FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AR/HNA/2020/0024**
HMCTS code	**:**	**V:VIDEO**
Property	**:**	**16 Dymoke Road, Hornchurch Essex RM11 1AA**
Appellant	**:**	**Darren Paul Emerson**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Havering**
Representative	**:**	**Mr Ham of counsel**
Type of application	**:**	**Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Pittaway** **Mr T Sennett FCIEH** **Mr A Fonka MCIEH CEnvH MSc**
Date of hearing	**:**	**25 March 2021**
Date of decision	**:**	**6 April 2021**

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. 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 before the tribunal at the hearing, the contents of which the tribunal has noted, were;

1. A combined bundle (382 pages)
2. 6 pages of colour photographs
3. L B Havering's penalty matrix and details of their fee ranges

At the video hearing the the appellant appeared in person and the respondent ws represented by Mr Ham of counsel. The tribunal heard evidence from Ms Heath of London Borough of Havering and from Mr Emerson, and heard submissions from Mr Ham and Mr Emerson. The hearing was also attended by Ms D Brown and Mr A Punj of London Borough of Havering and by Mr G Ventham of London Borough of Hounslow as observers.

During the hearing the tribunal learnt that Mr Creevy of Hunters, whose witness statement was in the bundle before the tribunal, had wanted to participate in the hearing but had not been sent the details that would have enabled him to join it. Mr Ham confirmed that he was content for the tribunal to have regard to Mr Creevy's witness statement without Mr Ham being afforded the opportunity of cross-examing Mr Creevy. In the circumstances the tribunal determined that the appellant's case would not be prejudiced by Mr Creevy's absence and proceeded with the hearing.

In addition the tribunal referred to the decisions in

IR Management Services Limited v Salford CC [2020] UKUT 81 (LC) (**'*Salford*"**)
Thurrock Council v Khalid Daoudi [2020] UKUT 209 (LC) ('***Daoudi***')
Thurrock Council v Palm View Estates [2020] UKUT 0355 (LC) ('***Palm View Estates***')

Decision

1. The tribunal finds that the appellant was a person 'in control' of and 'managing' the property and he has therefore committed an offence under section 72(1) of the Housing Act 2004 (the '**2004 Act**').

2. The tribunal finds that the appellant did not have a reasonable excuse pursuant to s95(1) of the 2004 Act for having committed a criminal offence.

3. The tribunal finds, having regard to the Council's policy and the evidence it heard, that the appropriate financial penalty to impose on the appellant in respect of the property is £1,000.

Application

4. By an application received by the tribunal on 3 February 2020 the appellant seeks to challenge the imposition by the Council of a financial penalty of £8,000 in respect of the property.

Background

5. The property is described in the application as a semi-detached Victorian house with five bedrooms.

Agreed matters

6. The parties agreed that the property was one which required an HMO licence and that Mr Emerson received the rack rent for the property, less commission of 9.2 % paid to Hunters who manage the property on Mr Emerson's behalf.

Issues

7. The issues for the tribunal to determine were
    - Had Mr Emerson committed the offence under section 72(1) of the 2004 Act of controlling or managing an unlicensed HMO?
    - If Mr Emerson had committed an offence did he have a reasonable excuse?
    - If Mr Emerson had committed an offence and did not have a reasonable excuse what was the appropriate level of penalty??

Evidence

8. Ms Heath, a Public Protection Licensing Officer at the Council, gave evidence that from 1 March 2018 the council designated certain areas of the borough for additional licensing, including the area in which the property is located. Before the proposal had been put to cabinet the council had carried out consultation with managing agents, including Hunters. In October 2018 she had e mailed Mr Creevy with a response to his general enquiry as to when additional licences would be required.

9. On 17 January 2019 the lead tenant Ms Lauren Gee started an application for a mandatory licence, which was never completed. When Ms Heath had followed up on this uncompleted application she received, on 15 April 2019 an email from another of the tenants, Mr Kriss Williamson, which confirmed there were four unrelated adults living at the property. He asked for a Temporary Exemption Notice (TEN) pending a decision on a planning application for change of use from C3 to sui generis (large HMO). The council explained that this was only appropriate in circumstances where steps were being taken to stop the use of the property as an HMO. Mr Williamson responded on 16 April that should planning permission be refused steps would be taken to stop the use of the property as an HMO. No

TEN application or HMO application having been received by 12 August the council started its Failure to Licence procedure. Warning letters were sent to Mr Emerson and Mr Williamson at the property and to Mr Emerson at an address obtained from the planning application. These letters were dated 3 and 17 September 2019, and receiving no response from Mr Williamson or Mr Emerson, the property was visited by the council, unannounced, on 3 October. Ms Heath's written statement to the Tribunal (paragraph 23) refers to an application for mandatory licence started by Mr Williamson on 13th September 2019. Access was not obtained to the property on 3 October but the council decided it had sufficient evidence for the property to be deemed an unlicensed HMO.

