FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CAM/34UF/HNB/2020/0007**
HMCTS code	:	**A: BTMMREMOTE**
Property	:	**7 Kingsthorpe Grove Northampton NN2 6NS**
Applicant	:	**Gary Gordon Bees**
Representative	:	**Archie Maddan (Counsel)**
Respondent	:	**Northampton Borough Council**
Type of application	:	**Appeal against financial penalties** Section 249A & Schedule 13A to the Housing Act 2004
Tribunal members	:	**Mary Hardman FRICS IRRV(Hons)** **Judge David Wyatt**
Date of decision	:	**21 December 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote (telephone) hearing, as explained below. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to are in a bundle of 126 pages from the Applicant and a bundle of 203 pages from the Respondent together with further submissions received by the tribunal on the morning of the hearing and referred to below. We have noted the contents.

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Decision

The tribunal hereby:

(1) Cancels the final notices dated 7 July 2020 which sought to impose financial penalties for allegedly failing to comply with regulation 3 and regulation 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006 (the "**HMO Management Regulations**");

(2) Confirms the final notice dated 7 July 2020 imposing a financial penalty of £1,000 for failure to comply with regulation 7 of the HMO Management Regulations; and

(3) Varies the final notice dated 7 July 2020 imposing a financial penalty of £1,000 for failing to comply with regulation 8 of the HMO Management Regulations to impose a penalty of £750 instead.

Reasons

The application

1. On 5 August 2020, the Applicant freehold owner of the Property applied to the tribunal to appeal against financial penalties in the total sum of £3,750, which had been imposed by the Respondent local housing authority under section 249A of the Housing Act 2004 (the "**Act**") by four final notices dated 7 July 2020.

Procedural history

2. On 20 August 2020, 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.

3. Whilst the Applicant had indicated in his application that he would be content for a paper determination, the tribunal explained that it is standard practice to hold hearings for financial penalty appeals, particularly where the offence(s) are not admitted. In view of the Covid 19 restrictions this was likely to be a remote hearing by video or telephone. A telephone hearing was subsequently arranged for 5 November 2020.

4. Bundles were received from both parties as set out in the directions. The Respondent informed the tribunal on 4 November that it would seek permission to have a further witness statement from Miss Ling admitted at the hearing. The Applicant's representative, on the same day, also informed the tribunal that it intended to seek leave to submit additional documents to include a head lease on the subject premises, company accounts, credit card and banks statements for The Property Saints

Limited, a rent increase notice and a council tax bill. Unfortunately, these documents were sent direct to a case officer who was on leave and did not reach the tribunal prior to the hearing. An attempt at the start of the hearing to re send was also unsuccessful, but the parties had seen and discussed these documents between themselves the day before the hearing. In the circumstances the tribunal reviewed the documents over the lunch break and was prepared to admit them all.

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

Hearing

6. The hearing was by telephone. The Applicant was represented by Archie Maddan, Counsel and Mr Bees was called to give evidence. James Chadwick, in-house lawyer represented the Respondent and called Barry Agnew and Samantha Ling, Public Health and Housing Officers employed at the time of the alleged offence by the Respondent, as witnesses.

Background

7. The Property is a 4-storey terraced property built circa 1907. It comprises a basement, ground, first and attic floor. It has 7 bedrooms, two with ensuite facilities, a kitchen/diner, WC and shower room.

8. The Applicant is the registered proprietor of the freehold title to the Property, having acquired it in 2008.

9. Mr Agnew said in his statement that the private sector housing team had received a complaint from two tenants of the property 0n 14 October 2019. The file note refers only to one tenant, Mr Davis, who is recorded as having complained about "*Disrepair issues when rains water coming through bathroom ceiling and bed bugs*".

10. The property was registered as a mandatory HMO with a licence granted in 2017 that expired on 20 April 2020. The property was licensed for occupation by no more than a maximum of 7 households and 7 persons. The licence holder was Mr Bees.

11. Mr Agnew attended the property to investigate the complaint on 21 October 2019. He took photographs, referred to as exhibits BA1 to BA26 and noted a number of issues as set out in his witness statement.

12. Under cover of a letter dated 28 February 2020, the Respondent served notices of intent on Mr Bees at his home address in respect of alleged offences under subsection 234(3) of the Act, of alleged non-compliance with Regulations 3, 4, 7 and 8 of the Management of Houses in Multiple Occupation (England) Regulations 2006 (the "**HMO Management Regulations**"). The total of the financial penalties that they proposed to impose was £9,600.

13. By letter on 27 March 2020, Julian Hunt, Counsel for the Applicant sent representations to the Council amounting to ten pages. These submissions did not deny that Mr Bees was the "manager" under the HMO Management Regulations (as considered below). They noted that no discount had been applied to the penalties for the fact that Mr Bees had a clean track record and no history of offending. They suggested that he and his wife had been landlords for around 12 years without any complaints and only one of the tenants in this property had made a complaint.

14. The property was licensed as a HMO, unlike many in which breaches are found and had been twice inspected by the LHA before the original licence. No PACE interview was conducted.

15. On being informed of the concerns in February 2020, Mr Bees rectified them within a very short space of time, many within 24 hours of being notified.

16. He said that Mr Bees had a large amount of personal medical mitigation that could have been taken into account, particularly between April and October 2019 when he was recovering from a stem cell transplant and was for some time out of the country for medical treatment.

