



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

<b>Case reference</b>	:	<b>LON/00BB/HNA/2019/0088 &amp; 0089</b>
<b>Property</b>	:	<b>877 Romford Road, Manor Park, London E12 5JY</b>
<b>Appellant</b>	:	<b>Bloomingdale Residential Ltd (“Bloomingdale”)</b>
<b>Respondent</b>	:	<b>The London Borough of Newham (“Newham”)</b>
<b>Type of application</b>	:	<b>Appeal against two financial penalties under section 249A of and Schedule 13A to the Housing Act 2004</b>
<b>Tribunal members</b>	:	<b>Judge Angus Andrew Duncan Jagger MRICS</b>
<b>Date and Venue of hearing</b>	:	<b>1 November 2019 10 Alfred Place, London WC1E 7LR</b>
<b>Date of decision</b>	:	<b>6 December 2019</b>

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**DECISION**

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In this decision section, schedule and part numbers refer to sections, schedules and parts in the Housing Act 2004 and numbers in square brackets refer to the pages in Newham’s hearing bundle. There were no page numbers in Bloomingdale’s bundle.

## **Decision**

1. We cancel the two financial penalties given to Bloomingdale both dated 25 June 2019.

## **Financial penalty notices and appeal**

2. On 25 June 2019 Newham issued the following two financial penalty notices relating to the property, against Bloomingdale Residential Ltd: -
  - (i) A penalty of £1,000 in respect of their asserted failure to licence a house in Multiple Occupation [211-213]; and
  - (ii) A financial penalty of £1,000 in respect of their asserted failure to comply with the Management of Houses in Multiple Occupation (England) Regulations 2006 (“the 2006 Regulations”) [217-219].
3. On the same date, 25 June 2019, Newham decided not to impose a financial penalty on Shohid Uddin who is the freehold owner of the property on the ground that he was not the person in control of or managing a house in multiple occupation.
4. On 23 July 2019 the Tribunal received Bloomingdales’ appeals against the two financial penalties imposed on it.

## **Hearing**

5. We heard the appeals on 1 November 2019. Bloomingdale was represented by Mr Umar Ali who is barrister. Newham was represented by Amanda Amafor who is a team leader for Newham.
6. Ahsam Malik is employed by Bloomingdale. His witness statement was included in Bloomingdale’s bundle. Although Mr Malik attended for cross examination Ms Amafor chose not to ask him any questions. Amanda Amafor’s witness statement is at [1-7] and she attended for cross examination.

## **The statutory framework**

7. Part 2 makes provision for the licencing of Houses in Multiple Occupation (“HMOs”). Not all HMOs are subject to the licencing regime introduced by part 2. The Licencing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 (“the prescribed descriptions order”)

describes those HMOs that are subject to the licencing regime. However, for the purpose of this decision is it sufficient to note that those regulations now apply to two-storey houses. The property is a two-storey house.

8. Section 56 in part 2 permits the Local Housing Authority to designate an area as being subject to additional licencing. The effect of such designation is to require HMOs not caught by the prescribed description order to be licenced. We understand that Newham have made such a designation.
9. Generally speaking the Housing Act 2004 does not require the licencing of houses in single occupation. However, section 80 in part 3 permits a Local Housing Authority to designate an area as being subject to selective licencing. The selective licensing regime enables a local housing authority to require the licencing of residential accommodation let under a single tenancy or licence. Again, we understand that Newham have made such a designation.
10. The net effect of these designations is that before residential accommodation within the designated area can be let Newham must have granted either an HMO licence under section 64 or a property licence under section 88.
11. If the residential accommodation is an HMO the 2006 regulations impose certain duties on the person managing the residential accommodation.
12. Section 72 creates a number of offences in relation to HMOs. In particular it provides that a person having control of or managing an HMO commits an offence if it is not licenced. The section provides a defence if that person had a reasonable excuse for not having a licence.
13. Section 234 provides that a person managing an HMO commits an offence if he fails to comply with the 2006 regulations. Again, the section provides a defence if that person had a reasonable excuse for not complying.
14. Section 263 defines the terms “person having control” and “person managing” and the section is recited below.
15. Section 126(2) and Schedule 9 of the Housing and Planning 2016 amended the Housing Act by inserting a new section 249A and schedule 13A.
16. Section 249A gives a local housing authority discretion to impose a financial penalty if it is satisfied beyond reasonable doubt that a person’s conduct amounts to a housing offence, which term includes the offences created by sections 72 and 234. The local housing authority has a discretion as to the amount of the financial penalty save that it may not exceed £30,000 and only one financial penalty may be imposed in respect of the same conduct.

17. Schedule 13A deals with appeals, which lie to this tribunal. An appeal is to be a rehearing of the local housing authority's decision but may be determined having regard to matters of which the authority was unaware. On an appeal this tribunal may confirm, vary or cancel a notice imposing a financial penalty.

