



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **BIR/41UG/HNA/2020/0016**

HMCTS code : **V:CVPREMOTE**

Property : **4 Park Crescent Stafford ST17 9BQ**

Applicant : **Roger Kirkham**

Respondent : **Stafford Borough Council**

Representative :

Type of application : **Appeal against a financial penalty -
Section 249A & Schedule 13A to the
Housing Act 2004 (“the Act”)**

Tribunal : **Judge D. Barlow
Mr P. Wilson
Mr R. Bryant-Pearson**

Hearing : **16 November 2020**

DECISION

COVID 19 PANDEMIC: DESCRIPTION OF HEARING

THIS HAS BEEN A REMOTE VIDEO HEARING WHICH HAS NOT BEEN OBJECTED TO BY THE PARTIES. THE FORM OF REMOTE HEARING WAS SKYPEREMOTE. 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 THAT THE TRIBUNAL REFER TO ARE WITHIN THE APPLICATION, THE APPLICANTS STATEMENT OF CASE AND A BUNDLE OF 210 PAGES FILED BY THE RESPONDENT, THE CONTENTS OF WHICH HAVE BEEN FULLY CONSIDERED BY THE TRIBUNAL. REFERENCES TO PAGE NUMBERS IN BRACKETS, ARE TO THE RELEVANT PAGE(S) WITHIN THE BUNDLE.

DECISION

- (1) The decision of Stafford Borough Council (“the Council”) to impose a financial penalty of £5000.00 for offences under s234 of the Act against the Applicant is confirmed.
- (2) The decision of the Council to impose a financial penalty of £10,000.00 for an offence under s72 of the Act against the Applicant is not confirmed and the financial penalty is cancelled.

REASONS

BACKGROUND

- 1) This is an appeal against financial penalties issued by the Respondent Council to the Applicant in the amount of £5000.00 and £10,000.00 respectively, made under section 249A and Schedule 13A, of the Housing Act 2004 (“the Act”).
- 2) On 21 May 2020, following consideration of representations received from the Applicant on 25 September 2019, the Respondent served on the Applicant, two Final Notices of Issue of a Financial Penalty under Schedule 13A of the Act, totalling £15,000.00.
- 3) The Notices of Intent were served on 2 August 2019. The first, proposing a financial penalty of £5,000.00 stated that the Respondent was satisfied that the Applicant, as a person having control of a Property operating as a House in Multiple Occupation (an “HMO”), had committed offences under s234 of the Act in relation to The Management of Houses in Multiple Occupation (England) Regulations 2006 (“the Management Regulations”). The element of the penalty attributed to each briefly described offence, is shown alongside:

- (i) Breach of Reg. 3 HMO Management Regulations £1,000.00 (The contact details for the manager were not clearly displayed.
 - (ii) Breach of Reg. 4 HMO Management Regulations £1,000.00 (The manager failed to ensure that reasonable measures were taken to protect occupiers from injury.)
 - (iii) Breach of Reg. 6 HMO Management Regulations £1,000.00. (The manager failed to ensure that the electrical installations had been inspected and tested every 5 years.)
 - (iv) Breach of Reg. 7 HMO Management Regulations £1,000.00 (The manager failed to ensure that the common parts of the Property were maintained in good and clean decorative order.)
 - (v) Breach of Reg. 8 HMO Management Regulations £1,000.00 (The manager failed to maintain the living accommodation.)
 - (vi) Total **£5,000.00**
- 4) The second Notice of Intent, served on 2 August 2020, proposed a Financial Penalty of **£10,000.00**. The Notice stated that the Respondent was satisfied that the Applicant, had committed an offence under s72(1) of the Act, that of having control of or managing an HMO which is required to be licensed under s61 of the Act and is not so licensed.
- 5) On 8 June 2020 the Applicant appealed to the Tribunal.

THE PROPERTY

The Tribunal did not inspect the Property due to corona virus restrictions in place at the time, but as seen on Google Street View (May 2019 images) it is apparent that the Property comprises an end of terrace, Edwardian style property probably constructed about 100 years ago. Mr Butcher's statement confirms however that the Property is constructed on the ground and first floors with an externally accessible cellar. The ground floor consists of a central hallway, with a bedroom and a living room to the right-hand side. There is a kitchen and bathroom to the rear of the ground floor. There is an external door to the rear leading from steps down into the garden which contains an outbuilding and access to the cellar. Stairs from the ground floor hall lead to a central landing with four bedrooms and a bathroom off. A sketch plan of the layout of the Property was attached to Mr Butcher's witness statement (page 17 of the bundle).

- 6) Official copies of the register of title show that the Property is jointly owned by Mr Roger William John Kirkham and Marion Muir Kirkham.

