FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/42UC/HNA/2019/0029**
HMCTS code	**:**	**F2FCOURT**
Property	**:**	**18A Lisburn Road, Newmarket, Suffolk CB8 8HS**
Applicant	**:**	**Russell Wayne Price**
Representative	**:**	**Gordon Menzies, instructed by Stanley Tee LLP**
Respondent	**:**	**West Suffolk Council**
Type of application	**:**	**Appeal against financial penalties** Section 249A & Schedule 13A to the Housing Act 2004
Tribunal members	**:**	**Judge David Wyatt** **Judge Wayte**
Date of decision	**:**	**13 October 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a face-to-face hearing, as explained below. The documents we were referred to are in a bundle of 55 pages from the Applicant and a bundle of 142 pages from the Respondent, together with the sanctions policy and schedule of previous convictions provided by the Respondent by e-mail on 14 September 2020. We have noted the contents.

Decision

The tribunal hereby cancels the five final notices dated 8 November 2019.

Reasons

The application

1. On 25 November 2019, the Applicant freehold owner of the Property applied to the tribunal to appeal against financial penalties in the total sum of £95,500, which had been imposed by the Respondent local housing authority under section 249A of the Housing Act 2004 (the "**Act**") by five final notices dated 8 November 2019.

Procedural history

2. On 3 December 2019, the tribunal gave case management directions, requiring the Respondent to produce a full bundle of the evidence they relied upon, including specified matters, and the Applicant to produce a bundle of the evidence he relied upon in answer. The Respondent was given permission to produce a reply, but did not do so.

3. The Applicant's solicitors requested a face-to-face hearing, with an interpreter for one of their witnesses. This hearing was arranged for 30 March 2020, but adjourned from March in view of the Covid-19 pandemic.

4. The Respondent failed to produce several of the key documents specified in the directions, including full details of the alleged offences, a full statement of the steps taken prior to and the reasons for imposing each penalty, including the factors taken into consideration when deciding the amount of the penalty, and a copy of any policy applied. Following a query from the tribunal the week before the hearing, the Respondent provided a copy of its local policy relating to financial penalties and a schedule of previous convictions by e-mail on 14 September 2020, but nothing more.

5. There was no inspection. The tribunal had indicated in subsequent directions that it did not consider an inspection was necessary, neither party requested an inspection and the Respondent provided photographs and plans in their bundle.

Hearing

6. The adjourned hearing was listed for 17 September 2020 at Cambridge Magistrates Court. The Applicant was represented by Gordon Menzies of Counsel, with Ms Hayes from the Applicant's solicitors in attendance. On the day before the hearing, the Applicant's solicitors wrote to say that the Applicant had been advised to self-isolate after displaying symptoms of Covid-19. They enclosed a copy text said to be from the NHS and confirmed that the Applicant was content for the

hearing to take place in his absence. They said that, due to recent contact with the Applicant, the Applicant's witnesses were also self-isolating and unable to attend. The tribunal provided telephone conference details to enable the Applicant and his witnesses to give evidence remotely at the hearing, but on the day the Applicant chose not to take that opportunity. His solicitors confirmed that the witness for whom the tribunal had arranged an interpreter, as requested, would not give evidence.

7. The Respondent was represented by David Smithet, in-house lawyer. Matthew Bullock and Emma Forsberg were called to give evidence for the Respondent.

Background

8. The Respondent had produced witness statements with exhibits from Mr Bullock, Mrs Forsberg, Mark Johnson, Karen See and Carole Balding, who were all senior public health and housing officers employed by the Respondent. Mr Bullock said in his statement that the Respondent had been prosecuted on three occasions since 2004 and had on 17 December 2017 been convicted of offences of breaching a prohibition order which (he said) prohibited use of the Property as an HMO, and of failing to comply with the relevant HMO management regulations. Unfortunately, the Respondent did not produce a copy of that prohibition order, or any evidence of those convictions, or any of the evidence relied upon in those prosecutions.

9. Ms Balding's statement said that the Respondent had been "*reliably informed*" (without disclosing when, or by whom) that the Property was occupied by ten tenants paying £90-£130 in cash per week, and was given a warrant by the Magistrates Court to enter the Property without notice. In their witness statements, the Respondent's witnesses explain what they saw when they used the warrant to inspect the Property with police officers and a locksmith from 5:50am on 9 July 2019. We have considered the Respondent's evidence carefully and the key points are examined below.

