FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference **HMCTS Code**	**:**	**CAM/34UF/HNA/2020/0028** **V:CVPREMOTE**
Property	**:**	**82 Semilong Road, Northampton NN2 6AF**
Applicant	**:**	**Mr Jalal Miah**
Respondent	**:**	**Northampton Borough Council**
Representative	**:**	**Mr Alan Parr (in-house solicitor)**
Type of application	**:**	**Appeal against financial penalties: section 249A Housing Act 2004**
Tribunal member(s)	**:**	**Judge Wayte** **Regional Surveyor Hardman**
Date of hearing	**:**	**28 January 2021**
Date of decision	**:**	**23 February 2021**

DECISION

Covid-19 pandemic: 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: CVPREMOTE. A face-to-face hearing was not held due to the pandemic. The tribunal was referred to a hearing bundle prepared by each party and separate emailed documents which are described in the decision as appropriate. The order made is:

(1) The tribunal cancels the six final penalty notices dated 24 August 2020.

(2) The respondent is ordered to reimburse Mr Miah the tribunal fees of £800 within 14 days of this decision.

The application

1. The respondent served six Final Notices to Issue a Financial Penalty on the applicant by hand at his company's office on 24 August 2020. The notices stated that the respondent, as the sole director of Direct Property Services UK Limited ("the company"), had committed offences under sections 72 (HMO licensing) and 234 (management regulations in respect of HMOs) of the Housing Act 2004 ("the 2004 Act") and imposed financial penalties amounting to a total of £24,800.

2. The applicant appealed those penalties by making an application to the tribunal on 23 September 2020. Two grounds of appeal were stated in the application. The first raised a "reasonable excuse defence" that the applicant was unaware that the property was being used as an HMO and the second ground stated that in any event the Notices of Intent were outside the 6 month time limit contained in Schedule 13A of the 2004 Act. The applicant further stated that as soon as the issue had been brought to his attention the property was returned to a family home.

3. Directions were given on 5 October 2020. Both parties filed their hearing bundles in accordance with the directions and the matter was listed for hearing on 28 January 2021. On 25 January 2021, the respondent filed an additional witness statement by Samantha Ling and a copy of *Nicholas Sutton v Norwich City Council* [2021] EWCA Civ 20. The following day, the applicant objected to the new statement but sought to introduce new evidence of his own and make some new arguments. At the hearing the tribunal allowed each party to rely on their new evidence and argument.

4. The appeal was heard on 28 January 2021 by video conference. Mr Miah appeared on his own behalf with his employee and witness Shaun Minney. The council was represented by Mr Alan Parr and relied on a number of witnesses: Arthur Chikonde, Emma Ryder, Brendan Healey and Samantha Ling, all part of the housing enforcement team at the relevant time, although Mr Healey had left the council's employment by the time of the hearing.

5. After the hearing, the tribunal requested further documents from the applicant in respect of the rent payments made for the property and any representations about the council's 2020 Enforcement Policy, with provision for a response by the council. In the light of that response, Mr Miah made further representations which have also been taken into account in this decision.

Background

6. The property at 82 Semilong Road is a three storey Victorian terraced house, owned by Shahnaz Begum. The applicant's company had let out the property on the owner's behalf for several years. The applicant confirmed that he had not visited the property himself; his role was largely managerial and his employees, including Shane Minney, dealt with the lettings.

7. The applicant's bundle included a copy of a tenancy agreement dated 1 June 2018 between Ms Begum and Mr Ivan Tamosausk. Under this agreement, signed by Mr Minney on behalf of the landlord, the tenant agreed to rent the property for £975 per month from 1 June 2018 exclusive of Council Tax and water charges. Gas and electricity charges were payable by pre-paid meter, for which the tenant was similarly responsible. The assured shorthold tenancy was for an initial term of 6 months. The terms and conditions signed by the tenant on 28 May 2018 included an agreement that "*The property will be used as a family home and will not be used as an HMO*".

8. The bundle included an inventory and photographs, which showed that the property was let unfurnished and a photocopy of Mr Tamosausk's Lithuanian identity card. There were two property inspection reports: 24 October 2018 and 5 March 2019 and two letters in respect of rent arrears: 5 November 2018 and 2 September 2019, the latter enclosing a Notice seeking possession of the property pursuant to section 21 of the Housing Act 1988.