17. In respect of the individual breaches under the HMO Management Regulations it was argued that:

- the penalties were excessive
- the breaches were not proved beyond reasonable doubt
- the guidance on fire safety provisions for certain types of existing housing produced by the Local Authorities Coordinators of Regulatory Services (LACORS) had not been referenced
- many of the defects were "latent"
- in some cases Mr Bees had a reasonable defence excuse in that issues were never raised by tenants or not apparent on normal inspection
- MHCLG guidance had not been followed.

18. By letter dated 7 July 2020, again addressed and sent to Mr Bees at his home address, the Respondent served Final Notices which said the Council had concluded its review including any representations made and had determined that penalties should be imposed in respect of all four alleged offences of non-compliance with the HMO Management Regulations. The total amount of penalties imposed had been revised to a total of £3,750.

19. 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.

20. In answer to the evidence in the bundle produced by the Respondent, the Applicant produced a witness statement from Mr Bees together with what was said to be a copy of an expert report from Mr Jan Movid, a former head of Fire Safety for Northamptonshire Fire and Rescue Service who now acted as a consultant undertaking risk assessments for domestic and commercial buildings. We put limited weight on the contents of this "report" as no permission was sought to adduce expert evidence, Mr Movid was not called by the Respondent as a witness at the hearing nor did the "report" meet the requirements under the Tribunal Procedures Rules, Rule 19(5) in respect of expert evidence. However, it had been included with the original submissions from Mr Hunt and the Respondent did not object to us considering it. The Applicant's bundle also included a copy of the tenancy agreements for the various rooms at the Property, in each case indicating that the landlord was The Property Saints Ltd.

21. As referred to in paragraph 4 above the Applicant also produced further documents immediately prior to the hearing. These included a set of bank statements in the name of The Property Saints Limited which appeared to indicate the rent payments from tenants at 7 Kingsthorpe Grove were paid directly into this account by direct debit, a series of Mr Bees' payslips headed 'The Property Saints Limited' showing monthly payments to him of £732 a month in the tax year 2020/21 with a single payment of £12,500 in 2019/20, communications with a tenant in the name of The Property Saints Limited and a lease of 7 Kingsthorpe Grove dated 1 December 2017 between Mr Bees and The Property Saints Limited for a term of four years at £1 per annum.

Law and Guidance

22. New provisions were inserted into the Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. One of those provisions was section 249A, which came into force on 6 April 2017. It enables a local housing authority to 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.

23. Relevant housing offences are listed in section 249A(2). They include the offence (under section 234) of failing to comply with the HMO Management Regulations.

24. Only one financial penalty under section 249A may be imposed on a person in respect of the same conduct. The amount of that penalty is determined by the local housing authority (but it may not exceed £30,000), and its imposition is an alternative to instituting criminal proceedings for the offence in question.

Procedural Requirements

25. Schedule 13A to the Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent setting out:

- the amount of the proposed financial penalty;
- the reasons for proposing to impose it; and
- information about the right to make representations.

26. Unless the conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct.

27. A person who is given a notice of intent has the right to make written representations to the local housing authority about the proposal to impose a financial penalty. Any such representations must be made within the period of 28 days beginning with the day after that on which the notice of intent was given. After the end of that period, the local housing authority must decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount.

28. If the local housing authority decides to impose a financial penalty on a person, it must give that person a final notice setting out:

- the amount of the financial penalty;
- the reasons for imposing it;
- information about how to pay the penalty;
- the period for payment of the penalty;
- information about rights of appeal; and
- the consequences of failure to comply with the notice

Relevant Guidance

29. A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions in respect of the imposition of financial penalties. Such guidance ('the MHCLG Guidance') was issued by the Ministry of Housing, Communities and Local Government in April 2018: Civil penalties under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities. It states that local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty and should decide which option to pursue on a case by case basis. The MHCLG Guidance also states that local housing authorities should develop and document their own policy on determining the appropriate level of penalty in a particular case. However, it goes on to state:

"*Generally we would expect the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous history of offending*."

30. The MHCLG Guidance also sets out the following list of factors which local housing authorities should consider to help to ensure that financial penalties are set at an appropriate level:

- a. Severity of the offence.
- b. Culpability and track record of the offender.
- c. The harm caused to the tenant.
- d. Punishment of the offender.
- e. Deterrence of the offender from repeating the offence.
- f. Deterrence of others from committing similar offences.
- g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.

The Council's policy

31. The Respondent said that it followed its "*Private Sector Housing Civil Penalties Policy*" which had been in effect from 1 August 2017, because its current policy was only introduced in April 2020, after the notices of intent had been given. However, in her evidence Ms Ling suggested that the review that she had done of the offences prior to the issue of the Final Notice was (and the scoring assessment (undated) provided in the bundle also appears to be) based on the more recent policy.

32. The Respondent's 2017 and 2020 policies set out the factors to be taken into account when deciding the level of any financial penalty. They refer to the list of factors in the MCHLG guidance (paragraph 30 above) when considering the penalty to be imposed:

33. Further, the 2017 policy states that the Respondent will take into account the cost of investigating the offence(s) and preparing the case for formal action. It sets out two matrices:

    i. one sets out three bands (low, medium and high) for the cost of investigation of different offences (for example, for failure to comply with an improvement notice, a low-cost investigation is £200 and a high-cost investigation is £400); and

    ii. one sets "punitive charges" based on assessments of culpability and harm, to be used "*as a starting point*" for determining, on a case by case basis, the level of civil penalty that should be imposed.

