FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CA/HNA/2019/0102**
Property	**:**	**Flat 2, 45, Oxford Road, Southport PR8 2EG**
Applicants	**:**	**Justin Lloyd and Clifton Lloyd**
Respondent	**:**	**Sefton Metropolitan Borough Council**
Type of Application	**:**	**Appeal against a financial penalty imposed under Section 249A & Schedule 13A Housing Act 2004**
Tribunal Member	**:**	**Mr J R Rimmer** **Mr J Faulkner**
Date of Determination	**:**	**6 July 2020**
Date of Decision	**:**	**24 July 2020**

DECISION

Order : The decision to impose a financial penalty notice in respect of Flat 2, 45, Oxford Road, Southport for an amount of £3,750.00 is upheld for the reasons set out herein.

A. Application

1. The Tribunal has received an application under paragraph 10 of Schedule 13A to the Housing Act 2004 ("the Act") against a decision of Sefton Metropolitan Borough Council (the "local housing authority") to impose a financial penalty against the Applicants under section 249A of the Act.

2 This penalty relates to an offence that the Council determined had been committed by the Applicant by to failing to provide an electrical safety certificate in respect of the property as required by the management regulations applying to a house in multiple occupation ("HMO").

3 The Tribunal has sent a copy of the application to the Respondents and the parties have complied with directions given by the Deputy Regional Judge of the Tribunal for the further conduct of this matter.

B Background

4 The Applicants constitute the owners and controllers of the property known as Flat 2, 45, Oxford Road, Southport that falls to be regarded as an HMO by virtue of the provisions of Section 257 Housing Act 2004 ("the Act").

5 It is clear that Section 257 was not well understood by the Applicants and the difficulty with the provisions of the section are acknowledged by the respondent Housing Authority. The effect of the section is to bring within the definition of an HMO, and therefore within the regime that the Act imposes upon such buildings, a type of property that would not normally be recognised as an HMO. The type of building is one that has been converted into flats prior to the coming into effect of the 1991 Building Regulations on 1st July 1992 if, at that time and since that time, the building did not, and has not, complied with those regulations.

6 There are exceptions from the HMO requirements if certain owner occupier conditions are met by the occupiers of the flats, but they do not appear to apply to this building.

7 The property came to the Respondent's attention in or about May 2019 as a result of matters regarding its state and condition that no longer form any part of the Respondent's issues with the Applicants so far as this application is concerned. In dealing with those matters, however, the Respondent sought to obtain from the Applicants the electrical safety test certificate relating to the building and the flats within it.

8 From the evidence submitted by the parties to the Tribunal it would appear that the following timescale applies to the events that then occurred:

(1) On 24th May 2019 the Respondent serves a notice indicating its intention to enter the building in pursuance of its investigatory powers. At the same time its investigating officer requests copies of the relevant certificate within 7 days.

(2) On 19th June the inspection takes place and in the absence of the certificate both Applicants were reminded of the obligation to provide it.

(3) On 2nd and 10th July further reminders are issued by the Respondent's officers requesting the certificate.

(4) On 15th July Mr Justin Lloyd takes issue with building being an HMO and the need for a certificate

(5) On 8th August the Respondent's officer writes at length regarding the classification of the building as a HMO and offering a further opportunity to provide the certificate by 19th August.

(6) There then follows a series of communications between the Respondent, Mr Clifton Lloyd, a contractor and the occupier of Flat 2, whereby an inspection takes place on 19th August, resulting in further communication between the Respondent's officers and the Applicants to the effect that the results of the inspection will be considered by the Applicants and appropriate action taken.

(7) It is clear from the documentation now submitted to the Tribunal by the Applicants that an appropriate inspection did take place on 19th August and a certificate dated 21st August produced. It would appear that the inspection may have been incomplete in view of access diifculties.

(8) It is not clear at what point, if any, prior to the Tribunal proceedings the certificate was provided to the Respondent. Although the Applicants advise the Respondent on 28th August that the inspection has been carried out the tenor of the communications suggest that the certificate is not forwarded, merely that appropriate work will now be considered to upgrade the electrical facilities.

(9) In any event the Respondent issued a notice of its intention to impose a financial penalty on 30th August and seeking any representations from the Applicants. They are forthcoming, but not directly upon the matter of the making of the notice, nor the amount under consideration, and a final notice in the sum of £3,750.00 was issued on 3rd October.

9 The amount of the penalty is assessed according to the Respondent's Local Policy for Civil Penalties and the matrix to be found therein whereby the offence is considered to be one involving medium culpability on the part of the Applicant and low harm arising from the offence.

C The Law

10 It is appropriate at this stage to set out the various statutory and regulatory provisions that the Tribunal needed to take into account in coming to its decision.

In relation to the commission of a relevant offence and imposition of a financial penalty

11 Section 249A of the Act provides;

(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-...

(e) Section 234 (management regulation in respect of HMOs)

(3) ...

12 Section 234 of the Act provides for the making of regulations in respect of the management of HMOs

(1) The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every (HMO) of a description specified in the regulations-

(a) There are in place satisfactory management arrangements; and

(b) Satisfactory standards of management are observed.

(2) The regulations may, in particular-

(a) Impose duties upon the person managing the house in respect of repair, maintenance, cleanliness and good order of the house and facilities and equipment in it;

(b) Impose duties upon persons occupying a house for the purpose of ensuring that the person managing the house can effectively carry out any duty imposed upon him by the regulations.

