FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/HNA/2020/0029 & 0030** **LON/00AG/HNA/2020/0037**
Property	:	**Flat 9 Gladstone Court, 49 Fairfax Road, London NW6 4EP**
Applicant	:	**(1) Woodcrest Accommodation Limited** **(2) Mrs Liran Yechiel**
Representative	:	**(1) Mr Farhan Rad** **(2) In Person**
Respondent	:	**London Borough of Camden**
Representative	:	**Mr Edward Sarkis**
Type of application	:	**Appeal against a financial penalty** – Section 72, Section 234, section 249A & Schedule 13A to the Housing Act 2004
Tribunal members	:	**Deputy Regional Judge N Carr** **Ms L West (Lay Member)**
Venue	:	**CVP REMOTE**
Date of hearing	:	**5 October 2020**

DECISION

Decision of the tribunal

(1) The appeal against a financial penalty imposed by the London Borough of Camden on Mrs Liran Yechiel in respect of an offence under section 72 of the Housing Act 2004 (control of an HMO while no Additional Licence is in place) in connection with the property at

Flat 9 Gladstone Court, 49 Fairfax Road, London NW6 4EP is allowed. The Penalty Notice dated 8 January 2020 is therefore dismissed.

(2) The appeal against a financial penalty pursuant to section 249A of the Housing Act 2004 imposed by the London Borough of Camden on Woodcrest Accommodation Limited in respect of an offence under section 72 of the Housing Act 2004 (control or management of an HMO while no Additional Licence is in place) in connection with the property at Flat 9 Gladstone Court, 49 Fairfax Road, London NW6 4EP is dismissed. The Penalty of £7,000 is upheld.

(3) The appeal against a financial penalty pursuant to section 249A of the Housing Act 2004 imposed by the London Borough of Camden on Woodcrest Accommodation Limited in respect of an offence under section 234 of the Housing Act 2004 and Regulation 5 of the Licensing and Management of Houses in Multiple Occupation (Additional Provisions)(England) Regulations 2007 (breach of the duty of manager to take safety measures) in connection with the property at Flat 9 Gladstone Court, 49 Fairfax Road, London NW6 4EP is dismissed. The Penalty of £5,000 is upheld.

Reasons for the Decision

Procedural History

1. Mr Farzan Rad, Director of Woodcrest Accommodation Limited ('the First Appellant'), appealed against the imposition of two financial penalties under section 249A of the Housing Act 2004 ('the Act') in respect of a property known as Flat 9 Gladstone Court, 49 Fairfax Road, London NW6 4EP ("the Property") on 5 February 2020.

2. A Letter of Alleged Offence (failure to licence), which included further allegations of breaches of the Management of Houses in Multiple Occupation (England) Regulations 2006 ('the Regulations'), was sent to the First Appellant on 10 September 2020. Notice of Intention to impose a financial penalty in respect of (1) being in control or management of an unlicensed House in Multiple Occupation ('HMO'), (2) breach of paragraph 4 of the Regulations (safety measures) and (3) breach of paragraph 8 of the Regulations (maintenance of living accommodation) was given to the First Appellant on 4 November 2019.

3. The initial proposed penalties respectively were (1) £10,000, (2) £7,500 and (3) £2,500 for the reasons given in the Notices of Intention.

4. Mr Rad made representations to the London Borough of Camden (hereafter 'LHA'), and Final Notices were given on 8 January 2020 reducing the penalties to (1) £7,000 and (2) £5,000 respectively for the

reasons as set out in the Final Notices. The 3rd financial penalty was discontinued.

5. On 26 February 2020, Mrs Liran Yechiel ('the Second Appellant') appealed against the imposition of one financial penalty under section 249A of the Act, and in her application appointed as her representative Mr Tristan Ponsonby of Ash Ponsonby Limited.

6. A Letter of Alleged Offence (failure to licence) (which also included allegations of breaches of the Regulations), was sent to the Second Appellant, via her agents Ash Ponsonby Limited (the second Appellant being resident in the United States of America), on 10 September 2019. Notice of Intention to impose a financial penalty in respect of being in control or management of an unlicensed HMO was given to the Second Appellant via her agent in the UK on 4 November 2019. The initial proposed penalty was £10,000, for the reasons given in the Notice of Intention. Mrs Yechiel and her Agent made representations to the LHA, and a Final Notice was given on 8 January 2020 reducing the penalty to £5,000 for the reasons set out in the Final Notice.

7. Directions were issued in the Second Appellant's case joining it with the First Appellant's appeals on 10 March 2020. There was then a delay to all cases in the Tribunal due to lockdown brought about by the COVID-19 pandemic. The parties were invited, by letter of 3 June 2020, to update the Tribunal as to the progress of the directions in their appeals, and on 18 June 2020 Judge Vance sent updated directions for the matter to be heard by video hearing (CVP) on 24 August 2020.

8. At the video hearing on 24 August 2020, the First Appellant appeared in person and the Second Appellant appeared and was represented by Mr Tristan Ponsonby of Ash Ponsonby Limited. The Respondent was represented by Mr Edward Sarkis and Mr Jack Kane was in attendance as a witness.

9. At the outset of the hearing on 24 August 2020 we raised a potential conflict as between the Second Appellant and Mr Ponsonby, as it appeared to us that we would need to hear evidence from Mr Ponsonby that could potentially conflict with that of Mrs Lechiel.

10. After Mr Sarkis had given his opening statement, Mrs Lechiel had had the opportunity to digest our comments, and notified us that she did not feel prepared to go on with the case without Mr Ponsonby speaking for her. We indicated that given the circumstances, and in the absence of any objection from Mr Sarkis, it would be fair to adjourn Mrs Lechiel's appeal to a new date and give her the opportunity to seek alternative representation and provide a witness statement.

11. Mr Rad, Director of the First Appellant, had confirmed at the outset of the hearing that he conceded liability for the offences and intended to limit his case to mitigation and level of penalty. On turning to hear from him, having adjourned Mrs Lechiel's appeal, Mr Rad resiled from his full admission of the second offence, that of failure to comply with rule the Regulations, but was not able to sufficiently encapsulate his argument as to why he was not 'a manager' for the purpose of the Regulations. It was difficult for the Tribunal and for the LHA to identify in which respects factual or legal findings must be made.

