FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference:	**MAN/00BN/HNB/2020/0001**
Property:	**86 Palatine Road, Manchester M20 3JW**
Applicant:	**Alan Erasmus**
Respondent:	**Manchester City Council**
Type of Application:	**Appeal against financial penalty- Section 249A and Schedule 13A to the Housing Act 2004**
Tribunal Members:	**Judge J M Going** **J Faulkner FRICS**
Date of Deliberations:	**21 August 2020**
Date of Decision:	**25 August 2020**

DECISION

The Decision and Order

The Final Notice is to be varied by amending the financial penalty to £7,500, to be paid within the period of 28 days beginning with the day after that on which this Decision is posted to the parties.

Preliminary

1. By an Application dated 2 January 2020 the Applicant ("Mr Erasmus") appealed to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under paragraph 10 of Schedule 13A of the Housing Act 2004 ("the 2004 Act") against the Respondent ("the Council")'s issue on 4th December 2019 of a Penalty Charge Notice ("the Final Notice") requiring Mr Erasmus to pay a penalty charge of £12,500, having been satisfied that Mr Erasmus had committed an offence relating to the property under section 234 (3) of the Act of failing to comply with a House in Multiple Occupation ("HMO") management regulation.

2. The Tribunal gave Directions.

3. Both parties provided a bundle of relevant documents including written submissions which were copied to the other. The Council's bundle (extending to some 689 pages) included a witness statement, land registry entries, copies of various notices, letters and emails sent to Mr Erasmus, its policy on civil penalties, photographs and notes of various inspections of the property, and copies of various certificates. Mr Erasmus bundle included a witness statement, photographs and various copy bank statements.

4. The Tribunal made its deliberations on 21 August 2020.

The Property

5. The Tribunal did not inspect the property but understands it is to be a large house on multiple floors converted into seven self-contained flats.

Facts and Submissions

6. None of the following matters have been disputed, except where specifically referred to.

7. Following an initial complaint from the tenant of Flat 1 about a leak and other items of disrepair, Evelyn O'Sullivan a Neighbourhood Compliance Officer with the Council sent a hazard notification letter to Mr Erasmus on 17 October 2018.

8. He responded, and Ms O'Sullivan subsequently received confirmation from the tenant that some of the work had been done but not all, and that there were further items of disrepair.

9. Ms O'Sullivan inspected Flat 1 on 9 January 2019. In her Witness Statement she states that "at this visit, whilst several hazards were noted and although formal enforcement action was a reasonable action for me to take, (the tenant)… did not want to pursue formal action at that time, as she felt her landlord was well-intentioned and would eventually get the work done with a little informal pressure. Unfortunately, although I intended to send Mr Erasmus a letter following this visit, I did not do so".

10. On 8 May 2019 Ms O'Sullivan revisited the property. Mr Erasmus was not present, but telephoned Ms O'Sullivan on 4 June 2019 when they discussed her concerns as regards various items of disrepair. On 10 June 2019 a second hazard notification letter was sent, containing in Ms O'Sullivan's words "a long list of works that were required at the property, including the requirement to carry out an electrical safety check and provide a satisfactory condition report to the council. It also required up-to-date gas safety records to be provided".

11. On 21 June 2019 Ms O'Sullivan received an email, on behalf of Mr Erasmus, to acknowledge receipt of the letter of 10 June, stating that he had been unwell but confirming "that the matters set out in your letter and list are being investigated and remedial action will be taken as appropriate. Please be aware that there are plans to significantly redevelop the building (in particular the basement) in the near future and a lot of matters raised will be addressed as part of that larger redevelopment. In the meantime, the certificates requested will be forwarded to you under separate cover…"

12. Mr Erasmus telephoned Ms O'Sullivan on 10 July 2019 with a progress report on the works being undertaken at the property.

13. On 31 July, on a further visit to the property, Mr Erasmus showed Ms O'Sullivan gas safety records dated 3 August 2018. She found them to be "satisfactory but identified some recommended works" and advised Mr Erasmus that they had almost expired.

14. Ms O'Sullivan's statement then refers to a voicemail from Mr Erasmus on 11 September 2019 confirming that "the gas check was being done as well as the electric check, but the estimates were expensive at around £7000 for the required electrical work".

15. On 18 September she received a telephone call from Mr Erasmus "he was essentially ringing to ask for more time… he had had another disaster.. hadn't realised he had to renew his driving licence when he turned 70…." and had used all his money after the police towed his car away and being fined for not having a licence. "Two days after all this he had been due to have the gas check done but had had to cancel that he couldn't pay the gas contractor".

