FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MR/HNA/2020/0005
Property	:	Cabmans Rest 1 Plymouth Street Portsmouth PO5 4HW
Applicant	:	SL Rental Ltd ,Trading as Kings Estates Portsmouth
Representative	:	Alexander Croker Office Manager
Respondent	:	Portsmouth City Council
Representative	:	Sarah Curtis Housing Standards Officer
Type of Application	:	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004 (2004 Act)
Tribunal Member(s)	:	Judge Tildesley OBE Mr R Athow FRICS Mr M Jenkinson
Date and Place of Hearing	:	Havant Justice Centre 28 July 2020 Conducted remotely by means of the Cloud Video Platform.
Date of Decision	:	1 September 2020

DECISION

SUMMARY OF DECISION

I. The Tribunal is satisfied beyond reasonable doubt that the Applicant had committed the offence of being in control of an HMO which did not have a licence contrary to section 72(1) of the 2004 Act.

II. The Tribunal decides provisionally that an amount of £12,000 is an appropriate financial penalty for the offence.

III. In view of the Tribunal's intention to increase the penalty from £6,000 to £12,000 it will give the Applicant an opportunity to make representations which must be made at a hearing on 14 September 2020 at 2.00pm held remotely by the Cloud Video Platform.

BACKGROUND

1. The Applicant appeals against financial penalty notice dated 9 April 2019 made under section 249A of the Housing Act 2004 imposing a civil penalty of £6,000.00 for an offence of being in control of an HMO without a licence.

2. The property known as Cabmans Rest 1 Plymouth Street Portsmouth was a former public house which had been converted to a two storey residential dwelling with 12 bedrooms. The property is owned by a Jaspal Singh Ojla and Raswinder Kaur Ojla. The Applicant managed the property for Mr Ojla and found tenants for him from 1 July 2019. In December 2019 an occupier of the property informed Portsmouth City Council ("the Council") that 12 unrelated individuals were living there and the property had no HMO Licence.

3. The Council formed the view that the Applicant was in control of the property because it was in receipt of rents from the tenants as agent, and that Mr Ojla managed the property by virtue of being the owner of the freehold. The Council decided that the Applicant and Mr Ojla had committed the offence of being in control or managing an HMO without a licence contrary to section 72(1) of the 2004 Act.

4. The Council decided to impose a civil penalty as an alternative to prosecution on both Mr Ojla and the Applicant. On 14 February 2020 the Council gave Notice of Intention to issue a civil penalty in the sum of £7,500.00 against each of them but this was reduced to £6,000.00 following representations.

5. The Applicant and Mr Ojla made separate Appeals against the financial penalty. Mr Ojla withdrew his Appeal on 6 July 2020.

6. The Applicant's grounds of Appeal were that it disagreed with the decision to impose financial penalty and the amount of the financial penalty. The Applicant made no substantive challenge about whether it had committed the offence. The Applicant's grievance appeared to be that the Council was not consistent in its approach in dealing with

unlicensed properties and had singled it out for a financial penalty. Also the Applicant requested a reduction in the penalty to reflect its current financial difficulties. The Council contended that it had already given the Applicant the maximum deduction permitted under its Enforcement Policy for undue hardship.

7. The issues for the Tribunal are (1) whether it is satisfied beyond reasonable doubt that the Applicant had committed the offence of controlling an HMO without a licence (2) if so satisfied, whether a financial penalty should be imposed and, if it is, the amount of the penalty.

8. The Appeal was heard on the 28 July 2020 remotely using the Cloud Video Platform. Judge Tildesley sat at Havant Justice Centre which meant that the proceedings were open to the public. Mr Athow and Mr Jenkinson the two other members of the Tribunal joined the hearing remotely. Mr Croker, the Manager of the Southsea Office represented the Applicant at the hearing. Mr Croker confirmed that he had the authority of the directors to speak for the Applicant. Miss Curtis represented the Council. Miss Carolyn Tanner, a Housing Standards Officer was called as a witness. Mr Michael Conway of the Council attended as an observer.

9. The Tribunal admitted in evidence the parties' hearing bundles.

The Law

10. The matter under Appeal is a financial penalty imposed on a person under section 249A of the 2004 Act for controlling or managing an HMO without a licence.

11. Prior to imposing a financial penalty the Council must give an Initial Notice of intent and a Final Notice. Schedule 13A to the 2004 Act contains the requirements for these notices.

