which he partly attributed to his remote location and the difficulties with finding suitable and reliable workmen.
- 35 The Applicant denied that it knowingly permitted residential occupation or that any harm was done. Mr Tao said that he had co-operated with Mr Kenney in good faith and pragmatically and that the Applicant should be spending its limited resources making improvements to the Property not paying fines.
- 36 Mr Tao stated that the Applicant had received no numerical indication of the likely level of fine and has not profited from receipt of rents. He

said that the proceedings combined with family illness have impacted adversely on his health.

- 37 Mr Tao told the Tribunal that the reinstatement of the gas supply took much longer than anticipated and the delay was beyond his control. He thought that he had been in continuous communication with the Respondent but accepted that there was a lapse in communication last summer, partly attributable to holidays and partly to the delay in the completion of the works.
- 38 All of these issues were addressed by the Respondent, who has also referred the Tribunal to the balance sheet extracted from the Applicant's accounts for its accounting year ending 30 September 2017. [B136]. Mr Brett stated that this was evidence of its substantial assets. In response Mr Tao stated that the balance sheet figure did not demonstrate "actual cash in the bank". However when asked by the Tribunal he conceded that the Applicant would be able to pay a fine of the order of £12,700.
- 39 In response to further questioning from Mr Brett and the Tribunal Mr Tao admitted that he had not provided information about the financial position of the Applicant despite the Directions referring to him being entitled to do so.
- 40 The letter dated 20 March 2018, which Mr Tao claims he did not receive, referred to the maximum amount of a Financial Penalty as being £30,000 per notice.

### **The Law**

- 41 The Tribunal's jurisdiction is contained in the Act. Section 249A a copy of which is in the appendix to this Decision, enables a local housing authority to impose a financial penalty.
- 42 Schedule 13A 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 13A sets out the rights of the person on whom a notice is served to appeal to this Tribunal and sub paragraph 10(3) states that an appeal made 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.
- On an appeal the Tribunal may confirm vary or cancel the final notice. It has to be satisfied of the allegations to the criminal standard of proof.

### **The Tribunal's decision**

- 43 There is no dispute between the parties that it was appropriate for the Respondent to serve the Improvement Notices or that that the identified deficiencies existed.

- 44 The Tribunal finds that the Respondent followed the correct procedure in issuing the Improvement Notices and serving the final notices of intent to impose a Financial Penalty as an alternative to prosecution.
- 45 Although arguments, intermittently put forward by the Applicant during the Hearing, suggested that the Improvement Notices should have been served on a “tenant” the Tribunal is satisfied that, even if there had been lease of the Property to a third party, it was for a term of two years and that the Respondent served the Improvement Notice on the appropriate person. Section 263(1) of the Act identifies who this is and refers to a person having an estate or interest in the Property. Section 262(7) states that “owner” in relation to premises means a person entitled to dispose of a freehold interest in the Property or a person holding the Property under a lease with an unexpired term of more than three years. In any event, the time for challenging the service of the Improvement Notice was by appealing those Notices and that it is now too late.
- 46 The Tribunal finds on a balance of probabilities that Notice of Intention to impose a financial penalty was properly served. The administrative fee that was sent with this Notice was paid. It is therefore more likely than not that the Notice itself was received by the Applicant at the same time.
- 47 Mr Tao accepts that some of the work was still outstanding at the date stated in the Improvement Notices for compliance and that he could have been more diligent in communicating with the local authority and asking for an extension of time. Mr Tao also accepted that some of the work was not carried out properly. He said that he had relied on a reputable builder and had assumed that the works would have been carried out to an acceptable standard. The Tribunal found that neither this nor any other explanation given by the Applicant as to why the Improvement Notices had not been complied with constituted a reasonable excuse. Consequently, the Tribunal finds beyond all reasonable doubt that the Applicant has committed a “relevant housing offence” under section 249A(2) of the Housing Act 2004 and that the Respondent was therefore entitled to impose a financial penalty on the Applicant under subsection (1) of that section.
- 48 It is then necessary for the Tribunal to determine whether the level of the penalty imposed by the Respondent is appropriate in the circumstances of this case. In this respect the Tribunal has had regard to the Guidance issued by the Department for Communities and Local Government which states that Local Authorities should develop and document their own policy on determining the appropriate level of civil penalty in a particular case, the Respondent’s methodology for arriving at the penalty they sought and the Applicant’s representations for mitigation of the amount of the penalty.



- 49 The Tribunal has taken into account the severity of the offence (that tenants were placed at serious though not imminent risk of harm) and agrees with the Respondent that a penalty on level 3 of the Respondent's criteria is appropriate for each Improvement Notice, (i.e. that a penalty of between £7,500 to £15,000 would be appropriate), with reductions to reflect that this is a first offence and that some of the work had been carried out. In this case the initial Financial Penalty sought was to be £15,000 plus £5,722.40 totalling £20,722.40. (See paragraph 28 above). The £15,000 penalty was reduced to £11,250.00, on 15 October 2018, to take account of the Applicant's "work in progress" with the second penalty remaining at £5,722,40, (totalling £16,972.40),
- 50 On 4 March 2019 the Respondent sent the Applicant a letter notifying him that a further reduction of 25% had been applied to both penalties so that the penalty currently sought is £12,729.30. This further reduction was made to take account of the fact of his representations and that it was his "first offence". [B145].
- 51 Having considered all the evidence presented to it at the Hearing and within the hearing bundle, the Tribunal finds that a total financial penalty of Twelve Thousand Seven Hundred and Twenty Nine Pounds and Thirty Pence, (£12, 729.30) is appropriate in the circumstances of this case and so confirms the penalty sought by the Respondent in that sum.

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.

## Appendix

### *249A Financial penalties for certain housing offences in England*

- 1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.
- (2) In this section "relevant housing offence" means an offence under—
  - (a) - (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.