FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HNA/2020/0023 & 0025 & 0026 & 0027 V:CVP**
Properties	**:**	**35 Priolo Road, 26 Inverine Road, 9 Fairfield Grove and 15 Priolo Road, London SE7**
Applicant	**:**	**Mr Dayu Shang**
Representative	**:**	**Mr Simon Connolly of Counsel**
Respondent	**:**	**Royal Borough of Greenwich**
Representative	**:**	**Mr Ali Dewji of Counsel**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A of, and Schedule 13A to, the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn** **Mr P Roberts DipArch RIBA**
Date of Hearing	**:**	**24th July and 11th September 2020**
Date of Decision	**:**	**16th October 2020**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was **V:CVP**. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in a series of electronic bundles, the contents of which we have noted. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the tribunal

The aggregate financial penalty imposed on the Applicant is reduced from £100,000 to £60,000.

Introduction

1. The Applicant has appealed against a combination of four financial penalties imposed on him by the Respondent under section 249A of the Housing Act 2004 ("**the 2004 Act**"). A separate penalty of £25,000 has been imposed in respect of each of the four Properties and the aggregate penalty is £100,000.

2. In each case, the financial penalty was imposed for a failure to license a House in Multiple Occupation ("**HMO**") in breach of section 72(1) of the 2004 Act.

3. The basic facts are undisputed. In each case, the Applicant held the relevant Property under a lease and in turn sublet parts of the Property to others, liaising with his landlord in respect of property management issues. It is also the case that in respect of these Properties and three other properties the Respondent has opted for a dual approach of imposing financial penalties for certain offences and pursuing prosecution in the Magistrates Court for other offences.

4. The appeal is against the level of penalty.

Witness evidence

Mr Quaroni's evidence

5. Mr Quaroni is the Respondent's case officer in relation to this matter and has given a witness statement. In that statement he explains how the level of the financial penalty was calculated, including the use of a matrix based on the Respondent's Enforcement Policy for Private Sector Housing 2017. The matrix is made up of various contributing factors, each one with its own score, and he explains the rationale for each score. We will not summarise these here but will instead refer to them later.

6. As regards the decision to pursue a dual approach of financial penalties and criminal prosecution, Mr Quaroni was asked what this was designed to achieve.

Mr Quaroni said that each property was separate and the Respondent wanted to achieve maximum impact because of the extent of the offences. He also believed it to be standard practice to prosecute for failing to provide information, as the Respondent had done here. He accepted that the Respondent had not previously adopted a dual approach but said that this was the first case of its kind. Adopting the dual approach gave the Respondent more tools to deter future offending.

7. Mr Quaroni was a little uncertain specifically as to why a dual approach would necessarily achieve a greater penalty or greater deterrence. When pressed, he accepted that it was possible that the decision to impose a financial penalty could have been influenced by the fact that all of the money from the penalty would come to the Respondent.

8. As for the information provided by the Applicant in relation to his income, Mr Quaroni was asked what evidential burden he used when testing it and his answer was that the Applicant offered no supporting evidence for his statements, although Mr Quaroni conceded that he did not ask for more information. When pressed as to the evidential burden he said that he had relied on his legal team.

9. Counsel for the Applicant put it to Mr Quaroni that the Applicant would have to sell his home in order to pay the financial penalty, to which he replied that this might be the case but that his job was to apply the matrix. As regards mitigation, it was also put to Mr Quaroni that the Applicant's mental health should have been a mitigating factor but Mr Quaroni said that it was not a defence to the commission of an offence.

10. Mr Quaroni accepted that the Applicant at one point told a landlord that it was the landlord's job to obtain a licence and that probably all of the landlords knew that their property was being let out as an HMO. He also accepted that the Properties were generally in at least average condition.

11. As regards the level of harm, it was put to Mr Quaroni that very little harm had been caused to others in this case. Mr Quaroni accepted that there had been relatively few complaints by tenants but added that there was some evidence that tenants had been discouraged from complaining. He also said that the large number of individual occupiers led to a greater health risk arising out of the failure to license a property. On the question of the level of vulnerability of the occupiers, Mr Quaroni noted that the occupiers were generally foreign women but he accepted that there was no actual evidence of vulnerability.

12. As regards the Applicant's level of culpability, it was put to Mr Quaroni that surely the level of culpability differed between the Properties as one of the failures to obtain a licence had to be treated as a first-time offence. Or were they all collectively a first-time offence? Mr Quaroni accepted that this was a possible analysis but said that nevertheless multiple offences had been committed and therefore the Applicant was a multiple offender. As for the proposition that the Applicant was a portfolio landlord, it was put to Mr

Quaroni that even if this was technically true he was a 'one-man band' managing a few properties. In response, Mr Quaroni emphasised that the Applicant had been managing a large number of properties in total (not just the 7 properties which were the subject of these proceedings or the subject of criminal prosecutions); at one time he was advertising up to 75 rooms.