9. On 10 October 2019 the respondent obtained a warrant to enter the property from Northampton Magistrates Court. The Information for the warrant, signed by Mr Healey, was included in the respondent's bundle. It stated that information had been received over a number of years that the property was being used as an HMO, most recently in September 2019 via a report from Northants Police. It made reference to 23 individuals being linked to the property, many of which appeared to be of Eastern European extraction and confirmed that Council tax records showed that as of 1 June 2018 the liable party was a Mr Ivan Tamosausk.

10. On 21 October 2019 the respondent's officers entered the property under the warrant, shortly after the police had entered under their own warrant and taken two of the occupants away. The council found evidence of 6 lettings with 8 occupants and therefore considered that the property was an HMO. There was no HMO licence and the council found a number of defects at the property in terms of the HMO management regulations. After leaving the property the council contacted the applicant's company as they were particularly concerned about the lack of smoke detectors. They went back to the property later

that day where they met Mr Minney and confirmed the smoke detectors had been installed and were functioning correctly.

11. Shortly after the council's visit the occupants left the property which was refurbished and re-let by the applicant's company to a single family group on 7 December 2019. That fact was confirmed by the council in their case summary released as part of the representations process described below.

12. On 31 January 2020 the applicant attended the Council Offices for an interview under caution. The transcript in the respondent's bundle confirms that the applicant said he had been advised to give a "no comment" interview by his solicitor. At that stage the applicant was being asked questions about this and another property, which he confirmed had both been let on "AST" agreements and were not HMOs, as there were no HMO properties in the company's portfolio. The rest of the interview was largely "no comment", although the applicant referred the council to his solicitors, Shepherd & Co and confirmed that they would assist the council with any further enquiries.

13. On 10 February 2020 Mr Minney attended the Council Offices for an interview under caution. Mr Minney also confirmed that the property was not let as an HMO, although he was unable to provide any details of the letting at the interview. He confirmed the company's general letting procedure and that the tenant would have been registered for Council Tax. When asked by the council how the property could have come to be used as an HMO he stated that he believed the tenants may "*have allowed friends or something to stay with them*". The interview then became largely "no comment". A second interview was then conducted in respect of another property managed by the company which was also suspected of being an HMO. During that interview Mr Minney asked the council officer for help to avoid such situations in the future.

14. On 12 February 2020 Mr Healey wrote to Mr Miah, recording that both he and Mr Minney had indicated a willingness to assist the council in its investigations. He made a formal request for documents in relation to both properties to be sent to the council by 26 February 2020. The notice provided several addresses for service of the documents, including by email to pshs@northampton.gov.uk .

15. On 25 February 2020 Mr Minney emailed all of the documents requested for the property to Mr Healey at the given address, which included both tenancy agreements and supporting documents, including the copy of Mr Tamosausk's identity card. That email confirmed that no deposit was taken on either tenancy.

16. On 31 March 2020 Mr Healey submitted his assessment of the proposed civil penalties for review by the council. The assessments all

referred to the "*no comment interviews*" and a statement that "*responsibility for the property being occupied as an HMO was diverted to the occupiers*". He assessed culpability for the offences as "*high*" and the harm as "*low*".

17. On 20 April 2020 Notices of Intent were served on the applicant by hand at the company's business address. The accompanying letter stated that the council was satisfied beyond reasonable doubt that the applicant's conduct amounted to relevant housing offences but continued that there was a right to make representations within 28 days.

18. On 1 May 2020 the council approved their new Private Sector Housing Civil Penalties Policy which replaced the previous 2017 policy and was said to relate to all civil penalties issued on or after 6 April 2020. The council admitted they had not considered this policy prior to the hearing.

19. On 15 May 2020 Ms Kamila Halas, a paralegal employed by the respondent, made a report on the assessment of evidence and proposed penalties. She confirmed that she was satisfied that there was sufficient evidence to prove that the property was being used as an HMO but considered that more work was required to substantiate the offences under the HMO Management Regulations. In terms of the banding assessment documents (presumably those mentioned in paragraph 16 above) she stated that there was very little, if any, evidence in the statements to support the claim that Mr Miah knew of the requirements or of him making false statements and attempting to divert blame to another.

