FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/HNA/2019/0101**
Property	**:**	**Flat 3 Kenbrook House, Leighton Road, London NW5 2QN**
Applicant	**:**	**The North London Network Limited**
Representative	**:**	**Mr K Hart of Freemans Solicitors**
Respondent	**:**	**London Borough of Camden**
Representative	**:**	**Mr E Sarkis, in-house lawyer**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A of, and Schedule 13A to, the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn** **Mr S Mason FRICS**
Date and venue of Hearing	**:**	**25th November 2019 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**13th December 2019**

DECISION

Decision of the tribunal

The financial penalty imposed on the Applicant is reduced from £7,000.00 to £4,000.00.

Introduction

1. The Applicant has appealed against a financial penalty imposed on it by the Respondent under section 249A of the Housing Act 2004 ("**the 2004 Act**").

2. It is common ground between the parties that between certain dates the Property was being used as a house in multiple occupation and was required to be licensed but was not so licensed. The Applicant's involvement with the Property was in its capacity as a firm of letting agents.

3. The decision to impose a financial penalty on the Applicant followed an investigation by the Respondent into the Property. There were three tenants residing at the Property at the relevant time who had been introduced to the owner of the Property ("**the Owner**") by the Applicant. The Applicant charged fees to the Owner for the service of introducing the tenants and for connected services, but the Owner apparently could not afford to pay those fees up front. As a result, the Applicant came to an arrangement with the Owner that the tenants would pay rent direct to the Applicant for the first 3 months and then, after deducting their fees, the Applicant would account to the Owner for the balance of the rent for that period.

4. On 1st May 2019 the Respondent served on the Applicant a "Notice of Intent to Impose a Financial Penalty" on the basis that between 12th September 2018 and 21st February 2019 the Applicant, being a person in control of or managing a House in Multiple Occupation at the Property, had committed an offence in that the Property was required to be licensed but was not licensed, contrary to section 72(1) of the 2004 Act. The proposed financial penalty was £7,000.00. The Applicant made representations but the Respondent issued a "Final Notice to Impose a Financial Penalty" on 18th July 2019 which confirmed the penalty at £7,000.00.

5. Details of the relevant legislation appear in the Appendix to this determination.

Application for strike-out of Respondent's case

6. Paragraph 9(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**") states that

"The Tribunal may strike out the whole or a part of the proceedings or case if … the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case … succeeding". Paragraph 9(7) of the Tribunal Rules then adds the clarification that *"This rule applies to a respondent as it applies to an applicant except that … a reference to the striking out of the proceedings or case … is to be read as a reference to the barring of the respondent from taking further part in the proceedings …".*

7. The Applicant submitted that the Respondent could not proceed *"on the information currently charged"* as the particulars of the charge were inaccurate. The Respondent had charged the Applicant *"as being a person having control and person managing the property between 12/09/18 and 21/02/19".* However, the Applicant had not collected an amount of rent that could be considered the rack-rent for the purposes of section 263(2) of the 2004 Act (see Appendix) as it had only collected rent for 91 out of 162 days in respect of the period referred to in the charge, which worked out as 56.2% of that rent and not the minimum two-thirds required by statute. In addition, the Applicant was not a *"person managing"* the Property for the dates charged as it was not collecting rent after 12th December 2018. In the Applicant's submission, the First-tier Tribunal could not vary the charge.

8. In response the Respondent stated that it was open to the First-tier Tribunal to determine that the offence had been committed for part if not all of the period of charge. The Respondent also stated that in its submission the Applicant had both been managing and in control of the Property. It had been managing as it had received rent from the tenants as agent or trustee for the owner and it had been in control as it had received the rack rent. In part support of its position the Respondent cited the cases of *Luton BC v Altavon Luton Ltd* (Queens Bench, 31st July 2019) and *Camden v Citydeal*, the latter being an unreported case from 2018 in the Highbury Corner Magistrates Court.