16. On 19 September 2019 Ms O'Sullivan sent a formal letter requesting the latest valid landlords gas safety records and the latest satisfactory electrical installation test certificates for the property within seven days clearly pointing out that failure to do so would constitute a breach of Regulation 7 of The Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 ("the 2007 HMO regulations").

17. On the same day she separately served an Improvement Notice under Section 12 of the 2004 Act relating to the whole of the property, as well as an Abatement Notice under Section 80 of the Environmental Protection Act 1990 regarding the leak into the bedroom of Flat 1.

18. Ms O'Sullivan states that on 1 October 2019 Mr Erasmus telephoned and confirmed that the fire assessment would be done that week, the gas engineer would be coming the following Monday or Tuesday and that the electrical contractor should have come last Thursday or Friday but there had been some sort of "logjam" but would be coming that week.

19. Not having received the requested gas or electricity certificates, the Council served a Notice of Intention to impose a financial penalty ("the Notice of Intent") on 7 October 2019.

20. The Notice of Intent referred to the Council being satisfied that Mr Erasmus had failed to comply with Regulation 7 of the 2007 HMO regulations being an offence under section 234 of the 2004 Act and had assessed the amount of the appropriate financial penalty at £12,500. In its reasons, the Council confirmed that it had assessed the harm as being low, but the culpability as high. The Notice of Intent confirmed that representations about the proposal to impose a financial penalty must be made within 28 days.

21. Miss O'Sullivan's statement refers to a voicemail from Mr Erasmus on 28 October in which he "described ongoing issues he was having completing electrical work and said this would be done the following Wednesday or Thursday. He said he had the new gas certificates, and… had the fire risk assessments done weeks ago… It became clear he had misread the Notice of Intention… which had a deadline for the representations by the following Monday and he had thought that that was when the certificates had to be in by.."

22. On 29 October 2019 Mr Erasmus hand delivered the gas safety certificates and fire safety risk assessment to Ms O'Sullivan. She later discovered that there were two gas safety records for Flat 3, but none for Flat 2a. It was also noted that the fire safety risk assessment was incomplete because the contractor had not inspected all areas of the property.

23. On 4 November 2019 Mr Erasmus delivered an NICEIC electrical installation inspection certificate and condition report dated 31 October 2019 to Ms O'Sullivan at her office. This contained various observations and recommendations for actions to be taken.

24. On 26 November 2019 it was said that the electrician would be coming back to do works identified as necessary on the inspection certificate.

25. On 2 December there were further telephone discussions and Ms O'Sullivan stated that Mr Erasmus "confirmed he still had not completed the electrical works" and so did not have a satisfactory certificate in respect of the electrical installation.

26. The Final Notice was issued and dated 4 December 2019. The financial penalty referred to remained unchanged at £12,500.

27. On 13 January 2020 Ms O'Sullivan revisited the property to assess compliance with the Improvement Notice and, as with her previous inspections, she took helpful photographs and made notes, copies of which were exhibited with the papers.

28. On 21 February 2020 she received a phone message from Mr Erasmus to say that the electrician had been to the property and had done the necessary work and he was now waiting for a letter from him to confirm the works were complete. Ms O'Sullivan received an email from Mr Erasmus electrician on 12 March 2020.

29. Mr Erasmus appeal is against the level of the financial penalty, and on the grounds that although the level of harm had been categorised by the Council as low, which he agrees with, "the degree of culpability has been incorrectly categorised as high or reckless". He has stated that he was actively engaged in taking a number of steps to renovate the property and provide all the required documentation "but circumstances resulted in me not being able to provide the documentation as quickly as the Council desired". He emphasised that he had "very limited financial means (I receive state pension and all the income generated from the rents received is currently being spent on renovations) and the financial hardship which will be caused by… this level of fine is not commensurate with the low level of harm".

30. Mr Erasmus stated that gas certificates for all of the property dated 3rd August 2018 were provided to the Council on 31 July 2019 and that Ms O'Sullivan noted that they were satisfactory. He also pointed out that further gas certificates were provided on 29 October 2019, and that whilst Ms O'Sullivan stated there were issues, they "did not relate health and safety matters but solely to the certifying engineer incorrectly identifying one of the flats in his report, so that it looked like no certificate was in place when this was not the case. He corrected the number and resupplied the certificate which was sent to the Respondent". Mr Erasmus contends that "at no times were any of the tenants at risk… or at all insofar as (the) gas supply was concerned".