20. On 22 May 2020 Mr Nazir of Shepherd & Co made representations on Mr Miah's behalf, seeking an extension of time due to problems seeking legal advice during the pandemic. Those representations reiterated that the company had not let the property as an HMO but under an "AST". They submitted that their client had a reasonable excuse for the offence.

21. On 26 May 2020 Mr Healey responded to those representations, extending the period to 5pm on 9 June 2020 but also stating that "*I have been instructed to advise you that none of the Notices to Intent will be withdrawn.*" The period for representations was subsequently extended to 23 June 2020.

22. On 14 June 2020 Shepherd & Co made further representations. That email referenced the documents provided by Mr Minney on 25 February 2020 and asked the council to send copies to them. It reiterated that the company does not deal with HMOs and sent a copy of the website homepage which made that clear. It also reiterated that the property had been let to a single family under an AST to be used as

a family home with subletting prohibited. Their client was therefore not in management or control of an HMO and could not be held responsible for the alleged offences.

23. On 15 June 2020 Ms Ling responded to that email stating that all relevant information had been provided to submit any representations "to" the Notice of Intention regarding 82 Semilong Road.

24. On 24 August 2020 the Final Notices were served on Mr Miah by hand at the company's business address under cover of a letter of the same date. That letter, which appears to be a template, stated that "*The Council has now concluded its review, including any representation you may have made*", although made no other reference to any representations from the applicant.

The Law

25. Financial penalties as an alternative to prosecution were introduced by the Housing and Planning Act 2016 which amended the Housing Act 2004 by inserting a new section 249A and schedule 13A. It is for the local authority to decide whether to prosecute or impose a fine and guidance has been given by the Ministry of Housing, Communities and Local Government. In order to impose a financial penalty the local authority must be satisfied beyond reasonable doubt that the conduct amounts to a relevant housing offence.

26. Section 249A lists the relevant housing offences which include offences under section 72 (licensing of HMOs) and section 234 (management regulations in respect of HMOs) of the 2004 Act. Section 72(1) is the offence of being in control of or managing an unlicensed HMO, which is a strict liability offence subject to the "reasonable excuse" defence in section 72(5), which is for the accused to establish on a balance of probabilities. Section 263(1) describes a person having control as someone who receives the rack-rent of the premises whether on his own account or as an agent or trustee of another person.

27. Schedule 13A sets out the requirement for a notice of intent to be given before the end of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates. It also contains provisions in respect of the right to make representations within 28 days after that initial notice and the requirements for the final notice.

28. Appeals are dealt with in paragraph 10 of Schedule 13A. The appeal is a re-hearing and may be determined having regards to matters of which the authority was unaware. On an appeal the First-tier Tribunal may confirm, vary or cancel the final notice.

29. The maximum civil penalty is £30,000. The relevant factors as set out in the MHCLG guidance are:

(a) Severity of the offence;

(b) Culpability and track record of the offender;

(c) The harm caused to the tenant

(d) Punishment of the offence

(e) Deter the offender from repeating the offence

(f) Deter others from committing similar offences.

(g) Remove any financial benefit the offender may have obtained as a result of committing the offence.

The issues

30. At the start of the hearing, the applicant confirmed he wished to challenge the respondent's claim that the property was being used as an HMO controlled or managed by his company, in addition to his claim that he had a reasonable excuse defence to any offence found to be committed. The directions had also confirmed that when deciding whether to confirm, vary or cancel the final notice the tribunal would consider whether the respondent had complied with all of the necessary requirements and procedures relating to the imposition of the penalties, as well as the amount.

31. Mr Miah also raised the question of whether the Notices of Intent were served late, as argued by his solicitor but the tribunal pointed out that assuming the first day the respondent had sufficient notice of the offence was 21 October 2019 (the day of the inspection), service of the notices by hand on 20 April 2020 was in time, albeit on the last possible day. He therefore withdrew that argument.

Was the property an HMO requiring a licence?

32. Under the 2004 Act, a property is a mandatory HMO, requiring a licence, if it is occupied by 5 or more persons, living in two or more households and meets one of the "tests" in section 254. In this case, the council relied on the "standard test", effectively that two or more households share one or more basic amenities and occupy the property as their only or main residence.

