FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/36UD/HNA/2019/0087**
Property	**:**	**90 Dragon Parade, Harrogate, HG1 5DQ**
Applicant	**:**	**Mr Andrew Norman**
Respondent	**:**	**Harrogate Borough Council**
Representative	**:**	**Ms Vodanovic (Counsel)**
Type of Application	**:**	**Housing Act 2004, Section 249A & Sch. 13A**
Tribunal Members	**:**	**Phillip Barber (Tribunal Judge)** **Aisling Ramshaw MRICS**
Date of Hearing (Telephone)	**:**	**14 August 2020**
Date of Decision	**:**	**24 August 2020**

DECISION AND REASONS

Decision

We have decided that the appropriate financial penalty under section 249A of the Housing Act 2004 for number 90 Dragon Parade, Harrogate HG1 5DQ should be £13,500 for contraventions of section 72 of that Act (licensing of HMOs).

Reasons

Introduction

1. This Decision and Reasons relates to 1 appeal against the imposition by the respondent of a financial penalty under section 249A of the Housing Act 2004 ("the Act") in relation to 1 property owned by the Applicant, Mr Norman.

2. The appeal was heard remotely via the telephone as a result of the current health pandemic. Ms Vodanovic, barrister, represented the Respondent and in attendance were Ms Lynn Ashton, Solicitor for Harrogate Borough Council and Ms Claire Riley, Environmental Health Office for Harrogate Borough Council who had been involved with the enforcement action against Mr Norman. Mr Norman represented himself. We heard evidence and submissions from Mr Norman and evidence and submissions from the Respondent and we were satisfied that the use a telephone hearing was an effective means of addressing the issues in this appeal.

3. Prior to the hearing it was decided that no inspection was necessary but the parties were at liberty to provide any additional evidence in the form of photographs if they wished to do so. No additional evidence was provided. The Tribunal had before it a bundle of documents from the Applicant and a bundle of documents from the Respondent and at the start of the hearing it was confirmed that all parties and the Tribunal were working from the same bundles.

The issues we had to decide

4. By section 249A of the Act:

> (1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.
>
> (2) In this section "relevant housing offence" means an offence under—
>
> (a) section 234 (management regulations in respect of HMOs),
> .....

5. By subsection (4) the maximum penalty is £30,000 and subsection (6) provides that the procedure for imposing such a fine and for an appeal against the financial penalty is as set out in schedule 13A to the Act.

6. Paragraphs 1 to 3 of Schedule 13A set out the provisions in relation to a "Notice of Intent" which must be served before imposing a financial penalty. Paragraph 2 provides that the notice must be served within 6 months unless the failure to act is continuing (which is the case in this appeal) and paragraph 3 sets out the information which must be contained within the Notice.

7. After service of the Notice of Intent and following consideration of any representation made, paragraph 6 provides for the service of a "Final Notice", which must set out the amount of the financial penalty and the information required in paragraph 8: i.e., the amount, the reasons, how to pay and information about the right of appeal.

8. A "house in multiple occupation" (HMO) is defined in section 254 of the Act and there is no dispute that the property meets the requirements of that definition.

9. By section 72(3) of the Act:

> A person commits an offence if-
> (a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and
> (b) he fails to comply with any condition of the licence.

10. Mr Norman appealed the financial penalty, and paragraph 10 of schedule 13A sets out the provisions in relation to such an appeal:

> (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—
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> (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.

11. Accordingly, the Tribunal, in this appeal, has jurisdiction over the decision to impose a penalty; the amount of the penalty and can confirm, vary or cancel the final notice including increasing, if it so determines, the amount of the penalty. The appeal is by way of a re-hearing, which we have conducted.

12. We had to be satisfied beyond reasonable doubt that the conduct of the Applicant amounts to a "relevant housing offence" under section 72(3) of the Act – i.e. that Mr Norman is the licence holder and has failed to has failed to comply with a condition of that licence.

13. We also considered and took into account the decision of the Upper Tribunal in *London Borough of Waltham Forest v Marshall & Ustek* [[2020] UKUT 0035, The decision makes little difference to the outcome of this appeal.