31. Mr Erasmus explained his inability to provide copies of the electrical certificates "due to the electrical contractor having transferred his records to cloud… and… his widow was unable to retrieve them. When the Respondent required further work to be done, the Appellant has ensured that it was carried out although this did not happen within the exact time frame required".

32. Mr Erasmus stated that he was receiving ongoing treatment for stress, was 71 years old, now in poor health and simply does not have the funds available to pay the fine and that "all his income (including his pension) has been spent on refurbishment of the properties and repayment of loans taken out to finance that refurbishment". He said that he had not made any financial gain, and that all the rents received in the last past 5/6 years had been spent solely on maintaining and refurbishing the property. He also took issue with the

allegation that tenants that live in hazardous conditions and felt that the Council's photographs only showed matters requiring attention rather than the majority of the building "which is in a good state of repair".

33. He also stated "I have a diagnosis of dyslexia and in addition to reading difficulties my condition means that I struggle with sequential thoughts so that the large number of communications from Ms O'Sullivan made it extremely difficult for me to follow what she wanted me to do". He felt that there had been confusion between what was said and what was written, and felt, for example, in September 2019 he had been given the clear impression that the additional electrical works could be delayed until October.

34. Mr Erasmus attached copies of his various bank statements. 2 of the accounts had minimal balances in June 2020, and a further account had an overdraft of approximately £1000 at the same time. A loan account showed £9,668 owing, and a credit card account had an outstanding debit balance of £11,689.

35. He stated "I cannot afford to rent property myself and I have to live in a motorhome on friends' property"

Statutory Framework and Guidance

36. Section 249A(1) of the 2004 Act (inserted by the Housing and Planning Act 2016) states that 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…"

37. A list of relevant housing offences is set out in Section 249A(2),which includes the offence, under Section 234 of the 2004 Act, of failure to comply with management regulations in respect of HMOs. Section 234(4) states that "it is a defence that he had a reasonable excuse for failing to comply with the regulations".

38. Regulation 7 of the 2007 HMO regulations states: –

(1) the manager must supply the local housing authority within 7 days of receiving a request in writing from that authority the latest gas appliance test certificate it has received in relation to the testing of any gas appliance at the HMO by a registered engineer.

(2) ..

(3) The manager must –

(a) ensure that every fixed electrical installation is inspected and tested at intervals not exceeding five 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; and

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

39. Section 249A(3) of the 2004 Act confirms only one financial penalty may be imposed in respect of the same conduct and subsection (4) confirms that whilst the penalty is to be determined by the housing authority it must not exceed £30,000. Subsection (5) makes it clear that the imposition of a financial penalty is an alternative to instituting criminal proceedings.

40. The procedural requirements are set out in Schedule 13A of the 2004 Act.

41. Before imposing a penalty the local housing authority must issue a "Notice of intent" which must set out

- the amount of the proposed financial penalty,
- reasons for proposing to impose it, and
- information about the right to make representations. (Paras 1 and 3)

42. Unless the conduct which the penalty relates (which can include a failure to act) is continuing the Notice of intent must be given before the end of the period of 6 months beginning on the first day on which the authority has sufficient evidence of that conduct. (Para 2)

43. A person given Notice of intent has the right to make written representations within the period of 28 days beginning with the day after that on which the Notice was given. (Para 4)

44. If the housing authority then decides to impose a financial penalty it must give a "Final Notice" imposing that penalty requiring it to be paid within 28 days beginning with the day after that on which the final Notice was given. (Paras 6 and 7)

45. The Final Notice must set out: –

- the amount of the financial penalty,
- the reasons for imposing it,
- information about how to pay it,
- the period for payment,
- information about rights to appeal; and
- the consequences of failure to comply with the Notice. (Para 8)

46. The local housing authority in exercising its functions under Schedule 13A or section 249A of the 2004 Act must have regard to any guidance given by the Secretary of State. (Para 12)

47. Such guidance ("the Guidance") was issued by the Ministry of Housing Communities and Local Government in April 2018 and is entitled "Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities".

48. Paragraphs 3.3 and 3.5 of the Guidance confirm that the local housing authority is expected to develop and document their own policies on when to prosecute and when to issue a civil penalty and the appropriate levels of such penalties and should make such decisions on a case-by-case basis in line with those policies.

49. The Guidance states "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. Local housing authorities should consider the following factors to help ensure that the… penalty is set at an appropriate level:

- severity of the offence,…
- culpability and track record of the offender,…
- the harm caused to the tenant,…
- punishment of the offender,…
- deter the offender from repeating the offence,….
- deter others from committing similar offences,….
- remove any financial benefit the offender may have obtained as a result of committing the offence…

50. The Council has documented its own policy entitled "Association of Greater Manchester Authorities (AGMA) policy on Civil (Financial) Penalties as an alternative to prosecution under the Housing and Planning Act 2016 " ("the Council's policy") and included a copy of that in the papers. The Tribunal makes further reference to the Council's policy later in these reasons.