10. A Notice of Intention was issued on 14 October 2019, which identified the penalty of £8000, and gave until 17 November 2020 for representations to be made to the council. On 17 November Ms Heath received representations from Mr Creevy of Hunters as Mr Emerson's representative (having been in email communication with him since 29 October). On the same day, Ms Heath confirmed (paragraph 23 of her witness statement) that, an application for a mandatory licence was submitted successfully by Mr Williamson. The Final Notice in respect of the Financial Penalty was then issued on 7 January 2020. The licence for the property headed 'Additional HMO Licence' has an operative date of 5 December 2019 (p 97 of bundle) and was issued 21 April 2020.

11. Ms Heath gave evidence as to how the financial penalty was calculated with reference to a matrix used by the council (pp 263-4 of the bundle), which assesses offences across four criteria, applying a scoring regime which is then converted to a financial penalty. The criteria being,

    - Deterrence and prevention
    - Removal of financial incentive
    - Offence and history
    - Harm to tenants

    The council also takes account of sections 3 and 4 of the MHCLG guidance on civil penalities under the Housing and Planning Act 2016.

12. In calculating the financial penalty Ms Heath gave evidence that the council had regard to:

- having low confidence that a financial penalty would deter repeat offending, given the failure by Mr Emerson to reply to the letters sent in September 2019.
- In relation to removal of financial incentive the council had regard to the properties owned by Mr Emerson, categorising him as a small portfolio landlord, and his share holdings in companies involved in sound recording and music production.
- That there was no record of previous offences by Mr Emerson.
- As to harm to the tenants regard was paid to the absence of any licence application, and the vulnerability of one of the tenants. Regard was also paid

to the fact that the landlord was addressing the works required to bring the property up to standard.

13. On being questioned by the tribunal Ms Heath explained that the need to contact the landlord directly only arose once there is a failure to licence a property. An application can be made by the tenants of the property, and there had been no reason to contact the owner then. Ms Heath confirmed that the interior of the property had not been inspected before the Notice of Intention had been served, and was never inspected. She confirmed that PACE questioning had not been undertaken, while pointing to the letter of 14 October having invited written representations.

    Ms Heath explained that as this had been her first case she had relied on a senior officer's experience and guidance in fixing the level of penalty. Ms Heath had also relied on superior's advice when no account was taken of the receipt of a valid licence application, on the ground that it had come from the tenant and not Mr Emerson. That no account had been taken of the possibility of the penalty levied on Hunters exculpating Mr Emerson was also taken on the superior officer's advice.

    Ms Heath accepted that Mr Emerson was not a 'portfolio' landlord as he only let one property and confirmed that Hunters had already been fined £16,000, which it had paid. Ms Heath confirmed that the property was still occupied by the same tenants, who had not made any complaints about the property, save in respect to fire safety issues which had been sorted out. She explained that the vulnerability of one of the tenants was based on a conversation with that tenant.

    Ms Heath confirmed that the valid application for a licence had been received before the final notice was issued, but that she still considered the level of penalty levied on Mr Emerson appropriate. She explained that the reason the penalty had not been reduced or withdrawn was on the advice of her superior, Mr Paul Oats, who was no longer with the council.

14. Mr Emerson gave evidence that, as he is frequently outside the United Kingdom, he employed Hunters as property agents to manage the property, including finding tenants, collecting rent, maintenance of the property and protection of the tenants' deposits. No copy of the agreement with Hunters was included in the bundle before the tribunal, but in his witness statement Mr Emerson gave evidence that since 2016 Hunters had acted for him in letting the property, charging 9.2% of the rent. Any correspondence that he received in relation to the property he sent to Hunters for them to deal with.

