FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	CAM/26UG/HNA/2021/0015
Property	**:**	10 Fern Dells, Hatfield AL10 9HX
Applicant	**:**	Ricardo Pinto
Applicant's Representative	**:**	Richard Pinto
Respondent	**:**	Welwyn Hatfield Borough Council
Respondent's Representative	**:**	Mrs Sherriff, solicitor
Type of application	**:**	Appeal against a financial penalty imposed pursuant to s. 249A Housing Act 2004
Tribunal members	**:**	Mr Max Thorowgood and Sarah Redmond
Venue	**:**	By CVP on 8th September 2021
Date of Decision	**:**	14th September 2021

DECISION

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1. The application

1.1. On 1st December 2020 the Respondent served a notice of its intention to issue a financial penalty to the Applicant in respect of his failure to apply for an HMO licence for the property known as 10 Fern Dells, Hatfield Hertfordshire AL10 9HX ("the Property"). The notice said that the Respondent became satisfied that the offence had occurred on 29th June 2020.

1.2. The notice required a response by 29th December 2020.

1.3. The Applicant provided a response on 22nd January 2021. That response was to the following effect:

1.3.1. He never gave permission for more than 4 people occupying the Property at any one time.

1.3.2. When he agreed to let a tenant who he knew as Ely occupy a room, Ely then allowed what he described as a 'gang' of people to come and reside at the Property. This led to complaints from his existing tenants, one of whom was pregnant, and he took steps to put an end to their occupation. He was himself a victim of fraud by this Ely and his associates.

1.3.3. In any event, the fine imposed was excessive given that the country was in the midst of a pandemic which had severely affected the Applicant's driving school as well as his rental income. His actions were in accordance with Government and Council guidance to show flexibility and compassion to tenants in this difficult time.

1.4. Despite the Applicant's representations, the Respondent nevertheless proceeded to issue the proposed financial penalty in the sum of £5,000.00 on 24th February 2021. The offence alleged to have been committed was that the Property had become licensable and that, being the owner of the HMO and the person responsible for its management,

he failed to apply for a licence. The notice did not state the point at which the Property became licensable or the period for which it was licensable. At the hearing the Respondent's representatives stated that it became licensable on 10th April 2020 and then ceased to be on 4th May 2020. The stated grounds for the penalty were that:

1.4.1. The Applicant was an experienced landlord with 4 HMO's who had been provided with advice and guidance about the licensing requirements previously by the Council.

1.4.2. His culpability was partially mitigated by the fact that he had only a small offence history.

1.5. The Applicant now appeals by his notice which was received by the Tribunal on 25th March 2021. His application identifies three possible bases to challenge the imposition of the penalty:

1.5.1. The notice of intention was not issued within 6 months of the date upon which the Council had sufficient evidence that the offence to which it related had been committed as required by Sch. 13A paragraph 2(1) of Housing Act 2004 ("the Act");

1.5.2. The Property has never been a property in respect of which an HMO licence was required;

1.5.3. Even if the Property was a licensable HMO the Applicant had a reasonable excuse for not applying for one in that he had no knowledge that the Property would be occupied by more than 4 people and that as soon he did become aware that it was being so occupied he acted out of concern for the existing tenants to remedy the situation.

The grounds of appeal did not repeat the points made in respect of the extent of the penalty but we nevertheless take account of the representations made to us at the hearing and which appear in the Applicant's letter of 22nd January 2021.

2. The legal framework

2.1. Section 72 of the Act provides that it is an offence for a person to control an HMO which is required to be licensed under Part II of the Act. It is a defence to a charge under s. 72 that the person responsible for obtaining a licence had a reasonable excuse for having control of an HMO in circumstances which required it to be licensed without doing so, see s. 72(5) of the Act.

2.2. There was no dispute between the parties that the Property was an HMO or that, if it was ever occupied by 5 or more people, it was required to be licensed by reason of Part II and the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006/371.

2.3. Section 249A of the Act provides that the Local Housing Authority may impose a financial penalty up to a maximum of £30,000.00 in respect of offence committed under section 72 if it is satisfied beyond reasonable doubt that the person's conduct amounts to a relevant offence in respect of a property in England.

2.4. Section 249A also provides that the procedure for the issuing of such penalties and for appeals against their imposition is set out in Schedule 13A to the Act. Schedule 13A provides at paragraph 2(1) as follows:

> "The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates."