9. As notified to the parties at the hearing, we did not accept that the Respondent should be barred from taking any further part in the proceedings as we did not agree that there was no reasonable prospect of the Respondent's case succeeding. Our reasoning for this overlaps with the reasoning for our determination on the substantive application itself, which is explained later.

Applicant's case

10. Part of the Applicant's case has already been summarised above in the context of its strike-out application.

11. In its application the Applicant submits that it was neither a "person having control" of nor a "person managing" the Property for the purposes of sections 72 and 263 of the 2004 Act. In the alternative, it

submits that it had a reasonable excuse for the purposes of section 72(5) of the 2004 Act as it informed the Owner of the requirement to have an HMO licence and believed that the process of applying for a licence had begun.

12. The Applicant entered into an arrangement with the Owner to collect its fees for introducing the tenants to the Owner. The arrangement did involve the tenants paying money direct to the Applicant but the Applicant was not a party to the tenancy agreement and was not a rent collector for the purposes of section 263 of the 2004 Act.

13. As regards the level of the penalty if, despite the Applicant's other submissions, the tribunal considers that a penalty should be imposed, the amount should be reduced. The Applicant has no previous licensing breaches or convictions, it was incapable of applying for a licence itself, it was not managing the Property on a day to day basis, it informed the Owner of the need to obtain a licence on more than one occasion, it co-operated with the Respondent regarding the investigation, it ensured that the Owner undertook safety checks, the Property was broadly compliant with HMO standards with no specific HHSRS breaches, and the only complaints from tenants related to disrepair. In correspondence with the Respondent the Applicant submitted that a penalty of about £2,000 would be more appropriate. At the hearing Mr Hart for the Applicant said that any penalty should be £4,000 or less.

Respondent's case

14. The Respondent summarises the factual background, as understood by it, in its written statement of reasons opposing the application.

15. The Respondent submits that the Applicant was a "person managing" the Property because it received the rent from the tenants, at least for the first three months of the tenancy. It was also a "person having control" because it received the rack-rent.

16. The Respondent also summarises its enforcement policy and the factors taken into account in this case which either constituted aggravating or mitigating factors.

Mrs Suarez's evidence

17. Mrs Suarez is an environmental health officer at the Council. Her witness statement is the same document as the written statement of reasons referred to above.

18. At the hearing she said that the tenants had complained about the condition of the Property and that they had suspected that there was no

HMO licence in place. In her view the tenants had expected more support from the Applicant to help them resolve various issues. She also argued that the Applicant had been involved with the Property since September 2016 and therefore had ample time to ensure that it was licensed.

19. In cross-examination it was suggested to her that the spirit of the legislation was to punish rogue landlords but she did not accept that this was the only purpose. She accepted that no action had been taken by the Respondent in relation to the alleged poor condition of the Property but said that this was not because there were no issues. She also accepted that the Applicant was relatively helpful when answering the Respondent's questions. Mr Hart also put certain questions to her about the details of the Respondent's policy on financial penalties.

20. Mrs Suarez was asked by the tribunal why the offence was treated as being in the Band 5 level of severity (with a starting point of £20,000) and why she then concluded that a penalty of £7,000 would be appropriate, and a discussion of the Respondent's policy then ensued.

Mr Tsuman's evidence

21. Mr Tsuman is a director of the Applicant. His witness statement contains a chronology of events as he understands them.

22. At the hearing he said that one of the Applicant's employees had made a mistake in believing that no licence was needed. He also said that the Applicant had been instructed by the Owner to have minimal involvement in lettings. He commented that licensing is complex and that the Applicant holds seminars for landlords. He also added that he personally has a track record of taking licensing issues seriously.

23. In cross-examination, Mr Tsuman accepted that he was aware of the existence of the Respondent's additional licensing scheme before the offence was committed but said that he was unaware that the Property was an unlicensed HMO until recently. Mr Sarkis put it to him that the Applicant only advised the Owner to check whether the Property needed a licence 3 months after the tenancy commenced and that as a professional firm of agents the Applicant should have done better. Mr Tsuman replied that the Applicant was not itself managing the Property and also that it had very little experience of the policy of this particular London borough. In response to another question he was unable to point to anything in the Applicant's terms of business which alerted landlords to the need to license HMOs.

