FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BR/HNA/2019/0052**
Premises	**:**	**87 Blandford Road** **Salford** **Manchester** **M6 6BD**
Appellant	**:**	**Mr Zicheng Xiong**
Representative	**:**	**N/A**
Respondent	**:**	**Salford City Council**
Representative	**:**	**Mr P Whatley, Counsel**
Type of Application	**:**	**Housing Act 2004 – Schedule 13A, paragraph 10**
Tribunal Members	**:**	**Judge J Holbrook** **Regional Surveyor N Walsh**
Date and venue of Hearing	**:**	**3 March 2020** **Manchester**
Date of Decision	**:**	**20 March 2020**
Date of Determination	**:**	**30 April 2020**

DECISION

DECISION

The Final Notice which is the subject of this appeal is confirmed: Zicheng Xiong must therefore pay a financial penalty of £20,500 to Salford City Council.

REASONS

INTRODUCTION

The appeal

1. On 3 June 2019, Zicheng Xiong appealed to the Tribunal against a financial penalty imposed on him by Salford City Council under section 249A(1) of the Housing Act 2004 ("the 2004 Act"). The financial penalty related to an alleged housing offence in respect of premises known as 87 Blandford Road, Salford, Manchester M6 6BD ("the Premises").

2. To be more precise, Mr Xiong appealed against a final notice dated 7 May 2019 given to him by Salford Council under paragraph 6 of Schedule 13A to the 2004 Act ("the Final Notice"). It imposed a financial penalty of £20,500 on Mr Xiong for conduct amounting to an offence under section 234(3) of the 2004 Act.

The Premises

3. The Tribunal inspected the Premises prior to the hearing on the morning of 3 March 2020 in the presence of Mr Xiong and representatives of Salford Council. The Premises comprise a mid-terraced house of traditional design and construction dating from the late nineteenth or early twentieth centuries and located in a predominantly residential area.

4. The Premises were unoccupied and unfurnished at the time of inspection. They comprise two rooms on the ground floor, with a kitchen at the rear, and two rooms and a bathroom/wc on the first floor. It was apparent that the 'middle' room on the ground floor had previously been partitioned to form a small bedroom plus a corridor-style room which included a breakfast bar. However, the partitioning had been removed prior to the inspection.

The hearing

5. Following the inspection, a hearing was held at Piccadilly Exchange in Manchester. Mr Xiong represented himself at the hearing and Salford Council were represented by Mr Paul Whatley of counsel.

6. The Tribunal heard oral evidence from two witnesses for Salford Council: Christopher Gleave and Liz Mann (Housing Standards Officers employed by the Council). Mr Xiong also gave oral evidence and the parties had previously submitted bundles of documentary evidence in support of their respective cases. In addition, the Tribunal heard oral submissions from Mr Xiong and Mr Whatley.

7. Judgment was reserved.

LAW AND GUIDANCE

Power to impose financial penalties

8. New provisions were inserted into the 2004 Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. One of those provisions was section 249A, which came into force on 6 April 2017. It enables a local housing authority to 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.

9. Relevant housing offences are listed in section 249A(2). They include the offence (under section 234) of failing to comply with the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the HMO Management Regulations").

10. Only one financial penalty under section 249A may be imposed on a person in respect of the same conduct. The amount of that penalty is determined by the local housing authority (but it may not exceed £30,000), and its imposition is an alternative to instituting criminal proceedings for the offence in question.

Procedural requirements

11. Schedule 13A to the 2004 Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent setting out:

- the amount of the proposed financial penalty;
- the reasons for proposing to impose it; and
- information about the right to make representations.

12. Unless the conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct.

13. A person who is given a notice of intent has the right to make written representations to the local housing authority about the proposal to impose a financial penalty. Any such representations must be made within the period of 28 days beginning with the day after that on which the notice of intent was given. After the end of that period, the local housing authority must decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount.

14. If the local housing authority decides to impose a financial penalty on a person, it must give that person a final notice setting out:

- the amount of the financial penalty;
- the reasons for imposing it;
- information about how to pay the penalty;
- the period for payment of the penalty;
- information about rights of appeal; and
- the consequences of failure to comply with the notice.

Relevant guidance

15. A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions in respect of the imposition of financial penalties. Such guidance ("the HCLG Guidance") was issued by the Ministry of Housing, Communities and Local Government in April 2018: *Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*. It states that local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty and should decide which option to pursue on a case by case basis. The HCLG Guidance also states that local housing authorities should develop and document their own policy on determining the appropriate level of penalty in a particular case. However, it goes on to state:

> "Generally, we would expect the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous record of offending."