34. The 2017 policy states that the Respondent will consider the findings from its investigation against the seven MCHLG factors (as listed above), that aggravating factors will increase the "*initial amount*" and that any mitigating factors will reduce it. The matrix ranges from £2,000 to £27,000 per offence.

35. The 2017 policy states (7.19) that the Respondent will "*conclude*" that the offender is able to pay any financial penalty imposed unless they have supplied sufficient financial information to the contrary, that it is for the offender to disclose such information and that where the Respondent is not satisfied that it has been given sufficient reliable information it will be entitled to draw reasonable inferences as to the offender's financial means. It also specifically refers to offenders who

have a low income but are likely to have assets, or equity in a property, which they could sell or borrow against (paragraph 7.22).

36. Whilst Miss Ling contended that the revised policy adopted in April 2020 was not fundamentally different, what does appear to be different is the scoring matrix for offences.

37. It does not provide for addition of fixed investigation costs. Instead, it uses a single matrix and adopts seven factors which it takes into account which are similar but not identical to its previous system. These are:

- Culpability of the offender
- Seriousness of the offence and level of harm
- Punishment of the offender
- Financial benefit
- Deter the offender and others
- Assets and Income
- Mitigating factor (an offset to the above)

38. The new policy adopts a five-level scoring matrix from Not applicable to Severe and this is applied to each of the factors set out in paragraph 38 above. Some of the scores are also weighted by a factor or two. The score is then the starting point for an assessment of the civil penalty on an 11-step matrix which ranges from £250 to £30,000 per offence.

The alleged offences

39. Northampton Council asserts that Mr Bees' conduct amounts to relevant housing offences in respect of the Property; namely, failure to comply with regulations 3, 4, 7 and 8 of the HMO Management Regulations and thus offences under section 234(3) of the Act.

40. Regulation 3 of the HMO Management Regulations provides:

The manager must ensure that—

(a) his name, address and any telephone contact number are made available to each household in the HMO; and

(b) such details are clearly displayed in a prominent position in the HMO.

33. Regulation 4 of the HMO Management Regulations provides:

1) The manager must ensure that all means of escape from fire in the HMO are—

(a)kept free from obstruction; and

(b)maintained in good order and repair.

(2) The manager must ensure that any firefighting equipment and fire alarms are maintained in good working order.

(3) Subject to paragraph (6), the manager must ensure that all notices indicating the location of means of escape from fire are displayed in positions within the HMO that enable them to be clearly visible to the occupiers.

(4) The manager must take all such measures as are reasonably required to protect the occupiers of the HMO from injury, having regard to—

(a)the design of the HMO;

(b)the structural conditions in the HMO; and

(c)the number of occupiers in the HMO.

(5) In performing the duty imposed by paragraph (4) the manager must in particular—

(a) in relation to any roof or balcony that is unsafe, either ensure that it is made safe or take all reasonable measures to prevent access to it for so long as it remains unsafe; and

(b) in relation to any window the sill of which is at or near floor level, ensure that bars or other such safeguards as may be necessary are provided to protect the occupiers against the danger of accidents which may be caused in connection with such windows.

(6) The duty imposed by paragraph (3) does not apply where the HMO has four or fewer occupiers.

41. Regulation 7 of the HMO Management Regulations provides:

(1) The manager must ensure that all common parts of the HMO are—

(a)maintained in good and clean decorative repair;

(b)maintained in a safe and working condition; and

(c)kept reasonably clear from obstruction.

(2) In performing the duty imposed by paragraph (1), the manager must in particular ensure that—

(a)all handrails and banisters are at all times kept in good repair;

(b)such additional handrails or banisters as are necessary for the safety of the occupiers of the HMO are provided;

(c)any stair coverings are safely fixed and kept in good repair;

(d)all windows and other means of ventilation within the common parts are kept in good repair;

(e)the common parts are fitted with adequate light fittings that are available for use at all times by every occupier of the HMO; and

(f)subject to paragraph (3), fixtures, fittings or appliances used in common by two or more households within the HMO are maintained in good and safe repair and in clean working order.

(3) The duty imposed by paragraph (2)(f) does not apply in relation to fixtures, fittings or appliances that the occupier is entitled to remove from the HMO or which are otherwise outside the control of the manager.

(4) The manager must ensure that—

(a)outbuildings, yards and forecourts which are used in common by two or more households living within the HMO are maintained in repair, clean condition and good order;

(b)any garden belonging to the HMO is kept in a safe and tidy condition; and

(c)boundary walls, fences and railings (including any basement area railings), in so far as they belong to the HMO, are kept and maintained in good and safe repair so as not to constitute a danger to occupiers.

(5) If any part of the HMO is not in use the manager shall ensure that such part, including any passage and staircase directly giving access to it, is kept reasonably clean and free from refuse and litter.

(6) In this regulation—

(a)"common parts" means—

(i)the entrance door to the HMO and the entrance doors leading to each unit of living accommodation within the HMO;

(ii)all such parts of the HMO as comprise staircases, passageways, corridors, halls, lobbies, entrances, balconies, porches and steps that are used by the occupiers of the units of living accommodation within the HMO to gain access to the entrance doors of their respective unit of living accommodation; and

(iii)any other part of an HMO the use of which is shared by two or more households living in the HMO, with the knowledge of the landlord.

42. Regulation 8 of the HMO Management Regulations provides:

(1) Subject to paragraph (4), the manager must ensure that each unit of living accommodation within the HMO and any furniture supplied with it are in clean condition at the beginning of a person's occupation of it.