Findings of Fact

14. 90 Dragon Parade, Harrogate, (the "property") is owned by JC Lowes (Holdings) Limited a company with a registered address in both Blackpool and Preston (according to the Land Registry documents). According to Mr Norman, that company is controlled by "2 elderly people" and that he manages the property on their behalf. He receives no rent and, according to him, he has no connection with the company other than as managing agent for the property.

15. The property is a 4-storey building (including the basement) with 6 flats over 3 floors and at least 6 occupiers. It therefore comes within that class of building for which a HMO licence is mandatory under Part 2 of the 2004 Act. It appears that the property has had a HMO licence in the past which expired on the 28 November 2017, it is claimed in Mr Norman's name, but we have seen no documents in relation to this previous licence.

16. On the 28 July 2017, the Respondent served a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 on Mr Norman at the address of Xcell Support Services, a company run by Mr Norman, in an attempt to determine who owned and operated the property and details of the names and addresses of each of the occupiers. Mr Norman replied to those enquiries by indicating that Xcell Support Services Ltd were involved in "leasehold management" and that this company receives the "market rent". He names the owner as Mrs Cunliffe of JC Holdings Ltd and lists the occupiers as 6 tenants before signing the enquiry form on behalf of "Hillary Cunliffe, JC Lowes Holdings Ltd". Mr Norman followed that enquiry up with an email on the 22 September 2017 in which he stated that

"Xcell Support Services Ltd are the licence holder with the tenant being Hillside Property" and "Hillary Cunliffe is the owner of the freehold". We have seen no evidence of a previous licence but we note that that Respondent claims that Mr Norman himself was the previous licence holder and not Xcell Support Services.

17. It is also clear from the documents that some aspects of that email were not correct. Hillside Property could not be a tenant as it was dissolved on 11 April 2017 and Hillary Cunliffe was not the owner of the freehold. Mr Norman relies on this email as evidence of his claim that Harrogate Council have targeted the wrong person under section 249A, and that point with be addressed in our assessment of the grounds of appeal.

18. Mr Norman applied for a licence in relation to the property and he signed and dated the application form on the 05 November 2017 and we note that he signed the form as "Director" on page 6 and on page 15, but he completed the form in both his name and the name of a company "Xcell Support Services Ltd" as if both he and the company were to hold the licence. The application was received on the 09 November 2017.

19. On the 22 December 2017, the Respondent served a Notice of Proposal to Grant a Licence to Mr Norman as the manager and/or person in control of the property, enclosing a draft licence in Mr Norman's name with a schedule of mandatory conditions attached and Mr Norman responded to the draft in an email dated 09 January 2018 where he explained the nature of the arrangements for the various occupiers at the property. He repeats the point that he is writing "on behalf of the company" before describing the HMO as a "low risk shared house" rented to "Hillside" as a corporate let for "guests" who are not provided with "independent assured shorthold tenancy agreements" but instead are provided with a "simple licence" that allows them to "roam around the property" with access to all of the bedrooms. The email refers to the various works required by the conditions of the HMO licence and makes representations in relation to fire safety (i.e.the standard of the fire alarm and fire doors) before asking for the licence to be amended to reflect those representations. At no point in that email does he ask for the licence to be amended to name "Xcell Support Services" as licence holder as opposed to himself

20. Following this email, a meeting is arranged between Mr Norman and the Respondent to discuss the terms of the licence and the result of those discussions was a "modified" draft licence in which Mr Norman is still named as the licence holder.

21. In an email dated 13 April 2018, Mr Norman makes further representations about a modified licence but again at no point does he make any representations as to who the licence holder should be and on the 25 April 2018 the Respondent grants Mr Norman a licence in relation to the property until the 28 November 2022 with the mandatory condition that, by the 25 October 2018 the current fire alarm system must be upgraded to a grade A, LD2 fire detection and alarm system and that there must be a 30 minute protected route with fire-resisting FD30S doors to

each bedroom, the lounge and kitchen, with intumescent smoke seals and approved hinges and self-closing devices. As an alternative the current doors could be upgraded.

22. On the 26 April 2018, in an email, Mr Norman remained non-committal about whether to apply for a licence but it was pointed out to him that a valid licence had been granted and that if he were to want to return the property to single occupancy, then he would need to make an application for a temporary exemption.