We understand the phrase, "sufficient evidence of the conduct to which the financial penalty relates," to mean for the purposes of the time limit: sufficient evidence to justify the issuing of a penalty pursuant to s. 249A of the Act and, accordingly, that the evidence must be such as to satisfy the authority, "beyond reasonable doubt", that the person's conduct amounted to a relevant offence. In other words, the authority was required to be sure that the offence was being or had been committed.

3. The matters of fact to be determined

3.1. There are three crucial matters of fact which we need to determine:

3.1.1. The first is whether the Property ever became a licensable HMO, in other words, whether the Applicant ever caused or permitted the Property to be occupied by 5 or more people.

3.1.2. The second, if it was, is whether the Applicant had a reasonable excuse for permitting that state of affairs to occur and/or failing to apply for a licence.

3.1.3. The third is whether the notice of intent was issued within 6 months of the point at which the Respondent became satisfied that offence had been committed. That is to say, when did the Respondent become satisfied ?

3.2. We heard evidence from Ms Emillia Musk who is a Private Sector Housing Technician employed by the Respondent council. It is she who was responsible for investigating this case, gathering evidence and deciding (together with more senior members of her management team) whether an offence had been committed and if so whether to issue a financial penalty.

3.3. Ms Musk struck us as a committed, careful and conscientious person, patently honest and keen to assist us in our deliberations. It was also

obvious, however, from her exchanges with the Applicant both in correspondence and at the hearing and from the video of her inspection of the Property that her relationship with him was more than usually antagonistic. That antagonism was the result, in part at least, of the Applicant have complained previously about her dealings with him in relation to a different property. It was also clear that the Applicant adopted or attempted to adopt a contentious, truculent, domineering manner in his dealings with Ms Musk. We feel that the combination of these two personalities has contributed significantly to the way in which this matter has played out.

3.4. The Applicant struck us as an intelligent but rather hot-headed man, capable, as we have said, of adopting a truculent, contentious domineering manner in his determination to get what he wants. He was plainly very upset by the suggestion that he was not telling the truth and/or that he had not been trying to do his best in the difficult circumstances which obtained in April/May 2020 by the established tenants of the Property. We were quite clear that he understood the regulations and were also broadly impressed by the standard of the accommodation which he was offering at the Property. We also consider, contrary to his submissions to us that administration was not his strong suit, that he was 'on top of' and responsibly engaged in the management of his properties.

3.5. Turning then to the factual matters which require our decision, our conclusions are as follows:

3.5.1. Both in the Applicant's initial response to Ms Musk's email of 5th May 2020 on 12th May 2020, under cover of which he enclosed a copy of the tenancy agreement relating to the Property, and in the HMO declaration form completed by Mr Da Silva's on 16th May 2020, the position was clearly stated that there were at that point, i.e. a few days after 4th May 2020, 4 tenants of the Property and that they were in occupation. If that was correct, then the addition

of Eli or Nikolai or Mr Pavlov, whoever he may have been, meant that there would be a fifth occupant or person entitled to occupy the Property.

3.5.2. The Applicant has, since the notice of intention was served, said and produced corroborative witness statements from the established tenants of the Property (although they did not attend to be cross examined so we can give only limited weight to their written evidence) that there were in fact only three occupants and that the fourth, Wole Akindele, never signed the tenancy agreement and never returned to occupy the Property after Christmas 2019. If that is the case, we find it very surprising in view of the Applicant's knowledge of the rules relating to the licensing of HMO's, that he should not have made this point clear in his responses of 12th May 2020. Likewise, we can see no reason why Mr Da Silva should have answered the question, how many people are in occupation of the Property ? dishonestly or incorrectly. We are therefore satisfied that prior to the grant of a 'lodger's licence' to Eli on or about 10th April 2020 and the acceptance by the Applicant of £400.00 in consideration of that agreement there were 4 people in occupation of the Property. At the very least, we consider that there were 4 people entitled to occupy the Property. We are therefore further satisfied that when the Applicant permitted Eli to go into occupation of the Property the Property became a licensable HMO.

3.5.3. We are further satisfied that notwithstanding the provision of the Lodger's Agreement that only Eli was permitted to occupy the room, the fact that the Lodger's Agreement records the fact that Nadezhda Kirilova was to be his, "nearest of kin contact", means that the Applicant whether by himself or Mr Da Silva, who acted as his agent for this purpose, was aware that it was likely (possible at least) that Ms Kirilova would be occupying the room as well. On this basis, the Applicant caused or permitted 6 people constituting

more than two households, at least, to occupy the Property. Or, if we are wrong about Wole Akindele, 5 people.