12. The Council can only 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.

13. Section 249A(2) defines relevant housing offence which includes controlling or managing an HMO without a licence.

14. Only one financial penalty may be imposed on a person in respect of the same conduct. The maximum penalty is £30,000. The imposition of the penalty is an alternative to the prosecution for a "relevant housing offence".

15. Paragraph 10(12) of schedule 13A of the 2004 Act provides that a Council must have regard to any guidance given by the Secretary of State about the exercise of its functions with regard to financial penalties. In this regard the Secretary of State has issued *"Guidance for Local Authorities: Civil Penalties under the Housing and Planning Act*

*2016 (April 2018) ("*The Guidance*").* In its foreword there is a reference to the increase in the maximum penalty to £30,000 *"because a smaller fine may not be significant enough for landlords who flout the law to think seriously about their behaviour and provide good quality accommodation for their tenants."*

16. Paragraph 2.5 of The Guidance states that

> **Can a civil penalty be imposed on both a landlord and letting agent for failing to obtain a licence for a licensable property?**
>
> "Where both the letting agent and landlord can be prosecuted for failing to obtain a licence for a licensable property, then a civil penalty can also be imposed on both the landlord and agent as an alternative to prosecution. The amount of the civil penalty may differ depending on the individual circumstances of the case".

17. Paragraph 2.6 of The Guidance states that

> **Can a civil penalty be imposed on both a landlord and letting agent in respect of the same offence?**
>
> "Where both a landlord and a letting/managing agent have committed the same offence, a civil penalty can be imposed on both as an alternative to prosecution. The amount of the penalty may differ depending on the circumstances of the case".

18. Paragraphs 3-5 of The Guidance sets out a list of factors to be taken into account when assessing the level of the penalty:

- 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 committing similar offences
- Remove any financial benefit the offender may have obtained as a result of committing the offence.

19. The person on whom the penalty is imposed may appeal to the Tribunal. An appeal is by way of re-hearing. The Tribunal can confirm, vary or cancel the final notice.

20. The Upper Tribunal in *London Borough of Waltham Forest v Allan Marshall* and *London Borough of Waltham Forest v Huseyin Ustek* [2020] UKUT 35 (LC) gave guidance on the Tribunal's powers on Appeal and the weight to be placed on the Local Authority's policy and decision on the financial penalty.

21. Judge Cooke set out the following principles

a) The FTT is not the place to challenge the Council's policy about financial penalties. The remedy, if it is alleged that a policy has been unlawfully established, is an application to the Administrative Court for judicial review.

b) The FTT can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The FTT is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the Appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.

c) The FTT has the ability to set aside a decision that is inconsistent with the decision-maker's own policy and or the ability on appeal to substitute its own decision for the appealed decision but without departing from the policy.

d) If the FTT on appeal finds, for example, that there are mitigating or aggravating circumstances of which the original decision-maker was unaware, or of which it took insufficient account, it can substitute its own decision on that basis.

e) The FTT is not simply carrying out a review; it is to afford considerable weight to the local authority's decision but could vary it if it disagreed with it particularly if the decision engaged the FTT's specialism.

Has the Applicant committed an offence?

22. On 10 December 2019 Miss Curtis and Miss Tanner inspected the property under Part 2 of the Housing Act 2004, in response to a complaint that the property was being operated as an unlicensed HMO. Prior to the inspection, they reviewed Private Sector Housing records which showed that no Mandatory Licence for an HMO was held for the property. In addition, the Council was not in receipt of an application for a licence, nor received any communication regarding how to submit a licence.

23. Miss Curtis and Miss Tanner found the property to be a recently converted Public House, comprising a 12 bedroomed, 2 storey HMO with a mixture of washing facilities both communal and en-suite. There was a shared kitchen/living room, with access to an external yard.

24. During the inspection, they gained access to all rooms. The first bedroom was unoccupied at the time. The remaining 11 bedrooms were clearly occupied and contained household furniture and personal belongings, such as clothing electronics, and decorative items.

25. Seven of the occupants present at the time agreed to complete short witness statements. The occupants confirmed that they were not related to each other, that rent was paid to the Applicant and that when repairs were needed the occupants contacted the Applicant. All the occupants indicated they were students and had lived at the property generally from September 2019, although one gave a date in July 2019.

26. Miss Curtis and Miss Tanner found deficiencies in the property including a large build up of waste in the yard, lack of handrail to the stairway, evidence of rodent infestation, no fire door to the kitchen and lack of communal space for the occupants.