16. The HCLG Guidance also sets out the following list of factors which local housing authorities should consider to help ensure that financial penalties are set at an appropriate level:

a. Severity of the offence.
b. Culpability and track record of the offender.
c. The harm caused to the tenant.
d. Punishment of the offender.
e. Deterrence of the offender from repeating the offence.
f. Deterrence of others from committing similar offences.
g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.

17. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, Salford Council have adopted the policy devised by the Association of Greater Manchester Authorities on *Civil Penalties as an alternative to prosecution under the Housing and Planning Act 2016* ("the AGMA Policy"). We make further reference to this policy later in these reasons.

Appeals

18. A final notice given under Schedule 13A to the 2004 Act must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given. However, this is subject to the right of the person to whom a final notice is given to appeal to the Tribunal (under paragraph 10 of Schedule 13A).

19. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.

20. The appeal is by way of a re-hearing of the local housing authority's decision, but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.

BACKGROUND FACTS

21. Mr Xiong purchased the Premises in 2016 and, prior to Salford Council's intervention towards the end of 2018, he let rooms in the Premises to various tenants. At any one time, up to three individuals occupied rooms under separate tenancies, each paying rent of about £300 per calendar month. Each tenant had a lockable bedroom and shared the use of the other facilities (including the 'breakfast area' described above). The other part of the partitioned room on the ground floor was let as a bedroom. Mr Xiong attended to all the letting and management arrangements himself: he did not use the services of any property professionals and did not seek advice on his obligations as a landlord.

22. The Premises are situated in an area which is designated under section 80 of the 2004 Act as subject to selective licensing under Part 3 of that Act. On 19 March 2018, Mr Xiong applied for a selective licence for the Premises. Mr Xiong stated in his application that the Premises were occupied by one person and that its maximum occupancy would be by three people. He also stated that the Premises would be occupied by just one household and that one tenancy agreement had been issued. Based on this information, Salford Council processed the application for a selective licence without flagging the property on its systems as one which potentially constituted a house in multiple occupation ("HMO"). A selective licence was granted for the Premises in June 2018.

23. Following a complaint from one of the tenants about the condition of the Premises, officers from Salford Council carried out an inspection on 2 October 2018. The Premises were found to be an HMO because they were then being occupied by three separate tenants who did not form a single household. Because the Premises constituted an HMO, the HMO Management Regulations applied to them, and the Council's inspectors noted that there appeared to be several breaches of those Regulations. In particular:

- The Premises were not fitted with an adequate, mains-wired, fire alarm and detection system;
- There were no internal fire doors;
- The bedroom locks were key-operated, as was the lock on the final exit door from the Premises; and
- There was no protected escape route for the occupant of the partitioned bedroom on the ground floor – the only means of exit being via the breakfast area/hallway (located next to the kitchen).

24. Salford Council sent Mr Xiong a schedule of the remedial works he should carry out and he was subsequently interviewed under caution in respect of his non-compliance with the HMO Management Regulations. Mr Xiong asked for advice on how best to proceed with the property. He agreed to fit extra stand-alone battery alarms, to remove the key-operated locks, and to move the tenant of the partitioned room upstairs. He subsequently confirmed that he had decided to convert the Premises into a home for a single family and that he had served notice to quit on his existing tenants. The Premises were vacated by the end of January 2019.

25. On 5 March 2019, Salford Council gave Mr Xiong a notice of intent under paragraph 1 of Schedule 13A to the 2004 Act. This stated that Salford Council intended to impose a financial penalty of £21,500 in respect of an alleged breach of regulation 4(4) of the HMO Management Regulations. Mr Xiong submitted written representations in response to the notice of intent, and these were considered by Salford Council.

26. On 7 May 2019, Salford Council issued the Final Notice which is the subject of this appeal. The amount of the financial penalty imposed on Mr Xiong was reduced by £1,000 (to £20,500) in response to Mr Xiong's assertion that the imposition of the penalty would be "a disaster for my family". The Council stated that, although no specific evidence had been provided to suggest financial difficulty, it was acknowledged that the income generated by the Premises had been dramatically reduced following the inspection and subsequent enforcement action.

ALLEGED OFFENCE

27. Salford Council asserts that Mr Xiong's conduct amounts to a relevant housing offence in respect of the Premises; namely, to breach of

regulation 4(4) of the HMO Management Regulations and thus to the offence (under section 234(3) of the 2004 Act) of failing to comply with those Regulations.