15. Mr Emerson had been aware, from an email dated 22 January 2019 from Julian Creevy of Hunters, of the need for an HMO licence for the property. That, email stated that the tenants would be responsible for the cost and obtaining the HMO licence, and Mr Emerson had relied upon this representation. When he received the letters from the council in September 2019 he passed these immediately to Hunters to deal with. When asked whether a letter marked 'Warning' should have alerted him to a problem he

told the tribunal that he had relied on Hunters and their assurance that matters were under control. He had confidence in Hunters and would have contacted the council directly if he had thought that they were not in control of the situation. Mr Emerson confirmed that prior to 2016 he had employed other agents who had not proved satisfactory which is why he had employed Hunters.

16. On being questioned by the tribunal Mr Emerson confirmed that he did not visit the property, relying on Hunters, and had never received any complaints from the tenants. He confirmed that Hunters, and Mr Creevy, still managed the property on his behalf.

17. The witness statement of Mr Creevy of Hunters stated that when approached by Ms Gee to rent the property he was reassured by the fact that she worked for Havering council and that she could make the necessary application. The statement accepted that Hunters had complete management of the property and confirmed that Hunters have already paid a financial penalty in the sum of £16,000, which it had not challenged.

Submissions

18. Mr Emerson submitted that having fully delegated responsibility for the property to Hunters he was neither in control nor managing the property. For the respondent Mr Ham submitted that under section 263 of the 2004 Act Mr Emerson was both a person in control of the property, as he was in receipt of the rack-rent of the property, and a person managing the property as, as owner, he received the rent.

19. Mr Emerson submitted that he had a reasonable excuse under section 72(5) of the 2004 Act as he had no control of the property as he employed Hunters. For the respondent Mr Ham submitted, referring to the decision in *Salford*, that it is for the appellant to prove, on the balance of probabilities, that he had a reasonable excuse. In Mr Ham's submission it was not reasonable for Mr Emerson to rely entirely on Hunters, he remained partially liable for the offence. From past experience Mr Emerson knew that agents could get things wrong and he should have responded to the letters sent to him in September 2019, marked respectively "Important Information' and 'Warning'. There was evidence that he had received the letters.

20. In relation to the penalty itself Mr Emerson submitted in his witness statement that the financial matrix does not take into account his financial circumstances, in particular expenses in excess of £2000 a month, and that he is no longer able to work by reason of the pandemic. He submitted to the tribunal that he had never been in court before. He had been a good landlord, he had taken Hunters' advice about the tenants being responsible for obtaining the HMO licence and had relied on it. He stated that he was unlikely to commit the offence again, that he was unaware of any tenant being vulnerable and that, the original licence for the property having only been issued for one year, the property had since been re-licensed. For the

respondent Mr Ham submitted that the penalty was reasonable in the circumstances. Ms Heath had taken advice in fixing its level and it was not mitigation for Mr Emerson to say that he had relied on his agent.

Reasons for the tribunal's decision

21. The tribunal makes the determinations in this decision on the basis of the bundle before it at the hearing, the evidence heard at the hearing and the submissions by the appellant and by Mr Ham on behalf of the respondent. The relevant sections of the 2004 Act to wwhich the tribunal had regard are referred to below.

22. There was no dispute between the parties that the property required an additional HMO licence and that Mr Emerson received the rack rent for the property less commission of 9.2% paid to Hunters.

Did the appellant commit an offence?

23. The tribunal do not doubt that Mr Emerson believed that he had delegated management and control to his agents, Hunters. His belief was not correct in law.

24. Section 72(1) of the 2004 Act provides,

'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'.

Section 263 of the 2004 Act provides

'(1)In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
(2)In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
(3)In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—
(a)receives (whether directly or through an agent or trustee) rents or other payments from—
(i)in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises;'

25. Mr Emerson is the owner of the property and receives the rack rent for the property from the occupants, through his agents Hunters. He is therefore both a person 'having control' and also 'managing' an HMO for the purposes of the 2004. He has therefore committed an offence under section 72(1) of the 2004 Act.

Reasonable excuse

26. Section 72(5) of the 2004 Act provides that,

> '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.'

27. In *Daoudi,* at paragraph 26, it was stated that ignorance of the need to obtain an HMO licence may be relevant in a financial penalty case. However in this case Mr Emerson was not ignorant of the need to obtain an HMO licence. Hunters had told him that one was required. He did not apply for the licence because he understood that the tenants were going to do this. And when he was notified by the council that a licence had not been obtained he relied on Hunters to resolve the issue.