27. The Applicant supplied copies of emails sent to Mr Ojla dated 23 September and 24 October 2019 which identified the following issues: no splashback on the cookers, not enough worktop space in the kitchen, kitchen area very cramped, another fridge freezer required, and no first aid kit, fire extinguishers and blankets present in the property.

28. Following the inspection on 10 December 2019, Miss Curtis contacted the Applicant and spoke to Mr Croker who stated that he believed that Mr Ojla had applied for a licence. Mr Croker indicated his surprise when he was told that no such application had been made, and said that he would do everything to rectify the mistake. On 12 December 2019 Mr Ojla completed an online application for an HMO licence.

29. On 12 February 2020 the Council conducted separate PACE interviews with Mr Croker for the Applicant and Mr Ojla.

30. In interview Mr Croker stated that the Applicant managed around 250 properties in Portsmouth and about 30 of which were HMOs. Mr Croker asserted that the Applicant was competent in managing HMOs and that this was the first slip up in ten years of operating. Mr Croker confirmed that he was aware that properties occupied by five or more individuals were required to be licensed, and of the requirement for the licence to be on display within the property.

31. Mr Croker stated that the Applicant took over the management of the property in July 2019. Mr Croker said that Mr Ojla had told him that the property had planning permission for an HMO. With regards to the licence, Mr Croker stated that the Applicant "badgered him (Mr Ojla) for it but then just went ahead and kind of rented the rooms". Mr Croker said that "we kind of took his word for it", and that "he was keen to impress and it was an oversight on our part". Mr Croker confirmed that the Applicant had assumed that Mr Ojla had done the licensing. Mr Croker was unable to produce any written communication where the Applicant had asked Mr Ojla about the licence.

32. Mr Croker accepted that the Applicant received the rent direct from the tenants at the property and that the Applicant passed the rent to Mr Ojla. Mr Croker said that this was a big learning curve for the Applicant, and that since this incident the Applicant had carried out a

thorough audit of the properties managed to make sure they were compliant with statutory requirements.

33. Mr Ojla in interview said that he owned various commercial properties and four residential flats which did not require an HMO licence. Mr Ojla stated that the property was the first HMO with which he had been involved. Mr Ojla confirmed that he knew the Applicant would be occupying the property with five or more unrelated individuals and that the Applicant created the tenancies for the property. Mr Ojla said that he was not aware that he needed an HMO licence for the property. Mr Ojla confirmed that the Applicant had asked him if he had an HMO licence. Mr Ojla said he presumed that the Applicant was asking him about planning and that he may have inadvertently said yes to something which he believed to be right. Mr Ojla stated that he was not expecting the Applicant to apply for an HMO licence on his behalf.

34. Mr Ojla asserted that he made a mistake and did not realise that he needed a licence. Mr Ojla pointed out that as soon as he received the letter from the Council about not having a licence, he put everything in order and submitted an Application.

35. The Tribunal noted that the planning permission was for a conversion of former public house to an eleven bedroom HMO.

36. The Applicant did not challenge the Council's evidence of the inspection of the property and of the PACE interviews.

37. The Tribunal makes the following findings of fact:

    a) The property is a building consisting of 12 units of living accommodation which were not self-contained flats.

    b) Eleven tenants lived there on 10 December 2019. The evidence indicated that they were not related to each other and were occupying the property as separate households.

    c) The evidence indicated that at least seven of the tenants were students occupying the property for the purpose of undertaking a full-time course of study. By virtue of section 259 of the 2004 Act they were occupying the property as their only or main residence.

    d) The tenants paid rent to the Applicant as agent for Mr Ojla.

    e) The tenants were sharing basic amenities of kitchen, bathrooms and toilets.

38. The Tribunal is satisfied that the property meets the standard test for an HMO as defined in section 254(1)(a) and 254(2) of the 2004 Act.

39. Since October 2018 all HMOs which meet the standard test and are occupied by five or more persons living in two or more separate households require a licence under section 61 of the 2004 Act.

40. The Tribunal holds on the facts found that the property required a licence under section 61 of the 2004 Act, and that it did not have a licence on the 10 December 2019. The evidence also showed that there were at least seven persons living there as separate households from various dates in September 2019.

41. The Tribunal finds that the Applicant was in receipt of the rack-rent of the property as agent for Mr Ojla, and met the definition of a "person having control" as set out in section 263 of the 2004 Act.