10. Under cover of a letter dated 4 October 2019, the Respondent served notices of intent to issue financial penalties in the total sum of £95,500. The notices of intent stated that the Applicant had previously been prosecuted for operating a house in multiple occupation in breach of a prohibition order and for failure to comply with management regulations. They stated that the inspection had identified four unrelated occupiers in addition to the Applicant and his brother, and four further rooms with personal items.

11. By a handwritten letter received by the Respondent on 29 October 2019, the Applicant sent representations denying that the Property was being used as an HMO. He said that he had two lodgers "*that have been whith fo at least six along whith an my brother*". He said that anyone else who stayed in his house were guests "*non paying and for a*

short period of time". He said he was only trying to help people out and the smoke detector in "*Mr Petri Annexe has bee up dated*".

12. By letter dated 8 November 2019, the Respondent said this letter had been reviewed and gave no valid reason why the Respondent should "review" the penalties, so the original amounts were upheld. The Respondent served with this letter five final notices, all dated 8 November 2019, in the same terms and same amounts as the notices of intent. Of these:

    a. one imposed a financial penalty of £30,000 based on an alleged offence under subsection 72(1) of the Act; and

    b. four imposed total financial penalties of £65,500 based on alleged offences under subsection 234(3) of the Act, of alleged non-compliance with various regulations of the Management of Houses in Multiple Occupation (England) Regulations 2006 (the "**Management Regulations**").

13. These proceedings are the Applicant's appeal, under paragraph 10 of Schedule 13A to the Act, against those penalties. As explained in the case management directions, the appeal is to be a re-hearing of the Respondent's decision to impose the penalties and/or the amount of the penalties, but may be determined having regard to matters of which the Respondent was unaware.

14. In answer to the evidence in the bundle produced by the Respondent, the Applicant produced a bundle of documents including his own witness statement which insisted that the Property was not an HMO. He said that he understood he was not allowed more than two tenants and he had abided by this. He said that any other persons at the Property were temporary guests who did not pay cash, but were persons to whom he owed favours or would return the favour by allowing him to stay with them abroad, for example. His brother, Julian Price, also lived with him without charge. He also produced witness statements from Kenneth Osagie, Robert Dean and Veliko Nedelchev, which are considered below.

The basis for the financial penalties

15. By subsection 249A(1) of the Act:

> "*The local housing authority may impose a financial penalty on any person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England*."

16. By subsection 249A(2), each of the offences alleged by the Respondent in the final notices is a "relevant housing offence" under the section.

17. Accordingly, as explained in the directions, the first issue for the tribunal is whether we are satisfied beyond reasonable doubt that the

Applicant's conduct amounts to the alleged relevant housing offence(s) in respect of the Property. Otherwise, the relevant financial penalties cannot be imposed.

The alleged offences

18. The first financial penalty was based on an alleged offence under subsection 72(1) of the Act, by which (subject to a reasonable excuse defence in subsection 72(5)):

> "*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*."

19. The penalties in the other five notices were based on alleged offences under subsection 234(3) of the Act. Section 234 gives the appropriate authority power to make regulations for satisfactory management of HMOs of a description specified in those regulations. By subsection 234(3), subject again to a reasonable excuse defence in subsection (4), a person commits an offence "*if he fails to comply with*" such a regulation. The Respondent relied on the Management Regulations, which confirm at regulation 1(2) that they apply to:

> "*any HMO in England other than a converted block of flats to which section 257 of the Act applies*."

20. Accordingly, the alleged offences could only be committed, and so the relevant financial penalties could only be imposed, if the relevant part of the Property was an HMO as defined in the Act.

When is a building, or part, an HMO?

21. By section 77 of the Act, "HMO" means "*a house in multiple occupation as defined by sections 254 to 259*".

22. Since (despite the directions) the Respondent had not produced any statement of case, Mr Smithet confirmed at the hearing that the Respondent's case was that the Property was an HMO because it met the "standard test" under subsection 254(2) of the Act. When giving evidence, Mr Bullock also mentioned the "converted building" test, but the Respondent did not make any case on this.

23. By subsection 254(1), a building or part of a building is an HMO if it meets the conditions specified in subsection (2) (the standard test), (3) (the self-contained flat test) or (4) (the converted building test). There was no suggestion, let alone case, from the Respondent that the Property or any part of it met the self-contained flat test. Nor did it suggest that the Property fell within any of the other potential categories of HMO (certain converted blocks of flats as specified in section 257, or premises in respect of which the local authority has made an HMO declaration under section 255).