12. Although Mr Sarkis invited us to refuse to adjourn the First Appellant's appeal, due to the difficulty in understanding the extent of Mr Rad's arguments we decided that his appeal would also be adjourned to the same date as Mrs Lechiel's adjourned hearing. We sought dates to avoid and provided further directions for witness statements to be made by Mrs Lechiel and Mr Ponsonby independently from each other, for Mr Rad to provide an Addendum Statement of case making his position clear and unequivocal, for the LHA to respond to the updated documents, and for all parties to consider in their submissions to the tribunal the cases of (a) ***London Borough of Waltham Forest v (1) Marshall; (2) Ustek*** [2020] UKUT 35 (LC) and (b) ***Sutton v Norwich City Council*** [2020] UKUT 90 (LC).

13. During the course of the adjournment, the First Appellant by its director Mr Rad received legal advice and provided an Addendum case statement. However, by the time of the hearing the First Appellant was no longer represented.

14. During the early period of the adjournment, I also caused to be sent to the parties a copy of ***Thurrock Council v Khalid Daoudi*** [2020] UKUT 209 (LC), a decision promulgated by Deputy Chamber President Martin Rodger QC after the date of the first hearing.

15. We also took the opportunity to ask the LHA to put together a properly paginated composite bundle of documents for use by all parties at the hearing. We are grateful indeed to have now received a full bundle of papers running to 423 pages, which we have had the opportunity to read before the hearing today.

16. At the video hearing on 5 October 2020, the First Appellant appeared in person as did the Second Appellant. Mr Tristan Ponsonby of Ash Ponsonby Limited attended as a witness for the Second Appellant. The Respondent was represented by Mr Edward Sarkis and Mr Jack Kane was in attendance as a witness.

Background

17. The Property is an originally three-bedroomed self-contained flat on the third floor of a purpose-built block. Sometime early on after the acquisition of the leasehold, Mrs Yechiel had a wall removed in the property to remove one of the bedrooms and create a large open plan space, rendering the property two-bedroomed.

18. The Second Appellant purchased the leasehold title on 6 January 2012, with the assistance of a mortgage from Santander UK PLC. It appears that this was never her residence and that she bought it as an investment from overseas.

19. On 15 June 2015, the London Borough of Camden was designated as an area of additional licensing for HMOs. The designation came into force on 8 December 2015.

20. The Second Appellant originally let the property to Woodcrest Worldwide Limited in 2016. That is a company that was incorporated on 16 January 2014, and of which Mr Rad has been the company secretary since 1 January 2015. Mr Darvish was, until 20 December 2018, a Director of Woodcrest Worldwide with a majority shareholding. Mr Rad has been, according to Companies House, a person with significant control of Woodcrest Worldwide since 6 April 2016, though he disputed this at the hearing.

21. The First Appellant was incorporated on 20 August 2015, and Companies House reveals that Mr Rad has been a Director since its incorporation. According to Companies House, Mr Simon Darvish was, until 19 September 2019, the majority shareholder and co-Director. After that date Mr Rad has been the sole Director and is stated to be the majority shareholder. Again, Mr Rad disputed this at the hearing, stating that Mr Darvish had in fact ceased to be a Director in September 2018.

22. Sometime in 2017 Woodcrest Worldwide 'shifted' approximately 9 properties to the First Appellant for management. In continuation of the previous arrangement with Woodcrest Worldwide but in accordance with this 'shift', the Second Appellant let the Property to the First Appellant on 16 October 2018 under a 'Company Let Agreement' ('the Head Agreement'). We deduce that since Mr Ponsonby was dealing with the same individuals, Mr Darvish and Mr Rad, he was content to recommend to Mrs Lechiel that the relationship continue.

23. Material clauses of that Head Agreement include the following:

"5. The Premises will sublet to the Tenant's clients ("the Occupier") as licensee of the Tenant who will use the same for residential purposes only. The Tenant may allow additional or replacement Occupiers to occupy the Premises upon receipt of written permission from the

Landlord or the Landlord's Agent, with such consent not being unreasonably withheld.

7. THE TENANT AGREES WITH THE LANDLORD as follows:-

…

7.2.5 To keep all smoke alarms in good working order and in particular to replace all batteries as and when necessary…

7.2.7 To notify the Landlord promptly, and preferably in writing, as soon as any repairs and other matters falling within the Landlord's obligations to repair the Premises or the Fixtures and Fittings come to the notice of the Tenant…

7.2.14 To have the option to build a partition wall between the reception room and the hallway, to remove and make good the premises to the original condition before the end of the tenancy…

7.11 To Use the Premises for the purpose of a private residence only in the occupation of the Occupier approved by the Tenant and their immediate family…

8. THE LANDLORD AGREES WITH THE TENANT as follows:- …

8.5 Safety Regulations

8.5.1 That all the furniture and equipment within the Premises complies with the Furniture and Furnishings (Fire)(Safety) Regulations 1988 as amended in 1993.

8.5.2 The gas appliances comply with the Gas Safety (Installation and Use) Regulations 1998 and that a copy of the Safety Check Certificate will be given to the Tenant at the commencement of the tenancy.

8.5.3 The electrical appliances at the Premises comply with the Electrical Equipment (Safety) Regulations 1994…

9.4 Repair

9.4.1 Sections 11-16 of the Landlord and Tenant Act 1985… apply to this Agreement. These require the Landlord to keep in repair the structure and exterior of the Premises (including drains, gutters and pipes) and keep in repair and proper working order the installations in the Premises for the supply of water, gas, electricity, sanitation, and for space and water heating. The Landlord will not accept responsibility for charges incurred by the Tenant that are the Landlord's responsibility, except in the case of emergency.

9.4.2 The tenant also agrees to carry out quarterly inspections and provide feedback to both the Landlord and the Landlord's Agent throughout the Tenancy.

9.9.15 The expression "the Occupier" shall be any person named in Clause 5 and Clause 7.11 or any replacement Occupiers who occupy the Premises with the written permission of the Landlord or the Landlord's Agent..."

24. At some point during the early period of the agreement Woodcrest Worldwide had erected the agreed-upon partition wall in the former living area of the property, creating a property with 4 bedrooms and shared kitchen and bathroom facilities (the divided lounge area now being the two further bedrooms; there was no other communal area).

25. A number of occupiers came and went pursuant to Assured Shorthold Tenancy Agreements ('ASTs') between them and the First Appellant and/or Woodcrest Worldwide. It is a feature of this case that there is at best a sloppy differentiation between those two companies.