## **Background**

18. On the basis of the Land Registry documents [231-233] Shohid Uddin acquired the property in March 1999. It is an investment property and Mr Uddin does not live there. On 15 June 2017 Mr Uddin entered into an agreement with Bloomingdale for term of three years from that date [133-139]. The front page of the agreement records that Bloomingdale is to pay Mr Uddin a rent of £1,900 per calendar month. However, on reading the agreement it is apparent that it is not a tenancy agreement but rather an agreement by which Mr Uddin appointed Bloomingdale as his letting and managing agents. We assume that Bloomingdale let the property on behalf of Mr Uddin.
19. On 8 March 2018 Mr Uddin applied for the grant of a selective property licence under section 88 on the basis that the property was then let to Mr Khaleem Khan who occupied the property as a single household [49-58]. The licence was issued on 7 June 2018 "for maximum of 12 people living as one household" [77-92].
20. On 7 September 2018 Mr Uddin entered into two further agreements with Bloomingdale. The first was a surrender of the management agreement of 15 June 2017. The second was a document headed "5 Year Guaranteed Rent LEASE CONTRACT" [193-199]. Despite this heading Clause 5 of the agreement provides that the "*Lease shall be for a term of 1 years terminating on the second anniversary of the date of this contract*". The agreement refers also to an "*accommodation fee*" of £1,900 per month. At clause 3.5 of the agreement the use of the property is limited to "*providing temporary accommodation for those persons nominated by local authorities or other similar statutory or voluntary organisations in an execution of their short-term housing duties under the homeless or social services legislation*". It is however apparent that neither Mr Uddin nor Bloomingdale had any intention of using the property for that purpose.
21. Taken at face value the agreement amounts to what has become known as a "*let to let agreement*". That is Mr Uddin let the property to Bloomingdale at a rent of £1,900 per month with the intention that Bloomingdale would then sublet the property and retain any profit as their management and letting fee.
22. It is however apparent that neither Mr Uddin nor Bloomingdale intended to create a landlord and tenant relationship. On the basis of Mr Malik's

unchallenged evidence both Mr Uddin and Bloomingdale intended that Bloomingdale should simply continue as Mr Uddin's management and letting agent. This may seem surprising but having heard Mr Malik's evidence we accept that it was the intention of the parties. In answer to our questions it became apparent that Bloomingdale and Mr Malik in particular pay little attention to the documents that they ask their clients to sign and certainly they seem to have no understanding of the legal consequences of those documents. Indeed, it seems that the documents were prepared by Adam, a person undergoing work experience. Whether in such circumstances Bloomingdale is competent to act as letting and managing agents is outwith this decision.

23. That aside Bloomingdale negotiated a letting of the property to Mr Mazhar Latif. By a tenancy agreement dated 15 November 2018 Mr Uddin let the property to Mr Latif for a term of one year at a rent of £2,000 per calendar month [141-146]. Thus, and despite the agreement of 7 September 2018, there was a direct contractual relationship between Mr Uddin and Mr Latif. At clause 7(j) of the agreement Mr Latif covenants not to sublet or part with possession of the property.
24. Newham became suspicious that the property was being used as an HMO in contravention of the licence. Ms Amafor inspected the property on 5 March 2019. During her inspection she was accompanied by two colleagues and by police officers. On inspection it was apparent that the property was being used as house in multiple occupation and this was not disputed by Mr Malik. There were six rooms in the property all of which were individually let. Ms Amafor obtained statements from three occupiers indicating that each room was let at a rent in the region of £400 to £450 per month. Ms Amafor also identified three breaches of the 2006 regulations including a failure to maintain a battery-operated smoke detector in good working order.
25. On 8 March 2019 Ms Amafor sent a "*notification of incorrect licence type*" to Mr Uddin, who she had identified as the freehold owner of the property [123-126]. The notice did two things. Firstly, it informed Mr Uddin that he must either submit a new application for an HMO licence or he must take immediate steps to return the property back to a single family dwelling. The notice states in terms that if Mr Uddin was unaware that the property was being used as an HMO he must by 5 April 2019 provide documentary evidence that he is "*actively taking steps to return the property back into use as a single family dwelling*". The notice makes it clear that failure to respond might result in Newham taking "*steps to vary or revoke your licence*". Secondly the notice required Mr Uddin to send 11 documents to Newham. Mr Uddin passed the notification to Bloomingdale.
26. It seems that on 19 March 2019 both Mr Uddin and a Bloomingdale representative telephoned Newham [127] and explained that the property

had been sublet without their knowledge and that they were in the process of evicting the current tenants. They also said that they would in any event apply for an HMO licence. On 3 April 2019 the accounts manager at Bloomingdale wrote to Ms Amafor enclosing the requested documents [129]. The covering e-mail repeated the explanation that the property had been let as a single household and that the tenant in breach of the tenancy terms had sublet the property “*to other people without our consent or acknowledgement*”.