Standard test

24. By subsection 254(2), with our emphasis added:

> "*A building or part of a building meets the standard test if—*
>
> *(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;*
>
> *(b) the living accommodation is occupied by persons who do not form a single household (see section 258);*
>
> *(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);*
>
> *(d) their occupation of the living accommodation constitutes the only use of that accommodation;*
>
> *(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and*
>
> (f) *two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities*."

25. Mr Menzies confirmed there was no issue in respect of (a), (b) and (d). The issues were (c), (e) and (f).

Self-contained flat test

26. By subsection 254(3), a part of a building meets the self-contained flat test it consists of a self-contained flat and the conditions set out in s.254(2)(b) to (f) apply, reading references to the living accommodation concerned as references to the flat.

27. By subsection 254(8), a "self-contained flat" means a separate set of premises, whether or not on the same floor, which forms part of a building, either the whole or a material part of which lies above or below some other part of the building, and in which all three basic amenities are available for the exclusive use of its occupants.

Converted building test

28. By subsection 254(4), a building or part of a building meets the converted building test if:

    a. it is a converted building (defined as a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed);

b. it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats); and

c. the same conditions as those set out in s.254(2)(b) (two households), (c) (main residence), (d) (only use) and (e) (rents/consideration) apply.

Defined expressions

29. By subsection 254(8), "basic amenities" means a toilet, personal washing facilities or cooking facilities.

30. Section 259 of the Act provides that a person is to be treated as occupying as their only or main residence for the purposes of section 254 if they occupy for the purpose of undertaking a full-time course or further or higher education, as a refuge (as defined) or as specified in regulations. For this purpose, regulation 5 of the Licensing and Management of Housing in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Order 2006 (the "**Miscellaneous Provisions Order**") specifies certain migrant or seasonal workers (those whose occupation is made partly in consideration of their employment, and where the building or part is provided by or on behalf of their employer or an agent or employee of their employer) and certain asylum seekers. There was no suggestion in this case that any of the occupants of the Property fell within any of these categories of people who are deemed to occupy as their only or main residence.

31. By section 262, "occupier", in relation to premises, means a person who occupies the premises as a residence (and, subject to the context, so occupies them whether as a tenant or other person having an estate or interest in the premises or as a licensee), and related expressions are to be construed accordingly.

32. The word "residence" is not defined in the Act. The authorities on the meaning (in different contexts) of expressions such as "*a private residence*" were reviewed in Nemcova v Fairfield Rents Limited [2016] UKUT 303 (LC). Some of those authorities suggest that such expressions involve the use of the property, at least in some way, as a home, pointing to the significant difference between holiday lets for a week or two and a tenancy for several months, but the Upper Tribunal (HHJ Bridge) observed (at para. 48 in Nemcova) that:

> "*A person may have more than one residence at any one time – a permanent residence that he or she calls home, as well as other temporary residences which are used while he or she is away from home on business or on holiday … it is necessary, in my judgment, that there is a connection between the occupier and the residence such that the occupier would think of it as his or her residence albeit not without limit of time.*"

Owner-occupier exception

33. Since the Applicant is an owner-occupier, all these tests are subject to subsection 254(5) and paragraph 6(1) of Schedule 14 to the Act, by which a building (other than a converted block of flats to which section 257 applies) is not an HMO if it is occupied by the freehold owner (or others), any member of the household of such a person and not more than such number of such other persons as is specified in regulations. By paragraph 6 of the Miscellaneous Provisions Order, that number is two.

34. Mr Bullock confirmed at the hearing that he had advised the Applicant that he could have up to two tenants. Based on the owner-occupier exception and the definition of occupation as set out above, it might be more accurate to say that he could, in addition to himself and his brother, have up to two residents in the building.

The Property

35. The parties agreed that the Applicant owns the freehold title to the Property. The Applicant said in his witness statement that he had the building at 18A Lisburn Road constructed between 2000 and 2001, selling 18 Lisburn Road and retaining 18A to live in with his family.