THE HEARING

- 7) The Applicant Mr Kirkham, represented himself at the hearing and gave evidence. The Respondent Council was represented by Ms F. Samuda. Mr

C. Butcher and Mr K Hewitt also attended for the Council and gave evidence.

The Respondents submissions

- 8) Mr Butcher's statement confirms that in March 2019 a complaint was received about poor housing standards from Mr Clayton, a tenant of the Property. The complaint alleged that the Property, a shared house occupied by six people, was in a poor state of repair. It was also poorly managed.
- 9) Mr Butcher confirmed that he was the lead officer in this case. On 11 March 2019 Mr Butcher inspected the Property with Mr Kevin Hewitt, a housing standards officer at the Council. During the visit they met the occupants of four of the five bedrooms. The occupants were identified as: Sam Briggs (bedroom 2, occupied 4 to 5 years); Nigel Clayton (bedroom 3, occupied two years); Michaela Trigg (Mr Clayton's girlfriend also occupying bedroom 3 since October 2018); Jesse Lee (bedroom 4, occupied since February 2019); Dan Hodgkins (bedroom 5, occupied 2-3 years). In discussion, the occupants told the Council officers that bedroom 1 was occupied by "Mike" who had been in occupation for approximately two years.
- 10) Mr Briggs indicated that he had written tenancy agreement to enable him to claim benefits. The other occupants did not claim to have a written agreement. Mr Hewitt's impression was that they probably didn't have one. All occupants confirmed that they paid rent direct to Mr Kirkham by bank transfer. The occupants raised concerns about the management of the Property. Although Mr Kirkham is generally approachable, he did not attend to specific concerns promptly, such as concerns about the electrical consumer unit tripping when the oven was used, water leaks from the bathroom and the overall cleanliness and condition of the Property.
- 11) Mr Butcher confirmed that the condition of the Property was poor. Cracked plaster was seen in several locations. The fire detection system was not working at the time of the visit. The common parts of the Property were dirty and contact details of the property manager were not displayed. He concluded that the Property was being insufficiently managed and it was likely that there were breaches of the Management Regulations. Mr Butcher was also concerned that there appeared to be at least five people occupying the Property as their own or main residence and the Property should therefore have been licensed under Part 2 of the Act.
- 12) During the visit Mr Butcher took a number of photographs which are attached to his statement (pages 37 to 44 of the bundle). The photographs show the general condition of the Property and more specific areas of concern including: the partially blocked rear escape route to the rear. A dilapidated outbuilding within the garden. Accumulated rubbish in the rear garden. The inside of the basement area left unlocked and accessible from an open access garden containing combustible items and the gas boiler. Access from the rear of the Property into the garden with no handrail at a reasonable height. The electrical consumer unit with missing

blanking plates allowing access to the live mechanism within it. The fire detection control panel in the ground floor hallway which at the time of the visit indicated “general disablement”. Various examples of disrepair to the Property. The escape route from the front of the first floor of the Property impeded and containing flammable materials.

- 13) On 18 March 2019, the Council sent a letter to Mr Kirkham enclosing a Schedule of Deficiencies (pages 18 to 28 of the bundle). The schedule provided details of material breaches of the Management Regulations. Mr Kirkham was also invited to attend an interview under caution to investigate the alleged offences. Mr Kirkham called the Council on 1 April 2019 to say he would not attend an interview, that he could not find the electrical safety certificate for the Property and was arranging for electrical works to be completed.
- 14) On 2 April 2019, Mr Butcher took a telephone call from Mr Clayton. He said that works were being completed at the Property but he was being asked to sign a backdated tenancy agreement from 1 January 2017 without mentioning his partner. On 3 April 2019 Mr Butcher met with Mr Clayton who provided a statement (pages 126-128 of the bundle). Mr Butcher took a photograph of a text message exchange between Mr Clayton and Mr Kirkham on 13/14 December 2018 which appears at page 30 of the Bundle, and reads as follows:

“Hi Roger, this is Nigel from 4 Park Crescent, just to let you know that I received your letter today, I am happy to pay at least £240 off of that on the 24. I would like my girlfriend to move into my room with me, is that okay and will you require any extra rent for this?” - 13th of December 2018

“No charge for girl but get the rent paid please” - 14 December 2018

- 15) Following a review of the information obtained during the visit, the statement of Mr Clayton and the information provided by Mr Kirkham, by letter dated 30 March 2019, Mr Butcher determined that offences had been committed. The evidence on site indicated there were six occupants. In his letter of 30 March 2019, Mr Kirkham said there were only four tenants living in the Property, he acknowledged that they do have guests from time to time and that it was impossible for him to know how long the guests stay. However, the text message evidence provided by Mr Clayton indicated that Mr Kirkham was aware of and allowed Mr Clayton’s girlfriend to move into the Property. Mr Butcher’s view was therefore that there were at least five, possibly six occupants, resident at the time of his visit. Either way a licence was required for the Property or an application for a temporary exemption to allow for the numbers in the Property to be reduced. Neither application had been made and therefore Mr Butcher contended an offence had been committed under section 72 of the Act.
- 16) Mr Butcher acknowledges that following contact with Mr Kirkham some remedial works were carried out to the Property but this did not, in his view, excuse the conditions found at the Property at the time of his inspection. Mr Butcher considered that the Property was poorly managed

and that it was not a reasonable excuse for a manager to wait until a statutory inspection revealed breaches of the management conditions before addressing poor housing standards. With regard to the specific breaches of the management regulations he submitted:

- (i) at the time of his visit the name and address and telephone number of the manager was not clearly and prominently displayed in the Property. Furthermore, several tenants appeared not to have documented tenancy agreements and therefore did not have the managers address. Breach of regulation 3.
 - (ii) at the time of the visit the escape route on the first-floor hallway and from the kitchen to the rear garden was blocked. The fire detection system had been disabled with the “general disablement” code illuminated. Fire extinguishers had not been serviced. Self-closing fire doors were propped open or missing. The cellar had open access from the garden and was filled with combustible materials. The electrical consumer unit was missing blanking plates that prevent access to the live parts within the unit. Breaches of regulations 4(1), (2) and (3).
 - (iii) Regulation 6 requires the landlord to ensure that the fixed electrical installations are inspected every five years and to provide a copy of the compliance certificate to the local authority within seven days. This was requested by the Council on 18 March 2019. The response from Mr Kirkham received on 8 April 2019 was after the seven-day requirement and enclosed a new certificate that did not cover the period up to and including inspection. The new certificate noted that “all code 1 and code 2 faults have been remedied” indicating that deficiencies were present at the time of the inspection.
 - (iv) Overall the inspection noted a poor state of decorative repair with damaged wall plaster, poor decorative quality repairs, disrepair to kitchen cupboards and the electrical socket for the cooker. The first-floor bathroom was dirty, the garden was not maintained, the stairs from the kitchen into the garden did not have an appropriate handrail. As a whole, it was considered there were breaches of regulations 7 (1) (2) and (4).
 - (v) The window frame in bedroom three did not shut properly and the door lock to bedroom four was missing. Breach of regulation 8 (2).
- 17) Following a Case Review, on 2 August 2019 two notices of intent to issue a financial penalty were sent to Mr Kirkham. The value of the financial penalties were assessed using a matrix adopted by Staffordshire Council and the wider West Midlands group of local authorities. The Council’s matrix is shown at appendix 1 (page 69 to 72 of the bundle). It is a charging table for determining the value of financial penalties imposed under the Act.
- 18) Offences in relation to licensing of HMOs under Part 2 of the Act (section 72) are listed. The starting point on the matrix for a 1st offence of failure to

obtain a licence is £10,000. The notes to the charging table show 8 factors which may have the effect of increasing or lowering the starting point. There were no aggravating factors to justify an increase from the starting point and Mr Kirkham had not provided any evidence of income that would justify a reduction financial penalty. A financial penalty of £10,000 was therefore confirmed.

- 19) The starting point for a 1st offence of failure to comply with Management Regulations in respect of HMOs (section 234) is £1000 per offence. There were no aggravating factors to justify an increase from the starting point and Mr Kirkham had not provided any evidence of income that would justify a reduction financial penalty. A financial penalty of £1000 per offence, totalling £5000 was therefore confirmed.
- 20) On 25 September 2019 Mr Butcher received representations from Mr Kirkham's solicitor (having agreed an extension of time for this). Mr Kirkham's representations can be summarised as follows:

There are 4 tenants in the Property Mr Clayton, Mr D. Hodgkins, Mr S. Briggs and Mike Buckley, who each pay rent of £60 per week exclusive of utilities (including Council tax). All except Mr Clayton were issued with an AST agreement. Mr Clayton occupied under the same terms but refused to sign an agreement. Mr Kirkham responds promptly to any issues. Clause 6 of the written tenancy agreements permits overnight guests provided they do not make the Property their permanent home without the landlords written agreement. Mr Kirkham was aware of the HMO legislation and had made a conscious decision not to bring the Property within the scope of the legislation. He did not believe the Property was an HMO and accordingly that the Management Regulations did not apply.

Mr Kirkham was alerted to Mr Clayton's girlfriend staying at the Property but assumed her to be visitor. He had not received rent from anyone other than the 4 tenants. On his visits to the Property he saw no evidence that Mr Clayton's girlfriend was in residence or occupation on permanent basis. In short, he did not consider that 5 or more persons were in occupation. Mr Kirkham's other 3 tenants Mr Briggs Mr Bickley and Mr Hodgkins, had provided written confirmation that Mr Clayton's girlfriend stayed in the Property no more than 3 days per week (between one and 3 days) and on the days she was not at the Property was living with her parents. Mr Kirkham had no knowledge of the persons named Cherisse or Jesse who Mr Clayton identified as being in occupation in his statement.

Mr Kirkham does not dispute the exchange of text messages on the 13/14 December 2018. At the time of the exchange he did not appreciate the content of the message as suggesting that Mr Clayton's girlfriend would become a person whose only or main residence was the Property. He construed the phrase "move in" as being within the permission envisaged by clause 6 of the written agreements. He accepts that he may unwittingly have allowed the premises to acquire HMO status because of this exchange. However, he had no intention of allowing Mr Clayton's

girlfriend's occupation to be more than casual. Otherwise he would have not agreed that no charge or rent was payable.