42. The Offence under section 72(1) of the 2004 Act of a person in control of an HMO without a licence is one of strict liability. It does not require knowledge on the part of the offender. The fact that the offender may not know the property required a licence is not relevant.

43. The Offence under section 72(1) of the Housing Act is subject to the statutory defences of (1) that at the material time an application for a licence had been duly made, and (2) a reasonable excuse.

44. Defence (1) is not available to the Applicant because the application for a licence was made after 10 December 2019.

45. The Applicant's excuse for not ensuring that the property was licensed was that they relied on the word of Mr Ojla that the property had a licence.

46. Whether an excuse is reasonable or not is an objective question for the Tribunal to decide. The Tribunal must be satisfied that the Applicant's belief that it was licensed must be an honest belief (subjective) and that there must be reasonable grounds for holding the belief (objective).

47. The Tribunal is satisfied that there are no reasonable grounds for the Applicant to believe the property was licensed. The Applicant was an experienced Agent who managed around 250 properties of which 30 were HMOs. The Applicant knew of the regulations for HMOs including that a copy of the licence had to be exhibited on the property. The Applicant let the property from July 2019 knowing that the regulations in relation to HMOs were not being observed. The Applicant accepted Mr Ojla's word that the property was licensed. A prudent Agent would have made enquiries of the Council to confirm what they were being told was correct. They made no such enquiries. A prudent agent would not have let the property until it had seen a copy of the HMO licence. A prudent Agent would have made sure that all requirements for an HMO would have been met before letting the property. The Applicant's email of 23 September 2019 showed that the property did not have a first aid kit, fire extinguishers and blanket. A prudent Agent would have satisfied itself that Mr Ojla understood the question of having an HMO

licence. It is clear from Mr Ojla's interview that he did not understand the licensing requirements for HMOs.

48. The Tribunal finds that the Applicant did not have reasonable excuse for the Offence of having no licence.

49. The Tribunal is, therefore, satisfied beyond reasonable doubt that the Applicant committed the offence of a person having control of an HMO which is required to be licensed but is not so licensed on 10 December 2019 pursuant to section 72(1) of the 2004 Act.

Whether a Penalty should be Imposed and the Amount of the Penalty?

50. The Tribunal starts with the Council's decision and consideration of its Enforcement Policy in respect of Financial Penalties.

51. Ms Curtis explained that the Council referred to The Guidance and decided to impose a financial penalty, rather than prosecution, because the Council deemed it to be the most appropriate and effective sanction in this case, as neither offender had committed a similar offence previously. Ms Curtis also said that the Council relied on The Guidance which permitted the Council to impose a civil penalty on both the landlord and the agent where they have committed the same offence.

52. In deciding the level of the financial penalty to impose the Council takes into account its Private Sector Enforcement Policy. Appendix 1 sets out its approach in respect of financial penalties. The Council begins with the maximum penalty charge allowable for the offence in question and then makes an assessment of the seriousness of offences with specific reference to the factors identified in paragraph 3.5 of The Guidance. The Council applies its Methodology to be used in reducing the financial penalty from the maximum penalty which involves awarding a percentage reduction for each applicable mitigating factor. A maximum of 90 per cent reductions can be given if all mitigating factors are present.

53. In this case Council's assessment was as follows:

> **"The seriousness of the offence**
>
> Portsmouth City Council views the management of an unlicensed HMO to be a serious offence. It is recognised nationally that these types of property have an increased risk of fire and overcrowding, and as such, the Local Housing Authority needs to be able to regulate these properties to protect those that reside in them.
>
> **The level/amount of non-compliance found**
>
> The managing agent and landlord had wholly failed to comply with the legislation by failing to submit an application for a HMO license.
>
> **Financial benefit gained by the offender**

The rental income received while the property was operating unlicensed, based on Short Witness Statements was estimated to be in the region of £4,000 to £5,500 per calendar month. This, as well as the cost of the license application (£790) and works needed to bring the property to standard constitutes a high level of financial gain.

Financial loss to others as a result of the non-compliance

This factor is difficult to measure, but could include the rent payments paid by the occupants whilst the property was unlicensed as well as the licensing fees paid by compliant landlords operating HMO's within Portsmouth.