36. The layout of the Property is unusual. The Respondent relied on plans which seemed to have been used in the previous prosecution(s); some of the witnesses had used these without amendment, but Mrs Forsberg had updated hers as described below. These plans indicate that, while the building appears to be a simple two-storey cuboid, it comprises three parts which we will describe as:

    a. the left-hand unit, which has its own entrance and a dividing wall between it and the rest of the building. On the ground floor, it has a bedroom (described by the Respondent as room 11) and kitchen. On the first floor, it has two other bedrooms (described by the Respondent as rooms 12 and 13) and a bathroom;

    b. the right-hand ground floor unit, which has its own entrance, bedroom, living area, kitchen and bathroom, with a dividing wall between it and the rest of the building; and

    c. the main unit, which is between the side units described above and includes the first floor above the right-hand ground floor unit. On the ground floor, it has the main entrance, two kitchens, the rooms described by the Respondent as rooms 7, 8 and 9 (the latter was not numbered on the plans but explained at the hearing), with toilets and personal washing facilities for rooms 7 and 9. On the first floor, it has the rooms described by the Respondent as rooms 1-6, with personal washing facilities for each room and toilets for each room except perhaps room 4, and a kitchen which was previously a bathroom.

37. The parties agreed that the Applicant and his brother occupy the left-hand unit as their only or main residence and they are to be regarded as one household. Mr Bullock confirmed at the hearing that this unit is self-contained. There was no real evidence of occupation of this unit by anyone else; Mr Bullock's photograph seems to show clothes on what appears to be a temporary bed in the third bedroom, but he did not produce any evidence to indicate that they belonged to anyone other than the brothers.

38. Mr Bullock said that the right-hand ground floor unit was occupied by George Petrie. He said that the Applicant had attempted to disrupt their discussion with Mr Petrie. Mr Johnson (who was not exposed to cross-examination) said in his statement that the Applicant shouted when he first tried to speak to Mr Petrie, but Mr Petrie then allowed him into his room to continue their discussion and signed a form, exhibited to Mr Johnson's statement, saying that he paid rent of £150 per week in cash to the Applicant and had been at the Property for 3-4 days. The Applicant claimed in his statement that the £150 payment was only in case of accidental damage and was returned. He said they had hoped that Mr Petrie would become a long-term tenant if he liked staying there, but after the inspection attended by the police and the Respondent's officers he was quick to leave. Mr Smithet accepted at the hearing that the right-hand ground floor unit was self-contained and that only Mr Petrie had been found in occupation.

39. In the circumstances the Respondent did not contend, and we are not satisfied, that any of the tests are met in relation to the side units, so we are not satisfied that they were HMOs at the relevant time. Apart from anything else, there was no real evidence to indicate that either of them were occupied by persons who do not form a single household. Accordingly, we move on to examine the main unit.

Was the main unit an HMO – main residence and rents/consideration?

40. As noted above, the Respondent's case relied on the standard test. The Respondent did not mention or make any case in relation to the self-contained flat test (which cannot apply unless the part above the right-hand ground floor unit was a material part, which seems unlikely). The Respondent mentioned, but did not make a case on, the converted building test. As to that, there was no specific evidence of creation of units of living accommodation since construction, but the Applicant did indicate he had lived at 18A with his family from about 2000/2001 until his children left home, so one of the units, or dividing structures, might have been added later.

41. We do not make findings about this because no case on the alternative tests was put to the Applicant and, in any event, the main residence (s.254(2)(c)) and rents/consideration (s.254(2)(e)) conditions are common to all three tests. We consider below whether the main unit met these conditions.

Kenneth Osagie

42. Mrs Forsberg said she found Mr Osagie in what she described as the ground floor front left room 7. Based on her plan, this is in the main unit, immediately to the left of the main entrance and staircase. Mrs Forsberg said that she started to interview Mr Osagie, writing his answers down on a form. These answers stated that he did not pay rent and had lived there for two months. Mrs Forsberg said that the Applicant interrupted and advised Mr Osagie to take legal advice, so the interview was terminated.

43. The Applicant produced a witness statement from Mr Osagie, which said that his address was in Luton, he had been friends with the Applicant for about four years, and he valeted the cars of owners/trainers at Newmarket racecourse. It said that he stayed with the Applicant for periods of about four weeks when the sales or other events were on, but it was not his home and he spent more time at his own residence. The Applicant did not call Mr Osagie for cross-examination, but Mr Smithet did not contest his evidence about residence, saying that he could not go behind this.