28. Regulation 4(4) of the HMO Management Regulations provides:

> *The manager must take all such measures as are reasonably required to protect the occupiers of the HMO from injury, having regard to–*
> *(a) the design of the HMO;*
> *(b) the structural conditions in the HMO; and*
> *(c) the number of occupiers in the HMO.*

29. For these purposes, the "manager" means the person managing the HMO, as defined by section 263(3) of the 2004 Act.

30. As already noted, section 234(3) of the 2004 Act makes it an offence to fail to comply with the HMO Management Regulations. However, by virtue of section 234(4), a defence is available to a person accused of this offence: a person does not commit the offence if he has a reasonable excuse for not complying with the regulation in question.

GROUNDS OF APPEAL

31. Mr Xiong does not dispute that the HMO Management Regulations applied to the Premises when they were being let as a 'bedsit-style' HMO. Nor does he dispute that, for the reasons summarised at paragraph 23 above, there was a breach of regulation 4(4) in this case. However, Mr Xiong argues that he has a defence to the relevant housing offence, in that he had a reasonable excuse for non-compliance: essentially, he argues that Salford Council should have warned him earlier that he was operating the Premises as an HMO and that additional fire safety measures were therefore required.

32. Alternatively, Mr Xiong argues that the amount of the financial penalty imposed by the Final Notice is excessive. He also argues that the notice of intent which had been given to him in March 2019 failed to explain adequately Salford Council's reasons for imposing the penalty.

DISCUSSION AND CONCLUSIONS

Procedural compliance

33. It is convenient to begin by considering Mr Xiong's contention that the notice of intent given to him by Salford Council was defective. His complaint is that, whilst the Final Notice itself detailed the particular factors which had influenced the Council's assessment of harm and culpability in this case (and we say more about this below), that information had not been included in the notice of intent which preceded it. Whilst this is factually true, the omission did not render the notice of intent defective, as it still complied with the requirements of Schedule

13A to the 2004 Act which we have described at paragraph 11 above. The extent of those requirements was recently considered by the Upper Tribunal (Lands Chamber) in *London Borough of Waltham Forest v Younis* [2019] UKUT 0362 (LC). That case demonstrates that the matters which must be covered in a notice of intent are fairly straightforward: the local authority's reasons for proposing a penalty must be set out sufficiently clearly so that they can be understood and responded to – so long as the notice explains why a penalty is proposed it will have done what is required of it. The notice of intent must obviously also state the amount of the proposed penalty, but *Younis* demonstrates that it does not need to explain in great detail how that amount has been arrived at, provided that a sufficient explanation is given of the seriousness of the offence to enable the recipient of the notice to make representations in response.

34. In the present case, the notice of intent given to Mr Xiong identified the relevant housing offence on which the proposed financial penalty was based, and explained the circumstances which were alleged to amount to that offence. It stated the amount of the proposed penalty and explained that this amount had been arrived at in accordance with Salford Council's policy on financial penalties (which is publicly available). It also explained that the proposed penalty had been assessed as falling within Banding Level 5 of that policy and informed Mr Xiong that he had the right to make representations in response to the notice. In our judgment, therefore, the notice of intent included sufficient information to comply with the relevant procedural requirements.

35. Even if the information given in the notice of intent had been inadequate in some way, it does not follow that the subsequent Final Notice imposing the financial penalty would necessarily be a nullity: this is also demonstrated by the Upper Tribunal's judgment in the *Younis* case. As the Upper Tribunal pointed out:

> "Not only does the recipient of the notice [of intent] have the opportunity to respond to it, but the authority also has the obligation to think again before making a final decision. Once that decision has been conveyed in a final notice, the recipient has the right to appeal to the FTT, where they may rely on matters which were not known to the authority."

36. The Upper Tribunal concluded that, on this basis, even if the reasons given in a notice of intent are unclear or ambiguous, the subsequent imposition of a financial penalty should not be nullified unless this is justified because of the prejudice which the procedural deficiency causes to the recipient of the notice. In the present case, even if the notice of intent was defective (which we do not think it was), Mr Xiong has suffered no prejudice as a result: he had the opportunity to make representations to Salford Council, and did so. Those representations were fully considered – indeed they resulted in a reduction in the amount of the penalty ultimately imposed. He also had the opportunity to come fully prepared to the hearing of this appeal, and to challenge Salford

Council's decision (including their assessments of harm and culpability) before the Tribunal, and again did so.