3.5.4. As to the question whether the Applicant had a reasonable excuse for failing to apply to licence the Property as an HMO, the Applicant's evidence on this point went more to the question of whether he had a reasonable excuse for his actions in getting rid of Eli and his 'gang' rather than whether he acted reasonably in causing or permitting the Property to operate as a licensable HMO without a licence. We therefore conclude that the defence is not made out. The Applicant knew what he was doing and evidently decided to take a risk perhaps conscious that Wole Akindele would not return and that Linda, who had given her notice, would also leave.

3.5.5. We also take account in reviewing the honesty of the Applicant's evidence as to what he knew and did not know about the occupancy of the Property the fact that he apparently gave an account of how Eli and Nadezhda came to have been in the Property to PC Aaron Taylor who attended the eviction of Eli's 'gang' on 4th May 2020 which is significantly at odds with that which he now says is the truth. PC Taylor's note records that he said there was no written agreement and that he had no knowledge of the arrangement. Both of these statements were admittedly false.

3.5.6. The final factual matter which we must consider is the point at which the Respondent had sufficient evidence that the offence to which the notice related had been committed, i.e. sufficient evidence to justify the issue of the notice. For this purpose we set out a chronology of the relevant events:

3.5.6.1. On 4th May 2020 Miss Musk was informed by a colleague of the possible illegal eviction of Mr Pavlov.

3.5.6.2. On 5th May 2020 she wrote to the Applicant informing him of the report and asking for his comments. She also

sent an HMO Property Declaration to both Mr Pinto and to Mr Da Silva.

3.5.6.3. On 12th May 2020 she received a response from the Applicant stating that there were 4 tenants of the Property and attaching a copy of the applicable tenancy agreement. That named Wole Akindele as a tenant but it was not apparently signed by him.

3.5.6.4. On 13th May 2020 she received a translation of a statement by Mr Pavlov setting out his account of events.

3.5.6.5. On 16th May 2020 she received a completed Property Declaration Form from Mr Da Silva. That said there were 4 people in occupation of the Property.

3.5.6.6. On 28th May 2020 she conducted an interview with Mr Pavlov and Ms Kirilova.

3.5.6.7. Having completed that interview an Enforcement Decision Meeting was held at which it was decided to invite the Applicant to attend a PACE interview.

3.5.6.8. An invitation was sent to the Applicant on 2nd June 2020. It did not identify the nature of the offence to which the interview was intended to relate.

3.5.6.9. By his reply dated 11th June 2020 the Applicant prevaricated, saying that he was taking legal advice as the Council had encouraged him to do.

3.5.6.10. By his email dated 22nd June 2020 the Applicant said that he had taken advice and been advised that as the invitation to an interview did not explain the nature of the matter to which the interview was intended to relate he was at a loss to understand why there should be any need to attend an interview.

3.5.6.11. On 26th June 2020 Ms Musk wrote to the Applicant explaining that the alleged offences were: i) failure to apply for an HMO licence; and ii) the unlawful eviction.

3.5.6.12. On 27th June 2020 Ms Musk received a statement from PC Aaron Taylor which appeared to corroborate the account of Mr Pavlov and Ms Kirilova that they had been in occupation of the Property prior to 4th May 2020. It did also say that PC Taylor had rejected their complaint that Mr Pinto had stolen a sum in the region of £2,000.00 from their belongings as being dishonestly made.

3.5.6.13. On 29th June 2020 Ms Musk received a hard copy of the Lodger's Agreement from Mr Pavlov. This was the point identified by Ms Musk in her witness statement and in her evidence as the point at which the Respondent became satisfied that an offence under s. 72 had committed.

3.5.7. It is our view that the standard of proof required in order for the Respondent to be satisfied was the criminal standard, it was required to be sure. For that reason, we conclude that it was correct and proper to invite the Applicant to give his account of the matter at a formal interview. When he declined to attend such an interview it was appropriate to wait for independent corroboration in the form a report from PC Taylor before being satisfied that an offence had been committed. We therefore conclude that the notice of intent was given within the 6 month period prescribed by paragraph 2(1) of Schedule 13A.