27. One of the provided documents was the tenancy agreement between Mr Uddin and Mr Latif referred to above. Another was a copy of Mr Latif's provisional driving licence that gave his address [161], whilst the covering e-mail included a mobile telephone number for Mr Latif. A further request for information resulted in Bloomingdale providing copies of three of Mr Latif's pay slips that identified his employer and confirmed his gross monthly pay at £4,170 [225-229]. Surprisingly Ms Amafor made no attempt to contact Mr Latif to obtain a statement, despite having this information and despite her suspicion that the tenancy agreement was a “*sham*”.
28. On 3 May 2019 Ms Amafor served notice of Newham's intention to serve financial penalty notices on both Mr Uddin and Bloomingdale [165-188]. They were given 28 days within which to make written representations.
29. Mr Uddin's response was brief but to the point. He said that the property was managed by Bloomingdale who dealt with all affairs relating to the property [191]. The tenant (Mr Latif) was in breach of his tenancy agreement because he had sublet the property. Bloomingdale had taken appropriate action and asked the tenants to vacate the property which was occupied as an HMO without his knowledge.
30. Bloomingdale responded on 29 May 2019 [201-204]. They made much the same point as Mr Uddin. They managed the property on Mr Uddin's behalf and they had arranged the letting to Mr Latif on the basis that it could be occupied only by one household. They did not know of the unauthorised subletting until Mr Uddin sent them a copy of the “*notification of the incorrect licence type*”. They had immediately inspected the property and had served notice on Mr Latif requiring possession of the property on the grounds that he was in breach of the terms of his tenancy agreement.
31. Having considered these responses Ms Amafor on 25 June 2019 issued the financial penalty notices referred to in paragraph 2 above. On the same date she also gave notice of her decision not to issue a financial penalty notice against Mr Uddin.

32. The property was vacated in July 2018 when Mr Latif stopped paying the rent and it is now empty.

### **Issues in dispute**

33. Essentially the issues in this case can be encapsulated in the following three questions: -

- a. Was Bloomingdale a “*person having control*” of the property within the meaning of section 263(1) of the Housing Act?
- b. Was Bloomingdale a “*person managing*” the property within the meaning of section 263(3) of the Housing Act?
- c. Did Bloomingdale have a “*reasonable excuse*” for not licensing the property as an HMO and/or for not complying with the 2006 regulations?

34. In answering these questions, we remind ourselves that we must be satisfied beyond reasonable doubt that Bloomingdale’s conduct amounts to a housing offence. However, and in contrast we need only be satisfied on the balance of probabilities that Bloomingdale had a reasonable excuse for its failure either to have an HMO licence or to comply with the 2006 regulations. Given our answers to these questions it is unnecessary for us to consider whether there was actually a breach of the 2006 regulations.

35. Before turning to our reasons, we set out section 263 in full: -

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

*(1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.*

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

*(3) In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—*

*(a) receives (whether directly or through an agent or trustee) rents or other payments from—*

*(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and*

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

*(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;*

*and includes, where those rents or other payments are received through another person as agent or trustee, that other person.*

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

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

### **Reasons for our decision**

36. Before answering the questions enumerated above we must make one finding of fact. Ms Amafor said that she suspected the letting to Mr Latif was “*a sham*”. That suspicion seems to have caused her to issue the financial penalty notices against Bloomingdale. Having heard the evidence, Ms Amafor concluded by conceding that she did “*not have the evidence*” to support her suspicion.
37. We go further than that. Having heard Mr Malik’s unchallenged evidence we are satisfied and find that the letting was genuine and that neither Mr Uddin nor Bloomingdale were aware of the unauthorised subletting by Mr Latif and the use of the property as an HMO until Mr Uddin received the “*notification of incorrect licence type*” sent to him on 8 March 2019.
38. In criticising the drafting of the Housing Act 2004 we follow a well-trodden path. The definition of rack-rent in subsection (2) does not differentiate between the full net annual value if let as a single dwellinghouse and if let as an HMO. In this case the distinction does not appear to matter because on the evidence available to us the rent received by Bloomingdale (as Mr Uddin’s agent) exceeds two-thirds of the rent received by Mr Latif. Thus, at first sight Bloomingdale would appear to be a “*person having control*”.
39. However, Bloomingdale were not in control of the use of the property as an HMO: they did not even know that it was being used as such. It seems unlikely that Parliament would have intended to create an offence of strict liability. Given the use of the word “*control*” and the words in parenthesis in sub-section (1) we consider that in the context of this case a person only has control if it receives the rent from those in occupation. Consequently, Mr Latif and not Bloomingdale was the “*person having control*”.
40. Subsection (3) is more straightforward. Subsection (3)(a) expressly provides that in the case of an HMO the rent must be receivable from those



in occupation. In this case Bloomingdale did not receive the rent from those in occupation and it was not therefore a “person managing”.

41. It follows from the above that Bloomingdale did not commit either of the Housing Offences that underpin the Financial Penalty notices that must therefore be cancelled.

42. However even if we are wrong about that we are satisfied and find that Bloomingdale had a “good reason” both for not having an HMO licence and for failing to comply with the 2006 Regulations. The reason being that Mr Latif had sublet the rooms in the property and created an HMO without their knowledge or consent. In that context Bloomingdale are an innocent party. They are entitled to rely on the defence afforded by sections 72 and 234 and for that reason also the Financial Penalty notices must be cancelled.

**Name: Judge Angus Andrew      Date: 6 December 2019**

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).