13. Regarding the category in the matrix labelled as 'punishment of the offender', it was put to Mr Quaroni that there had been no previous convictions or fines, but Mr Quaroni said that relevant factors included the number of offences now and the Applicant's lack of co-operation.

14. On the issue of financial benefit, Mr Quaroni said that it was felt that the penalty should have the maximum financial impact as the offences had been going on a long time, the Applicant had made a lot of money, and he had been able to refurbish his home. Mr Quaroni was asked again about how he had made his financial calculations and he referred to the relevant pages in the hearing bundle showing the basis of his calculations whilst accepting that some of the calculations were based on certain assumptions where information was missing.

15. On the issue of the need to deter the offender, it was put to Mr Quaroni that the Applicant had already stopped offending by the time the penalty was set. Mr Quaroni replied that even if that was true in relation to these properties, deterrence was also about future offending and about deterring others. As to why one of the landlords was only fined £5,000, Mr Quaroni said that the landlord in question had no links to any other property and engaged properly and quickly with the Respondent.

16. As for mitigating factors, Mr Quaroni did not accept that the Applicant's mental health, the loss of his home, the need to cancel his marriage plans or his parents' poor health were relevant mitigation.

17. On the issue of totality, Mr Quaroni's view was that totality can be applied to a single property but should not be applied across different properties.

<u>Applicant's evidence</u>

18. At the hearing the Applicant said that he spoke to the landlords many times about applying for an HMO licence but they were not interested. As regards the Applicant's lack of co-operation with the Respondent when it was investigating, he said that he tried to avoid speaking to the Respondent as he was frightened about losing his job and about what would happen to his landlords.

19. He said that he had been suffering from depression because of this case and because of his other problems noted above. He had no current income apart from financial support from his parents.

20. In cross-examination the Applicant confirmed that he had suspected that HMO licences were needed for the Properties. He also accepted that some of his tenants had been unhappy with his level of service. There were problems as regards his attending 26 Inverine Road without giving notice, and he accepted that complaints were made at 35 Priolo Road but said that he had raised them with his own landlord who had been uncooperative. It was put to him that there were some significant issues at 35 Priolo Road such as no smoke detectors, no handrail, no carbon monoxide monitor and the presence of disused fridges, and he accepted that his role was not simply to pass on messages of complaint to his own landlord.

21. Counsel for the Respondent asked the Applicant about his extensive uses of aliases when dealing with the Respondent in relation to this matter and in relation to Council Tax. The Applicant suggested in relation to one instance that he might have typed his name incorrectly. In relation to another instance he accepted that he had used "Sam" as a first name rather than "Dayu" but said that "Sam" was a nickname. He also said that he did not want to show up on the Respondent's system and he repeated that he had been frightened about the possibility of losing his job. In response to other questions about his use of aliases the Applicant simply apologised to Counsel for the Respondent for the use of aliases, and at times when asked for the rationale he said that he had "no knowledge". He accepted that he had given an incorrect name to Mr Quaroni when he spoke to him on 29th July 2019 and that he had refused to provide identity documents or to give his address or date of birth.

22. The Applicant was also asked about the copy tenancy agreement for 26 Inverine Road which was in the bundle. It was put to him that clause 4(2), which related to the question of who was responsible for licensing the HMO, had been inserted by him afterwards in order to try to make the freeholder solely responsible. In response he said that he periodically updated documents.

23. The Applicant acknowledged that he had failed to attend when invited to interview by the Respondent and that he had failed to respond to written requests for information. He also accepted that he had entered into new arrangements with subtenants whilst knowing that he was being investigated and that he had sent messages to subtenants asking them to lie to the Respondent.

24. In response to a question, the Applicant agreed that subtenants had paid him by bank transfer. He had provided the Respondent with an estimate of his income from property letting but accepted that he had not provided any copy bank statements or other supporting information.

Other witness evidence

25. We note the witness evidence from occupiers of the Properties, none of which was tested in cross-examination. It seems to be common ground that there are some occupiers who have stated that the Applicant was a good landlord and others (notably Ms Scarpati) who had complaints about his management.

Applicant's case

26. The Applicant does not deny the operation of HMOs without a licence and accepts that a financial penalty should be imposed. The appeal is against the level of that penalty.

27. An investigation was begun in relation to his property management activities in June 2019, resulting in several properties being identified as being managed by him. The investigation initially just resulted in his being charged with offences under section 72(1) of the 2004 Act, but then he was charged with further offences under sections 235(2) and 16(1) of the 2004 Act. Despite the Respondent being, in his view, in possession of sufficient evidence by November 2019 to decide how to proceed the Applicant was issued with two initial financial penalties, followed by criminal charges, followed by two further financial penalties and then further criminal charges over the course of two months.