Veliko Nedelchev

44. Ms See said that the room described as room 8 (which is shown on the Respondent's plan as being on the ground floor, on the left at the rear of the main unit, next to the kitchen) had been unlocked by the locksmith. Ms See said that there had been no-one in occupation at the time but she had seen belongings indicating current occupation, such as an electric toothbrush on charge, a riding hat, a kettle, a used cup and cigarette ends in the ashtray.

45. In response, the Applicant produced a witness statement from Mr Nedelchev, which said that he lived in Bulgaria. It said that he stayed three or four times a year for two to six weeks at a time, working in the bloodstock industry helping with horses and livery transport. It said he did not pay any rent but the Applicant stayed with him in his family home when he came to Bulgaria on holiday.

46. The Applicant did not call Mr Nedelchev for cross-examination, but Mr Smithet confirmed when we asked that the only individuals relied upon by the Respondent as having the main building as their sole or main residence were Mr Dean and Mr Pillio, considered below.

Robert Dean

47. Mrs Forsberg gave evidence that she found Mr Dean in the room described by the Respondent as room 5, which is on the first floor at the front right-hand corner of the main unit (above the self-contained ground floor unit occupied by Mr Petrie). She said that she interviewed him and wrote his answers down on a form, which she intended to exhibit, but the form had not been produced despite the omission having been referred to in the witness statement from the Applicant.

She said in her witness statement that Mr Dean told her he paid £110 per week to Mr Price and, although it was a temporary arrangement, he had no other address. Mrs Forsberg said she had seen a "*significant amount*" of personal belongings in room 5, but described these as cooking equipment, a toaster and bedroom furniture. Her photographs do not contain any indications of long-term occupation; they show a bare single mattress with a blanket and pillows loose on it, with mugs, cans and a plate on top of a small chest of drawers and something which appears to be a small fridge.

48. The Applicant produced a witness statement from Mr Dean, but did not call him for cross-examination. The statement says that Mr Dean has no fixed abode, worked for the Applicant when the Applicant was a trainer, moves around quite a lot, tends to stay with friends and stays with the Applicant when he has nowhere else to go. It says that when he made the statement he was staying with a different friend in Newmarket and has plenty of friends who let him stay, but most of them rented out their rooms during the sales and at that point he always stayed with the Applicant. It says this happens about two to three times per year, for periods of two to three weeks, and that in between stays he does leave some of his belongings at the Property. It adds that he usually paid £110 to £120 per stay in case of accidental breakage and always gets that money back when he leaves the property and has not broken anything. It said that he was surprised by the inspection and thought he was going to be arrested, has a criminal record and was uneasy about speaking with the police and the officers from the Respondent.

Nicoli Pillio

49. Ms See, who was not called for cross-examination, said in her statement that she found Mr Pillio in what the Respondent described as room 2. Based on the Respondent's plan, room 2 is on the first floor on the left at the rear of the building, facing the stairs. It is on the opposite corner of the first floor to room 5 (which was occupied by Mr Dean). Ms See says in her statement that Mr Pillio did not seem to understand the caution, but used his phone to translate the text on the form she was using to question him. Ms See's statement says that Mr Pillio told her he had been living at the property for 10-11 months and paid rent of £95 per week to the Applicant, in cash on Fridays, and that Mr Pillio signed the form to confirm these details. Ms See has exhibited a copy of the form, but it is a poor-quality copy. It appears to read "*Nicola Pillio*", with an almost illegible entry alongside "*How long have you lived here*?" which may say 10-11 months, and clearer entries that rent of "*£95 week*" is paid in cash on Fridays.

50. Ms See's statement confirmed that the room had an ensuite bathroom, a bed with personal items and clothes, a fridge, and basic foodstuff on top of two chests of drawers. The exhibited photographs bear this out, with no indication of long-term occupation. In the statement made by Mr Johnson, he referred to belongings in a different room (described as

room 4, on the first-floor right-hand corner of the Property) which contained personal belongings, clothing and medicine with writing which appeared to be in Italian, with an unmade bed and travel cases along with cutlery and china, but it is not clear whether this room was being used by Mr Pillio or someone else.

51. The Applicant's witness statement says that Mr Pillio lives in Italy, that they met through work in the racing industry and that Mr Pillio stays with him often, for periods of four to eight weeks at a time, to work and gain experience, without paying rent. It says that the Applicant sometimes visits Mr Pillio and his family in Italy. It says that Mr Pillio translates using his phone when he speaks to the Applicant (as he did while speaking to Ms See, at least about her form) and there are always plenty of mistakes. It says that the Applicant has been unable to contact Mr Pillio to ask him to make a statement.