51. A person receiving a Final Notice has the right of appeal to the Tribunal against the decision to impose a penalty or the amount of the penalty (under paragraph 10 of Schedule 13A of the 2004 Act).

52. The Final Notice is suspended until the appeal is finally determined or withdrawn. (Para 10(2))

53. The appeal is by way of rehearing, but the Tribunal may have regard to matters which the local authority was unaware of. (Para 10 (3))

54. The Tribunal may confirm, vary or cancel the Final Notice but cannot impose a financial penalty of more than the authority could have imposed. (Paras 10 (4) and (5))

The Tribunal's Reasons and Conclusions

55. The Tribunal began with a general review of the papers in order to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

56. Neither party has requested an oral hearing and, having reviewed the papers, the Tribunal was satisfied that this matter is suitable to be determined without a hearing, and that the issues to be decided have been clearly identified in the papers enabling conclusions to be properly reached in respect of the issues to be determined, including any incidental issues of fact.

57. There are three substantive issues for the Tribunal to address: –

- whether the Tribunal is satisfied beyond reasonable doubt that Mr Erasmus has committed a "relevant housing offence" in respect of the property,
- whether the Council has complied with all the necessary procedural requirements relating to the imposition of the financial penalty, and
- whether a financial penalty is appropriate and, if so, has been set at the appropriate level.

Dealing with each of these issues in turn:-

58. Mr Erasmus has readily admitted that he did not comply with regulation 7 of the 2007 HMO Regulations within the timescales set, and the Tribunal finds that he did not have a reasonable excuse for this failure. On the evidence before it, the Tribunal is clear that Mr Erasmus, could and should have invested more urgency in obtaining, and submitting to the Council the necessary certificates within the prescribed timescales. Mr Erasmus as the owner and the landlord of the property has a responsibility to ensure that relevant legislation is complied with.

59. The Tribunal is satisfied, beyond reasonable doubt, that Mr Erasmus's conduct amounts to an offence under section 234(3).

60. The Tribunal carefully reviewed the actions taken by the Council and the timing and information set out in its different Notices and concluded that it has satisfied the necessary procedural requirements to be able to impose a financial penalty.

61. The Tribunal then considered the appropriateness and amount of a penalty.

62. The Tribunal is satisfied that it is appropriate to impose a financial penalty in respect of the offence. It considered whether, rather than impose a financial penalty, a caution would been sufficient, but decided that such a sanction would be inadequate in terms of its likely punitive and deterrent effect.

63. The Tribunal began the task of assessing the appropriate amount of the fine by a review of the actions of the parties and an evaluation of the evidence. In so doing it has had particular regard to the 7 factors specified in the Guidance referred to in paragraph 49 above.

64. Whilst not bound by it, the Tribunal also carefully reviewed the Council's policy and found that in broad terms it provides a sound basis for quantifying financial penalties in a reasonable, objective and consistent basis. The Tribunal accepts that the policy results from a democratic process whereby the Council has sought to fulfil its statutory duty to provide a clear and rational basis for its determinations on a case-by-case basis.

65. As such the Tribunal was content to use it as a tool to assist its own decision making, paying very close attention and respect to the views expressed by the Council, to see if after making its own decision (in place of that made by the Council) the Tribunal agrees or disagrees with the Council's conclusions. In doing so it makes no criticism of the way in which the Council has approached the case, or the procedures which it has followed.

66. The Council's policy is itself based on the factors specified in the Guidance, and refers to the 3 potential categories of harm, being low, medium, and high, and 4 categories of culpability being low or no culpability, medium (negligent act), high (reckless act), and very high (deliberate act), and sets out examples of each. It thereafter sets out in tabular form a correlation between harm and culpability as a determinant of which of 8 banding levels are to be applied. Where there is a finding of low harm and low culpability band 1 applies, whereas low harm with medium culpability goes into band 2, and low harm with high culpability goes into band 3, and the banding increases up to 8 which is reserved for a combination of high harm and very high culpability.