28. The tribunal do not doubt that Mr Emerson believed that he had a reasonable excuse for any offence he might have committed because he had delegated management to Hunters.

29. The tribunal has to determine objectively whether not following up on whether a licence had been obtained and his delegation of responsibility for the property to Hunters was a reasonable excuse. It finds that a prudent landlord, with experience of previous unsatisfactory agents and knowing that a licence was required would have taken steps to ascertain that the licence had been obtained and would not have relied completely on his agent.

30. The tribunal finds, on the evidence before it, that Mr Emerson does not have a reasonable excuse.

Quantum of the financial penalties

31. In ascertainining the level of penalty to be charged the tribunal should have regard to the council's policy. While not referred to in the hearing this approach is consistent with the Upper Tribunal decision in *Waltham Forest LBC v Marshall* [2020] 1 WLR 3187 ('***Marshall***'). The tribunal find, on the evidence before it, that Ms Heath did not follow the guidelines set out in the council's matrix in applying a score to each factor. The tribunal have therefore reconsidered each of the four factors set out in the council's matrix in turn.

32. Deterrence and Prevention

The council awarded a score of 10 under this factor. This is the score that its matrix states is appropriate where the council have low confidence that a financial penalty will deter repeat offending, and was chosen because Mr Emerson did not respond to the letters sent to him in September 2019 before 2 October. On the evidence before it the tribunal is confident that Mr Emerson will be deterred from repeat offending and have therefore reduced this score to 1.

33. Removal of financial incentive

The council awarded a score of 10 under this factor, considering the landlord to have a 'small portfolio of low asset value'. As Ms Heath admitted when giving her evidence Mr Emerson only has one let property and in adopting this factor the council appear to have had regard to corporate shareholdings in companies whose assets are 'small'. The tribunal find on the evidence before it that Mr Emerson has assets of little value. It is therefore appropriate to award a score of 5 to this factor, in line with the council's stated policy.

34. Offence and history

The council awarded a score of 1 to this factor as Mr Emerson had no previous enforcement history, recognising that his was a single low level offence. The tribunal accept this score.

35. Harm to tenant(s)

The council awarded a score of 10 doubled, in line with statutory guidance, to 20. The council awarded this score justifying this on the basis that they had had no engagement with the owner and that there were vulnerable tenants at the property. The justification also referred to anti-social behaviour by the occupants pointing to poor management. The council provided no evidence of vulnerability of the tenants (which would depend upon hazards at the property which Ms Heath confirmed had not been inspected internally) nor of anti-social behaviour. The council's notes on its matrix say that this would be the appropriate score if there was moderate level health/harm risks to occupants but no evidence of this was before the tribunal. For this score to be appropriate the tenant should have provided information on impact but there was no such evidence before the tribunal. Given that the council had not inspected the property, there was no evidnce of harm to the tenants, no evidence of vulnerable occupants and no information provided by the tenants on impact. The tribunal consider that the appropriate score to be awarded for this factor, in line with the council's policy, is 1 which should be doubled to 2 in line with statutory guidance. According to the council's matrix this is the score that the council would award if, 'Very little or no harm caused. No vulnerable occupants. Tenant provides no information on impact.'

36. Mitigating factors

The tribunal were concerned that the council had not provided a copy of its civil penalty policy, so that the tribunal could not consider the account the council would take of any mitigating factors. The tribunal is also concerned that Ms Heath had told the tribunal that receipt of the valid application was irrelevant to mitigation. This is inconsistent with the decision in *Daoudi* where, at paragraph 24, the Upper Tribunal stated that the willingness of Mr Daoudi to comply with his application obligations was a mitigating factor.

The tribunal considered that the fact that a valid application had been made and that Mr Emerson had indicated remorse were both mitigating factors that the council should have taken into account in fixing the level of penalty.

37. The penalty

Using the fee ranges provided by the council as being attached to its matrix a score of 9, as determined by the tribunal, produces a fee of £1,500.

In the absence of the council's policy the tribunal, based on its own knowledge and experience, considers that a reduction of 33% in the penalty levied to be appropriate by way of mitigation, to reflect the valid application having been made before the Final Notice was issued and the remorse displayed by Mr Emerson.

The tribunal therefore determine that the appropriate financial penalty to impose on the appellant in relation to the offence is £1,000.

Name: Judge Pittaway **Date:** 6 April 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).