Relevant housing offence

37. Salford Council's decision to impose a financial penalty can only be upheld if the Tribunal is itself satisfied, beyond reasonable doubt, that Mr Xiong's conduct amounts to a breach of regulation 4(4) of the HMO Management Regulations (and thus to the offence under section 234(3) of the 2004 Act). For the reasons already explained, the question whether Mr Xiong has committed the offence in this case depends upon whether or not he had a reasonable excuse for his failure to comply with regulation 4(4) – and it is for him to establish that the statutory defence is made out: whilst the Tribunal must be satisfied, beyond reasonable doubt, that each element of the relevant offence has been established on the facts, an appellant who pleads a statutory defence must then prove, on the balance of probabilities, that the defence applies (see *IR Management Services Ltd v Salford City Council* [2020] UKUT 0081 (LC)).

38. Mr Xiong argues that he had a reasonable excuse for his failure to comply with regulation 4(4) because, when he applied for a selective licence, he was misled by Salford Council about the regulatory requirements that applied to the Premises. He says that Salford Council should have realised that the Premises were being operated as an HMO and should then have alerted him to the requirements of the HMO Management Regulations and to the need to apply for an HMO licence. Mr Xiong also argues that Salford Council should have warned him again about possible regulatory non-compliance in their letter of 18 September 2018 (which gave notice of the Council's intention to inspect the Premises). At that time, the Premises were occupied by just one tenant and Mr Xiong says that, had the Council's letter included such a warning, he would not have granted two further tenancies of the Premises, on 20 and 26 September respectively. He had not intended to operate the Premises as an HMO and did not realise that, by accepting additional tenants, he was doing so.

39. Mr Xiong appears to believe that he applied for – and was granted – the wrong type of licence for the Premises, i.e., a selective licence (under Part 3 of the 2004 Act) rather than an HMO licence (under Part 2). That is not so: whilst the HMO Management Regulations apply to all HMOs, a mandatory HMO licence is only required for HMOs satisfying particular conditions. The Premises did not satisfy those conditions and so the correct licence for the Premises was a selective licence. The financial penalty imposed on Mr Xiong by Salford Council was not based on a contravention of licensing requirements under the 2004 Act, but on an alleged breach of the HMO Management Regulations.

40. When considering applications for selective licences, local housing authorities will seek assurances that certain safety-related matters have

been attended to, but they are not required to assess the condition of individual houses or to satisfy themselves that all potentially applicable regulations are being complied with. Salford Council's practice is to ask applicants about the level and nature of the actual and/or proposed occupancy of the house in question and to ask for fire safety certificates where these appear to be required. If the applicant's responses suggest that the property requires an HMO licence, the case is also flagged for appropriate follow-up action.

41. In this case, the information Mr Xiong provided in his application for a selective licence did not indicate that the Premises were being operated as an HMO or that he intended to operate them as such (see paragraph 22 above). Nor did they indicate that a fire safety certificate was required. When processing Mr Xiong's application, Salford Council had no duty to look beyond the information he provided and had no reason to believe that the Premises were being operated as an HMO. Salford Council did not mislead Mr Xiong about whether the HMO Management Regulations applied. In any event, the Council were under no duty to alert Mr Xiong to the fact that the Regulations applied to the Premises because of the way he was using them: as a landlord letting residential premises for profit, the onus was on Mr Xiong to find out what he needed to do to ensure that the Premises were safe to let and then to comply with the relevant requirements. Because he did not seek any advice about such matters, Mr Xiong failed to do this.

42. Nor did Salford Council mislead Mr Xiong when they wrote to him on 18 September 2018. That letter was prompted by a complaint about the condition of the Premises, not by a concern that it was being operated as an HMO. We accept Ms Mann's assurance in evidence that, prior to Salford Council's inspection visit on 2 October 2018, no assessment had been made by Salford Council as to whether the Premises might be operating as an HMO. Moreover, whilst it is true that Mr Xiong might not have granted more tenancies in September 2018 had he then realised that, by doing so, he would be operating the Premises as an HMO, the fact remains that he had operated the Premises as a bedsit-style HMO on previous occasions and had thereby breached regulation 4(4) already.

43. For these reasons, we are not persuaded that Mr Xiong had a reasonable excuse for failing to comply with regulation 4(4) of the HMO Management Regulations. It follows that we are satisfied, beyond reasonable doubt, that his conduct amounts to the offence of failing to comply with that regulation.

Amount of the financial penalty

44. We are satisfied that it is appropriate for Salford Council to impose a financial penalty on Mr Xiong in respect of his failure to comply with the regulation in question. We must therefore determine the amount of that penalty.

Guiding principles

45. The Tribunal's task is not simply a matter of reviewing whether the penalty imposed by the Final Notice was reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In doing so, the Tribunal should have regard to the seven factors specified in the HCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 16 above).