(2) Subject to paragraphs (3) and (4), the manager must ensure, in relation to each part of the HMO that is used as living accommodation, that—

> *(a) the internal structure is maintained in good repair;*
>
> *(b) any fixtures, fittings or appliances within the part are maintained in good repair and in clean working order; and*
>
> *(c) every window and other means of ventilation are kept in good repair.*

(3) The duties imposed under paragraph (2) do not require the manager to carry out any repair the need for which arises in consequence of use by the occupier of his living accommodation otherwise than in a tenant-like manner.

(4) The duties imposed under paragraphs (1) and (2) (b) do not apply in relation to furniture, fixtures, fittings or appliances that the occupier is entitled to remove from the HMO or which are otherwise outside the control of the manager.

(5) For the purpose of this regulation a person shall be regarded as using his living accommodation otherwise than in a tenant-like manner where he fails to treat the property in accordance with the covenants or conditions contained in his lease or licence or otherwise fails to conduct himself as a reasonable tenant or licensee would do.

43. For these purposes, the "manager" of the HMO is defined by section 263(3) of the Act as follows:

'*person managing' means in relation to premises the person who, being an owner or lessee of the premises-*

(a) receives (whether directly or through an agent or trustee) rents or other payments from-

> *(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and*
>
> *(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or*

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

44. As already noted, section 234(3) of the Act makes it an offence to fail to comply with the HMO Management Regulations. However, by virtue of section 234(4),

a person does not commit the offence if he had a reasonable excuse for not complying with the regulation in question.

Grounds of appeal

45. Counsel for the Respondent informed the tribunal at the start of the hearing that the statements that 7 Kingsthorpe Grove was held on an 'implied tenancy' granted by Mr Bees to The Property Saints Limited (made in the witness statement of Mr Bees and the submissions from his solicitors in the bundle) were mistaken. Documents had just come to light to show that the company held the Property under a 4-year head lease. The emphasis of their defence had changed and the main ground they now intended to pursue was that the Council had not served the notices on the right person and that therefore they were ineffective.

46. We asked about the submissions from the solicitors in the bundle which accepted that Mr Bees was the "person having control" as defined in section 263(1), because that suggested that Mr Bees was admitting that he received the rack rent of the Property. Mr Maddan indicated that this too was mistaken and made before he had been instructed in this matter; the company received the rent, not Mr Bees, paying corporation tax on the rent it received.

47. Should the tribunal not be persuaded by that argument they would argue that the Respondent could not reasonably have concluded that the Applicant had committed an offence to the standard required by the legislation – which is 'beyond reasonable doubt'.

48. Failing this, they argued, Mr Bees had a reasonable excuse for not complying with the regulations.

49. Failing this, they argued, the local authority had changed its policy and had been inconsistent in the application of this policy.

50. Finally, in relation to each of the offences, they argued that the penalties were excessive, taking into account the lack of harm to the occupiers, the minor nature of the breaches alleged and the Applicant's medical condition.

Incorrect defendant

51. At the hearing the tribunal agreed with both parties to hear first what Counsel for the Applicant, Mr Maddan, said was his main ground of appeal – that the Council had served the notices on the wrong person and that therefore they were ineffective.

52. Mr Maddan argued that all notices relate to s234 offences under the HMO Management Regulations. The person potentially liable under these regulations is the manager – which is defined at paragraph 2(c) of these regulations as the 'person managing the HMO'.

53. The statutory definition of 'person managing' is found in s.263(3) of the Act (see paragraph 43 above). Mr Maddan made the following submissions.

54. The Council had not made proper enquiries to identify the person managing the Premises. It could be seen from the witness statement of Mr Agnew that the Council had searched for ownership and licence holder but their enquiries had gone no further. They had not examined their own council tax records in terms of who was paying the bills and they had not offered a PACE interview to seek to obtain the correct information. They also appeared to have looked to identify the 'person having control'. This he argued was irrelevant.

55. Mr Bees had let the property on a 4-year head lease to The Property Saints Limited (the company) from December 2017. The lease had only come to light the week of the hearing, when Counsel had been instructed and had asked Mr Bees' accountant about the arrangements. This arrangement had been made and the lease had been drawn up on the advice of the accountant as it was tax efficient. He and his wife were the directors of this company.

56. However, the company receives the rents in its own right and not as an agent for Mr Bees. It grants tenancies to occupiers in its own name, it collects the rents, pays tax and files its accounts at Companies House. It pays money to Mr Bees as a director and/or as an employee.

57. Mr Maddan then said that the Council had indicated (when approached shortly before the hearing about this) that they would argue that if they did not succeed under s.263(3) then Mr Bees was liable as a director of the company under s.251 of the Act. However, he did not accept that this was arguable. The notices were deficient, he said, in that they did not mention The Property Saints Limited; they alleged that Mr Bees was the manager. It was wrong to read this into the notices. The appeals process could only function if parties knew from the notices of intent what they were being accused of.

58. He also argued that the Council cannot now ask the tribunal to rescue them by making amends to notices to make them effective. The notices were defective and should not stand.

59. Mr Chadwick for the Council argued that there were two people managing the Premises – The Property Saints Limited and Mr Bees. He said that Mr Bees was receiving rent from the company. As the Property was an HMO, common areas were not demised to tenants and the company, as head lessee, was therefore in occupation of part of the premises. As Mr Bees was then receiving rent directly from an occupier he fulfilled the definition of 'person managing' in s.263(3) (a) (i).