Submissions

52. Mr Smithet submitted that Mr Dean (room 5) and Mr Pillio (room 2) had been using the main unit as their main residence and paying rent. He submitted that the evidence demonstrating this was clearest in respect of Mr Pillio.

53. Mr Menzies submitted that there was a dispute about whether payments were made as rent or a security deposit to be returned, and there was insufficient evidence of residence, where the Applicant contended that both Mr Dean and Mr Pillio were "*itinerant*". He submitted that they do not fall within the categories specified under section 259 of the Act or regulation 5 of the Miscellaneous Provisions Order (in essence, he submitted, migrant or seasonal workers are only deemed to be occupying as their only or main residence if the accommodation comes with their job). We have summarised the law on this above.

The tribunal's decision

54. We are satisfied beyond reasonable doubt that rents were payable or other consideration was to be provided in respect of at least one of the relevant persons. We have no real evidence suggesting cash payment by anyone except Mr Petrie, Mr Dean and Mr Pillio. Mr Petrie was not occupying the main unit. The form said to have been signed by Mr Dean was not produced, despite the prompt from the Applicant in his statement. We put limited weight on the form signed by Mr Pillio and the witness statement from Ms See, given that Mr Pillio had language difficulties (at least with the written form) and was in a hurry to leave for work, and Ms See was not exposed to cross-examination. Even allowing for these matters, we are sure that Mr Dean or Mr Pillio were paying something by way of rent or other consideration. The form signed by Mr Pillio did have a legible "*£95*" and the corresponding statement from Ms See is credible, saying this was paid in cash on Fridays; it is difficult to see what else this could be referring to. The

Applicant does not dispute that Mr Dean told Mrs Forsberg he paid a weekly sum (and the evidence from Mrs Forsberg about this was not challenged on cross-examination), but attempts to explain this by reference to Mr Dean's past and uneasiness. In both cases, the explanations about deposits are not credible enough to leave any reasonable doubt. The Applicant's own evidence is that he believed he could have two tenants (and as many non-paying temporary guests as he liked) under the owner-occupier exception. Mr Petrie (in the larger self-contained unit) was one of the people from whom he was expecting a (higher) rent, at least in future, so it is difficult to see why he would not require a rent or other consideration from Mr Pillio and/or Mr Dean. Further, his letter in October 2019 seems to be saying that at that time there had been two lodgers in occupation for some time, apart from his brother and temporary guests. It might also be that the arrangements described by the Applicant (such as accommodation provided for him abroad in exchange for accommodation he provided here) could be enough to amount to "other consideration", but these were characterised as favours. The Respondent made no case about this and we have no evidence to suggest sufficient certainty or any binding arrangement, so we do not base our finding on this.

55. However, we are not satisfied beyond reasonable doubt that the living accommodation was occupied by the relevant persons (those who do not form a single household) as their only or main residence or that they are to be treated as so occupying it. There was no case, or evidence to indicate, that any of the occupiers fell within the categories (set out in section 259 of the Act and regulation 5 of the Miscellaneous Provisions Order) of those deemed to occupy as their main residence. As explained above, the Respondent's case at the hearing was that the relevant persons were Mr Dean and Mr Pillio, where:

a. Mrs Forsberg accepted that Mr Dean had told her immediately when she knocked on his door, early in the morning, that this was a temporary arrangement. The photographs of the contents of room 5 do not indicate longer term residence and the Respondent produced no other evidence to indicate this was Mr Dean's main residence. Neither Mr Dean nor the Applicant exposed themselves to cross-examination, so their statements carry limited weight, but their statements about residence are consistent with what Mr Dean said to Mrs Forsberg and with what we can see from the photographs; and

b. Ms See accepted that Mr Pillio did not seem to understand what was said in the form and was using a translation service on his phone. Ms See is not clear in her statement about whether he was providing all information through the translation service on his phone. She was not offered for cross-examination, so we could not clarify this and again her witness statement carries limited weight. Mr Pillio signed her questionnaire form, but she says that he was leaving urgently to go to work; the only part of that form which is relevant to the question of residence is the almost illegible entry alongside

"*How long have you lived here*?" which may say 10-11 months. If that is what it says, we seriously doubt that Mr Pillio understood it. The photographs of room 2 show nothing to indicate anything other than temporary residence and the Respondent produced no other evidence to indicate this was Mr Pillio's main residence.