28. In the Applicant's submission, it is not within the spirit of the 2004 Act to initiate criminal proceedings for some offences and to impose a fixed penalty in respect of others in circumstances where the offences are all part of the same course of conduct. By separating out the breaches in the way that the Respondent has done in this case, he argues, the tribunal is restricted in its ability to consider the totality of the penalty. This has resulted in his being punished with a fixed penalty and a criminal conviction, with an additional penalty to be decided by the Magistrates' Court.

29. Counsel for the Applicant submits that the decision to retain certain matters as 'fines' was made in the context that there would also be criminal prosecutions for the same course of conduct, and the 'public interest' test must be applied to that decision. He then goes on to question what the public interest was in not prosecuting four failures to license HMOs whilst at the same time prosecuting other offences relating to a failure to provide required information. He quotes Mr Quaroni as describing the Respondent's decision to take this dual approach as the Respondent "hedging their bets" and says that Mr Quaroni was unable to explain what additional objective was achieved by taking civil action in addition to pursuing criminal proceedings. He submits that the only real reason for pursuing both courses of action was to generate income for the Respondent, and he quotes Mr Quaroni as admitting that the financial advantages to the Respondent of using a civil penalty would have been considered at some point.

30. Counsel for the Applicant argues that to proceed with criminal prosecutions and civil penalties simultaneously disregards the general principle of totality in sentencing in the context of what was clearly a single course of conduct which needed to be viewed together when considering punishment. In his submission, fines are an alternative to criminal prosecution and are not intended to be used as an additional penalty unless the multiple offending in question is separate and unrelated.

31. On the question of whether the Applicant was acting alone or with the knowledge of the relevant landlord, the Applicant states that witness evidence submitted to the Magistrates Court and not challenged by the Respondent shows that the landlords knew what was happening. Counsel for the Applicant invites the tribunal to accept that the Applicant made no attempt to hide from his landlords that he was subletting.

32. On a separate point, the penalty notices included a provision that each penalty would be reduced by 50% if paid within 28 days, but on 7th January 2020 the Respondent applied for and obtained a restraint order under the Proceeds of Crime Act. The effect of that order was that the Applicant was unable to dispose of any of his property, which would have been the only way he could have afforded to pay the penalty within that timescale.

33. On another point, the Applicant notes that one of the landlords was only given a £5,000 penalty whereas his penalty was £25,000 per Property (and £100,000 in total), and he considers it unfair that he should have been penalised so much more heavily than the relevant landlord.

Analysis of Respondent's matrix

34. Counsel for the Applicant notes that the Respondent as a local authority is entitled to develop and apply a policy for assessing financial penalties, although he argues that the matrix prepared by the Respondent in this case (and other cases) does not have the same authority as the policy itself and is merely an attempt to apply the policy in an objective and consistent manner. The matrix should therefore not be regarded as some form of quasi legislative framework. In this context he argues that there may be areas of discretion, when applying the matrix, which would benefit from experience and good judgment and states that person who used the matrix in this case to arrive at a penalty – Mr Quaroni – in fact has limited experience in this area.

35. The Respondent's policy allows for a portfolio landlord to be treated more harshly than a landlord of a single property, the rationale being that portfolio landlords are likely to belong to large organisations with large resources who can be expected to have the backing of senior management as well as experience and training. In the present case, the Applicant had what numerically counts as a portfolio but not in the way anticipated by the policy as he was a 'one man band', had no supervisory back-up or offices, was operating as a small business, had no training or experience, was in all cases only a tenant himself and only received a small percentage of the rent.

36. There has also been an element of double-counting. The number of properties is stated to increase the seriousness of the offence but the Applicant has also been fined separately for each Property. In addition, in order to reach the

number of 5 properties in order for the Applicant to be said to be managing a portfolio, the Respondent must have included properties being dealt with in the Magistrates' Court.

37. As regards the level of culpability and the way in which it has been scored in the matrix, there has been no prior offending and the Applicant was previously of good character. The other current offences cannot constitute prior offending as they are only being dealt with now. Counsel for the Applicant submits that a more measured approach to culpability should have been taken, whereas Mr Quaroni has at each stage erred on the side of selecting the higher score.

38. As regards the level of harm and the way in which it has been scored in the matrix, it is submitted that the two factors – severe level of health risk and 5 or more victim households – could be interpreted as cumulative (i.e. both needing to be present) for a score of 20 to be appropriate. Not all properties occupied by 5 people present the same risk. In practice, most of the Applicant's sub-tenants had been happy, the main complainant being Ms Scarpati. No severe level of health risk or harm was identified in any of the Properties and there were no vulnerable occupants.