Attitude of the offender

In failing to check the documentation for the property and 'taking (the landlords) word for it', the Applicant showed an unprofessional and informal attitude to the management of the property. They did not act in the interest of the potential tenants, which is especially concerning given that the Applicant manages around 250 properties in Portsmouth, 30 of which are licensed HMO's.

Maximum criminal fine a magistrates' court could impose

The maximum fine for managing an unlicensed HMO is unlimited".

54. The Council applied the following discounts to the Maximum Penalty after receiving representations

Mitigating circumstance	**% reduction**	**Does it apply in this instance?**
Internal failed preventative measures	20%	No - There were no measures in place at the Applicant for checking an HMO application had been made
Good co-operation with the Council	20%	Yes the Applicant took immediate steps to co-operate. An application for a license was made and steps were taken to mitigate hazards found. The Applicant attended a PACE interview and admitted partial liability for the offence.
Immediate and voluntary remediation	20%	Yes - an application for a HMO licence was immediately received.
No previous history of	10%	Yes - this is a first breach of Housing Act related legislation

non-compliance		for the Applicant
Any relevant personal circumstances	10%	No - no evidence has been submitted
Undue financial hardship	10%	Yes the Council have received evidence that this penalty would cause financial hardship.

55. In this case the Council did not start with the maximum penalty for the Offence. Instead the Council treated the Applicant and Mr Ojla effectively as one and split the penalty between them. The result of this approach was that the Council's starting point was £15,000.00 rather than £30,000.00 for the Applicant which with the discounts produced a penalty of £6,000.00.

56. The Council had given notice of intention to impose a financial penalty of £7,500.00 but gave a 10 per discount for financial hardship following the Applicant's representations.

57. In its consideration the Tribunal follows the approach advocated by the Upper Tribunal in *London Borough of Waltham Forest v Marshall and Ustek* . In this regard the Tribunal considers whether the Applicant's representations justify a departure from the policy.

58. The Applicant in its extended statement dated 4 July 2020 made the following points:

    a. This is the first time in 11 years that the Applicant had suffered an oversight with an unlicensed HMO - which the landlord assured us he had in place.

    b. Since the ban on letting fees the Applicant had struggled dearly. The Applicant feared a fine of such magnitude would put it more financial difficulty. In short it would be out of business. The Applicant believed a fine would be justified but not one of such magnitude.

    c. Since the incident the Applicant had put in place systems to ensure that their managed properties were fully compliant with regulatory requirements.

    d. Mr Ojla misled the Applicant about the status of the HMO.

    e. The Applicant contended that the Council was giving individual landlords who did not have an agent a chance to put matters right without a penalty if they had failed to apply for a licence. In the Applicant's view the Council was unfairly targeting the Applicant and local business people who have not previously breached any rules and always paid their rates.

59. The Tribunal considers that the Council has addressed issues (a), (b), and (c) raised by the Applicant by giving maximum discounts in accordance with its Policy. The Tribunal is of the view that d) is essentially an argument about whether the Applicant had a reasonable excuse which the Tribunal has dealt with at [47] and [48]. The final matter (e) raised by the Applicant is whether the Council was applying its policy fairly. The Tribunal does not consider that this issue falls within its jurisdiction and is a matter for judicial review.

60. The Tribunal concludes that the Applicant has put forward no persuasive arguments for it to depart from the Council's decision on the imposition and the amount of the penalty.

61. The Tribunal now turns to the issues of whether the Council has given proper attention to the individual circumstances of the Offence, the culpability of the Applicant and whether it has complied with its own Policy.

62. The Tribunal observes that there was no proper consideration by the Council of the seriousness of this offence. The Council made generalisations about the risks posed by unlicensed HMOs but did not address the seriousness of this Offence.

63. The Tribunal reminds itself that it is rehearing the Appeal and not simply acting as a review of the Council's decision.

64. The starting point for a financial penalty is the seriousness of the individual offence. In this case the Tribunal finds that (1) This property was a high risk HMO with potentially twelve occupants over two floors. (2) The property suffered deficiencies in its compliance with fire regulations. (3) The kitchen for 12 persons was cramped and had inadequate facilities and posed serious risks to health and safety of the occupants. (4) There was no communal living area. (5) There was evidence of rubbish accumulation and rodent infestation. (6) This state of affairs had been allowed to continue from July 2019 and in all probability would have continued if an occupant had not drawn the Council's attention to the fact that the property did not have a licence.