4. Penalty

4.1. As we have already intimated, it is our view that the contentious course of this matter has been directed in part by the antagonism between the Applicant and Ms Musk. The blame for that antagonism we consider needs to be shared between them although the greater part is attributable to the Applicant. We believe that in other circumstances, given the difficult situation which confronted both parties at the beginning of the pandemic, it might have been resolved without the need for any penalty to be imposed. We consider the Applicant's culpability in relation to the offence to be at the lower end of the scale, the Property was generally maintained to a reasonable standard and the Applicant has complied with the small number of requisitions made of him following the Respondent's inspection.

4.2. That said, the aggressive intimidatory way in which the Applicant conducted himself to Ms Pinto in the course of that inspection was not justified. Nor is the contradictory and at points untruthful evidence presented by the Applicant. These are aggravating features not so much of the offence itself as the Applicant's response to the accusation that he had committed an offence they are nevertheless to be taken into account in considering the penalty which it is appropriate to impose. The factors identified by the Respondent concerning the Applicant's knowledge of the regulations are also aggravating features.

4.3. Mitigating features are the difficult circumstances arising from the pandemic and the fact that Mr Pavlov does appear to have introduced a number of unapproved visitors to the Property in the course of that pandemic. These were a significant source of concern to the Applicant and we are fully satisfied that he acted as he did in ejecting the 'gang' from the Property in what he conceived to be the best interests of his vulnerable existing tenants.

4.4. A further mitigating feature is what we accept has been the serious impact of the pandemic on the Applicant's business.

4.5. We have considered whether the shortness of the period during which it is alleged the Property was licensable should be a mitigating factor and concluded that it is not. The Applicant did not know at the time he allowed Eli into possession that he would be there only for a short period.

4.6. In these circumstances, we consider that the penalty should be reduced to £2,500.00.

5. Conclusions

5.1. For these reasons, whilst we consider the Respondent was justified in concluding that an offence under s. 72 of the Act had been committed and in imposing a penalty, we consider that the level of the fine was too high and direct that it should be reduced to £2,500.00.

APPENDIX 1- 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.

APPENDIX 2

RELEVANT LEGISLATION

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) 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.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(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.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to [a fine].

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

[(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.]

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.
(9) The conditions are—
(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of [the appropriate tribunal]) has not expired, or
(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.
(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

249A Financial penalties for certain housing offences in England
[(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.
(2) In this section "relevant housing offence" means an offence under—
(a) section 30 (failure to comply with improvement notice),
(b) section 72 (licensing of HMOs),
(c) section 95 (licensing of houses under Part 3),
(d) section 139(7) (failure to comply with overcrowding notice), or
(e) section 234 (management regulations in respect of HMOs).
(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—
(a) the person has been convicted of the offence in respect of that conduct, or
(b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.
(6) Schedule 13A deals with—
(a) the procedure for imposing financial penalties,
(b) appeals against financial penalties,
(c) enforcement of financial penalties, and
(d) guidance in respect of financial penalties.
(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.
(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.
(9) For the purposes of this section a person's conduct includes a failure to act.]

Schedule 13A

Notice of intent
1
Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").

2
(1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.
(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—
(a) at any time when the conduct is continuing, or
(b) within the period of 6 months beginning with the last day on which the conduct occurs.
(3) For the purposes of this paragraph a person's conduct includes a failure to act.

3
The notice of intent must set out—
(a) the amount of the proposed financial penalty,
(b) the reasons for proposing to impose the financial penalty, and
(c) information about the right to make representations under paragraph 4.

Right to make representations

4
(1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.
(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

Final notice

5
After the end of the period for representations the local housing authority must—
(a) decide whether to impose a financial penalty on the person, and
(b) if it decides to impose a financial penalty, decide the amount of the penalty.

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

7
The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8
The final notice must set out—
(a) the amount of the financial penalty,
(b) the reasons for imposing the penalty,
(c) information about how to pay the penalty,
(d) the period for payment of the penalty,
(e) information about rights of appeal, and
(f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

9
(1) A local housing authority may at any time—
(a) withdraw a notice of intent or final notice, or

(b) reduce the amount specified in a notice of intent or final notice.
(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals
10
(1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—
(a) the decision to impose the penalty, or
(b) the amount of the penalty.
(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.

Recovery of financial penalty
11
(1) This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.
(2) The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.
(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—
(a) signed by the chief finance officer of the local housing authority which imposed the penalty, and
(b) states that the amount due has not been received by a date specified in the certificate,
is conclusive evidence of that fact.
(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.
(5) In this paragraph "chief finance officer" has the same meaning as in section 5 of the Local Government and Housing Act 1989.

Guidance
12
A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A.