Mr Kirkham commented on the Management Regulations offences. He enclosed copies of the written agreements with 3 of the 4 tenants. He has now fixed a notice with his contact details behind a Perspex cover screwed to the wall. The landing has been cleared of obstruction and the tenants' instructed to keep it clear. He has told the tenants repeatedly not to wedge doors open and will visit the premises more often to ensure compliance. An inspection certificate for the fire extinguisher has been provided. The basement has been cleared of combustible materials and locks fitted. The fire detection system has been attended to. The electricity consumer box has been replaced with approved equipment. All bedroom windows are designed open for rescue in the event of fire. Gas appliance test certificate supplied. Electrical report covering fixed electrical installations supplied. All deficiencies under paragraph 1.4 of the schedule were attended to within 10 days of being notified of them. The 1st floor shower does not leak, it was repaired 12 months ago. The cooker has been inspected and is working satisfactorily.

- 21) Mr Butcher considered the submissions made by Mr Kirkham. He believes that the exchange of text messages between Mr Kirkham and Mr Clayton is clear. Mr Kirkham had not made any attempt to qualify his consent to Mr Clayton's girlfriend moving in and in his view Mr Kirkham's claim that Ms Trigg had another place to occupy was an unsupported sham.
- 22) In relation to the management regulations offences, the submissions do not amount to a denial that there were failings, only that they were addressed quickly following inspection. Whilst admirable this does not justify the fundamental failings noted on the initial inspection. HMOs require routine and regular visits and ongoing management and maintenance to prevent deteriorating conditions. In Mr Butcher's opinion the failings were not the result of a rapid decline due to damage by tenants' but consistent with ongoing poor management. The issues were not trivial. At the time of the visit there was no working fire detection in the Property and fire doors were propped open. There was evidence of accumulated materials and disrepair to the electrical installation. No reasonable landlord engaged in proper management of their Property would consider the conditions found on the initial inspection to be acceptable.
- 23) Mr Butcher also noted that prior to his visit Mr Kirkham had not considered the Property to be an HMO Property and therefore, that he did not have to comply with the Management Regulations. Mr Butcher exhibited 2 letters from 2005 and 2008 from the Council to Mr Kirkham making him aware that the Property would be an HMO with any more than 2 occupiers; and that he was therefore responsible for meeting the additional statutory requirements associated with such properties (pages 31 and 32 of the bundle).
- 24) Mr Kevin Hewitt housing standard officer at Stafford Borough Council filed a witness statement and also gave evidence at the hearing. He jointly

attended the inspection on 11 March 2009 with Mr Butcher. He confirmed the inspection was conducted using the Housing Health and Safety Rating System (“HHSRS”) and the Management Regulations. Mr Hewitt confirmed that Mr Clayton and his girlfriend were present. She was pregnant at the time. The Property had 5 bedrooms all of which appeared to be occupied with one bedroom having 2 occupants. The Property was in a poor state of repair. Mr Hewitt’s statement broadly confirms the evidence of Mr Butcher in this regard. He confirmed that the common parts of the Property were poorly maintained, not managed and that living conditions were below standard. When asked about landlord engagement, the general consensus of the tenants was that he was a decent and friendly landlord but somewhat absent with regard to repair and property management issues. The condition of the Property appeared to corroborate this view.

- 25) When asked about the HHSRS inspection Mr Hewitt said that the risks around fire safety really stood out. The fire alarm system had been disabled and there was open access externally to a cellar area that was full of combustible material. This increased the risk of spread of fire, which combined with a disabled alarm system and compromised means of escape led to a high overall risk to the tenants in the event of fire. This, he put down to poor management of the HMO
- 26) A witness statement made by Mr Clayton on 3rd of April 2019 was included with the Council’s bundle (pages 126-128). Mr Clayton did not however attend the hearing for cross-examination. Mr Butcher confirmed that Mr Clayton and the other tenants had been made aware of their right to seek a rent repayment order, should their landlord receive a financial penalty for a relevant offence under the Act. Mr Clayton’s statement confirmed that he had been in occupation since early 2018 paying £60 a week rent. He states that he was never given a written tenancy agreement or any other paperwork. Mr Clayton’s statement goes on to confirm the content of the exchange of text messages with Mr Kirkham. He considered Mr Kirkham’s response to be clear permission for his girlfriend to move in. Mr Clayton’s statement confirms that during his occupation there had been a number of other occupants of the house. Of the 5 bedrooms four had been in continual occupation and the 5th had on and off occupation. Mr Clayton states that the 5th bedroom was occupied for a time by “Cherise” who left end of December or beginning of January. The room was vacant 2 to 3 weeks and was then occupied by “Jesse”. He confirmed that on 1st of April 2019 Mr Kirkham had asked him to sign a tenancy agreement dated 1st of January 2017. He refused to sign because his name was incorrectly recorded and the agreement did not include his girlfriend.
- 27) When asked why he hadn’t obtained a witness statement from Mr Clayton’s girlfriend, Mr Butcher said it was because she hadn’t spoken to Mr Kirkham, the only exchange had been between Mr Clayton and Mr Kirkham. However, she had told Mr Butcher she was living there all the time, her clothes with there and both Mr Clayton and his girlfriend had expressed concerns that there would be insufficient space for the baby.