23. It follows, and we find as fact that the property was operated as a HMO, in that it came within the definition of a HMO and it required a licence. Mr Norman applied for a licence and whilst at some points he purports to be acting on behalf of a company, the Respondent granted a licence to him with conditions as to fire safety at the property.

24. No other representations were made as to the terms of the licence and subsequently he started to make arrangements to comply with the licence conditions.

25. On the 26 June 2018, the Respondent carried out a visit to the property to check on the status of the informal works (i.e. those not the subject of the financial penalty). It was established at this visit that the "informal" works had been completed but details of the HMO licence scheduled works were not assessed until a power of entry was exercised on the 16 November 2018 – i.e. 3 weeks after the date the works were required to be completed.

26. On the 16 November 2018, the Respondent carried out a formal inspection of the property in the absence of Mr Norman and the photographs from that visit are at pages 159 through to 173a of the bundle. It was noted during this inspection that the upgrade to the fire detection and alarm system had not been undertaken and that, whilst various fire safety doors had been installed or upgraded in some of the bedrooms, the upgrades were poorly executed with "timber showing, a hole from a previous lock, two hinges, missing intumescent smoke seals and a defective self-closing device. The self-closing device to the kitchen door was also defective." The result was that the doors did not meet the appropriate safety specifications. Mr Norman had previously indicated that a flood to the basement had prevented the completion of works for the fire alarm system to be installed.

27. Following the service of a letter under PACE, the Respondent again visited the property on the 05 December 2018 but could not gain entry as Mr Norman was not there. The Respondent again carried out a formal inspection on the 18 January 2019 and the notes of that inspection are at pages 181 to 182 of the bundle. Three of the bedrooms were locked. Photographs of this visit are contained at pages 182 to 185 of the bundle and it was apparent that the fire detection system had still not been completed with a number of problems remaining to the fire safety doors.

28. On the 28 January 2019, the Respondent completed an Enforcement Decision Record in which it was decided that a Civil Penalty Notice would

be the most appropriate remedy for the continuing breach of licence conditions at the property with a civil penalty assessed at £15,000.

29. On the 18 April 2019, the Respondent served a Notice of Intention to impose a financial penalty in the sum of £15,000 and on the 13 May 2019, Mr Norman made representations on that Notice of Intention, including photographs of the state of the works at the property.

30. The Respondent carried out a further visit to the property on the 14 June 2019 and the notebook entry from that visit is reproduced at pages 92 through to 95a of the bundle, with photographs at pages 96 through to 101a. At this visit it was established that the fire alarm system had been completed but that the doors to bedrooms 4 and 5, the kitchen and cellar still did not comply with the requirements of the licence and entry to check the doors in the rest of the property was not possible. Only bedrooms 1 and 3 were identified as complying with the terms of the licence. As a result a final notice was served on the 20 June 2019 with the financial penalty remaining at £15,000.

31. Mr Norman appealed that decision to this Tribunal and we held a hearing of his appeal on the 14 August 2020 as detailed above.

32. During the hearing, Mr Norman spoke to his written skeleton arguments and he was cross questioned by Ms Vodanovic in relation to his appeal and the points he raises. We noted, in particular that Mr Norman has a number of other properties which he rents out and that as well as property management, he is a professional landlord himself.

33. Mr Norman had two lines of defence to the financial penalty. Firstly, he claims that a flood in the basement prevented works from being completed as it was necessary to allow time for the basement to dry out and secondly, the tenants are at fault themselves for propping open doors and generally opening and closing the doors in a manner which causes them to be damaged and regularly require repair works. However, we did not find either of those arguments to be persuasive. No evidence of the flood and the resultant inability to comply with the terms of the licence has been provided and Mr Norman did not report this at the time or ask for an extension; and secondly, most of the works necessary to the doors to comply with the licence had nothing to do with the use by the tenants. Mr Norman claims, for example, that the hinges to the door to bedroom 1 are compromised by the regular opening and closing of the door by the tenant. We do not accept that and in our view, we thought that opening and closing a door should not damage the hinges.

Our Assessment of the Appeal

34. This is a re-hearing of the decision to impose a financial penalty for breach of Mr Norman's obligations under the compulsory HMO licencing regime and as mentioned above, we have considered all of the issues afresh.