26. In August 2019, another resident at the block in which the Property is situate complained to the LHA regarding rubbish allegedly left by the occupiers of the Property in the communal area. In his oral evidence, Mr Kane also asserted that they had complained about an unlicensed HMO. Mr Kane obtained authorisation to visit the Property pursuant to section 239 of the Act, and attended on 28 August 2020. Only one of the occupiers was present, and Mr Kane arranged to re-attend on 5 September 2020 when all occupants stated they would be present. On that visit, Mr Kane concluded that the Property was an HMO within the definitions of section 254 of the Act.

27. Mr Kane observed a number of issues with what might be colloquially termed basic fireproofing, including a lack of 30-minute fire door (or indeed any door) to the kitchen, smoke or fire alarms (whether battery operated or mains wired), and movement in and gapping above the new partition wall that would allow smoke transfer at a very fast rate. Considering the LACORS guidance he considered that there was a risk to the occupiers should a fire break out both that they would have no knowledge of it, and that their means of escape would be insecure since the spread of smoke would be so rapid.

28. Mr Kane further observed a leak from the shower leading to damp to the adjoining wall and the rotting of the windowsill, and cracked panes to the single glazing within the property.

29. Mr Kane obtained information from both the occupants (whose ASTs have been exhibited) and from the First and Second Appellants.

30. Having considered the matter, the LHA decided to serve Notices of Intent to impose financial penalties on both the First and Second Appellants.

31. The First Appellant swiftly repaired the leak to the shower/rotten sill and made good the issues with fire protections after receipt of the LHA's Notices. It appears that in cooperation with the Second Appellant's Agent, the windows were also repaired (though it appears there was no ability to replace them with double-glazing as suggested by Mr Kane). It appears the latter is why the third proposed penalty was dropped against the First Appellant. There is evidence demonstrating that the leaking shower/rotting sill were brought to the attention of the Second Appellant's agent on 23 July 2019.

32. In the period that followed issuing of the Notices, the First Appellant made representations to the LHA that:

(a) He had been unaware that the property was not licensed, as he had assumed that Mr Darvish had managed it properly;
(b) He had not been the Director of the First Appellant until September 2018 and had only been company secretary up to then;
(c) The First Appellant had been unaware that the fire systems at the property were inadequate; again, he had assumed Mr Darvish had attended to these things;
(d) The identified problems at the property had now been fixed, and an HMO license applied for;
(e) In any event, the expenses in connection with the HMO were such that the First Appellant had not received anywhere near the £1,250 per month that the LHA based its calculations on.

33. The Second Appellant initially stated that she had thought the property to be a company let for offices. When it was clarified that she knew that the accommodation was used for residential purposes, she asserted as follows:

(a) She was unaware of the HMO licensing requirements;
(b) Her Agent Ash Ponsonby was unaware of the licensing requirements or the LHA's advertising of the scheme;
(c) She had not profited from the HMO, rather she had received less rent than she would have done had the property been let out in its original arrangement (though she admitted receiving rent);
(d) She had not been aware that the First Appellant was receiving an additional £1250 per month in rental income;
(e) That she had always been a good and conscientious landlord. This was her sole investment property, and the LHA had given her no forewarning. In any event it was the First Appellant's responsibility to obtain the license as she was not and never had been operating an HMO.

The law

34. Section 249A of the Act permits a local housing authority to impose a financial penalty for a number of housing offences, amongst which are

an offence of failing to license under section 72 (failure without reasonable excuse to have control of or management of housing that requires an HMO license) and failure to comply with the Regulations made and imposed pursuant to section 234 of the Act. Each offence carries a maximum penalty of £30,000.

35. Schedule 13A sets out that the LHA must first give a Notice of Intent before the end of six months beginning on the first day on which the authority has sufficient evidence of the conduct to which the penalty relates. It must set out the amount of the proposed penalty, the reasons for proposing to make it, and information about making representations to the authority. The authority must then give a Final Notice setting out *inter alia* the amount of the penalty and the reasons for giving it.

36. The meaning of 'management or control' for the purposes of the Act is set out in section 263:

263 Meaning of "person having control" and "person managing" etc.

(1) In this Act *"person having control"*, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) *"rack-rent"* means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act *"person managing"* means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

37. The Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 ('the Regulations') set out at regulation 5 the duty of a manager of an HMO to take safety measures:

(2) The manager must ensure that all fire fighting equipment and fire alarms are maintained in good working order…

(4) The manager must take all such measures 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;
(c) the number of flats or occupiers in the HMO…

38. For the purposes of the Regulations, 'the manager' is defined (somewhat tautologically) as 'the person managing the HMO'.

39. An appeal to the tribunal by the person subject to the penalty is to be by way of a rehearing, but may be determined with regard to matters of which the authority was unaware.

40. It is for the LHA to prove the offence beyond reasonable doubt, and for the Appellant to prove any reasonable excuse on the balance of probabilities (***IR Management Services Ltd v Salford City Council*** [2020] UKUT 81 (LC)).

41. The tribunal has no jurisdiction over the lawfulness of the LHA's policy; any such challenge would have to be brought by way of judicial review.

42. In ***London Borough of Waltham Forest v (1) Marshall; (2) Ustek*** [2020] UKUT 35 (LC) Judge Elizabeth Cooke held that the Tribunal is to give weight to the authority's own decision made in accordance with its properly applied policy.

43. In ***Sutton v Norwich City Council*** [2020] UKUT 90 (LC) Deputy Chamber President Martin Rodger QC endorsed the decision in

Marshall. Regard needed to be had to the 2016 guidance to LHAs given by the Secretary of State, re-issued in April 2018, entitled Civil Penalties under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities ('the Guidance').

44. A Tribunal was also to have regard to the LHA's policy and should consider for itself what penalty is merited by the offence under the terms of the policy. If the LHA has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision.