39. As regards the aspect of the Respondent's policy which seeks to punish the offender and the way in which it has been scored in the matrix, Mr Quaroni has conceded that there were no previous infractions other than a complaint in 2016 in respect of which no action was taken. The Applicant is not a repeat offender but a first-time offender and his lack of co-operation was only in relation to the present case. In addition, he pleaded guilty immediately in the Magistrates Court. In the circumstances, the Applicant considers Mr Quaroni's scoring of this element to have been too high and that it also contained an element of double-counting for 'repeat offending'.

40. As regards financial benefit and the way in which it has been scored in the matrix, the Applicant was earning a fraction of the amount being earned by his landlords. Mr Quaroni's estimate as to the amount of money earned by the Applicant from these lettings is speculative and includes an assumption that the deposit for his home came from illegal letting. There is no evidential basis for Mr Quaroni's conclusions and he has ignored council tax payments, expenses and empty rooms in making his calculations.

41. The Respondent has applied the maximum deterrence effect but to do so is disproportionate to the circumstances. The Applicant has received a much greater penalty than one of the landlords, even though the landlord concerned would have made a much greater profit, and he has since been co-operating with the Respondent. Seen from the Applicant's perspective, this was a low value operation. The Applicant has been severely affected by the investigation and is unlikely to put himself in this position again.

42. The matrix requires the Respondent to consider mitigation but Mr Quaroni has concluded that there are no mitigating factors at all. This is despite the fact that there are no previous convictions, the investigation has severely affected the

Applicant's mental health, he may have to sell his home to pay the financial penalty, and he has belatedly now sought to obtain licences for all of the Properties.

43. On the issue of totality, Counsel for the Applicant submits that Mr Quaroni admits not having considered the principle of totality at all but that he should have done so because the offences in question constituted one course of conduct. He further submits that £30,000 is the maximum amount that should have been applied.

Respondent's case

Two-track approach

44. The Applicant has criticised the Respondent's two-track approach in imposing financial penalties for certain offences whilst pursuing criminal prosecutions for others. However, the statutory scheme does not prohibit a split approach. As to whether the Respondent has disregarded the 'spirit' of the legislation, if Parliament had intended offenders to be dealt with in total in one forum or another then it could easily have provided for this. Furthermore, it is entirely logical for the Respondent to have taken this approach as it wanted an approach which was the most rapid and the most effective and had the most deterrent value. The Respondent's view was that financial penalties provide a rapid response and can deter escalation, whilst prosecutions usually take longer but are effective as a record of a person's convictions.

45. The Respondent could have pursued a criminal prosecution for all seven properties, and this could easily have led to a worse position for the Applicant, and therefore there is no basis for concluding that there was something intrinsically unfair about pursuing a split approach.

46. On the question of totality as between the financial penalty and the criminal prosecution, any problem is easily resolved by the Applicant informing the Magistrates Court when sentenced there of the outcome of the present appeal so that the Magistrates can take the outcome of this appeal into account.

The restraint order

47. The Applicant objects that he was unable to take advantage of the offer to pay only 50% of the penalty by paying within 28 days because of the restraint order preventing him from dealing with his assets, but Counsel for the Respondent submits that the Applicant would have been able to obtain a variation of the restraint order on that basis.

The matrix

48. The Applicant argues that the matrix does not have the same authority as the Respondent's enforcement policy itself, but Counsel for the Respondent submits that it is clear from considering the enforcement policy that the matrix is part and parcel of the policy. It does, though, need to be read in conjunction with the remainder of the policy in order fully to understand it.

49. The category of culpability is effectively the level of intention or 'mens rea', save that ignorance is no excuse. In this case the Applicant has confirmed that he knew enough about the licensing requirements to have raised them with his landlords, but it was insufficient in law just for him to pass on his concerns. The length of time over which the offending took place is also relevant to culpability. Furthermore, the Applicant was obstructive and deceptive and tried to hide his offending from the Respondent, and he altered the wording of one of the tenancy agreements in order to try to shift the blame. The offence was repeated many times, and to recognise this in the scoring is not double-counting but goes to the degree of culpability.

50. Regarding the issue of previous offending, the key point is that the Applicant has been offending for a very long time, and the Applicant cannot simply argue that he is technically a first-time offender.

51. As for the uplift for agents/landlords of multiple properties, the Respondent is entitled to apply this uplift – either the Applicant has a portfolio or he does not. In this case the Applicant had over 70 rooms to let and was running the operation as a business through a company.

52. Regarding the level of harm, there were generally at least 5 occupiers in each Property, and the number of occupiers (or 'victims') is relevant. It is also submitted that young women from overseas are in a more vulnerable category. There is some evidence of actual harm to occupiers, as some of the shortcomings in the Properties are a direct result of the failure to license.

53. As for the principle of removing the financial benefit derived from offending, it is accepted that the Respondent's calculations could not be scientific as the Respondent did not have full information, but the penalty needs to be large enough to remove any profit. The Applicant's counter-assertions as to the amount of profit are not supported by any evidence. In addition, the Applicant has £235,000 worth of equity in his home, and so a penalty of £100,000 still leaves him with the ability to rent another property for a considerable period.