33. The council's evidence, contained in witness statements by Mr Healey, Mr Chikonde and Ms Ryder, all stemmed from their inspection of the property on 21 October 2019 when they found 8 people residing in four rooms, with shared use of the kitchen and bathroom. On this basis they submitted that there was overwhelming evidence that the property was being used as an HMO.

34. As stated above, whether a property is being used as an HMO is essentially a question of fact and the offence is one of strict liability, subject to the defence of reasonable excuse. Although none of the occupants attended the hearing to support the council's case, there is plenty of evidence in terms of the statements and exhibits, including photographs, that they were in occupation at the date of the inspection.

35. In the circumstances, the tribunal is satisfied that the respondent has established that the property was being used as an HMO on 21 October 2019. It also follows that the respondent has established a number of breaches of the HMO regulations, as there was no dispute that the property did not comply – the applicant's case being that he was unaware that the property was being used as an HMO, having been let by his company as a family home. Rent was received by the applicant's company on the owner's behalf, meeting the definition of being "in control". For the avoidance of doubt, the rent does not have to be received from the occupants as opposed to Mr Tamosausk to meet this test, the issue is whether it is at least 2/3rds of the market rent. However, if the applicant can establish his defence, none of these offences will have been committed by him.

The defence

36. Both Mr Miah and Mr Minney stated from the outset that the company did not deal in HMOs, as confirmed by its website. The property had been let on an AST to Mr Ivan Tamosausk, who must have allowed it to be used as an HMO in breach of his agreement, without their knowledge or consent. Although they gave limited replies in their interview under caution, they provided evidence in support of the defence in response to the council's request before the Notices of Intent were issued and brought that evidence to the council's attention during the representations process before the Final Notices were given. Several other properties let by the company were also being investigated at the time and no action had been taken against the applicant in relation to them.

37. During the inspection on 21 October 2019 the council had taken a number of statements from some of the occupants. They identified their landlord as Shane (or Wayne) and all provided the mobile telephone number of Mr Minney, which was set out on the Notice Seeking Possession. They claimed that their rent included the bills and they paid cash weekly on various days either to Shane (or Wayne) or

different people who collected it from the property. There was no reference to the applicant or his company. Two of them said they found the room via "a friend" and one that he had occupied the property the previous Christmas. Two of the rooms had apparently been let furnished. All of the persons interviewed were Eastern European nationals, either from Latvia or Bulgaria. The council confirmed that two of occupants were taken away by the police before they could be interviewed.

38. During his evidence to the tribunal, Mr Miah confirmed that the rent for the property had been paid in cash at the company's office. After the hearing he provided a copy of his ledger for the property which showed the rent received monthly as cash, deduction of his commission of £70 per month and payment of the balance by bank transfer to the owner. He also provided copies of the company's Daily Cash Log which recorded payments in and out of cash, for this and other properties, over the relevant period.

39. Mr Minney confirmed that all payments would have been made at the office and he had never accepted rent personally. In any event he did not work on the days given as payment days by the occupants. His explanation for the use of his name and number was that the occupants must have taken it from his letter serving the Notice Seeking Possession, or been given his details by the tenant.

40. He had never received any complaints from neighbours or prior indication of any problems until the council got in contact after their inspection. He confirmed that he had carried out the two inspections on behalf of the company in 2018 and 2019. If he had noticed any indication that the property was not being occupied as a family let at that stage he would have taken action. He confirmed that the usual practice of the company was to let property unfurnished, apart from white goods.

41. Both the applicant and Mr Minney stated that they would never let a property in the condition shown in the council's photographs. Although some of the breaches related specifically to HMOs which the company avoided, they were aware of the need for smoke alarms and were careful to maintain the company's good reputation for property management. The photographs attached to the inventory showed the property had been let in good condition.

42. Mr Parr had no questions for either witness. Ms Ling's response to the evidence of rent provided by Mr Miah after the hearing was that cash receipts or copies of rent book payments should have been provided, or bank statements. She did not consider that the documents would be sufficient to support a financial investigation or auditing of accounts.