60. Mr Chadwick went on to say that the head lease had only been sent to the Council the previous afternoon. Prior to this the agreement had been said to be verbal, or implied. The Council had seen nothing to suggest that Mr Bees was not managing the Premises – he was the HMO licence

holder and the tenancy agreements were apparently signed by Mr Bees as a director.

61. Mr Chadwick argued that whilst the legal definition of the "person managing" might be the company, the "de facto" manager was Mr Bees himself.

62. Should the tribunal determine that Mr Bees was not the 'person managing' under s263 then the Council would argue that s251 applies as the company, of which Mr Bees is a director, has committed relevant housing offences and there is neglect on the part of its director.

63. If necessary, he invited the tribunal to amend the Notices to make it clear that Mr Bees was being served as director of the company. Any suggestion that the Council has committed an abuse of process was not valid. There is no requirement to offer an interview under caution. The 28-day notice period was given to make representations – and such representations were made - and no prejudice was caused.

64. Mr Chadwick then called Barry Agnew, employed at the time of the alleged offence as a Public Health and Housing Officer by the Respondent, as a witness.

65. Mr Agnew said that a PACE interview was not offered as offences under the HMO Management Regulations are absolute offences and based on fact – it was obvious on inspection that the regulations had been breached and there was no more to ask.

66. On cross examination by Mr Maddan he said that he had checked the Council's system to find out who the license holder was. He didn't see any need to contact Mr Bees to discuss the findings as he had photographs of the breaches.

67. He was aware that the notice board displayed notices for tenants referring to The Property Saints Limited (as shown in his photograph) but he assumed they were an emergency contact. He didn't ask to see the complainant tenant (Mr Davis's) tenancy agreement as he didn't believe he needed to. Nor had he consulted the Council Tax records as he felt they were not relevant. He believed that the person managing was the person getting the rent. Mr Davis had said that Mr Bees was the landlord and he had called the Council due to a lack of response from Mr Bees.

68. On questioning Mr Agnew said he believed that the person responsible is the license holder. He had spoken to tenants and checked the HMO register and the Council's internal database. He said that he had asked for documents to be produced under s235 of the Act and these were produced by 30 October 2019 as required in his notice.

Discussion and Conclusion

69. The tribunal accepts that there was a legitimate tenancy agreement between Mr Bees and the company, albeit for tax purposes. It is

unfortunate that it was found very late in the day but the documents appear to be genuine and we accept the evidence from Mr Bees that his health became far worse after 2017, through 2018 and 2019; it is credible that he forgot about the precise arrangements made for him by the professionals he had instructed in 2017 or earlier.

70. Mr Bees, whilst being the owner of the premises did not receive rents from persons who were in occupation of parts of the premises – either directly or through an agent or trustee (the company not being an agent or trustee). The definition of "person managing" in section 263(3)(a) indicates that receipt of salary or dividends from the company would not be sufficient to constitute receipt of the rents or other payments from persons in occupation. The accounts produced indicate that the company paid corporation tax on the net rental income it received, the bank statements show rents being paid to the company and expenses being paid by the company, and the payslips show Mr Bees being paid as an employee (director).

71. The tribunal sees no merit in the Respondent's argument that the company was in occupation of those parts not demised to tenants – the common parts. Occupier is defined in s262(6) of the Act as a person who 'occupies the premises as a residence' and 'related expressions are to be construed accordingly'. The company clearly does not occupy the premises as a residence and is not capable of doing so. As such, receipt by Mr Bees of the (notional) head lease rent from the company does not constitute receipt of rents or other payments from persons who are in occupation under s.263(3).

72. The tribunal finds that the person managing the premises was in fact The Property Saints Limited. They held the premises on a lease from Mr Bees and the tenancy agreements produced were in the name of the company, signed by Mr Bees as a director (it appears this is an electronic signature applied by other employees of the company). Payments of rent were made to the company account and expenses in respect of the Premises appear also to have been made from the company account. Mr Bees was paid as a director – although there appears to have been only one lump sum payment of £12,500 for the tax year 2019/20 with monthly payment of £732 made subsequent to that. The accounts show that he had director's advances of £8,864 in 2017/18 and £24,662 in 2018/19.

73. Had the Council sought to make reasonable enquiries during or after their inspection of the Premises, whilst the financial arrangements may not have been apparent, they could have ascertained that the company was not an emergency call out company and made more investigations prior to serving the notices solely on Mr Bees. They could and should have contacted him and/or the company promptly after their inspection in October 2019 to raise any issues they were concerned about and ask questions about who (given the company details on the noticeboard in the Property, including terms of occupation) was the manager, rather than taking no action until they issued their notices of intent in February 2020.

74. The tribunal is also not persuaded by the argument that both Mr Bees and the company were the 'person managing' – for the reasons set out above.

Section 251 – Housing Act 2004

75. Financial penalties were levied on Mr Bees because the Council did not correctly identify the manager of the HMO. However, Mr Bees is a director of the manager. Under section 251(1) of the Act, Mr Bees would commit the same offence and would be liable to be proceeded against and punished for it if, as the Council allege in their alternative argument, they have proved that The Property Saints Limited's offences were committed with his consent or connivance, or are attributable to any neglect on his part.

76. The tribunal must first consider whether the notices were defective in that they did not name the company or indicate that they were served on Mr Bees in his role as director, but instead alleged that he was the manager.