54. The penalty also needs to be large enough to act as a deterrent; this was an unprecedented case and deterrence is crucial.

55. As regards mitigating factors, the Respondent's policy sets out what counts as legitimate mitigation and most of it relates to the level of cooperation. None of what the Applicant claims as mitigation is relevant.

56. As for the totality principle, the policy states that where there are multiple offences arising from separate incidents/conduct the Respondent will assess each one individually and apply separate civil penalties where it is proportionate to do so. This is what the Respondent has done in this case.

Tribunal's analysis

Preliminary points

57. Under Schedule 13A to the 2004 Act, this appeal is a re-hearing of the Respondent's decision but may be determined having regard to matters of which the Respondent was unaware.

58. The Applicant accepts that he controlled and/or managed an HMO at each of the four Properties, that the HMOs were required to be licensed but were not so licensed, and that therefore he has committed an offence under section 72(1) of the 2004 Act in respect of each Property. Neither the Applicant nor his legal representative has sought to argue, for the purposes of section 72(5) of the 2004 Act, that he had a reasonable excuse for controlling and/or managing the Properties in the circumstances set out in section 72(1).

The enforcement policy

59. In relation to the Respondent's enforcement policy, the logical starting point is the recent decision of the Upper Tribunal in *Waltham Forest LBC v Marshall (2020) UKUT 35*. In that case, Cooke J noted that the Secretary of State published guidance on enforcement in 2016 (re-issued in 2018) and that near the beginning of that guidance it states that local housing authorities must have regard to the guidance in the exercise of their functions. Later on, it states that the First-tier Tribunal (FTT) is not itself bound by the guidance but "will have regard to it". The guidance also states that local housing authorities should develop and document their own policy on determining the appropriate level of civil penalty in a particular case, and Cooke J went on to note that the FTT is not the place to challenge the local housing authority's policy itself. Cooke J also added that the local authority is an elected body and its decisions deserve respect for that reason. Whilst the FTT can depart from the local authority's policy it must start with the policy and only depart from it if persuaded that it should do so, the burden being on the appellant to persuade the FTT that it should.

60. In the present case, the Applicant is not seeking to use these proceedings to challenge the validity of the Respondent's policy, and nor in our view is he inviting the tribunal to depart from that policy. Instead, he is challenging the application of the policy to the facts of this case and is also questioning the status of the matrix.

The Respondent's twin-track approach and the statutory totality limitation

61. We note the wording of legislation and the submissions of the parties on these points. Section 249(1) of the 2004 Act allows a local housing authority to 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 ..."*. Section 249(3) states that *"only one financial penalty under this section may be imposed on a person in respect of the same conduct"* and section 249(4) states that *"the amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000"*.

62. In our view it is clear that the limitations set out in sections 249(3) and 249(4) are intended to be read by reference to the phrase *"in respect of premises"* contained in section 249(1). Section 249(1) deals with the imposition of a penalty for a housing offence in respect of premises, i.e. in respect of a single property, and therefore in our view it is implicit that the limitation in section 249(3) that only one penalty can be imposed and the limitation in section 249(4) that the total amount of the penalty must not be £30,000 assumes in each case that the offences in question relate to the same property. Aside from the point that this is the more natural reading of section 249(1), it cannot have been Parliament's intention that if a person has committed multiple serious offences in respect of a hundred properties the local housing authority can only impose a single penalty on that person of no more than £30,000.

63. As to whether the Respondent's twin-track approach was outside the 'spirit' of the legislation, we do not accept that it was. Faced with what it considered to be a very serious case the Respondent was entitled to use all the tools at its disposal. The Respondent has argued that financial penalties and criminal prosecutions have different advantages and disadvantages and that it used a mix of the two in order to try to achieve a result which in part would be (or could reasonably have been anticipated to be) relatively quick and which in part would achieve maximum deterrence.

64. Whilst it is true that Mr Quaroni acknowledged the possibility that the Respondent could have chosen to pursue the financial penalty route because the money would all go to the Respondent, this acknowledgement has to be seen in its proper context. Mr Quaroni, a relatively junior officer, was cross-examined for several hours and was pressed on this point. Although there was nothing improper about the cross-examination, in our view Mr Quaroni was merely being candid in allowing for the possibility that this was the Respondent's motivation rather than making an admission that it was. Mr Quaroni stressed on a few occasions that he had consulted with colleagues and had taken advice from in-house lawyers, and we do not see his comments as being more than speculation.

65. As regards whether the Applicant was unfairly prejudiced by the Respondent's approach, in a sense we consider this to be the wrong question in that the Respondent is entitled in principle to adopt the approach which it considers will be the most appropriate in the circumstances, provided that it acts properly. But in any event, there is no evidence that the Applicant has been unfairly

prejudiced by this approach. It is not clear that a different approach would necessarily have been better for the Applicant, even if this were a relevant consideration, and when final sentencing takes place at the Magistrates Court it will be open to the Applicant to notify the Magistrates as to the level of financial penalty set by this tribunal so that they can take it into account.

