FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/38UC/HNA/2020/0001**
Property	**:**	**10A Windmill Road, Headington, Oxford, OX3 7BX**
Appellant	**:**	**Michael Nicholls**
Representative	**:**	**Unrepresented, assisted by Nigel Henry**
Respondent	**:**	**Oxford City Council**
Representative	**:**	**Private Sector Safety Team** (Ref: Helen Broadhurst, EHO)
Type of application	**:**	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004 ("2004 Act")
Tribunal	**:**	**Judge J. Oxlade**
Decision	**:**	**12th June 2020 (on the papers)**

DECISION

For the following reasons, I allow the appeal and direct a cancellation of the final notice dated 3rd January 2020 imposing a financial penalty on the Appellant for an offence of failing to comply with an Improvement Notice, and served on the Appellant regarding the property.

I make no order as to costs, or reimbursement of fees paid by either party.

REASONS

Background

1. The Appellant appeals against a final notice issued to him by the Respondent dated 3rd January 2020, pursuant to section 249A and Schedule 13A of the 2004 Act, having allegedly failed to comply with an improvement notice served on him pursuant to sections 11 and 12 of the 2004 Act, and having failed to do so he has committed an offence under section 30 of the 2004 Act, which can attract a financial penalty.
2. Schedule 13A of the 2004 Act gives jurisdiction to the First-tier Tribunal to decide the Appellant's appeal against the Respondent's decision to make a financial penalty, both as to the decision to impose a penalty and the amount of the penalty.
3. On appeal the burden rests on the Respondent to show beyond reasonable doubt that the Appellant has committed an offence under section 30 of the 2004 Act.

Primary Challenge – service of the improvement notice on the correct person

4. There is no issue but that the improvement notice was served on the Appellant on 2nd November 2018 by the Respondent, nor that - whilst he indicated an intention to appeal against that notice – he did not in fact file a valid appeal.
5. The Appellant's position is that he is not the correct person on whom an improvement notice should have been served: rather it should be served on "the owner".
6. He says that the premises consist of a flat (known as 10A, located on the first and second floors above a commercial premises) which is not licensed under Part 2 or 3 of the 2004 Act (which is not disputed by the Respondent) and so by virtue of Schedule 1, Part 1, paragraph 3(2)(a) must be served on the "*owner* of the flat". He denies being the owner of the flat, which is owned by Mr. Dring.
7. The Appellant says that he entered into a long lease in his own name, but in his skeleton argument (para 1) says that when his business was incorporated in 2005 responsibility for the lease was transferred to the incorporated entity. However, a copy of the tenancy agreement between himself and Messers Dring made on 21st January 2015 has been provided, which makes him (the Appellant) the tenant of the premises. The Respondent's search of the Land Registry and confirms that Mr. Dring is the freeholder.
8. In reply to the Appellant's submission on whether he is the correct person, the Respondent says that the Appellant was correctly served with the improvement notice, pursuant to Schedule 1, Part 1, paragraph 2(a) of the 2004 Act being a person who has "control of the dwelling" and which is further defined in section 263 of the 2004 Act. The Respondent had not argued that the Appellant was "the owner", and by arguing that he was the person with control, there appears to be an implicit acceptance that he was not so regarded as the owner.

Findings

9. Firstly, I find – despite not having made a valid appeal against the improvement notice – that the defence under section 30(4) of having a reasonable excuse for non-compliance, remains open to the Appellant to argue in proceedings for a financial penalty. This must flow from the commonality of using the term "offence" in both the criminal and civil proceedings, and as these proceedings are penal in nature.
10. Secondly, I find that the Respondent cannot rely on Schedule 1, Part 1, paragraph 2(a) because this only applies to premises which are not flats; not only has the Respondent conceded in the case summary (para 1) that the premises is a flat, the Respondent so referred to the premises as a "flat" in the section 30 notice was issued (see hazard number 24 – fire, para 3).
11. I therefore find that the Respondent had not served the improvement notice on the owner, and cannot serve it alternatively on the "person having control of the dwelling". I further find that not being liable to comply with the improvement notice the Appellant has a defence of a reasonable excuse for failing to comply with it, pursuant to section 30(4). It follows that I allow the appeal and cancel the financial penalty.
12. Though not argued in the alternative by the Respondent, I have considered whether or not the Appellant would fall within the definition of "owner" set out in section 262(7) of the 2004 Act. I have concluded that he would not be so regarded as he is neither the person entitled to dispose of the fee simple of the premises (i.e. sell the freehold) nor entitled to gather in the rents and profits *under* a long lease which exceeds three years. Though he has a lease which exceeds 3 years, he is not entitled to take in the rents arising from that long lease of three years – it not being suggested that the occupants/apprentices had leases or tenancies of three years or more, indeed there is no evidence in support to suggest that this is so.
13. It follows that I find that the Appellant is not the correct person to have received the improvement notice, and so is not liable to conviction or financial penalty for failing to comply with it.
14. In the circumstances, I allow the appeal.

Costs/Fees reimbursement

15. I make no order in respect of the costs or reimbursement of the fees paid to bring the appeal, it being within my discretion whether or not to do so, and in the circumstances of this case - as the Respondent has sought to achieve legitimate aims in improving the living conditions of tenants within the city – I do not think it appropriate to make orders as sought.

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Judge J. Oxlade

12th June 2020