77. It is clear that Mr Bees received the Notices of Intent as he instructed Counsel to reply to them on 27 March 2020 and also promptly put measures in place to remedy the issues raised in these notices. The Council did not investigate who was the manager, but in response to the notices of intent alleging that Mr Bees was the manager, Mr Bees and his original Counsel did not raise this as an issue at all. In respect of the Final Notices, Mr Bees submitted an appeal via his solicitors on 7 August 2020. Even then, the grounds of appeal in the application did not say that he was not the manager. It appears this was suggested for the first time in the middle of written submissions from his solicitors to the Council in about October 2020. Mr Bees has been fully aware of the matters alleged by the Council throughout and until recently answered as if he was the manager and personally liable. It is well established that such errors or omissions will not necessarily invalidate the process, as confirmed in London Borough of Waltham Forest v Younis [2019] UKUT 0362 (LC). We do not accept that he was prejudiced by the failure to mention the company nor his role as director on the notices and do not believe that failure to correctly describe Mr Bees as the director of the manager is fatal to the validity of the notice. We do not consider that it is necessary to use our power under paragraph 10 of Schedule 13A to the Act to (as canvassed by the parties) to vary the final notices in this respect.

78. Mr Maddan argues that any offence was not committed with the consent or connivance of Mr Bees, nor attributable to any neglect on his part, because he was ill during much of the relevant period, having treatment for Multiple Sclerosis and spending time abroad and then coming home to recuperate and convalesce.

79. Mr Bees in his evidence said that the company was mainly run by his wife and sister in law during this period. His illness gave him 'brain fog' at times and it was his wife or sister in law who dealt with the business on a day to day basis. The maintenance person they employed and the

tradesmen tended to go to them for instructions and not him. He did accept that because of his illness the normal monthly routine of checks may not always have happened but as soon as he was informed by the Council – some 4 months after they had made their inspection – all the works required were done.

80. The tribunal has every sympathy with Mr Bees and accepts that he is suffering from a serious illness. However, as one of only two directors in the company who is receiving a salary and dividends from the company it is not reasonable to expect to be able to step away from that position and absolve himself of responsibility for the company's actions. The company has 8 HMOs and, in his absence, appropriate arrangements should have been put in place to ensure that they were properly managed and that breaches of HMO regulations were not allowed to occur.

81. We therefore reject Mr Bees's defence to his own personal liability under section 251(1) of the Act. If the relevant offences were committed, that was attributable to his neglect, as examined below.

Relevant Housing Offences

82. The notices of intent to impose financial penalties in respect of the HMO Management Regulations dated 28 February 2020 were based on the breaches which were said to have existed on 21 October 2019. The Tribunal is required to be satisfied beyond reasonable doubt that the company failed to comply with the relevant regulations on that date.

83. In addition to the oral evidence of Mr Agnew and Miss Ling we were shown numerous photographs of the interior and exterior of the Property. Our findings on the various breaches alleged, based on that material are as follows:

Regulation 3 – the duty to provide information

84. Regulation 3 requires the manager to ensure that "his name, address and any telephone contact number are clearly displayed in a prominent position in the common parts" of the HMO so that they can be seen by all occupiers. The person whose contact details are required is the manager, not the caretaker or managing agent. There is no absolute obligation to provide a telephone number, but if the manager has a telephone contact number it must be provided. The object of the requirement appears therefore to be that occupiers of an HMO should know the identity and address of the person responsible for ensuring that satisfactory management arrangements are in place and standards of management are observed (those being the purposes for which the 2006 Regulations were made, see section 234(1) of the Act). The Regulations do not require the manager to provide a telephone number for use in emergencies, or to ensure that someone is on call to deal with management issues 24 hours a day.

85. The breach alleged in the Council's final notice of 7 July 2020 was that the required information was not displayed on the Premises. Mr Agnew

accepted at the hearing that the name, address and telephone number of The Property Saints were displayed on the notice board at the Property, and we can see from his photograph that they were. He confirmed that it was only the name of Mr Bees that was missing, but we are not satisfied that Mr Bees was the manager of the Property.

86. On this basis, it appears that the company (as the manager) did comply with regulation 3. We are not satisfied that there was any breach of regulation 3 of the HMO Management Regulations and we cancel the relevant final notice.

Regulation 4 – duties in respect of fire precautions

87. Regulation 4(1)(b) requires that all means of escape from fire in the HMO are maintained in good order and repair, and regulation 4(4) obliges the manager to take all measures reasonably required to protect the occupiers from injury.

88. The breach alleged in the Council's final notice of 7 July 2020 was that the required measures to protect the means of escape from fire and smoke were not in place.

89. On the date of his inspection on 21 October 2019 Mr Agnew noted that the patio doors in the ground floor middle bedroom could not be fully opened due to a restrictor lock. He said that the room occupant had not been provided with a key.

90. In his bundle the applicant provided a report from Mr Jan Movid – see paragraph 20 above, who stated that the means of escape was adequate without the patio doors as it had direct access to a protected stairway as required by the Building Regulations. The Applicant did not call Mr Movid so the tribunal were unable to question him on this. At the hearing, Mr Bees suggested that the occupier had been given a key and had lost it, although he had not said this in his witness statement. When notified that the Council were unhappy about the restrictor, the company workman had promptly replaced it with a keyless device, but that did not necessarily indicate that the previous restrictor failed to comply.

91. Mr Agnew for the Respondent said that that ideally you need two forms of escape and the patio windows were a potential means of escape and had been blocked off. He acknowledged that he was not a fire safety expert and could not question the "report" from Mr Movid. His training and knowledge were that a potential means of escape should not be blocked as this could cause delay to the occupant vacating in a fire situation. He was asked if the lock was in place when the property was inspected for the license in 2017 and said that he didn't know but the lock appeared to be new. Ms Ling said that if the patio doors were not there the escape from this room out of the front door would be "adequate", but because they were there they should be available for use as an alternative fire escape.