The Wrong Person

35. Mr Norman's claim is that the Respondent has targeted the wrong person and that it is the company Xcell Support Services who should have been the subject of the Financial Penalty and not him. He says this is because it was Xcell who made the application, he merely completed the form; that he is not the owner of the property and has no legal interest in the property; that he has always communicated on behalf of the property and that he has made repeated attempts to get the Respondent to alter the name on the licence but without success.

36. The problem with all of those points is that none of them hold up to scrutiny. It is accurate that the company is named on the licence application, but so is Mr Norman and both prior to the application being made and during discussions as to the contents of the draft licence, Mr Norman used the email address "andy@hillsideproperty.co.uk" with no mention of acting on behalf of Xcell Support Services. There is reference in an email dated 22 September 2017 to Xcell Support Services as the "licence holder" but as numerous aspects of that email are incorrect (see above) we have our doubts that Xcell Support Services were the previous licence holder. In any event, Mr Norman is claiming that this email is authority for the fact that he intended Xcell to be the holder of the renewed licence but we do not agree that this changes matters. This email is responding to an enquiry into ownership and control of the property and pre-dates the licence application. Finally, there are no repeated attempts to change the name on the licence. As mentioned above in none of the emails between Mr Norman and the Respondent which post-date the application does he mention this point. He mentions numerous other points, including the necessity for works and the various conditions attached to the licence but altering the name is not one of them.

37. In any event, even if Mr Norman did not intend to personally hold the licence, he was and is the licence holder. He could have made an application to vary the licence but he didn't. As a result, he is responsible for complying with the terms of the licence and the proper target of the Respondent's enforcement action.

Is there an Offence?

38. As required by section 249A of the Act and for the reasons given above, we are satisfied, beyond reasonable doubt, that Mr Norman's conduct amounts to a relevant housing offence under section 72(3) of the Act. The HMO licence required various works to be completed within 6 months and they manifestly were not completed within that time scale.

39. In particular, the fire detection and alarm system was not upgraded and installed within the necessary timescale and the fire doors were not upgraded so as to comply with the appropriate fire safety requirements.

40. Our findings of fact as set out above demonstrate that Mr Norman, as licence holder for the property failed to comply with a number of

conditions and that it must be beyond reasonable doubt that an offence has been committed under the relevant section.

41. Mr Norman in his appeal claims that no offence has been committed but it is very difficult to see how he can maintain that position in the face of overwhelming evidence to the contrary.

The Statutory Requirements

42. We find as fact that the notices were properly served and that they contained the proper statutory information. There were no procedural irregularities.

43. Accordingly, and given our findings of fact, that there is a breach and that Mr Norman is culpable the only remaining issue is the level of the penalty.

The Amount of the Penalty

44. There is no guidance in the legislation (other than setting maximum amounts) as to the amount of any penalty. As already mentioned, the Tribunal has power to vary the final notice, and this includes a power to increase the penalty.

45. Pages 209 through to 221 of the Respondent's bundle reproduce the Respondent's policy on civil penalties and housing enforcement, and pages 194 through to 203a reproduce the Ministry of Housing, Communities & Local Government "Guidance to Local Authorities on Civil Penalties under the Housing and Planning Act 2016", both of which we have taken into account in arriving at our determination as to the appropriate amount of the penalty for the Applicants' failure to comply with section 234 of the Act. In particular, however, the Guidance gives a number of factors which the Local Authority (and the Tribunal) might have regard to in determining an appropriate financial penalty under which we make the following findings.

46. The Respondent has set out on pages 188 through to 189 how it arrived at the financial penalty and we take that calculation as the starting point in relation to our own assessment of the level of financial penalty applicable in this appeal.

Level of Harm and Culpability of Offender

47. We view the Applicants' failure to comply with the terms HMO management standards as a very serious offence. We note that throughout the tenancies, the tenants were at serious risk of injury from fire. We note that the Applicant is a professional landlord with several other properties and carries on a business as a property manager. It seems to us that he ought to have known about his responsibilities under the HMO regulations and complied with them without question.