- 28) Mr Butcher re-inspected the Property on 4 November and noted that most of the breaches of the management regulations had been remediated. However, the fire detection system was again disabled, the fire doors propped open and the kitchen dirty. He therefore considered that whilst remedial works had been carried out the Property remained poorly managed. A photograph of the fire detection unit showing the disablement code, taken on the inspection on 4th of November 2019, was annexed to the bundle at page 44.
- 29) On 21st of May 2020 Mr Butcher sent two Final Notices imposing the financial penalties to Mr Kirkham having reviewed the offences against the agreed matrix and having taken into account Mr Kirkham's representations. The Final Notices and "penalty justification forms" are at pages 104-118 of the Bundle. The tribunal asked Mr Butcher why there had been a substantial delay of some 8 months between receiving Mr Kirkham submissions and the issue of final notices, given that the penalties were unchanged from the notices of intent. Mr Butcher confirmed that there had been no contact between the Council and Mr Kirkham during this period (other than the inspection on 4 November 2019). The delay was purely due to resource issues at the Council.

Mr Kirkham's submissions

- 30) Mr Kirkham's written submissions are virtually identical to his submissions to the Council in response to the Notices of Intent, as summarised at paragraph 20 above. In addition, he attached a copy of a letter of advice from his solicitors Pickering & Butters dated 13th of September 2019 concerning Mr Kirkham's representations to the Council and on any appeal, should final penalty notices be issued. It is clear from the letter that Pickering & Butters obtained counsel's opinion on the issues in this case. The solicitors identify the critical issue relevant to the failure to licence allegation, as being whether, assuming only the four rent paying tenants were in occupation, Mr Clayton's girlfriend was occupying bedroom 3 as her "only or main residence". In their view this would have the effect of tipping the Property into a licensable HMO.
- 31) The solicitors had clearly been provided with some questionnaires completed and signed by Mr Hodgkins, Mr M. Bickley and Mr S. Briggs. They are referred to in the 1st and 2nd paragraphs of the letter which states that the questionnaires indicate Mr Clayton's girlfriend was staying at the house up to 3 nights per week.

"Mr Hodgkiss [sic] says that on occasions she did not stay at all and he puts the number of nights as ranging between 1 per week and 3 per week (an average of 2). It was in around March that Mr Clayton's girlfriend stopped staying with him and Mr Hodgkiss [sic] indicates that when she was not at the house she was at her parents' home. This arrangement he said had been going on to 12 months. Mr Briggs says something very similar as does Mr Bickley. On occasions she did not stay at all but the maximum number of nights was 3 per week. The average seems to be 2 nights per week. Some weeks she did not stay at all. She ceased to stay in

March 2019 or around then (Bickley says April) and her home when she was not staying at the house was her parents' house stop"

- 32) The letter goes on to explain the difficulty of proving the extent of Mr Clayton's girlfriend's occupation, or whether Mr Kirkham's lack of knowledge of the circumstances could amount to the defence of "reasonable excuse" and recommends that it might be preferable to seek to mitigate the level of financial penalty.
- 33) Mr Kirkham refers to "third-party written statements, that Mr Clayton's girlfriend was only ever regarded as a visitor to the Property, and had her main place of residence elsewhere" in his grounds of appeal. When asked why the questionnaires/statements were not in evidence Mr Kirkham said that the tenants' had written out statements which he had collected and sent to his solicitor in September 2019. He did not retain copies but thought they were in his solicitors file. He had tried to ascertain whether the solicitor had retained copies but they had closed their file.
- 34) In cross-examination Mr Kirkham said that, other than Mr Clayton, the tenants did not have an issue with occupation. They told Mr Kirkham that Mr Clayton had been behind everything and they had written statements confirming that Mr Clayton's girlfriend was a temporary visitor. He had tried to get copies of the statements from his solicitor but failed. When asked why the other tenants had not attended the hearing to give evidence for him, Mr Kirkham said that Mr Briggs had said that he would attend and give evidence, but has since moved and Mr Kirkham is unable to contact him. All the tenants have now left now except Mr Buckley.
- 35) So far as the possible occupation of bedroom 4 by Jesse Lee and formerly "Cherise" is concerned Mr Kirkham said that he had no knowledge of anyone called Cherise staying at the Property. He understood that Jesse Lee was one step away from homeless. Mr Kirkham was told that Jesse Lee visited friends in houses hoping to stay for a few days because it was better than the park bench. He had no idea who came and went unless he happened to see them. He understood that Jesse Lee had turned up one night homeless and the tenants' allowed him to stay in bedroom 4. Mr Kirkham wasn't aware of this and he didn't collect any rent from him. Bedroom 4 did not have a lock on the door, it was used for storage.
- 36) Mr Kirkham said he was aware that the tenants' visitors sometimes stayed overnight at the Property, the tenancy agreements permit this, but he wouldn't allow anyone to move in permanently. If Mr Clayton's girlfriend stayed longer than 3 to 4 days it was outside his knowledge. Mr Kirkham inspects his properties about twice a year but with this Property more often because he stated that the tenants were dirty, he said that he had cleaned common areas numerous times. He stated that in his view some of the tenants suffer from depression. They stay in their room and throw things out onto the corridors. Mr Kirkham has attended the Property about 10 to 15 times a year, but it varies hugely. Sometimes there is a 2 month gap, but on average, he probably attends once a month. In all his visits Mr Kirkham has never met Mr Clayton's girlfriend. He called once about 2 years ago concerning rent arrears. Mr Clayton's girlfriends was in the