45. In ***Thurrock Council v Khalid Daoudi*** [2020] UKUT 209 (LC), Deputy Chamber President Martin Rodger QC set out the following passages regarding how a tribunal is to approach the question of reasonable excuse:

> *25. The weight which the FTT gave to Mr Daoudi's ignorance of the need for a licence was challenged by Mr Thompson, who submitted that all landlords are under an obligation to inform themselves of their responsibilities when letting their own property for profit. He referred in support of that submission to paragraph 3.5 of the Guidance on Civil Penalties issued to local authorities by the Ministry of Housing, Communities and Local Government under the Housing and Planning Act 2016 which suggests:*
>
> > *"A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations."*
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> *26. Ignorance of the need to obtain an HMO licence may be relevant in a financial penalty case in at least two different ways. There may be cases in which an ignorance of the facts which give rise to the duty to obtain a licence may provide a defence of reasonable excuse under section 72(5). In* I R Management Services Ltd v Salford City Council *[2020] UKUT 81 (LC) an experienced letting agent responsible for the management of a property comprising only two bedrooms mounted a reasonable excuse defence on grounds that he had been unaware that the property had come to be occupied by more than one household, making it an HMO. The FTT in that case was not persuaded of the letting agents' lack of knowledge but, if it had been, his ignorance of the need to obtain a licence in those circumstances would have been capable of supporting the statutory defence. It is also possible to imagine circumstances in which a landlord had a reasonable excuse for not appreciating that a property had come within a selective licensing regime (although it would be necessary for the landlord to have taken reasonable steps to keep informed). Short of providing a defence, ignorance of the need to obtain a licence may be relevant to the issue of culpability. Although, as the Government's Guidance points out, a landlord is running a business and*

ought to be expected to understand the regulatory environment in which that business operates, not all businesses are the same. A decision maker might reasonably take the view that a landlord with only one property was less culpable than a landlord with a large portfolio.

27. … In I R Management *I suggested at paragraph 31 that the issue of reasonable excuse might arise on the facts of a particular case without an appellant articulating it as a defence and that tribunals should consider whether any explanation given by a landlord of an HMO amounts to a reasonable excuse for the relevant offence… No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence…*

28.The FTT also considered that Mr Daoudi's responsibility to make enquiries and inform himself of his own obligations was "balanced against" the Council's responsibility to take reasonable steps to secure that applications were made for HMO licences. It referred in that regard to section 61(4) of the 2004 Act which does indeed require a local housing authority to take all reasonable steps to that end. … In any event, the inference that the Council had not taken reasonable steps to publicise the selective licensing regime was apparently based on its inability to produce documents at the hearing, which had not previously been requested. There was no reason why the Council should have been in a position to provide evidence of advertisements or posts on websites and the FTT ought not to have treated its inability to do so as a matter weighing against the imposition of an appropriate penalty for the offence.

31. … There must be a limit, however, on the extent to which belated compliance with an obligation can mitigate the punishment appropriate to the original non-compliance, especially when the offence exposes tenants to a high degree of risk. I do not see how eventually doing what the law requires can justify a decision to impose no penalty at all, although it has a bearing on the level of punishment. There is no reason in principle why a decision-maker should not decide that no penalty ought to be imposed despite a breach of the criminal law, but where Parliament has provided for penalties of up to £30,000 for offences which it clearly intends to be treated as serious, a substantial justification would be required….

The grounds of appeal

46. The First Appellant initially appealed the level of the penalty only. It has now provided an addendum statement of case in which Mr Rad asserts that it has a reasonable excuse in respect of both penalties.

47. In his letter of 10 July 2020, Mr Rad asserts firstly that there were good reasons for the breach arising from the fact that he only took over as Director of the company on 1 September 2018 and had assumed that the previous director had done everything he ought to, such that it would be unfair for the First Appellant to take the burden of such large penalties. Secondly, he states he took prompt action as soon as he was aware of the breaches to rectify them, and that ought to be a mitigating

factor. Thirdly, Mr Rad asserts that although it looks like the First Appellant received £1250 in rent each month, in fact the outgoings associated with the property reduced this sum to circa £693. The Property has now been returned to the Second Appellant as a result of the difficult financial situation brought about by COVID-19, and the lack of profitability of the Property.

48. In his Addendum statement of case, Mr Rad asserts that the above submissions amount to a 'reasonable excuse'. He no longer asserts in his statement of case, as he did orally at the last hearing, that he was not a manager of the property for the purposes of the Regulations. However, in his evidence he maintained that line of argument, and so we will deal with it below.

49. The Second Appellant appeals on the basis of the Grounds of Appeal attached to her application form dated 26 February 2020. Those grounds are as follows:

(i) The additional licensing rules were not in place when she purchased the Property and, as she lives in New York, she knew nothing about them;
(ii) She has not gained financially from the property running as an HMO; she has only received the "standard market rent";
(iii) The First Appellant was responsible for general maintenance at the property;
(iv) The First Appellant didn't tell her or her Agent the property needed an HMO license;
(v) The LHA did not tell her or her Agent that the property needed an HMO license;
(vi) Her Agent did not see any advertisements regarding the additional licensing scheme;
(vii) There is no evidence that the Property is in a bad condition. Imposing a penalty on her is in flagrant breach of the Guidance issued by the Ministry of Housing, Communities and Local Government and the penalty should be overturned or rendered a nominal figure;
(viii) She considers herself a good, honest and responsible landlord. She has only this one Property. As soon as she was made aware, she agreed to do whatever was required to adhere to the legal requirements.
(ix) She has made no financial gain.

50. In her witness statement in support of the Appeal, Mrs Yechiel stated that as the property had remained vacant for some months in 2016 (having been previously let out to a couple), in 2016 the property had been let to Woodcrest Accommodation for less than market rate (though of course at this time the let was to Woodcrest Worldwide). This statement was also made by Mr Ponsonby in his witness evidence.

51. The LHA is first required to prove its case beyond reasonable doubt, and in the event that it does so the Appellants are each required to establish their reasonable excuses on the balance of probabilities.

52. In the event that either or both fail to do so, at the third stage we will need to consider the level of the penalty. In the First Appellant's case the financial evidence provided by Mr Rad is limited to the outgoings at the property itself. Insofar as the Second Appellant contends that her penalty ought to be rendered 'nominal', we take this also as a challenge to the level of the penalty, though in her case no financial information has been provided to us.

53. At the hearing on 24 August 2020, Mr Sarkis had already opened the case for the LHA. The parties agreed that we need not hear it again. Given that the initial burden was on the LHA to establish the offences beyond reasonable doubt, we asked to hear from Mr Kane first, and thereafter took evidence and submissions from the Appellants, in respect of each of the grounds of appeal, in turn.