43. As stated above, it is for the applicant to provide his defence, on a balance of probabilities. The tribunal has no reason to doubt the authenticity of the AST to Mr Tamosausk, particularly in the light of his identity card and registration for council tax. The cash payments triggered some concern but again the tribunal has no reason to doubt that the payment and cash logs produced by Mr Miah after the hearing were genuine. They marry up with at least the first letter about the rent arrears and Ms Ling's comments are largely irrelevant – they were produced to support the applicant's defence as opposed to a financial investigation or audit. It is not credible that the applicant's company would be so adamant that it would not deal in HMOs only to let the property as one. The tribunal considers that Mr Tamosausk must have sublet the property or allowed it to be used as an HMO without the applicant's knowledge or consent.

44. In truth, the council never engaged with this issue, relying purely on the fact of occupation as proof of the offence, together with the statements taken from the occupants at the inspection. The tribunal considers that the naming of Shane/Wayne as the landlord and knowledge of his mobile number was likely to be as a result of the letter serving the Notice Seeking Possession. The other inconsistencies in the occupants' statements and the fact that there was clearly police interest in at least some of the occupants at the property, together with them vacating the property immediately after the inspection, casts further doubt that the statements taken by the council were true.

45. In the circumstances, the tribunal finds that Mr Miah has proven he has a reasonable excuse for all the offences as set out in section 72(5) of the 2004 Act. No offences have therefore been committed and the financial penalties must be cancelled.

The respondent's conduct

46. Although there is no need to consider the issues further from the point of view of the applicant's liability, the tribunal has a number of concerns about the conduct of the respondent in this matter.

47. The applicant was at a loss to understand why the council insisted on proceeding with the penalties for this property, despite his evidence of the AST granted to Mr Tamosausk. The answer was provided by Ms Ling, who claimed at the hearing that the council had never received the documents. This resulted in the applicant sending a copy of his email dated 25 February 2020 to the tribunal. During his evidence, Mr Healey stated he had no recollection of making any enquiries of the applicant or of the documents, he also had no recollection about Mr Tamosausk being registered Council Tax. He was similarly unable to provide any information about the other properties. When asked what action he had taken in response to the representations, he said he would consult his manager, Ms Ling.

48. Ms Ling was similarly unable to give any evidence about the other properties or why the decision was taken to proceed with the penalties for 82 Semilong Road. She was unaware of the documents sent by Mr Minney and relied on the evidence from the occupants taken at the inspection. She was asked whether any attempt was made to contact them after that day. The answer was that the council had attempted to contact them in the week preceding the hearing but their phones were not answered.

49. On the evidence provided, the tribunal considers that the respondent made no attempt to properly consider the applicant's representations made at the interviews under caution and subsequently. The documents requested by Mr Healey were emailed to the correct address. The fact that Ms Ling may not have seen them does not mean that they were not received by the council. The tribunal accepts that the pandemic means that many officers will have been working at home during the relevant period, although the documents were sent well before the first lockdown. The fact is that the respondent never engaged with the applicant's arguments at all, despite their knowledge that Mr Tamosausk was registered as the Council Tax payer when they sought their warrant and having been warned by their paralegal that there was little, if any, evidence to support the assessment of Mr Miah's culpability as high.

50. The council's Private Sector Housing Civil Penalties Policy 2020 states in paragraph 5.5 that all of the Private Sector Housing Team's enforcement activity will be targeted, proportionate, fair and objective, transparent, consistent and accountable. Ms Ling and her team have not met those principles in this case, particularly in respect of the promise that enforcement action will be based on the individual circumstances of the case, taking all available facts into account and that officers will carry out investigations with a balanced and open mind. The responses to the representations are a particularly poor example of entirely the opposite approach, for which Mr Miah is owed an apology.

51. As a result of this failure, the applicant has been put to considerable expense in preparing his appeal. He may wish to make a claim for costs under Rule 13(1) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. This jurisdiction is limited to wasted costs or costs incurred as a result of unreasonable conduct in defending the tribunal proceedings and must be made within 28 days of the date this decision is sent to the applicant.

52. In addition, Rule 13(2) provides the tribunal with discretion to make an order requiring a party to reimburse any other party the whole or part of the tribunal fees. In the circumstances the tribunal orders that the respondent must repay the applicant's fees of £800 within 14 days.

Name: Judge Ruth Wayte **Date:** 23 February 2021

Rights of appeal

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

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

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

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

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

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