



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/30UK/HNA/2019/0123 & 24**

Property : **9 Pedder Street, Ashton on Ribble, Preston
PR2 2QH**

Applicant : **Mr Michael Gibbons (t/a Student
Accommodation Preston)**

Representative : **Richard Tacagni (London Property
Licensing)**

Respondent : **Preston City Council**

Type of Application : **Housing Act 2004 - Schedule 13A(10)(1)**

Tribunal Members : **Mr S Moorhouse LLB
Mr IR Harris BSc FRICS**

Date of Decision : **7 October 2020**

DECISION

DECISION

The two Final Notices imposing financial penalties appealed in this case, issued to the Applicant in respect of the Property on 27 November 2019, are **confirmed**.

REASONS

The Applications

1. The Applicant in this case operates as a private landlord trading under the business name Student Accommodation Preston.
2. On 27 November 2019 two Final Notices were issued to the Applicant by the Respondent, each imposing a financial penalty of £12,375. The first related to the letting of the Property without the necessary HMO licence for the period 1 October 2018 to 17 June 2019, and the second related to a failure to comply with an Improvement Notice in respect of the Property dated 17 December 2018.
3. The Applicant appealed both financial penalties, submitting Applications to the tribunal dated 16 December 2019 pursuant to Schedule 13A paragraph 10(1) of the Housing Act 2004 ('the Act'). The two Applications were combined.

Submissions

4. Pursuant to Directions bundles of papers were submitted by the Respondent ('the Respondent's bundle') and the Applicant ('the Applicant's bundle'), and a reply was submitted by the Respondent ('the Respondent's Supplemental bundle').
5. The Application forms submitted by the Applicant set out the grounds of appeal. These were developed further in the written submission by the Applicant's representative, and certain aspects of the appeal were withdrawn on the Applicant's behalf. The remaining grounds for appeal can be summarised as follows:
 - It is submitted that both Final Notices are invalid for failure to set out the reasons for imposing the penalty, as required by paragraph 8(b) of Schedule 13A to the Act. The case of *London Borough of Waltham Forest and Hasan Younis [2019] UKUT 0362 (LC)* is cited in support.
 - It is submitted that the Property was not required to be licensed in the period 1 October 2018 to 17 June 2019 since it was not occupied by 5 or more individuals, and therefore the Applicant has not committed an offence under section 72(1) of the Act.
 - If, in relation to each of the Final Notices, the Applicant is unsuccessful in appealing the decision to impose a financial penalty, the Applicant appeals the amount of the penalty on the basis that this is excessive.

Paper Determination

6. The Applications are considered by the tribunal on the papers, but without holding a hearing. In this respect the tribunal has the benefit of written submissions submitted on behalf of both parties, witness testimony in the form of signed statements and supporting documentary evidence provided by the parties. Rule 31 of the tribunal's procedure rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed). In this case the Applicant has indicated that he consents to a paper determination and the Respondent has not objected.
7. Moreover, having reviewed the parties' submissions, the tribunal is satisfied that the matter is suitable for determination without a hearing. The Applicant has specialist representation and the Respondent's submission has been prepared by the Respondent's own Group Solicitor. Whilst there are certain inconsistencies in the papers provided, the tribunal is able to reach a decision without the need to require a hearing. In this respect the tribunal is mindful of its overriding objective to deal with cases fairly and justly, including dealing with the case in a way which is proportionate to the importance of the case and avoiding unnecessary delay so far as compatible with proper consideration of the issues.

The Law

8. The power of a local authority to impose financial penalties is set out at section 249A of the Act. Subsection (2) lists 'relevant housing offences'. The Final Notices in the present case rely upon subsection (2)(b) (section 72 - licensing of HMOs) and subsection (2)(a) (section 30 - failure to comply with improvement notice). Subsection (4) provides that the amount of a financial penalty imposed under section 249A is to be determined by the local housing authority, but must not be more than £30,000.
9. Schedule 13A to the Act sets out the procedure for imposing financial penalties, provision for appealing financial penalties, provisions concerning enforcement and a requirement for local housing authorities to have regard to guidance given by the Secretary of State.
10. Paragraph 10(1) of Schedule 13A provides that a person to whom a final notice is given may appeal to the First-tier Tribunal against the decision to impose the penalty or the amount of the penalty. Sub-paragraph (3) provides that such an appeal is to be by way of a re-hearing of the local housing authority's decision, but may be determined having regard to matters of which the authority was unaware. Sub-paragraph (4) provides that the First-tier Tribunal may confirm, vary or cancel the final notice.
11. The guidance issued by the Ministry of Housing, Communities & Local Government (included at page 150 in the Respondent's bundle) sets out 7 factors that should be considered by a local housing authority to help ensure that a civil penalty is set at an appropriate level: severity of the offence; culpability and track record of the offender; the harm caused to the tenant; punishment of the offender; deter the offender from repeating the offence and deter others from committing similar offences.
12. There are various authorities in case law relevant to the approach that should be taken by a First-tier Tribunal in considering appeals against local authority decisions.