46. The Tribunal should also have particular regard to the AGMA Policy (see paragraph 17 above). Indeed, the recent judgment of the Upper Tribunal (Lands Chamber) in the case of *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC) makes it clear that, in determining the amount of a financial penalty, the Tribunal should normally adopt the same policy as the relevant local housing authority. It may depart from that policy, but only in certain circumstances (where the policy was applied too rigidly, for example): indeed, the Tribunal must give proper consideration to arguments that it should depart from it. In doing so, the Tribunal must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.

47. The Tribunal must also afford great respect (and thus special weight) to the decision reached by the local housing authority in reliance upon its own policy. It should be slow to disagree with a decision of a local authority which is consistent with its policy. Nevertheless, (remembering that it is conducting a rehearing, not a review), the Tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

48. It follows that, in order to determine this appeal, it is necessary for us to consider the relevant aspects of the AGMA Policy, together with the decision which the Council made in reliance upon that Policy in Mr Xiong's case.

The AGMA Policy

49. The AGMA Policy is itself based on the relevant factors specified in the HCLG Guidance. However, it places particular emphasis on an assessment of the seriousness of the relevant conduct in terms, firstly, of the harm it caused (or its potential for harm) and, secondly, on the culpability of the offender. Both harm and culpability are given a rating of low, medium or high. The interrelation between harm and culpability then feeds in to a matrix which determines which of six bands the penalty should fall into. The amount of the penalty is taken to be the mid-point of the relevant band, subject to further adjustment to take account of additional aggravating or mitigating factors. The six penalty bands are as follows:

Band 1	£0	- £4,999
Band 2	£5,000	- £9,999

Band 3	£10,000 - £14,999
Band 4	£15,000 - £19,999
Band 5	£20,000 - £24,999
Band 6	£25,000 - £30,000

Salford Council's decision

50. Salford Council assessed the seriousness of Mr Xiong's failure to comply with regulation 4(4) as 'high' in terms of its potential to cause harm and as 'medium' in terms of his culpability. We agree with those assessments.

51. The conduct in question amounted to a failure to ensure that the occupants of the Premises had the minimum acceptable level of protection against the risk of fire. The Premises were being used as a bedsit-style HMO, which poses the highest risk in terms of fire safety. The potential for harm arising from the matters described at paragraph 23 above is serious and substantial and the fact that, fortunately, those matters did not lead to actual harm in this case does not detract from the seriousness of the situation.

52. Turning to the question of Mr Xiong's culpability, Salford Council's assessment of this as 'medium' was based on their judgment that his conduct amounted to negligence, rather than a deliberate or reckless flouting of the HMO Management Regulations. Ms Mann concluded that, prior to the Council's intervention, Mr Xiong had very little grasp of fire safety or of what the HMO Management Regulations required him to do. Nevertheless, sources of guidance and advice for landlords had been available to him, and he ought to have taken greater care. Having regard to the AGMA Policy, an assessment of 'medium', rather than 'low', culpability was warranted because it could not be said that the offence had been committed with little or no fault on Mr Xiong's part.

53. An assessment of high harm and medium culpability places the appropriate financial penalty within Band 5 for the purposes of the AGMA Policy. The mid-point of Band 5 is £22,500 and we agree with Salford Council's decision (which is in accordance with the AGMA Policy) to take this figure as a starting point for the financial penalty in this case.

54. Salford Council decided that that the actual amount of the financial penalty should be reduced from this starting point by £2,000, so that the amount of the penalty imposed by the Final Notice was £20,500. They did so because they concluded that there were two mitigating factors which should be taken into account (with the AGMA Policy requiring the starting point figure to be reduced by £1,000 for each of them). The first of these mitigating factors was the fact that Mr Xiong had co-operated fully with the Council since its intervention. The second reflected the financial considerations mentioned at paragraph 26 above. We agree with Salford Council's decisions in this regard, and we have seen no evidence to persuade us that additional mitigating factors should be

taken into account. Whilst we note Mr Xiong's assertion that the imposition of a £20,500 penalty will cause financial hardship to himself and his family because he has no cash savings, the evidence he gave at the hearing indicates that he does have significant other assets and that he is in relatively well-paid employment. We are therefore not persuaded that the amount of the financial penalty should be further reduced on the grounds of financial hardship.

OUTCOME

55. For the reasons explained above, we uphold the decision of Salford Council to impose a financial penalty on Mr Xiong. We are satisfied that the AGMA Policy was properly applied in determining that the amount of that penalty should be £20,500. The imposition of such a financial penalty is appropriate in the circumstances of this case: not only does it reflect the seriousness of the offending conduct, but it should also have a suitable punitive and deterrent effect.

56. Accordingly, we confirm the Final Notice. Mr Xiong must therefore pay a financial penalty of £20,500 to Salford Council.