Evidence

54. Mr Kane broadly relied on his witness statement and Mr Sarkis took him through it in detail.

55. He further asserted that the complainant about the household waste situation (as recorded above) had also complained about the property being used as an HMO. Mr Rad disputed this on grounds it had not been included in Mr Kane's witness statement or suggested previously.

56. In considering the LACORS guidance, Mr Kane gave evidence that even if, as was now asserted by the Respondents, there had been in place battery operated smoke, heat and CO2 alarms, insofar as their adequacy for the protection of the residents of the HMO and in accordance with the LACORS guidance the LHA would have considered them insufficient. In any event, the LHA also relied on the poorly constructed partition wall and lack of fire-safe door to the kitchen, the area of an HMO that statistically posed the highest risk to the occupants.

57. Mr Kane explained how the relative penalties had been calculated. He had taken into account the MHCLG Guidance ('the Guidance') at p185 of the Bundle, and the LHA's own policy at page 205 *et seq*. Regarding the penalty to be imposed on the Second Appellant, he had considered that the starting point was in the serious category (between £10,000 - £20,000) in accordance with the LHA's matrix. As regards the First Appellant, he had considered the starting point to be in the severe category taking into account the property portfolio of the First Appellant and the serious fire safety issues. At the stage of the Notice of

Intention, he told us that he had taken into account the fact that penalties were to be imposed on both the First and Second Appellants, and further taken into account the separate penalties against the First Appellant and reduced them accordingly in order to avoid over-penalisation and take into account the totality principle.

58. After representations, Mr Kane had then reconsidered the penalties, to arrive in the Second Appellant's case at a figure of £5,000 (and thus taking the penalty to the top of the lowest level of the lowest category of offence, i.e. Moderate). In the First Appellant's case, the third penalty had been dropped entirely in light of the quick cooperation and evidence that the issue had been previously notified to Ash Ponsonby. The s72 penalty was reduced to £7,000, bringing it into the middle of the higher bracket of the moderate band, and the Regulations penalty had been reduced to £5,000, the top of the lowest level of the moderate band.

59. We asked Mr Kane for evidence of the rack rent in accordance with section 263(1) of the Act. Mr Kane stated that he did not have any.

60. The Second Appellant gave no evidence, for the reasons set out in ***Determination and Reasons*** below.

61. Mr Rad gave evidence that he accepted that the offence was made out in terms of failing to license the HMO, but that he had a reasonable excuse. He had only been managing the property since September 2018, and he had assumed Mr Darvish had previously dealt with the HMO licensing. For all of the other properties he managed (which now total around six, but at the time had been ten or eleven) the First Respondent always entered into letting agreements with Estate Agents acting for Landlords, and the Landlord sorted out things like licensing. He wasn't, he said, aware that one was needed until the LHA had written to him, and had instantly arranged for a license to be obtained. The company had never been in trouble for a failure to licence offence before. He had cooperated fully with the LHA.

62. In relation to the fire safety requirements in the Regulations, Mr Rad asserted that the First Appellant was not a 'manager' in accordance with the Regulations. He pointed to clauses 8.5 and 9.4 of the Head Agreement and stated that the First Appellant inspected the property twice a year in order to report back to Ash Ponsonby in accordance with clause 7.2.7 and 9.4.2. He relied on clause 8.5 of the Head Agreement, in which he asserted fire safety was clearly identified as the Second Appellant's obligation. He did not accept that clause 7.2.5 put fire safety in the First Appellant's remit, only the changing of the batteries for fire safety devices. The devices remained the Second Appellant's responsibility.

63. In any event he stated that there had been battery operated smoke, heat and CO2 alarms in the kitchen at the date of the Gas Safety Certification carried out by the Second Appellant at the property on 11 April 2019. He believed that they had been present at the time of his inspection leading to his email to Ash Ponsonby of 23 July 2019, in which he had notified Mr Stefano Todde of a leak from the boiler in the kitchen and a rotten windowsill next to the bath in the property. He suggested that it was a possibility that the tenants, now bringing an application for a Rent Repayment Order in respect of the property, had deliberately removed these items at the time of Mr Kane's inspection. He further asserted that there had never been a door to the kitchen from the outset of the Head Agreement (even when it had been with Woodcrest Worldwide), and that he had not been involved in the management of the property at the time the partition wall had been installed.

64. In any event, they had fixed the issue with the partition wall. All of the fire safety works had been completed rapidly after the Notice of Intent had been received. The First Appellant had, in September 2019, become an approved Letting Agent accredited by Safe Agent. The LHA had failed to take into account the First Appellant's cooperation, or the amount of outgoings that it incurred in the management of the property, when it had fixed the penalties. The income of the First Appellant from the property had been much less than £1,225 per month. The Property had now been 'given back' to the Second Appellant.

65. We asked Mr Rad about the company's finances. Mr Rad stated that for year ending 31 August 2019 the company's profit was only £21,000. The turnover, however, was £348,000.

66. We asked Mr Rad about his qualifications, since he had stated in his Addendum statement of case that since taking over the property he had always ensured that properties were managed properly and in accordance with the law.

67. Mr Rad set out his qualifications as follows: he was an Aerospace Engineering graduate, who had met Mr Darvish and found the property management business appealing and thought it was something he could do. Since becoming involved in 2015, he had taken one online course, though it had not covered HMOs. He took over in 2018 and had innocently thought Mr Darvish had sorted the legal requirements that needed sorting.

68. He was in the process of obtaining a Chartered Accountant qualification. He had not done any other training to become a property manager than the one online course. He had been unaware of the requirements of HMOs. The next step on his list after becoming approved by Safe Agent was to begin checking that issue. The company did not employ anyone else but him, but sometimes his wife helped out

with admin as it was too much for him to manage. He usually attended the property personally to investigate any issues (as demonstrated in his WhatsApp messages), or simply sent around a trusted contractor. He relied on the Estate Agents from whom he entered into these agreements to have all the legal issues covered off.

69. While Mr Rad accepted that the Guidance disclosed several bases on which a penalty was to be calculated, he did not accept that the amount of the penalty ought to be more than the income of the First Appellant derived from the property. The First Appellant was not making much since COVID, and while he agreed he had some responsibility and had acted unprofessionally, that had been innocently rather than deliberately and he hoped for some reduction.