65. The Tribunal turns next to the Applicant's culpability. The Council determined that *"In failing to check the documentation for the property and 'taking (the landlords) word for it', the Applicant showed an unprofessional and informal attitude to the management of the property. They did not act in the interest of the potential tenants, which is especially concerning given that the Applicant manages around 250 properties in Portsmouth, 30 of which are licensed HMO's"*.

66. The Tribunal notes that the Council did not address paragraphs 2.5 and 2.6 of The Guidance which suggests that there may be different penalties for a landlord and agent for failure to obtain a licence depending upon the individual circumstances of the case. The Council

decided that Mr Ojla and the Applicant should receive the same amount in the penalty.

67. The Tribunal's assessment of the evidence is that the Applicant's culpability for the Offence was potentially higher than that for Mr Ojla. The Tribunal formed the view from Mr Ojla's PACE interview that he did not know the property required licensing and that in effect he handed over the management of the property to the Applicant as soon as the development finished. This does not excuse Mr Ojla because as the owner of the property he is expected to be aware of his legal obligations. In contrast the Applicant knew of the legal obligations in relation to HMOs. It was at the time managing in the region of 30 HMO's. The Applicant knew that this property was an HMO. The Applicant knew that at the time the property did not comply with the regulatory requirements in relation to HMOs. Despite its knowledge the Applicant continued to find tenants for the property and create the necessary tenancies. The Applicant's excuse that it relied on the word of Mr Ojla runs hollow because a prudent agent would have contacted the Council to check that the property was in fact licensed and would have insisted on having a copy of the licence or an application for a licence before it started to let out the rooms in the property. The Tribunal finds that the Applicant's culpability for the offence is higher than that of Mr Ojla.

68. The Tribunal observes that the Council did not explicitly address the question of deterrence either in relation to the Offender or of others from committing an Offence which is one of the factors The Guidance requires the Council to consider under paragraph 3.5.

69. The Tribunal concludes that the circumstances of this offence was at the upper end of seriousness involving a high risk HMO, and that the Applicant's culpability for the Offence was high because the Applicant knew that the management regulations for HMOs were not being complied with and it closed its eyes to whether the property had a licence. In the Tribunal's view the Applicant's offending merited a significant financial penalty which would also deter others from taking the risks that the Applicant took in relation to allowing persons to occupy an unlicensed high risk HMO.

70. The Tribunal turns its attention now to whether the Council applied its own policy to the determination of the financial penalty in this case. The policy at paragraph 4.1 of Appendix 1 requires the Council to start with the maximum penalty for the offence and to consider whether the maximum penalty is reasonable and proportionate. The maximum civil penalty for controlling an HMO without a licence is £30,000.00. The Council started with a maximum penalty of £15,000.00, believing that the correct approach was to treat the offence as one and to split the maximum between the Applicant and Mr Ojla. Miss Curtis accepted that this was a mistake. The net effect of this decision was that the penalty was £6,000.00 which in the Tribunal's view does not

adequately reflect the seriousness of the offence and the Applicant's culpability.

71. The Tribunal, therefore, starts with the maximum penalty of £30,000.00. The Tribunal has examined the mitigating circumstances applied by the Council and its methodology for allocating discounts for those circumstances if they exist. The Tribunal agrees with the Council's assessment of those circumstances. The Tribunal considered whether a higher discount should be given for the Applicant's previous good record at the expense of the discount for any relevant personal circumstances. The Tribunal decided not to alter the 10 per cent discount for previous good character because the Council had already taken into account the Applicant's previous good character in deciding whether to opt for a civil penalty rather than a prosecution.

72. The Tribunal finds that the maximum penalty should be reduced by 60 per cent to reflect the mitigating circumstances which produces a penalty of £12,000.00. In the Tribunal's view a penalty of £12,000.00 is a more accurate reflection of the seriousness of the offence and the culpability of the Applicant.

73. The Tribunal's power on Appeal includes varying the penalty which operates either way by increasing it or decreasing it. The Tribunal has taken into account the potential unfairness between the penalty for Mr Ojla and the Applicant. If Mr Ojla had continued with his Appeal, the Tribunal in all likelihood would have increased it but possibly not to the same extent as the Applicant in view of the different assessment regarding culpability. The Tribunal does not consider that this potential unfairness as between Mr Ojla and the Applicant impugns the correctness of the penalty imposed on the Applicant. In the Tribunal's view "two wrongs do not make it right".