66. As Counsel for the Respondent has argued, if Parliament had wanted to prevent a twin-track approach being used it could easily have provided for this in the legislation. In conclusion, we do not accept that there was anything unlawful about the Respondent's twin-track approach, and nor do we accept that the Respondent is unable to impose a penalty which is higher than £30,000 across the four Properties.

The status of the matrix

67. It has been suggested by the Applicant that the matrix does not have the same authority as the enforcement policy itself, but we do not accept this. It is clear from the wording of the enforcement policy itself that the matrix (including the accompanying narrative) is intended to be the vehicle through which the enforcement policy is applied by scoring different factors according to certain criteria in order to arrive at a total figure which is then translated into the amount of the financial penalty.

The application of the facts to the scoring in the matrix

General

68. Whilst it is clear from the decision of the Upper Tribunal in *Waltham Forest LBC v Marshall* that the FTT is not the place to challenge the local housing authority's policy itself and that the FTT should be slow to depart from it, it is nevertheless open to the FTT to decide that the policy has been incorrectly applied if the facts warrant that conclusion.

69. Neither party has made any real attempt to distinguish between the different Properties on the facts, save for the degree to which occupiers have made complaints. However, even in connection with these complaints there has been no real attempt by either party to suggest that any specific Property has any distinguishing features such that it should be scored differently from the others. The comments that follow therefore apply equally to each Property, and we will use the matrix for 26 Inverine Road as the starting point, dealing with each factor listed in the matrix in turn.

70. As noted above, we do not consider that the Applicant is seeking to argue that the tribunal should depart from the Respondent's enforcement policy in this case. However, just for completeness, we do not consider that there is any proper basis in this case to depart from that policy, the burden to persuade the tribunal to do so being on the Applicant.

Culpability

71. The first factor in the matrix is the culpability of the offender, which the Respondent has scored as 15. The narrative in the template matrix for this category is *"Multiple offender. Some premeditation. The offence has been ongoing for a significant period of time. A case history of non-cooperation and relevant prior offending including a repeat of this offence"*. In our view the evidence indicates that the Applicant knew that the Properties needed an HMO licence and that therefore the offences were premeditated. The offences were also ongoing for a significant period of time and there has been a high degree of non-cooperation. What is less clear is whether the Applicant was a multiple offender when charged with these offences and whether there was relevant prior offending.

72. Taken literally, the concepts of multiple offending and relevant prior offending could be interpreted as referring only to offences for which the Applicant has previously been convicted. Indeed, there could be a perfectly sensible rationale for this, as this scoring category could be aimed at someone who has previously been convicted of a relevant offence and yet has not been sufficiently deterred by the previous punishment to refrain from re-offending. However, at the same time, multiple offences have in fact been committed and it is reasonable to consider the widespread nature of the offending when determining the level of culpability.

73. It is also necessary to consider whether the next category down would in fact be more appropriate or not. The narrative for the next category down is *"Second or third time offender. No premeditation. The offence has been going on for a modest period of time. A case history of non-cooperation and relevant prior offending which may include a repeat of the current offence"*. Whilst this formulation comes up against the same issue of whether the Applicant was a first-time offender, in our view the narrative for the score of 15 is overall more appropriate than that for 10. There was clear premeditation, the offences have been going on for a significant period of time and the degree of non-cooperation, including using aliases, persuading his tenants to lie to the housing authority and refusing to provide information, is very severe. Coupled with the fact of there being multiple offences, even if there is an argument that they are collectively first-time offences and that one of them is a first-time offence, we consider that a score of 15 is appropriate, especially given that in our view the Respondent has to be allowed a degree of discretion as to how it applies the matrix to the facts.

Portfolio landlord or agent

74. It is common ground between the parties that the Applicant fits the category of portfolio landlord and/or agent. The Applicant argues that he is only technically a portfolio landlord and that he is a 'one-man band'. However, the Applicant has not disputed the Respondent's analysis that he had over 70 rooms to let and was running the operation as a business through a company, and in our view the Respondent was perfectly entitled to apply the portfolio uplift.

Level of harm

75. The Respondent has scored this category at 20, which is the maximum, and then there is an automatic multiplier built in to the matrix which has the effect of doubling the score to 40. This category is described by the matrix as *"Severe-level health risk(s)/harm(s) identified. Five or more victim households"*. The evidence does indicate that there were generally (although not always) 5 or more occupiers at each Property, and so the question is whether the Respondent has successfully identified severe-level health risks/harms.