Determination and reasons

(i) The Second Appellant's appeal

70. The Appeal in this case was resolved without the need for the Second Appellant to give evidence as the LHA were unable to prove beyond reasonable doubt that the Second Appellant was in control of the property, by reference to receipt of two thirds of the net rack rent pursuant to section 263(1).

71. Mr Sarkis stated that he had taken this element of the offence to be admitted per the Appeal Notice. We drew Mr Sarkis's attention to page 52 of the bundle at paragraph 3 of the Grounds, in which the Second Respondent in the same paragraph states that she has received 'only the standard market rent' and not 'gained financially' from the HMO situation which she repeats at the final paragraph of that page. Read contextually with the correspondence with the LHA throughout, in particular at page 228 in her email of 1 December 2019 at paragraph 3, paragraph 3 of her email of 9 December 2019, and the Second Appellant's and Mr Ponsonby's witness statements, it was clear throughout that what the Second Appellant was repeatedly asserting was that she received 'less than market rent' for the property, and that her income was based on the previous position in which she was receiving over £2,000 per month for private rental of a two-bedroomed property to couples. That, of course, is very different from the market rent for a four bedroomed HMO.

72. We bore in mind the Deputy President's guidance in paragraph 27 of ***Daoudi*** regarding the Tribunal's investigative obligations in the facts, and considered that here the Second Appellant's inelegance of expression was not the same as an admission in light of her repeated position throughout. In these quasi-criminal proceedings the burden is on the LHA to establish the offence beyond reasonable doubt, and we determined that the LHA would need to establish that element of the offence.

73. Mr Kane stated that his general knowledge of the kinds of rents obtained in HMOs supported that the rack rent was around 'this rent'. We pointed out that the LHA had to prove its case beyond reasonable doubt, and that his general knowledge was not derived in the course of an expertise in valuation of market rents, which he conceded. Mr Sarkis asked whether we really expected expert evidence on the rack rent. We pointed out that it was an element of the offence for him to prove beyond reasonable doubt, and that if that meant obtaining expert evidence in a contested case then so be it. Even if there was some evidence of comparable properties in the vicinity from eg. local estate agents, we would have at least some foundational basis for a finding of level of the rack rent. However, with no evidence, the *prima facie* and indeed only evidence of the rack rent was the rate being charged by the First Appellant – i.e. £3,225, of which £2,000 was not the required two thirds. How otherwise could the LHA propose to satisfy its burden?

74. Mr Sarkis said that a tribunal had never raised the point before. We pointed out that we were unaware of what previous tribunals had or had not done, or what was or was not in issue, but even if true that did not assist the LHA's position in this particular case.

75. Mr Kane informed us that he had discussed this issue with Mr Sarkis and had sent to him an advertisement for a property in the same block with the same footprint that in July 2020 was being advertised for rent at £2,200. He didn't understand why it wasn't in the bundle. Mr Sarkis stated that it had simply been an error, and that he sought permission for it to be relied on today. We asked Mr Kane when he had first identified the comparator. Mr Kane stated he had saved it on 20 August 2020 but had obtained it sometime before that. The property concerned had been available for rent from 1 July 2020, was the same footprint as the subject property, and had three double bedrooms.

76. We asked Mrs Yechiel to address us on any objections she had to the comparator being admitted into evidence. She stated that it wasn't the same. We adjourned to consider the application.

77. In the course of the hearing we determined that the LHA would not be permitted to rely on this late comparator for three reasons:

(a) It had plainly been available before, and had been subject to discussions between Mr Kane and his legal representative. There was therefore no good reason for it being supplied in the middle of evidence today;

(b) It was a comparator for a three bedroomed property, which was not comparable in the context of this *de facto* four bedroomed property, and therefore could not assist us in establishing the rack rent;

(c) the comparator was relied upon as evidence of value of the subject property at the time of the commission of the offence. However, the value of the comparator was said to be at July 2020, ten months after the alleged offence, and in the middle of the COVID pandemic which had no doubt had an impact on the rental values of all such properties. Without evidence of the value at the time of the commission of the offence, or expert evidence on the effect of COVID on rents (which the Second Appellant had been deprived of the opportunity to obtain as the evidence had not been served) it would not assist us.

78. We asked whether there was a comparator with four bedrooms, and Mr Kane said no. He sought to rely on his experience that this was 'about the rent' that these types of HMOs obtained, or (Mr Kane suggested) that his experience suggested that a number of properties advertised as three bedroomed were *de facto* unlicensed four bedroomed HMOs, so that this comparator was a correct one.

79. Respectfully, this comes nowhere near the burden of proof beyond reasonable doubt. We are also unable to accept that a three bedroom comparator is correct because it 'might' be being used as an unlicensed four bedroomed HMO.

80. Mr Kane and Mr Sarkis further asserted that the proper comparator was a two bedroomed flat, as per the original configuration of the property, and that therefore the Second Appellant's own evidence was proof that she was receiving market rent or close to it.

81. With that we could not agree. Mr Kane's own evidence at paragraph 61 on page 91 of the bundle is that "*The partition wall which was erected at the property has removed what would have been the communal lounge to create two additional bedrooms, thus significantly increasing the rental income received from the property*.' This is a clear indication that, at least at the time of writing his statement, Mr Kane accepted that the relevant rack rent was for a four bedroomed property. Even the proffered (and rejected) late evidence, being said to be for a three double bedroomed property, could not support Mr Kane's assertion that the relevant comparator was a two bedroomed property.

82. The reconfiguration of the property has been throughout the point relied on by the Second Appellant: she did not profit <u>from the HMO structure</u> as she had received a 'just under' market rent based on a two-bedroomed property from the First Appellant, as set out in her witness statement. Much as one can see that the Second Appellant has 'profited' in the broader sense (contrary to her assertions), that does not equate to meeting the definition in the Act.

83. We therefore determine that the only *prima facie* evidence of rack rent for the purposes of the Act is, therefore, the £3,225 received in rental each month by the First Appellant, of which the Second Appellant

received £2000. The Act is quite clear that to fall within the definition of 'control', the individual must be in receipt of two thirds of the net rack rent. £2,000 is not two thirds of £3225.

84. That being the case, the offence of control of an unlicensed HMO against the Second Appellant could not be proved.

85. Mr Sarkis asked us to consider that the Second Appellant fell within the definition of 'a manager' for the purposes of section 263(3), and that the evidence established that offence had been made out. He stated we were entitled to make such a finding at the hearing.