56. We bear in mind that main residence may be difficult to prove and that the Applicant's evidence may be inconsistent with the line in his letter from October 2019 which may or may not be saying that he had two lodgers who had been there for six something – perhaps weeks, or months. Even if the letter in October 2019 was saying that he had long-term lodgers, there is no information about who they were, what they were occupying or their circumstances. Even if we draw adverse inferences against the Applicant in view of his choice not to expose himself or his witnesses to cross-examination, the fact that he attempted to stop some of the occupants answering questions from the Respondent, and our finding that his evidence about rents or other consideration was untrue, this still leaves us with more than reasonable doubt about the issue of main residence. It is reasonably likely that, while Mr Dean and/or Mr Pillio were paying something for their accommodation, neither of them were occupying the main unit as their sole or main residence. The main unit has the hallmarks of cheap temporary accommodation, particularly for people working at Newmarket racecourse or for related businesses when races, sales or other events are held there.

57. Even apart from the Respondent's failure to follow the case management directions, it does not seem ever to have focussed on the need to check on main residence to assess whether the Property or any part of it was an HMO. The questionnaire forms it uses for HMO inspections do not ask occupiers the critical question about sole/main residence. The Applicant consistently denied that this was an HMO, but the Respondent appears to have made no effort to gather any other evidence of main residence, whether by follow-up interview(s) or inspection(s), credit reference searches or otherwise.

58. In the circumstances, we are not satisfied beyond reasonable doubt that the Property (or any part of it) is an HMO as defined by the Act, so we cannot be so satisfied that the Applicant's conduct amounts to any of the alleged relevant housing offences in respect of the Property. Accordingly, pursuant to subparagraph 10(4) of Schedule 13A to the Act, we cancel the final notices.

Alternative - basic amenities shared or lacking (f)

59. In view of our finding and decision above, we do not need to go on to examine the condition in section 254(2)(f) (which is not part of the converted building test, but is part of the standard test on which the Respondent relied, and the self-contained flat test). However, we would make the following comments about this in passing.

60. Mr Smithet accepted that each occupier had their own bathroom. The Respondent's case was that the kitchen(s) were shared, not that the living accommodation was lacking in one or more basic amenities, so we have not examined how "living accommodation" should be interpreted in that context. Mr Smithet said that the occupiers had to use one of the two kitchens on the ground floor of the main building, since the plan exhibited to the statement from Mr Bullock indicated that there was no kitchen on the first floor. He was asked about the statement from Mrs Forsberg about a kitchen on the first floor. Mrs Forsberg gave evidence about this, confirming that as marked on the amended plan exhibited to her statement the room between rooms 3 and 4 on the first floor, which had been a bathroom, had been converted into a kitchen. Mr Smithet submitted that it was more likely than not that the occupiers were sharing a kitchen.

61. Ms Menzies pointed out that this assertion has not been contained in any of the evidence from the Respondent, and it was striking that the Respondent was referring to the balance of probabilities. He submitted that on the evidence we could not be sure that the relevant occupiers were sharing a kitchen.

62. On the case as put to us, we would not have been satisfied beyond reasonable doubt that two or more of the relevant households shared one or more basic amenities, as required by subsection 254(2)(f).

63. The Respondent's case was in effect that two or more of the households in the main building shared cooking facilities, not any other basic amenities. The evidence indicates three kitchens in the relevant part of the building (disregarding the self-contained units to either side), in addition to several microwaves, kettles and toasters in individual bedrooms and elsewhere.

64. The Respondent said that this part of the building was occupied by Mr Dean, Mr Pillio and Mr Osagie, referring also to belongings in other rooms which suggested that unidentified others might be in occupation. They did not see Mr Nedelchev, who was not there when they inspected but whose statement referred to the room the Respondent had found and described as having belongings indicating recent occupation. These three to four people had three kitchens between them. Further, Mrs Forsberg confirms in her statement that Mr Dean's room had its own "*cooking equipment*". All the rooms in the main unit give the impression of poor-quality temporary accommodation where people sleep and breakfast but some may well not even eat their main meals.