76. In its justification for scoring this category at 20 (which then doubled to 40), the Respondent states in completing this section of the matrix merely that the Property was occupied by 5 households, there being no reference to the severity of any health risks identified. The Respondent has sought to argue that the presence of several occupiers increases the health risks, and there is some truth to this, but in our view it is clear that in order to be able to justify the highest score in this category other evidence of severe-level health risks needs to be identified.

77. One factor identified by the Respondent, although not mentioned in the matrix, is the fact that the occupiers were generally female and from overseas. We do not accept that the mere fact that the occupiers were female should give rise to an automatic assumption of greater health risks, and there is no credible evidence before us that there was any greater risk in practice. We do, though, accept that the fact that the occupiers were generally from overseas could have made them more vulnerable as they might have been less familiar with a range of practical matters, including how to complain, and may also have had a relatively poor command of English. As for the state of each Property, whilst there is some evidence of problems not always being dealt with properly the Respondent has conceded that the Properties were all in at least 'average' condition.

78. Having considered the evidence, we therefore struggle to see how any of the Properties could have been scored at the maximum amount for 'level of harm'. Even the next category down (leading to a score of 15) refers to severe-level health risks/harms as having been identified, and again the evidence does not support this. The category below that (leading to a score of 10) refers to *"Moderate-level health risk(s)/harm(s) identified. Two to four victim households. Vulnerable occupants potentially exposed"*. Whilst it is clear that none of the categories exactly fits the facts of this case, what needed to happen was for the Respondent to have chosen the category which was the most appropriate balancing all of the circumstances. And whilst we accept that this process is not an exact science and that the Respondent needs to be given a degree of leeway and discretion, in our view a score of 20 or even 15 is clearly too high, as the Respondent has failed to identify severe-level health risks/harms, and the existence of severe-level health risks/harms seems to us to be a key part of the rationale for scoring 'level of harm' that highly. We accept that the facts do not fully fit the '10' category either, but in our view it is the most appropriate category. It is arguable that the health risks identified can be

categorised as moderate and that there was a degree of vulnerability in the occupiers, and a score of 5 is clearly too low (based on the narrative in that box) whilst a score of 15 or more is in our view too high.

79. Therefore, the level of harm figure needs to be reduced to 10, which then rises to 20 with the automatic weighting multiplier.

Punishment of the offender

80. This has been scored at 15, which is a score intended to reflect the following: *"Significant other crime. Offender made attempts to pervert and hostile to cooperation"*. As noted above, it is at least arguable that "other crime" is referring to previous offending rather than multiple current offending. However, the fact remains that the Applicant has committed several offences over a significant period of time. Furthermore, his attempts to pervert and his hostility to cooperation have been at the severe end of the spectrum. His attempts to cast a more sympathetic light on his behaviour have not been remotely credible, and that level of deception and obstruction needs to be punished severely.

81. We note that the next category down is for *"Minor previous infractions, attempts to pervert, unwilling to cooperate"*. We do not consider that this adequately reflects the extent of the Applicant's lack of cooperation, and in any event we accept that the Respondent can easily justify opting for the higher category and a score of 15.

Financial benefit

82. The Respondent has again opted for the highest category, giving a score of 20 which then automatically rises to 40 because of the multiplier. This score is for where it is justifiable to opt for the *"maximum financial impact available"*. The Respondent's rationale is that the Applicant *"has been generating an income off of illegally letting properties within the borough"*, but it is hard to see why someone would let out properties commercially otherwise than to generate an income and so this rationale does not explain why the Respondent has scored this factor in the highest category.

83. As regards the Respondent's evidence of the amount of income generated, the Applicant objects that some of the Respondent's calculations are speculative, but the Respondent does not deny this. Mr Quaroni accepts that there is missing information but comments that the process is not an exact science and that some assumptions have had to be made. The Applicant also states that the Respondent's calculations are at odds with his own calculations, but the

Respondent counters that the Applicant has offered no supporting evidence to substantiate his calculations.

84. We agree with the Respondent that the Applicant has failed to substantiate his own calculations, and particularly in the light of the substantial evidence of the Applicant's hostility to cooperation with the Respondent, his frequent use of aliases and his encouragement to others to lie on his behalf we are not inclined to place much weight on his own assertions as to the amount of income generated in the absence of independent evidence. On the other hand, Mr Quaroni has indeed made a number of assumptions and the Respondent has failed to explain why the financial benefit is such as to place this case in the highest category.

85. Having considered the evidence on financial benefit and in the light of the Applicant's complete lack of credibility, our view is that whilst the Respondent has been unable to explain why this case should be in the very highest category for the factor of financial benefit, it is plausible that this case fits within the next category down (scored at 15), which is the category of *"Large financial impact"*. Therefore, the financial benefit figure needs to be reduced to 15, which then rises to 30 with the automatic weighting multiplier.