86. Mr Kane's witness statement at page 81 of the bundle paragraph 23 proceeds only on the basis that the Second Appellant is '*in control of the premises under section 263(1)*' of the Act. This is echoed in paragraph 2 of the reasons in the Notice of Intent on page 216 of the bundle, and in the Final Notice at paragraph 2 on page 241 of the bundle. At page 229 in response to the Second Appellant's email of 21 November 2019, Mr Kane relies only on section 263(1). In his email of 9 December 2019, Mr Kane refers only to the Second Appellant being in receipt of the rack rent and therefore liable. Mr Sarkis (and, rather forcefully, Mr Kane) tried to persuade us that the statement of offence on the top of each of the Notice of Intent and the Final Notice encompassed the further definition in subsection (3) of section 263 and that was enough.

87. Regretfully we were unable to accept that. The reasons in both the Notice of Intent and the Final Notice to the Second Appellant each state <u>only</u> that the Second Appellant was <u>in control</u> of the property. We consider that this was a deliberate choice on the part of Mr Kane, as by comparison he uses 'in control or management of' in the Notices for each offence (both of Intent and Final) for the First Defendant.

88. We reject Mr Kane's contention that simply putting in the description of the offence at the top of the Notices is enough to entitle the LHA to rely on the definition in section 263(3) and to invite this Tribunal to find beyond reasonable doubt that the Second Appellant is the manager of the property. The description of the offence does not set out the elements of the offence that the LHA need to prove. Those are addressed in the reasons under the heading. The purpose behind the Act requiring that those reasons be set out is, it seems to us, so that the Second Appellant should know the precise nature of the criminal act alleged against her. They are more than a mere formality. The description of the offence is not a 'catch all' fallback position, especially in circumstances where criminal findings are concerned, and to permit the LHA to rely on the management definition where throughout it has, intentionally or in error, failed to do so would result in procedural unfairness at best, and an *ultra vires* decision at worst.

89. We therefore indicated that the LHA had failed to make out the offence in the course of its evidence, and did not require the evidence of Mrs Lechiel and Mr Ponsonby. The financial penalty is therefore set aside and the LHA's case dismissed.

(ii) The First Appellant's Appeal

(a) The section 72 offence

90. In respect of this offence at least, Mr Rad accepts that he was in management of the HMO. We do not accept that it is a reasonable excuse that Mr Rad only became the sole Director of the First Appellant in September 2018.

91. He has now been in the property business since 2015, and on his own case thought himself qualified to be a Director. On his own evidence he was a Director of the First Appellant since 2017 (though the Companies House entry makes clear he was a Director from its inception). He has not done anything to ensure he knew what the applicable laws to property management were in respect of this Property, let alone to abide by them. This Property has required a license since the partition wall was erected by Woodcrest Worldwide in around 2016. It has therefore been run as an unlicensed HMO by Woodcrest Worldwide and thereafter by the First Appellant throughout that time. Throughout that time, Mr Rad was a Director of the First Appellant, and a named officer of Woodcrest Worldwide. We are unimpressed that Mr Rad therefore states that he knew nothing about the Act or regulations right up until the point of the Notices.

92. There is no excuse for Mr Rad's failure to obtain any type of training or advice, save for a single online web course, since he has been a Director. It is not a reasonable excuse for him to blame Mr Darvish for failing to comply.

93. In any event it is the First Respondent as a company that is liable and therefore Mr Darvish's failure is also the First Appellant's failure. That Mr Rad was, as the sole Director from September 2018 on his evidence, managing a portfolio of some 10 or 11 properties without making himself familiar with even the basics of property management is very concerning indeed.

94. We therefore find that the offence in respect of section 72 is made out beyond reasonable doubt as against the First Appellant, and we are satisfied that the First Appellant has no reasonable excuse of which it can avail itself.

(a) The Regulations offence

95. Mr Rad purports that the First Appellant was not the manager of the property for the purposes of the Regulations, as that ought to have been the Second Appellant.

96. The Regulations themselves are really rather unhelpful, in that the individual managing is defined as the manager. We must therefore look first for features of management in the relationship between the First and Second Appellant, and between the First Appellant and its sub-tenants.

97. It is clear that the First Appellant was carrying out inspections of the property, collecting rents, undertaking minor repairs, and had specific contractual obligations to report back to the Second Appellant (or in this case her Agent, Ash Ponsonby) as regards any deficiencies at the property in respect of the Second Appellant's obligations to the First Appellant. It is also plain from the sub-tenancy agreements with the individual occupiers that the First Appellant was the only landlord in so far as they were concerned (though, like other deficiencies set out about, even the tenancy agreements were in the name of the wrong company for a number of the tenants long after Woodcrest Worldwide had divested itself of the property, which can only be down to poor property management). The First Appellant was their landlord, who managed the property as far as they were concerned. The WhatsApp messages and repeated attendance of Mr Rad or his contractors at the property to sort out minor sub-tenancy issues further prove that. *De facto* then, we consider that these features support that the First Appellant was a manager of the property.

98. For the legal position, section 234 of the Act is the statutory authority from whence to make the Regulations derived. In that section there are also references to 'management' of HMOs. Lacking a definition in the Regulations, the Act appears to us to be the appropriate source to turn to for the meaning of 'manager' in this context. In light of the LHA relying on it and the First Appellant conceding it for the purposes of the section 72 offence, we turn to section 263(3) of the Act.

99. In that section, to establish that a person is a 'manager' for the purposes of the Act, the criterion is fulfilled if the individual is an owner or lessee of the premise and receives rents or other payments from in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises.

100. Though the definition of 'lessee' for the purposes of the section might be troubling in a different case, Mr Rad on behalf of the First Appellant admitted the offence under section 72 was made out, which is, in the First Appellant's case, an admission of being in <u>control or management</u> as set out in the reasons provided in LHA's Notices of Intent and Final Notices. Given the meaning of 'in control of' as considered above, the admission <u>must</u> be in relation to management.

101. Taking those matters together, and in light of the manifestations of *de facto* management and in particular the obligations on the First Appellant through clauses 7.2.5 and 7.2.7, we find beyond reasonable doubt that the First Appellant was the manager of the Property for the purposes of the Regulations.