48. As demonstrated from our findings of fact, Mr Norman had a long period of time within which to start and complete the works and despite

numerous visits from the Respondent and a number of email exchanges failed to complete the works. He was aware of the need to upgrade the fire detection and alarm system and install appropriate fire doors as early as December 2017 (draft licence) but it was over a year later that the works were completed. Throughout this time there had been a substantial risk to tenants from fire at the property. We note that Mr Norman initially had an equivocal approach to the need to have a licence, indicating in his email of April 2018 that he might not continue with the application, despite it being a statutory requirement to hold such a licence. We also note that at times Mr Norman has questioned the need for a fire detection system of the type required by the Respondent and even at the Tribunal he still questioned the need for a fire safety door to the basement. We also note that on one occasion he was not present to allow entry to the Respondent for the purposes of an inspection (December 2018) and that inspection had to be abandoned. We also note that he was not present at the inspection on the 16 November 2018 and arrangements had not been made to access 2 of the bedrooms. Finally, he was not present at the inspection on the 18 January 2019, when 3 of the bedrooms were locked.

49. We agree with the Respondent that over the course of the investigation Mr Norman has shown a disregard as to the importance of compliance and we think this equivocal approach, together with what appears to be a denial as to the seriousness of the need to ensure fire safety at the property only serves to increase Mr Norman's level of culpability in relation to the breach.

50. We agree with the Respondent that the works required were fundamental to the safety of the tenants and that Mr Norman has demonstrated an inexcusable disregard for their safety putting lives at risk.

51. In our view and by reference to the Respondent's matrix on page 214a of the bundle, we view the level of culpability to be high and the level of harm to be medium. This would give a starting point of £15,000 for a civil penalty.

Track record of the offender

52. The Respondent claims that Mr Norman was a previous licence holder at the property, which expired on the 28 November 2017 and that he failed to comply with licence conditions for that licence. We have seen no evidence about this previous licence and any failure on Mr Norman's part and so we take the view that Mr Norman does not have a track record of non-compliance. Accordingly, no account should be taken of any track record.

53. We do, however, take account of the fact that Mr Norman has attempted to comply with the conditions of the licence. He started works within the time frame and the fire alarm was installed some 7 ½ weeks after the time for compliance but had not been certified and the Respondent has been unable to check the system. We think that credit should be given for these mitigating factors and we reduce the level of fine by 5% for each – i.e. £750 x 2 = £1,500.

54. This would give a civil penalty in the sum of £13,500.

Punishment of the Offender

55. Given our findings in relation to the severity of the offence and the culpability of the offender we are satisfied that Mr Norman should be appropriately punished and we are satisfied that the level of fine which we have set is an appropriate level of punishment.

Deter the Offender from Repeating the Offence

56. We note that Mr Norman has other properties and that he continues to manage the subject property out as a HMO (that we are aware of). The level of the fine we have set will appropriately deter him from committing any future offence in relation to his responsibilities as a professional landlord and property manager.

Deter others from Committing Similar Offences

57. We note that the property is situated in an area with other privately rented properties and it is necessary to ensure that any other landlord who may be breaching his or her responsibilities as a landlord is deterred from doing so. We consider that the level of fine we have determined as appropriate for the breach in relation to this property will help deter other landlords from failing to comply with their responsibilities.

Remove any Financial Benefit the Offender may have Obtained as a result of Committing the Offence

58. We note that Mr Norman is not responsible for the cost of carrying out the works and that he does not receive the rents for the property. However, he is managing the property and, whilst he told us he does not receive remuneration for managing the property, we thought he is not doing so for free. In any event, he told us that if he were not managing the property then no-one would manage it. We thought this statement to be implausible unless there were some connection between him and the owner of the property which meant that no other property manager would be employed. That said, we do not have any indication that Mr Norman has financially benefitted from the breach and accordingly do not take this into account in relation to our assessment of the level of financial penalty.

General Considerations

59. We also place weight on the Respondent's enforcement policy in relation to the Private Sector in its geographical remit. The Respondent has followed that policy and utilising its expertise and judgment it has appropriate set a level of fine which it justifies by reference to the calculation on pages 188a and 189 of the bundle. The only point where we disagree with the Respondent is in relation to previous non-compliance which has not been evidenced.

Conclusion

60. Taking all of the above aboard and in accordance with our findings of fact we have decided that an appropriate level of fine for the breach is £13,500.

Judge P Barber
24 August 2020