92. The tribunal has not attached any great weight to the "report" of Jan Movid, and notes that he refers to Building Regulations which the Respondent says are irrelevant. However, the Council has adopted the use of 'ideal' and 'preferable' in terms of having two means of escape. We bear in mind the practical points made by Mr Agnew and Ms Ling, but the Council did not seriously challenge the "report" from Mr Movid. Nor did either of the parties produce a floor plan. Given the parties agree that there is a door from this ground floor room directly onto the hallway, similar to other rooms, the tribunal does not accept that the Council has proved beyond reasonable doubt that the restrictor on the patio doors (an alternative means of escape) constituted a breach of regulation 4 of the HMO Management Regulations.

Regulation 7 – duty to maintain common parts in good order

93. Regulation 7 requires the manager to ensure that all common parts are maintained in good and clean decorative order, in a safe and working condition and kept reasonably free from obstruction, and in particular to ensure that all handrails and banisters are at all times kept in good repair, as set out in detail above.

94. The final notice of 7 July 2020 asserted that there were defective waste water pipes for the sink and for the first-floor bathroom, and moss/lichen growth on the outside of the kitchen wall. The front door was defective, there was defective flashing on the roof of the rear porch, defective mortar in the bricks to the rear elevation and a defective handrail leading to/from the attic bedroom.

95. Mr Agnew pointed us to photographs of the various alleged defects and said that whilst it might be somewhat difficult to see the mould and water dripping from the external pipes it was clear on inspection and the lichen in particular indicated damp for a prolonged period. He believed the glass to the front door could have easily fallen out and the handrail was fitted in two pieces where one would have been better. He also reported that the lower section of handrail was loose to the touch and not screwed to the wall. In addition, he said there was a split in and mould on the front door and a loose lock.

96. The Council also referred to other matters which were not identified in the notices. Mr Agnew pointed to a hole in the ceiling of the first-floor bathroom as shown in a photograph of that room. Mr Agnew accepted this could have happened recently. He also said that the extractor fan was not working and the temperature control for the shower was stiff. He said that the kitchen patio doors were insecure and said furniture in the garden under a plastic cover could harbour pests.

97. In response the case for the Applicant was that the crack in the mortar and loose flashing were not actual disrepair or not a safety issue, it was disputed that the handrail was loose or the other matters had been proven, and in any event the company was unaware of these alleged issues and had a reasonable excuse (234(4)). The tenants had not complained to the Applicant, the waste water pipes were covered with panels which had been removed by the complainant tenant to show Mr

Agnew, and these issues had not been uncovered during routine inspections by the maintenance man employed by the company, who Mr Bees said visited the property on a monthly basis. His representatives maintained that there is no disrepair liability on the landlord until such time as want of repair is reported to the landlord and they have had a reasonable opportunity to carry out a repair.

98. Mr Bees said that in March 2020, once notified of these issues, the handrail had been "retightened" and the interior and exterior waste pipes had been replaced.

99. The photographs of the interior pipework are inconclusive; they do not show a leak, Mr Agnew accepted that the first set were covered by a panel and the second set are inside the kitchen sink unit; it is reasonable to assume that these issues would not have been apparent on routine inspection. The tribunal was able to observe some lichen or moss on the outside wall. After Mr Agnew explained the photographs, we could see the drip from the exterior pipe that he had referred to. We can see the loose flashing on the porch roof and the cracks in the mortar in the brick elevation behind it. The handrail was indeed in two separate sections but there was no indication from the photograph that the lower rail was not secured to the wall and this was disputed by the applicant. Whilst it was not possible from a photograph to tell if the glass was firmly attached to the frame there is a clear crack in the lower panel of the front door.

100. On the basis of both the photographs and the evidence given in the witness statement of Mr Agnew and at the hearing the tribunal is satisfied beyond reasonable doubt that there was failure to comply with regulation 7, at least in respect of the issues with the external walls, external water leakage/damp from the external waste pipes, and the front door. The Council has not provided evidence beyond reasonable doubt in respect of the attic handrail.

101. We do not accept that the company has a reasonable excuse. Management of a HMO requires regular inspections by persons capable of identifying and arranging to remedy any defects. Mr Bees asserts that the property was inspected by the company workman on a monthly basis – in particular for fire alarm testing but also to pick up any defects. If this was the case it should have been sufficient to pick up the issues with the exterior pipework and the front door, because they should have been apparent from inspection. The fact that the landlord may not have a civil liability without actual notice and time to effect the repair is irrelevant. Therefore, the tribunal is satisfied beyond reasonable doubt that the company committed the offence of failure to comply with regulation 7 on 21 October 2019 and this was attributable to the neglect of Mr Bees.

Regulation 8 – duty of manager to maintain living accommodation

102. Regulation 8(2)(c) requires the manager to keep every window and other means of ventilation in good repair, and the other detailed requirements set out above.

103. The final notice of 7 July 2020 asserts that defective and weathered windows throughout the Property should have been identified by regular management inspections.

104. In Mr Agnew's witness statement, he referred to the attic window having a blown seal and the window frame being badly weathered and the handle and restrictors being worn and loose fitting. A photograph of the room shows an open window with normal fittings and a small area of condensation indicates a double-glazing unit which needs a new seal.