Tribunal's analysis

Did the Applicant commit an offence?

24. Under Schedule 13A to the 2004 Act, this appeal is a re-hearing of the Respondent's decision but may be determined having regard to matters of which the Respondent was unaware.

25. As it is common ground between the parties that the Property was between certain dates being used as a house in multiple occupation and was required to be licensed but was not so licensed, it is unnecessary to focus on the analysis which led to this conclusion with which we have no basis for disagreeing.

26. We turn now to the question of whether the Applicant was a "person having control" of the Property for the purposes of sections 72 and 263(1) of the 2004 Act. Under section 263(1) "person having control" means *"… 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"*, and under section 263(2) "rack-rent" means *"a rent which is not less than two-thirds of the full net annual value of the premises"*.

27. The Applicant argues that the charge related to the whole of the period between 12th September 2018 and 21st February 2019 (over 5 months) but that the Applicant only received rent for 3 months and that this was less than two-thirds of the full rental value for that period. Whilst we agree with the Applicant that the cases cited by the Respondent in support of its own position are of limited assistance, we do not accept the Applicant's basic argument on this point, as the fact that the Respondent specified a period between September 2018 and February 2019 does not seem to us to be the issue. The Applicant received 3 months' worth of rent and there is no evidence before us that this was less than two-thirds of the full net annual value of the premises during that period (pro rata). There seems to us to be no basis for interpreting either section 72 or section 263 as requiring the rack-rent definition to be construed by reference to the period specified by the Respondent in the original charge.

28. There might be an argument that the word "annual" (in section 263(2)) should be treated as meaning that the minimum amount of rent which constitutes receipt of the rack-rent must be a sum which equals two-thirds of a whole year's rent regardless of the length of the period in respect of which rent has been received, but the Applicant is not seeking to run this particular argument. It is clear that the Applicant received the rent as agent or trustee for the Owner, and therefore we are satisfied that the Applicant was a "person having control" of the Property.

29. Was the Applicant also a "person managing" the Property for the purposes of sections 72 and 263(3) of the 2004 Act? Under section 263(3) "person managing" means *"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 … persons who are in occupation as tenants or licensees … and includes, where those rents or other payments are received through another person as agent or trustee, that other person".* This sub-section is quite curiously phrased in that it initially appears to relate only to a property owner. However, it then goes on to state that where rents are received through an agent it includes the agent. It is also not confined to the receipt of the rack-rent but relates to "rents or other payments". We therefore consider that as well as being a "person having control" of the Property the Applicant was a "person managing" the Property.

30. The next issue is the point raised by the Applicant as to whether the offence was correctly charged. We accept that the Applicant did not receive rent in relation to the whole of the period between 12th September 2018 and 21st February 2019, but in our view this is not the issue. Under section 249A(1) of the 2004 Act a *"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".* The Property required a licence but was unlicensed. As in our view the Applicant was a "person having control" and/or a "person managing" the Property at the relevant time, it follows that the Applicant committed an offence under section 72. Under section 249A(2)(b) an offence under section 72 is a "relevant housing offence" for the purposes of section 249A(1).

31. The next point is whether the Applicant had a reasonable excuse for the purposes of section 72(5) of the 2004 Act. This point has not been argued in detail by the Applicant, but the Applicant's submission is essentially that it informed the Owner of the requirement to have an HMO licence and believed that the process of applying for a licence had begun. We do not accept that this is sufficient to constitute a reasonable excuse for the purpose of this legislation. A large part of the purpose of this legislation is specific and general deterrence, and if a person or organisation – particularly an experienced firm of letting agents – could escape liability simply by mentioning the requirement to the Owner but then taking no further steps to ensure that it was not controlling or managing a property which required a licence but was not so licensed, the legislation would lose much of its effect. A failure to obtain a licence is a criminal matter and needs to be taken very seriously. Therefore the "reasonable excuse" defence fails.