74. The Tribunal, however, recognises that the Applicant should be given the opportunity to make representations on the Tribunal's proposed penalty of £12,000. Although the Tribunal made it clear at the hearing that it had the power to increase the penalty as well as to decrease it, the Tribunal recognises that the Applicant may not have fully understood that.

Decision

75. The Tribunal is satisfied beyond reasonable doubt that the Applicant had committed the offence of being in control of an HMO which did not have a licence contrary to section 72(1) of the 2004 Act.

76. The Tribunal decides provisionally that an amount of £12,000 is an appropriate financial penalty for the offence.

77. In view of the Tribunal's intention to increase the penalty from £6,000 to £12,000 it will give the Applicant an opportunity to make representations which must be made at a hearing on 14 September 2020 at 2.00pm held remotely by the Cloud video Platform.

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Tribunal Members	:	Judge Tildesley OBE Mr R Athow FRICS Mr M Jenkinson
Date and venue of Hearing	:	Havant Justice Centre 14 September 2020 2pm Conducted remotely by means of the Cloud Video Platform.
Date of Decision	:	17 September 2020

ADDENDUM TO THE DECISION RELEASED ON 1 SEPTEMBER 2020

SUMMARY OF THE DECISION

I. The Tribunal, therefore, varies the financial penalty notice dated 9 April 2020 by increasing the penalty to £12,000 pursuant to paragraph 10(4) of Schedule 13A to the Housing Act 2004.

Background

78. On 28 July 2020 the Tribunal heard the Applicant's appeal against financial penalty notice dated 9 April 2020 made under section 249A of the Housing Act 2004 imposing a civil penalty of £6,000.00 for an offence of being in control of an HMO without a licence.

79. On 1 September 2020 the Tribunal published its decision and determined that

    a. The Tribunal is satisfied beyond reasonable doubt that the Applicant had committed the offence of being in control of an HMO which did not have a licence contrary to section 72(1) of the 2004 Act.

    b. The Tribunal decides provisionally that an amount of £12,000 is an appropriate financial penalty for the offence.

    c. In view of the Tribunal's intention to increase the penalty from £6,000 to £12,000 it will give the Applicant an opportunity to make representations which must be made at a hearing on 14 September 2020 at 2.00pm held remotely by the Cloud Video Platform.

The Hearing

80. At the hearing on 14 September 2020 Mr Croker represented the Applicant and Miss Curtis appeared for the Council. The Tribunal heard from Mr Croker. Miss Curtis had no representations to make. During the hearing there was a fault with the CVP server which meant that the hearing was concluded on BTMeet Me.

81. Mr Croker explained that the Applicant accepted that it had committed the offence. The reason for the Appeal was to challenge the amount of the penalty which the Applicant considered was too high and would cause it undue hardship. Mr Croker said that when the Applicant appealed it was not aware that the Tribunal could increase the financial penalty. Mr Croker repeated his evidence at the previous hearing that the Applicant had fully co-operated with the Council once the offence had come to light and that measures had been put in place to prevent an offence from being committed in the future.

82. Mr Croker indicated that he had no quarrel with the Tribunal's findings and accepted that the circumstances justified the conclusion the offence was serious. Mr Croker was deeply apologetic and assured the Tribunal that it would not happen again. Mr Croker said he had not informed the directors of the second hearing because it was his responsibility to resolve the problem.

Decision

83. The Tribunal acknowledges Mr Croker's fulsome apology and his commitment to ensure that it would not happen again. The Tribunal's decision, however, is against the Applicant company not Mr Croker, and it is the company that is liable to pay the financial penalty.

84. Mr Croker for the Applicant has put forward no new information that was not before the Tribunal on 28 July 2020. Mr Croker does not challenge the Tribunal's findings in relation to the severity of the offence and the matters that it took into account when determining the level of the penalty. The fact that Mr Croker did not appreciate that the Tribunal could increase the amount of the penalty is not sufficient on its own to justify the Tribunal departing from its original decision. The Tribunal recognised this by giving the Applicant the opportunity to make representations to the provisional decision

85. The Tribunal has heard no persuasive argument to change its mind in relation to the proposed penalty of £12,000. The Tribunal, therefore, varies the financial penalty notice dated 9 April 2020 by increasing the penalty to £12,000 pursuant to paragraph 10(4) of Schedule 13A to the Housing Act 2004. The maximum penalty that the Council could have imposed was £30,000.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case. The application must be sent by email to rpsouthern@justice.gov.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.