102. In asserting a reasonable excuse on behalf of the First Appellant, Mr Rad further relies on the assertion that at the date of the Gas Safety Certification ('GSC') in April 2019 there is made mention of both a smoke and CO2 detector. He asserts that there was also a heat detector, and that all three were placed in the kitchen. He concedes that these were battery operated. He makes some unsupported allegations about the tenants potentially having removed them.

103. We remain unconvinced that clauses 8.5.1 and 9.4.1 place all of the management responsibilities on the Second Appellant in respect of fire safety as the First Appellant maintains. Plainly, clause 7.2.5 went beyond simply replacing batteries; the First Appellant was to maintain smoke alarms 'in good working' order.

104. We further note that Mr Rad did not rely on the existence of the battery-operated detectors until after the Second Appellant had provided the GSC in the course of her disclosure in these proceedings. At no point during his representations to Mr Kane did Mr Rad mention any detection equipment.

105. We need not, though, make a finding as regards the truth of the assertion. The Regulations are quite clear: The manager is obliged to ensure, pursuant to regulation 5(4), that he takes all such measures as are required to protect the occupiers of the HMO from injury, having regard to the design, structural conditions and number of occupiers in the HMO. That obligation must be construed to mean that the First Appellant had a pro-active responsibility to review and provide or replace what was in existence at the Property, if what was at the Property was insufficient to meet that standard.

106. We accept Mr Kane's expertise as an Environmental Health Officer and reliance on professional guidance from LACORS, when he states that mains operated fire and heat detection equipment throughout the property would have been the only apparatus that could satisfy the requirement. In particular we had our attention drawn to the fact that there was only one means of escape from the property, that the partition wall was poorly constructed and incapable of halting a fire or the passage of smoke, and that there was no fire door to the kitchen, the most hazardous room in the context of a property occupied in such a way as this. We accept that battery operated smoke, heat and CO2 alarms only in the kitchen of the property would be insufficient to meet the obligations in the regulation.

107. Mr Rad asserts that, even from commencement of the agreement with Woodcrest Worldwide, there had been no fire door between the kitchen and the other rooms at the property. As the manager, and as the company with the right to install occupants in the Property, this ought to have been one of the matters the First Appellant reported to the Second Appellant, and then action at least in that regard could have been taken. The same might be said about the other fire safety equipment. As for the partition wall, this had been installed by Woodcrest Worldwide, a company in which Mr Rad and Mr Darvish had already been Director and Secretary at the point in time at which the property had moved over to the First Appellant. They must or ought reasonably to have known about the condition of the wall, and we are not persuaded that there is any foundation for an assertion that the Second Appellant would be liable for it as a consequence of the Head Agreement.

108. We therefore find that the Regulations offence is made out beyond reasonable doubt. For the same reasons as above, we do not consider that the First Appellant can avail itself of a reasonable excuse in the circumstances. Failure of the Director of the First Appellant to educate himself of his responsibilities in respect of fire safety we consider very grave indeed.

(c) The Amount of the Penalty

109. The First Appellant asserted that the LHA had failed to take into account the company's rapid compliance to regulate the HMO status and fire safety in the property, the general feedback that the First Appellant is a 'good landlord' and keeps its properties in good condition, and the fact that Safe Agent have now accredited it.

110. We accept Mr Kane's evidence regarding the matters he took into account at the first stage of the Notice of Intent, and after the First Appellant had offered mitigation at the second stage in the Final Notice. All of the above matters were within his knowledge at the relevant dates, and as he stated in his evidence resulted in much reduced penalties of £7,000 on the section 72 offence and £5,000 on the Regulations offence. We can find no flaw in the application of the policy contained in the bundle at pages 205 – 214 (although we question what it takes for someone to fall into the Moderate Category of the matrix from the outset of the offence) – indeed, if anything the resultant penalties, for a company with the portfolio of the First Appellant and the significant fire safety issues identified, might be considered by some to be somewhat on the low side, though we decline on this occasion to interfere with them.

111. To the extent that the First Appellant asserts any miscalculation of the penalty or failure by the LHA to apply its policy, Mr Rad's submissions were limited to this: firstly, he stated that the LHA had assumed that he

had received far too much money in profit in respect of this property so its calculations were accordingly wrong; and secondly, the First Appellant's profit for the year ending August 2019 was only £21,000, and the First Appellant had been hard hit by COVID such that its portfolio had now reduced to six properties. The level of the penalty was such that it failed to take into account the First Appellant's financial position.

112. As to the first, income received from the property is only one of the seven pillars set out in the MHCLG Guidance. Those are identified as:

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. Deter the offender from repeating the offence;
f. Deter others from repeating similar offences; and
g. Remove any financial benefit the offender may have obtained as a result of committing the offence.

113. These pillars have been adopted straight into the LHA's policy, along with their relevant explication. As Mr Sarkis fairly put to Mr Rad, the question of the penalty is not restitutionary (that is, of course, for the Rent Repayment proceedings), it is punitive.

114. While the First Appellant has provided some records of and receipts for payments made in respect of the property that demonstrate that its monthly income from the property was less than £1,250, that is only one element of the exercise in setting the penalty. On balance, we do not consider the difference in the financial benefit less the outgoings is significant enough to interfere with that penalty in light of what we have said about culpability and harm above.

115. As regards the second argument, while we have some sympathy for the First Appellant in what are no doubt very trying times across the property management sector, no evidence was produced to substantiate what was said. At the last year-end accounts in August 2019, the First Appellant had turned over, according to Mr Rad's evidence, £348,000. Albeit that Mr Rad stated that the profit to the First Appellant was only £21,000, the turnover was significant. No explanation was put forward for the difference – for example, Mr Rad stated that the First Appellant's only employee was himself.

116. We are led to conclude that the financial penalties imposed on the First Appellant at the date of the offences were well within reasonable bounds.

CONCLUSION

117. For all of those reasons, we allow the Appeal of the Second Appellant and dismiss the Penalty Notice.

118. We dismiss the Appeal on behalf of the First Appellant and uphold the penalties as set, being £7,000 in respect of the offence pursuant to section 72 of the Housing Act 2004 and £5,000 in respect of the offence pursuant to section 234 of the Housing Act 2004 and regulation 5 of the Licensing and Management of Houses in Multiple Occupation (Additional Provisions)(England) Regulations 2007.

Name: Deputy Regional Judge N Carr **Date:** 19 October 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).