room. She did not open the door, she just said that Mr Clayton was not there.

- 37) Mr Kirkham said that Mr Clayton's room was originally occupied by Mr Clayton's sister. Mr Clayton moved in to take care of her but she subsequently left to go home due to her illness. Mr Clayton remained in occupation and Mr Kirkham realised sometime later that he had overlooked giving Mr Clayton a written tenancy agreement. He asked Mr Clayton to sign a tenancy agreement shortly before the Council visit in March 2019. Mr Clayton refused to sign unless Mr Kirkham put his girlfriend on the agreement. Mr Kirkham refused because as far as he was concerned she was an occasional visitor. When asked why, as landlord, he did not know at any one time who was living at the Property, Mr Kirkham said that he was obliged to give notice or notify the tenants' of any inspection or visit. As a consequence, when he turned up any visitors would make themselves scarce. When asked to comment specifically on what the tenants' had told the Council officers during the inspection on 11 March 2019, Mr Kirkham said that Jesse Lee would likely claim to be an occupant due to concerns about being thrown out. Mr Clayton's girlfriend would say that she was an occupant because that was Mr Clayton's stance, he wanted her to be a tenant even though she wasn't.
- 38) Mr Kirkham confirmed that the 4 tenants paid £60 per week inclusive of all utilities, including Council tax. Council tax for the Property was about £1,200 per year. Electricity and gas was expensive, about £4-£6,000 per year. Mr Kirkham produced bank statements and accounts (pages 143 -156 of the bundle), that show a rental income of approximately £12,500 per year, which is consistent with 4 tenants paying £60 per week rent. After payment of Council tax and utilities together with maintenance Mr Kirkham confirmed that he makes very little profit. Given that, it was Mr Kirkham submitted inconceivable, that he would allow Mr Clayton's girlfriends or anyone else to occupy the Property without payment.
- 39) Mr Kirkham confirmed that all tenants have a night latch and mortice lock to their rooms. The Yale lock opens without a key from the inside. The mortice lock is just a latch. He confirmed the bedroom 4 has no locks because it was used for storage.
- 40) Mr Kirkham accepted that the Property was an HMO. He said there was some confusion on his part initially because he thought there needed to be more than 4 occupiers for a Property to be an HMO. He accepted therefore that the Property was subject to the Management Regulations, but not that the Property was an HMO that required to be licensed, because he submitted, there were only 4 tenants. Mr Kirkham said that he had originally owned 8 rental properties. He personally drafted his tenancy agreements and had been a landlord to some 20 to 25 years.
- 41) In relation to the alleged breaches of Management Regulations, Mr Kirkham only disputed 2 items. He explained the shower leak had been repaired some 12 months prior to the inspection in March 2019 and the staining was a consequence of the original leak. He did not accept that the

cooker was tripping out. Mr Kirkham had arranged for the cooker to be thoroughly inspected and nothing was found to be wrong with it.

- 42) In mitigation of the other matters Mr Kirkham said that the electricity certificate was genuinely lost. He was in the process of selling the properties and may have sent it to the solicitors acting for the buyer. It was a 5 year certificate that had not run out, but having been unable to locate it, he had arranged for an electrician to do a new inspection and certify the Property. In the process the consumer unit had been replaced and upgraded to a unit with a metal case. He said that notices have been displayed but the tenants knock them off and they also lose their tenancy agreements. The tenants also block the fire escapes and the main passageway with bicycles etc which Mr Kirkham is constantly having to clear.
- 43) Mr Kirkham confirmed that he had inspected the Property about a month before the Council inspected on 11 March 2019. He did notice that there was a mess on the landing, the upstairs bathroom was dirty, the tenants had put a table in the hall for mail which he had repeatedly asked them to move. He cleared the landing while there but did not notice any other issue. When asked whether the defects identified in Mr Butcher's letter were present at this inspection Mr Kirkham said the fire alarm panel didn't read other than normal. He acknowledged that the stair handrail was missing, that there was a damaged socket and a damaged kitchen unit door but doesn't recall any other issue. Mr Kirkham asked the tenants to clean up their rooms and he cleaned the common areas. Mr Kirkham confirmed that he had left the washing machine on the back stairs after removing it to install a replacement. In relation to the disabled fire alarm Mr Kirkham acknowledged that he had left the key on top of the box where he presumed it had been found by one of the tenants. He suggested that one of the tenants, with technical knowledge, had disabled it to prevent the fire alarm being triggered repeatedly when they are smoking.