105. We also note that the company had the windows and exterior walls decorated and painted, and replaced the rear bedroom window, in May 2020, within three months of the notices from the Council.

106. Although it appears this was not mentioned in or with the notices of intent, in these proceedings the Council also referred to what was said to be a bedbug-infested mattress from the attic, and bites on the arm of the complainant tenant living in the attic. Mr Agnew said that related allegations were made by the tenant.

107. At the hearing the Council also referred to the front door which is also referred to (more correctly) in the alleged failures to comply with regulation 7 above.

108. On the evidence produced by the Council, the tribunal is satisfied beyond reasonable doubt that there was a failure to comply with regulation 8 of the HMO Management Regulations, at least in respect of the attic window, and that the company did not have a reasonable excuse because this should have been apparent with adequate inspections. We therefore find that on 21 October 2019 the company committed the offence of failure to comply with regulation 8 of the HMO Management Regulations and this was attributable to the neglect of Mr Bees.

The Council's policy

109. The Council's policy is summarised in paragraphs 31-38 above. At the hearing Mr Maddan for the Applicant argued that the April 2017 policy was corrected by the April 2020 policy and that the threshold test in the earlier policy was incorrectly stated to be 'a realistic prospect of conviction' – the implication being that the Council officers had not applied the correct standard of evidence.

110. Whilst the tribunal would agree that the wording in the 2020 policy is clearer, it would also agree with the Council that paragraphs 5.9 and 5.10 in the 2017 policy should be read together and that it clearly states that the Council will need to be able to demonstrate beyond reasonable

doubt that the offence had been committed. The Council officers stated at the hearing that they were aware that the standard of evidence required was 'beyond reasonable doubt' in relation to the offences alleged to have been committed and the Tribunal accepts that this was the case.

111. In respect of which matrix was applied when reviewing the offences prior to the issue of the Final Notices the tribunal finds that the matrix in the 2020 Policy has been applied but that this was reasonable (the terms of that Policy indicate that it can apply to any financial penalty issued after 6 April 2020) and caused no prejudice to the Applicant – given the starting point is much lower and this is to his advantage.

Penalty

112. In respect of the offence of failure to comply with HMO Management **Regulation** 7 the Respondent said they had assessed the culpability, punishment of the offender, level of harm and financial benefit at Minor (level 2), deterring the offender and others at Moderate (level 3) and assets and income at Serious (level 4). The scoring sheet presented as part of the evidence again does not show any offset for mitigating factors; it gives a score of 65 comprised of:

- 5 for culpability (the policy says that this means a first-time offence, ongoing for a short time, with minor previous breaches) plus 10 because this is a landlord with more than five properties (although the terms of the 2020 Policy appear to provide for a double weighting, so the addition of five, not 10, for this);
- 10 for severity of the offence and harm;
- 5 for punishment;
- 10 for financial benefit;
- 10 for deterrence of the offender and others; and
- 15 for assets and income.

113. This score would have indicated a starting point of £2,500 under the matrix at paragraph 7.8 of the 2020 policy. Ms Ling said she had taken into account the representations made and looked at Mr Bees' medical evidence and had again adopted a lower penalty than the scoring had indicated. In this case she had assessed the penalty for this offence at £1,000.

114. The Tribunal generally agrees with the assessment of the levels applied to the various factors by the Council, even based on the more limited non-compliance proved. Adopting the matrix in the 2020 Policy, we would reduce the score for culpability by five (because this will be a double weighting as required by paragraph 7.5 of the policy). This would reduce the starting point to £1,000, but the score of 60 would still be at the top of the range (41-60) in the matrix. We also consider that it

is appropriate to apply the subtraction under stage seven of the policy for mitigating factors of Moderate (for the same reasons that Ms Ling made her deduction from £2,500 to £1,000), which would reduce the score to 50, still squarely within the bracket for the starting point of £1,000. On this basis the tribunal arrives at a score which indicates a penalty of £1,000. We consider this is appropriate in the circumstances and confirm the relevant final notice imposing the penalty of £1,000 as levied by the Council.

115. In respect of the offence of failure to comply with HMO Management **Regulation 8** the scoring was identical to that for failure to comply with Regulation 7 – the Council had assessed the culpability, level of harm, punishment of the offender, and financial benefit at Minor (level 2), deterring the offender and others at Moderate (level 3) and assets and income at Serious (level 4). The scoring sheet presented as part of the evidence again does not show any offset for mitigating factors and gives a score of 65.

116. This score would have indicated a starting point of £2,500 under the matrix at paragraph 7.8 of the 2020 policy. Again, Miss Ling said she had taken into account the representations made and looked at Mr Bees' medical evidence and had again adopted a lower penalty than the scoring had indicated. She had assessed the penalty for this offence at £1,000.

117. The Tribunal believes that the level of assessment is somewhat excessive given the nature and extent of the proven failure to comply with regulation 8. Adopting the matrix in the 2020 Policy, we would reduce the score for culpability by five (because this will be a double weighting as required by paragraph 7.5 of the policy). We would also reduce the level of harm to very little or no harm caused. This would reduce the starting point to £1,000, but the score of 52. We also consider that it is appropriate to apply the subtraction under stage seven of the policy for mitigating factors of Moderate (for the same reasons that Ms Ling made her deduction from £2,500 to £1,000), which would reduce the score to 42. This sits on the cusp of the £750 band (21-40). In the circumstances the Tribunal believes that a penalty of £750 is appropriate and varies the relevant final notice accordingly.

Mary Hardman FRICS IRRV(Hons)

21 December 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).