65. As with the question of sole/main residence, the Applicant has consistently denied this was an HMO. Despite this, the Respondent does not seem to have focussed on the need to ask about basic amenities in its HMO questionnaire form or specify who was sharing what (or what was lacking) in a statement of case, collect adequate evidence at its inspection or arrange further inspection(s) or interview(s).

Observations

66. While we make no findings about the following matters, they may be of some assistance.

67. This is a decision about technical points on which the Respondent has failed to prove its case. It does not mean that a better prepared case would not be successful in future or that other enforcement action is not available to the Respondent if needed. Parts of the Property do appear to be unsafe and we understand why the Respondent would be concerned about it, even aside from the previous convictions to which they referred. There are apparent fire risks, an unguarded balcony and many other potential problems. The Respondent said they had previously made a prohibition order (which, they said at the hearing, included a schedule of the remedial works they believed were required) and that the previous conviction from 2017 was for breach of that prohibition order. Such orders can be made whether or not a building or part of a building is an HMO, and they did not provide a copy. Nor could they show any attempt to engage with the Applicant to seek to resolve practical problems by agreement, when he does seem to struggle with written documents without external assistance.

68. Both parties should consider taking expert legal advice and co-operating with each other to use only such parts of the Property which can be used safely and lawfully. The sums the Applicant indicates he has spent or borrowed to fund this appeal would have been better spent on co-operation with the Respondent and seeking to improve at least part(s) of the Property. The Applicant should not assume that he can have two tenants and an unlimited number of guests without taking proper legal advice on this (as noted above, the owner-occupier exception only permits up to two people occupying the building as a residence in addition to himself and his brother).

69. All that said, we should mention that, even if we had been satisfied that the main unit was an HMO and was required to be licensed, the procedure and notices used by the Respondent, and the Respondent's calculation of the proposed penalties, appear unfair and seriously flawed. For example, the Respondent:

    a. seemed to think that it did not need to provide the details of its reasons for imposing each financial penalty, so may not have given adequate reasons as required by Schedule 13A to the Act, in the initial notices and the final notices;

    b. referred repeatedly to the alleged previous convictions as the main reason for the penalties and as the reason for imposing higher penalties than the alleged previous fines, without acknowledging that these convictions were said to be for breach of a prohibition order (which if anything is even more serious than the alleged offences on which the financial penalties were based) and without producing any evidence to show what that prohibition order said or

which Management Regulations were found on those previous convictions not to have been complied with;

c. had imposed the maximum penalty of £30,000 for the alleged offence under section 72(1), but accepted that no overcrowding had been alleged and the penalty would have been lower if it had not been for the alleged breaches of the Management Regulations for which separate penalties had been imposed (in effect, seeking to punish the Applicant twice for the same alleged offence);

d. appeared to have duplicated or misconceived other items (a penalty of £7,500 for a specific alleged breach of Management Regulation 4.4 by failing to provide a mains-wired interlinked smoke detection unit, when it appears this was in the self-contained right-hand ground floor unit in single occupation, outside the alleged HMO, while also imposing another penalty of £7,500 for a general and unparticularised alleged breach of Regulation 4.4 for failing to take reasonable measures required to protect the occupiers from injury with regard to the design and number of occupants);

e. had imposed a penalty of £15,000 for the alleged breach of Management Regulation 7.2(e), but confirmed at the hearing that this was based solely on a missing bulb in a light fitting in the L-shaped ground floor corridor leading from the glazed main entrance door;

f. even at the hearing, struggled to particularise most of the alleged breaches of the Management Regulations (e.g. a penalty of £15,000 for breach of Management Regulation 7.1);

g. had not asked the Applicant for any information about his financial circumstances, despite that being specifically required by the Applicant's own policy for these matters and knowing (as Mr Bullock accepted at the hearing) that there were no expensive cars outside the Property, the state of the Property was poor, and the Applicant said he was taking medication;

h. appeared again to have strayed from its own policy, which requires, after applying risk matrices and aggravating/mitigating factors, a review of the penalty to ensure that it meets, in a "*fair and proportionate*" way, the objectives of punishment, deterrence and removal of gain derived through commission of the offence. Generally, and particularly in view of the issues identified above, the total penalties of £95,500 do not appear to be fair or proportionate; and

i. indicated that informal resolution had been unsuccessful, when the Respondent had made no attempt to liaise with the Applicant about informal resolution since 2017 and had been called several times by the Applicant, who now claims he did not understand what he needed to do.

Name: Judge David Wyatt **Date:** 13 October 2020

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).