THE LAW

- 44) Section 72 of the 2004 Act provides as follows:

(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 (see section 61(1)) but is not so licensed.

(2) (3) (4).....

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

- 45) In the case of Management Regulations in respect of HMO's, section 234 (3) of the Act provides that "a person commits an offence if he fails to comply with a regulation under this section". Section 234(4) provides that "in proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation"
- 46) In the case of an HMO, section 263 defines the "person managing" as the owner or lessee of the Property who receives, directly or through an agent or trustee, rents or other payments from persons who are tenants or licensees of parts of the Property, or who are lodgers.
- 47) By virtue of section 55 of the 2004 Act, any HMO in a local authority's district is required to be licensed by the authority for the purposes of Part 2 if it falls within any prescribed description of HMO.
- 48) Under section 61, every HMO to which Part 2 of the Act applies must be licensed under this unless either: a temporary exemption notice is in force in relation to it under section 62; or an interim or final management order is in force in relation to it under Chapter 1 of Part 4. Neither situation is relevant to this appeal.
- 49) Section 249A of the 2004 Act allows a local authority to impose financial penalties for certain housing offences and provides as follows:
 - (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)
 - (b) section 72 (licensing of HMOs),
 - (c) - (d)
 - (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) – (9)
- 50) Schedule 13A of the Act deals with the procedure for imposing financial penalties and appeals against financial penalties Paragraph 10 of that Schedule states:

(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.

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

(3) An appeal under this paragraph—

(a) is to be a re-hearing of the local housing authority's decision, but

(b) may be determined having regard to matters of which the authority was unaware.

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

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

DELIBERATIONS AND DECISION

51) The Tribunal considered this appeal in three parts:

a) Whether the Tribunal was satisfied, beyond reasonable doubt, that the a “relevant housing offence” had been committed in respect of the Property (sections 249A (1) and (2) of the Act; and section 234(3) and (4) of the Act);

b) Whether the local housing authority had complied with all necessary requirements and procedures relating to the imposition of the financial penalty (see section 249A and paragraphs 1 to 8 of Schedule 13A of the Act); and/or

c) Whether the financial penalty was set at an appropriate level, having regard to any relevant factors, including:

(i) the offender’s means;

(ii) the severity of the offence;

(iii) the culpability and track record of the offender;

(iv) the harm (if any) caused to a tenant of the premises;

(v) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or

(vi) the need to remove any financial benefit the offender may have obtained as a result of committing the offence.

Was an offence committed by Mr Kirkham?

The offence of failing to licence the Property

- 52) We are satisfied beyond all reasonable doubt that on 11 April 2019, when the Council inspected the Property, Mr Kirkham was a person having control of and managing an HMO which was required to be licensed under the Act but was not so licensed.
- 53) It does not appear to be in dispute that Mr Kirkham was a person having control and management of the Property. Mr Kirkham is the person in receipt of the rents and the person, on his own evidence, responsible for the day-to-day management and maintenance of the Property.
- 54) It is also not in doubt that on the date of the inspection the Property met the statutory definition of an HMO because it was a house occupied by persons who do not form a single household, the four rent paying tenants occupied the living accommodation as their only or main residence, occupation of the living accommodation constituted the only use of the Property and at least 2 households who occupied the living accommodation shared one or more basic amenities, namely the bathroom and kitchen.
- 55) We are not satisfied that there is sufficient evidence to conclude that either “Charisse” or Jesse Lee were, or had been for any period, occupying the living accommodation as their only or main residence.
- 56) We are satisfied that Mr Clayton’s girlfriend was occupying the living accommodation as her only or main residence at the date of the inspection on 11 April 2019. We are not however satisfied, on the balance of probabilities, that Mr Kirkham was aware of this. We therefore find, in relation to the offence under section 72 (1) of the Act, that Mr Kirkham has established a defence of reasonable excuse under section 72 (5) of the Act for, in particular, the following reasons:
- (i) We accept Mr Kirkham’s evidence that the cursory exchange of text messages with Mr Clayton was primarily focused on collecting outstanding rent and that he didn’t give much thought to the expression “move in”. We also accept Mr Kirkham’s evidence that his tenancy agreements (written or otherwise) allow some flexibility for tenants’ girlfriends and visitors to stay overnight on an occasional basis and that he genuinely believed that to be the case in respect of Mr Clayton’s girlfriend. We also accept Mr Kirkham’s evidence that he had intentionally restricted the number of tenants at the Property to four, so as not to fall within a prescribed description that would require the Property to be licensed.
 - (ii) We find Mr Kirkham’s belief to be reasonable because on his visits to the Property he had not seen any evidence of occupancy by Mr

Clayton's girlfriend, also it is unlikely that he would have agreed to permanent occupancy by Mr Clayton's girlfriend given that Mr Clayton's rent of £60 per week was inclusive of utilities and Council tax.