Deter the offender and others

86. This has been scored at 15, and such a score is categorised as follows: *"Publicity will be sought. Large deterrence to offender and landlord community"*. We note the Applicant's objections but do not accept the validity of any of them. In each case the Applicant committed a serious offence in the context of his controlling a significant portfolio run through a company. His level of premeditation, deception and non-cooperation was severe and the offences were committed over a long period. It is entirely appropriate for the Respondent to wish to send a strong message of deterrence to the Applicant and to other landlords and to seek publicity for the Applicant's behaviour. Therefore we accept the score of 15.

Assets and income

87. Again this has been scored at 15, and such a score is categorised as follows: *"Small/medium portfolio landlord/agent (between 3 – 10 properties) with other assets/income"*. On the basis of the evidence provided, the basic factual details of which are uncontested, this seems to us to be the most appropriate category and therefore we accept the score of 15.

Mitigating factors

88. The Applicant has offered evidence of various matters such as poor mental health, parents' illness and the need to sell his home to pay the penalty. However, under the Respondent's enforcement policy none of these matters is relevant to mitigation in respect of this type of financial penalty. Three of the

seven specific matters which the Respondent's policy requires it to consider in mitigation relate to steps voluntarily taken to remedy the problem and the degree of cooperation, and it has already been established that the Applicant has behaved extremely poorly judged by these measurements.

89. There are other matters listed, but none of them applies here. Whilst it is true that two relate to medical matters, it is not the case that the Applicant had a mental disorder or learning disability or a serious medical condition which is or was linked to the commission of the offence. We are also not persuaded that the Applicant has shown there to be any relevant factors which have not specifically been listed. The scoring of 0 (zero) is therefore entirely appropriate, save for the minor point that technically the lowest score on the matrix is 1 and that therefore it should be increased to 1 (this being a figure which needs to be deducted from, rather added to, the total).

Double-counting

90. The Applicant has raised a general objection that the way in which the matrix works gives rise to double-counting. However, the way in which the matrix works is part of the enforcement policy and therefore in our view this constitutes a challenge to the policy itself. Such a challenge is outside the scope of this appeal.

Level of penalty

91. The level of penalty for each Property therefore needs to be based on the following scores:-

Culpability	15
Portfolio landlord	30
Level of harm	20 (after applying multiplier of 2)
Punishment of offender	15
Financial benefit	30 (after applying multiplier of 2)
Deter offender & others	15
Assets & income	15
Mitigating factors	-1.

TOTAL	139

92. The total score of 139 gives rise to a penalty of £15,000 for each Property. As noted above, it is consistent with the Respondent's enforcement policy to assess each Property individually and to apply a separate penalty for each Property. There is no requirement either in the legislation or within the Respondent's enforcement policy for it to employ the totality principle to reduce the total aggregate penalty.

93. Pursuant to Schedule 13A to the 2004 Act we therefore hereby vary each of the final notices so as to reduce the financial penalty to £15,000 per Property and therefore to a total of £60,000.

Cost applications

94. Prior to the hearing the Applicant's solicitors provided the tribunal with a written statement of their costs, although no costs submissions were made at the hearing and the basis of any cost application (if indeed one is being made) is unclear.

95. If either party wishes to make any cost application it must submit this in writing to the tribunal within **14 days** after the date of this decision, with a copy to the other party. The legal basis and justification for any such cost application must be clearly stated. If either party wishes to respond to a cost application made by the other party it must submit that response in writing to the tribunal within **28 days** after the date of this decision, again with a copy to the other party.

Name: Judge P Korn **Date:** 16th October 2020

RIGHTS OF APPEAL

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

B. 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.

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

D. 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.

Appendix

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part ... but is not so licensed.

(5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse ... for having control of or managing the house in the circumstances mentioned in subsection (1) ... .

249A Financial penalties for certain housing offences in England

(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

(2) In this section "relevant housing offence" means an offence under—

(a) section 30 (failure to comply with improvement notice),

(b) section 72 (licensing of HMOs),

(c) section 95 (licensing of houses under Part 3),

(d) section 139(7) (failure to comply with overcrowding notice), or

(e) section 234 (management regulations in respect of HMOs).

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if— (a) the person has been convicted of the offence in respect of that conduct, or (b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6) Schedule 13A deals with—

(a) the procedure for imposing financial penalties,

(b) appeals against financial penalties,

(c) enforcement of financial penalties, and

(d) guidance in respect of financial penalties.

(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9) For the purposes of this section a person's conduct includes a failure to act.

SCHEDULE 13A

FINANCIAL PENALTIES UNDER SECTION 249A

Appeals

6 If the authority decides to impose a financial penalty on [a] person, it must give the person a notice (a "final notice") imposing that penalty.

10

(1) A person to whom a final notice is given may appeal to the First-tier Tribunal against – (a) the decision to impose the penalty, or (b) the amount of the penalty.

(3) An appeal under this paragraph – (a) is to be a re-hearing of the local authority's decision, but (b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.