(3) A person commits an offence if he fails to comply with a regulation under this section

(4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation

(5) A person who commits an offence under subsection (3) is liable on summary conviction to a fine…

(6) See also Section 249A (financial penalties as alternative to prosecution for certain housing offences).

13 The Houses in Multiple Occupation (additional provisions) (England) Regulations 2007 ("the 2007 Regulations") provide a whole raft of requirements to be satisfied in an application, but the Tribunal is not concerned on this occasion with only one of these: Regulation 7(2) provides that the manager must:

(a) Ensure that every fixed electrical installation is inspected and tested at intervals not exceeding 5 years by a person qualified to undertake such inspection and testing;

(b) Obtain a certificate from the person conducting the test, specifying the results of the test;

(c) Supply that certificate to the local housing authority within 7 days of receiving a request in writing for it from that authority.

14 Paragraph 10 of Schedule 13A of the Act provides

(1) A person to whom a final (financial penalty) 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

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn

(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

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a penalty of more than the local housing authority could have imposed.

D The evidence

15 The Applicant' case is quite simple and is put clearly in the expanded statement that they supplied in support of the application and is essentially 3-fold:

(1) They were unaware of the building being an HMO, having only acquired the various long-term interests in the whole building in the recent past.

(2) Having been persuaded by the Respondent of the situation they set about obtaining a report and certificate with reasonable speed.

(3) Their intentions were, in part, thwarted by a difficult tenant. (The Tribunal is unaware of any action that the Respondent may have considered in respect of the occupier's duty under section 234 of the Act)

16 The Respondent provided an extremely comprehensive bundle of documents and statements from its significant witness, the responsible housing officer. The thrust of this statement, and supporting documentation, by way of copy correspondence, emails, together with a chronology of events, was to establish that the offence of failing to provide a relevant electrical test certificate within the 7-day time limit was made out.

E Determination

17 The Tribunal reminds itself that these proceedings being conducted by way of a rehearing. It takes the view that the Tribunal should consider carefully that the Respondent has taken considerable care to put in place both a licensing policy and a policy for the imposition of financial penalties where appropriate and had provided clear documentary evidence of how they had been applied to reach the conclusion that it had in relation to the Applicant.

18 Indeed, the Tribunal accepts that the policies are the direct result of the democratic process whereby the Respondent seeks to fulfil its statutory duty by seeking from its officers a clear and rational process for doing so. It should not seek unnecessarily to interfere with processes which are not themselves inherently unreasonable.

19 The Tribunal also has a duty: to re-hear the case against the Applicant. It has done so with the policies of the Respondent always within its mind. It offers no criticism of the thorough manner in which the Respondent has approached this case and the documented procedures it has followed.

20 <u>Has an offence been committed?</u>

The first question the Tribunal must ask itself is whether an offence has been committed. The clear answer is yes. There was clearly no existing certificate in place for the whole or any part of 45, Oxford Road at the time the Respondent became involved in its consideration of the building. Had it existed it would, no

doubt, have been produced. The Tribunal suspects that there were early attempts at obfuscation on the part of the Applicants; that a certificate may have been in existence and one was not required anyway.

21 Nothing that the Tribunal has seen suggests that the Applicant would be able to rely on the defence to criminal liability outlined in Section 234(4). The excuse put forward for the failure to supply a certificate is not reasonable. It is reasonable neither from the point of view of what might be expected to have been done by any reasonable person, nor from the point of view of what a reasonable person might have expected the Applicants to have done. Ignorance of the fact that the building is indeed an HMO is not sufficient, nor is ignorance of the fact that it is the building that matters , not the ownership of its various elements.

22 The Tribunal is so satisfied that it is sure that the offence has been committed.

23 <u>What sanction is appropriate to mark the commission of the offence</u>

Under the financial penalty regime, the Respondent, in the event of an offence having been committed, has available to it an amount of up to £30,00.00 that it can impose as a penalty. It has provided and explained its matrix and methodology to support its finding that an amount of £3,750.00 is appropriate.

24 This assessment is based upon the finding that the offence was one of medium culpability and low harm

25 The Tribunal can see how the finding of medium culpability could be reached but believes that a finding of low culpability might be more appropriate, given the Respondent's own acknowledgement of the difficulties created by Section 257 of the Act and the inclusion of converted buildings within the definition of a HMO.

26 Whilst confirming that ignorance is not a defence to the allegation, the Tribunal does believe in this case it is a mitigating factor, as is the relative speed with which the Applicants set about remedying the situation and commissioning a certificate, having accepted, so far as the Respondent is concerned, it has lost the HMO argument.

27 The Tribunal does however also have concerns about the harm caused by the failure to have a certificate to produce. That which is eventually produced by the Applicants' electrician, and about which they intend to take some future action, shows very serious faults with those installations that were tested. The scope for serious consequences from existing faults were clearly identified. The Tribunal is of the view that those potential consequences would have been considerably reduced had inspection and certification been in place earlier.

28 The Tribunal believes that the level of potential harm in the Applicants conduct is such that it borders between medium and high. It does not believe that this point can be over emphasised.

29 This view would put the likely financial penalty derived from the matrix at the same amount as that made out by the Respondent's own conclusions.

30 The Tribunal therefore confirms the imposition of a financial penalty of £3,750.00. It has reached its conclusion in a different way from that of the Respondent and has felt it preferable to show its own reasoning as being different from that of the Respondent, despite the same conclusion.

J Rimmer
Tribunal Judge
24 July 2020