32. In conclusion, therefore, the Applicant has committed a relevant housing offence and the Respondent was entitled to impose a financial penalty on the Applicant in respect of that offence.

Level of penalty

33. The level of the penalty needs to reflect the degree of seriousness of the offence whilst taking into account relevant aggravating and mitigating factors.

34. The Respondent has imposed a penalty of £7,000 by applying its Financial Penalty Charging Policy. However, we have concerns regarding the adequacy and clarity of the Policy and the way in which it has been applied. Mrs Suarez decided that the offence committed by the Applicant was serious enough to justify placing the offence in Band 5 of the Policy. According to the Policy's banding system this would result in a penalty of between £20,000 and £25,000 depending on the circumstances, i.e. a minimum penalty of £20,000. However, the penalty actually imposed was £7,000, which indicates to us either that Mrs Suarez did not actually feel that the offence belonged in Band 5 in the first place or that there is internal confusion as to how to apply the Policy. Indeed, there is even a basic internal contradiction in the analysis, as Band 5 relates to "severe" offences and yet this offence is described as "serious", which would have placed it in Band 3 or Band 4.

35. In our view the rationale for placing the offence in Band 5 in the first place and then for imposing a penalty of £7,000 is unclear, and we consider that the Policy itself is faulty or at least obscure and/or that the Policy has been misapplied. The fact that the appeal is by way of a re-hearing gives the tribunal a certain amount of discretion as to how to approach the level of penalty, and in our view it is right and proportionate in the particular circumstances of this case to substitute our own view as to what would be an appropriate penalty in the light of the nature of the offence, relevant aggravating and mitigating factors and the knowledge that the tribunal itself has as an expert tribunal as to the level of penalties generally being imposed for this category of offence.

36. As regards the factors relevant to the level of penalty, the factors set out in the Respondent's Financial Penalty Charging Policy are in our view reasonable factors to consider, albeit that they may not all have been given the right weight.

37. The Applicant is at the very least a medium-sized established firm of letting agents, and it should have taken more proactive measures to ensure that the Property had an HMO licence. In addition, the Applicant's terms of business do not alert landlords to the need to obtain HMO licences where relevant. It is also fair to argue that there is a risk of harm to occupiers arising out of the commission of the offence, in that the process of applying for and obtaining a licence would or could have highlighted relevant safety concerns.

38. On the other hand, there is no suggestion that the Applicant deliberately broke the law, and there is no evidence of its having committed previous offences. Mr Tsuman came across reasonably well at the hearing, and it seems clear that the Applicant will learn lessons from this experience. It is also not a case where the offender has greatly profited from, or as a side-effect of, the commission of the offence as the evidence indicates that it only received £1,620 by way of fees. The Applicant was also not managing the Property on a day to day basis and it co-operated reasonably well with the Respondent's investigations. Furthermore, there is no evidence of major health and safety failings at the Property.

39. Using our discretion and taking the above factors into account, we consider that an appropriate penalty in all the circumstances is £4,000. It needs to be significantly higher than the fees received by the Applicant so as to have a deterrence value, but there are some mitigating factors which mean that in our view it would not be appropriate to set the penalty any higher than £4,000.

Cost applications

40. No cost applications were made.

Name: Judge P Korn **Date:** 13th December 2019

RIGHTS OF APPEAL

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

B. 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.

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

D. 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.

Appendix

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part … but is not so licensed.

(5) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) … .

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) 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.

(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.

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 … persons who are in occupation as tenants or licensees …; or (b) …; and includes, where those rents or other payments are received through another person as agent or trustee, that other person".

SCHEDULE 13A

FINANCIAL PENALTIES UNDER SECTION 249A

Appeals

6 If the authority decides to impose a financial penalty on [a] person, it must give the person a notice (a "final notice") imposing that penalty.

10

(1) A person to whom a final notice is given may appeal to the First-tier Tribunal against – (a) the decision to impose the penalty, or (b) the amount of the penalty.

(3) An appeal under this paragraph – (a) is to be a re-hearing of the local 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.