67. The Council's policy has set the banding levels at, for: –

Band 1	£0- £4999
Band 2	£5000-£9999
Band 3	£10,000-£14,999
Band 4	£15,000-£17,990
Band 5	£18,000-£20,999
Band 6	£21,000-£23,999
Band 7	£24,000-£26,999
Band 8	£27,000-£30,000

The Council's policy states that the starting point for the civil penalty will be the mid-point of the relevant band based on the assumption that there are no aggravating/mitigating factors, and that an offender will be assumed to be able to pay a penalty up to the maximum amount unless they can demonstrate otherwise. It confirms that the penalty may be increased by £1000 for each aggravating factor up to the maximum of the band level, or decreased by £1000 for each mitigating factor to the minimum of the band level.

68. The Council's policy emphasises in bold letters that "the civil penalty should be fair and proportionate given the circumstances of the case but all instances should act as a deterrent and remove any gain as a result of the offence"

69. It is perfectly logical for a Housing Authority to use a formula (indeed the legislation has mandated that it should have a policy), but it essential that it then review the answer given in a holistic way, to see if that answer in a particular case is able to pass the test of being reasonable and proportionate in all the circumstances.

70. The Tribunal notes that both Mr Erasmus and the Council agree that the level of harm caused by the offence was low. Gas certificates were supplied to Ms O'Sullivan when visiting the property on 31 July 2019, and although Mr Erasmus could not at that point produce written evidence of any recent check

of the electrical system, it was noted that no significant safety issues had either been reported or noted. No evidence has been produced of any actual harm to the occupiers of the property. The Tribunal having made its own assessment agrees that the harm level should be classified as low.

71. The Tribunal then considered how Mr Erasmus culpability should be rated. Having carefully reviewed the actions of the parties, it was uncomfortable with a classification of high culpability and the Council's finding of recklessness.

72. The Tribunal noted that the offence was first committed on the day falling 7 days after receipt of the formal letter issued on 19 September 2019 which, assuming normal service in the first class post, would have been 27 September 2019 or thereabouts. In the event, valid gas certificates were obtained and dated 15 October 2019, followed by an electrical certificate (containing various observations and recommendations) dated 31 October 2019, albeit with further delays before their submission to the Council.

73. Having considered all the evidence in the round, the Tribunal found Mr Erasmus' delay and inaction to be negligent, rather than reckless. The Tribunal's overall impression from all of the evidence mirrors that stated by the tenant of Flat 1 being that "he is well-intentioned and will eventually get the work done".

74. The Tribunal reminded itself that it was not simply reviewing whether the Council's decisions were reasonable but conducting a rehearing, making its own determination, and is able to have regard to matters which the Council were unaware of when issuing the Notice of intent and Final notice. The penalty of £12,500 referred to in the Notice of intent was calculated by the Council at a time when none of the certificates had been produced to them, and the Tribunal can only assume that the decisions then made reflected that fact. The Tribunal in making its own decision has the advantage of being able to take into account the subsequent production and actual timing of the certificates.

75. The Tribunal felt that Mr Erasmus culpability was better described by the example given in the Council's policy of medium culpability, being a "failure to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence; e.g. part compliance with a schedule of works but failure to fully complete all schedule items within notice timescale."

76. The Tribunal concluded therefore that the degree of culpability should be categorised as a medium.

77. Adopting the matrix in the Council's policy, and having found the harm to be low, but Mr Erasmus culpability to be medium, the Tribunal's starting point was the midpoint figure in Band 2, ie £7,500.

78. It then went on to consider any aggravating or mitigating factors. An aggravating factor was Mr Erasmus' track record. There is clear evidence of the Council legitimately feeling the need to take other enforcement action in respect of various hazards identified at the property. Whilst these are separate matters, and where the Tribunal has sympathy with Mr Erasmus probably not having

the funds to complete all the required works in a timely fashion, and his attempts to do so, their significance should not be underestimated. The photographs produced by the Council show that there are various matters of disrepair at the property which do need to be addressed. The Tribunal therefore concluded that these matters should be regarded as an aggravating factor which on its own would have increased the penalty by £1000.

79. However, the Tribunal also considered Mr Erasmus financial circumstances to be a mitigating factor. It accepts the evidence that he has limited income. Notwithstanding the needs to consider deterring an offender from repeating an offence and to deter others from committing similar offences, the Tribunal is also conscious that the more money that Mr Erasmus has to pay by way of a fine, the less he will have to spend on necessary improvements to the property.

80. Having decided that the aggravating factor was offset by the mitigating factor, the Tribunal was returned to the starting figure for Band 2 in the Council's policy ie. £7,500.

81. The Tribunal, having reviewed all of the evidence and carefully considered all the matters referred to in the Guidance, is content that that figure is just and proportionate in all the circumstances.

Judge J M Going
25 August 2020