- (iii) We find it likely that Mr Kirkham's solicitor was provided with statements from the other tenants which cast some doubt on the extent of occupancy by Mr Clayton's girlfriend and that Mr Kirkham has been prejudiced in producing this evidence, partly as a consequence of the 8 month delay by the Council in issuing the final notices. By the time Mr Kirkham received the final notices his solicitor had closed the file and the tenants that were prepared to support Mr Kirkham at the hearing had moved out leaving him in difficulty contacting them.
- (iv) Mr Clayton provided a witness statement to the Council but did not attend the hearing for cross-examination. At the time Mr Clayton made the statement he had an interest in establishing that his girlfriend was a tenant and a financial interest in the outcome of the Council's proceedings. For that reason, we afford only limited weight to Mr Clayton's statement.

57) As the requirements for the offence under section 72 (1) of the Act are not met, we find that the Council was not entitled to impose a financial penalty under section 249A of the Act in respect of this matter and accordingly, the financial penalty is cancelled.

The offence of failure to comply with Management Regulations

58) We are satisfied beyond all reasonable doubt that an offence was committed by Mr Kirkham, in that on 11 April 2019, when the Council inspected the Property, he was a person having control of or managing an HMO, that had failed to comply with Management Regulations. In particular we find that there were breaches of regulation 3, regulation 4, regulation 6, regulation 7 and regulation 8, as detailed in the Schedule of Deficiencies sent to Mr Kirkham on 18th March 2019 because:

- (i) Mr Kirkham does not dispute the items of disrepair in the Schedule of Deficiencies other than in respect of 2 of the 6 items of disrepair under regulation 7 (the cooker circuit socket and the leaking shower).
- (ii) Mr Kirkham has offered mitigating circumstances in relation to many of the items of disrepair but we are not satisfied that the behaviour of the tenants or Mr Kirkham's inability to track down his certificates could amount to a defence of reasonable excuse.

Has the local housing authority complied with all necessary requirements and procedures?

59) There was no challenge by the Applicant in this element of the appeal and the Tribunal determines that the procedural requirements for the

imposition of a Financial Penalty have been satisfied. As all the requirements for the Management Regulations offences, under section 234 of the Act have been met, the Council was entitled to impose financial penalties under section 249A of the act

Was the financial penalty set at an appropriate level?

- 60) The amount of the penalty imposed for each offence is the starting penalty for the offence, as set out in the matrix adopted by the Council, which is derived from the relevant Government guidance, *Civil Penalties under the Housing and Planning Act 2016*. The Council has not found there to be any aggravating factor that should increase the penalty. The Council's matrix does not make any provision for mitigating factors to be considered which might reduce the starting penalty, other than where the landlord's income is below £440 per week.
- 61) It is in Mr Kirkham's favour that most of the items of disrepair were remediated promptly. However, the Tribunal shares Mr Butcher's view that a competent professional landlord should not need to be prompted by the local authority to comply with Management Regulations. The Tribunal finds that the items of disrepair were largely a consequence of long-term poor management, rather than items that had recently fallen into disrepair in an otherwise well-maintained Property.
- 62) Although the offences in relation to the fire safety measures in the Property are serious and could have resulted in significant harm occurring, because none of the tenants were "a vulnerable person" as defined under HHSRS, the matrix does not allow for a premium to be applied.
- 63) The Tribunal finds that Mr Kirkham operates a no-frills, low rent HMO for tenants that are unable to afford better quality accommodation. His profits are extremely modest and this undoubtedly plays some part in limiting the affordability of maintaining the Property in good condition. However, he is operating in a sector that is regulated and it is simply not good enough to make allegations as to the character of the tenants and attribute most of the failings to this. Putting tenants at risk from inadequate fire safety measures can never be justified. Neither can low profitability justify poor maintenance and management of an HMO.
- 64) Mr Kirkham did not provide any evidence of his means.
- 65) The Tribunal therefore finds that a financial penalty of £1000 per offence, totalling £5000.00, to be an appropriate penalty which balances the objectives of the need to punish the offender, act as a deterrent to further offending by the offender and others, against the mitigating circumstances put forward by Mr Kirkham and the financial penalty is accordingly confirmed.
- 66) The Tribunal therefore finds, weighing all the circumstances of the case, that a financial penalty of **£5000.00** to be proportionate and confirms the penalty.

APPENDIX - RIGHTS OF APPEAL

1. 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.
2. 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.

3. 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.

4. 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.