The Respondent cites the joint decision in *London Borough of Waltham Forest and Allan Marshall and London Borough of Waltham Forest and Huseyin Ustek [2020] UKUT 0035 (LC)* as authority that a court must accept the local authority's policy and apply it as if it was standing in the shoes of the council considering the application - neither the Magistrates Court nor the Crown Court being the right place to challenge the policy.

13. The Applicant quotes from the same case the following:

'The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The court is to start from the policy and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.....'

'It goes without saying that if a court or tribunal on appeal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or of which it took insufficient account, it can substitute its own decision on that basis....'

'...the court stressed that the original decision carries a lot of weight; and it is in this sense that it is true that the courts will not vary it unless it is wrong. Here "wrong" means a decision with which the court disagrees; the court can vary that decision where it disagrees with it, despite having given it that special weight.'

Findings of Fact & Reasons for Decision

14. The tribunal considered all of the areas in issue set out within the written submission for the Applicant, namely the validity of both Final Notices, whether there was a HMO licensing offence (it being accepted by the Applicant that he committed the offence of failing to comply with the Improvement Notice) and, insofar as the Final Notices are upheld, the amount of each financial penalty. These are taken in turn below.

Validity of Final Notices

15. The Applicant's submission on validity relies upon the requirement at paragraph 8 of Schedule 13A to the Act that the final notice must set out (inter alia) the reasons for imposing the penalty. It is contended that the requirement is not met because the detailed reasons were not attached to the Final Notices, whilst the Respondent contends that the detailed reasons did accompany each Final Notice.

16. Section 3 of each Final Notice is headed 'Reasons for Imposing the Monetary Penalty'. In relation to the Licensing matter, the final notice states that between 1 October 2018 and 17 June 2019, the Applicant did have control of a House in Multiple Occupation which was required to be licensed under Part 2 of the Act but was not so licensed contrary to section 72(1) of the Act, and gives the address of the Property. It is stated also stated that the detailed reasons for imposing the penalty are those given in Schedule A attached to the Notice of Intent dated 19 September 2019, a copy of which is stated to be attached to the Final Notice. The Final Notice goes on to state that having considered the Applicant's representations the Respondent considers that the

Applicant has not provided satisfactory reasons for his failure to apply for an HMO licence during the period referred to.

17. A similar approach is taken by the Respondent in relation to the failure to comply with the Improvement Notice, stating in the Final Notice that the Applicant failed to comply without reasonable excuse contrary to section 30(1) of the Act and making reference to Schedule A to the Notice of Intent, a copy of which is stated to be attached to the Final Notice. The Final Notice goes on to state that having considered the Applicant's representations the Respondent considers that the Applicant has not provided satisfactory reasons for his failure to comply with the Improvement Notice by the specified compliance date.
18. In the case of *London Borough of Waltham Forest v Hasan Younef* referred to earlier, the Upper Tribunal considered it appropriate to consider a Notice of Intent and accompanying documents in the context of correspondence that preceded it. In the present case, it is not disputed that Appendix A to the Notice of Intent had accompanied the Notice of Intent. The tribunal considers it appropriate to interpret the reasons set out at section 3 of each Final Notice in the context of the documents that preceded it, including Appendix A to the relevant Notice of Intent, whether or not a further copy accompanied the Final Notice. The reasons for imposing the financial penalties are set out at section 3 of each of the Final Notices as required by the Act and, in the context of the documents that preceded the Final Notices, the reasons for imposing the financial penalties are absolutely clear.
19. The tribunal therefore considers the Final Notices to be valid.

HMO Licensing Offence

20. It is common ground in this case that from 1 October 2018 the Property was required to be licensed as a House in Multiple Occupation if it was occupied by 5 or more persons. The Applicant submits that visitors such as the partner of a tenant should not be classed as occupiers even if they liaised with the Applicant on behalf of a tenant and stayed at the Property on occasion. The tribunal accepts this submission.
21. The Property is confirmed by an independent HHSRS Assessor in a report dated 27 February 2020 to comprise, at that time, a 5 bedroom shared semi-detached house. This is consistent with the witness statement of Mr Leslie Crosbie who makes reference to a ground floor front bedroom and four first floor bedrooms. On the evidence before it the tribunal finds that the Property comprises a five bedroom semi-detached house with shared communal facilities.
22. There are a number of inconsistencies in the documentary evidence supplied by the parties. For example:
 - a copy email sent by tenant Amber Swales to the Applicant appears as a printed version in the Applicant's bundle and as a screen shot from the sender's hotmail 'sent mailbox' in the Respondent's Supplemental bundle. In the former the message includes the statement 'we have signed for 4 tenants and 4 tenants occupy the home...' and in the latter the same message reads instead 'we have signed for 5 tenants and 5 tenants occupy the home...'; and

- the copy tenancy agreement supplied by the Applicant lists 4 tenants on the first page and has 4 signatures on the final page, whereas a copy of the final page submitted in the Respondent's supplemental bundle has 5 tenant signatures.
23. These inconsistencies hinder the tribunal in determining how many individuals were in occupation of the Property throughout the period 1 October 2018 to 17 June 2019 referred to in the Final Notice.
 24. Nevertheless the tribunal finds that (1) a copy email sent by the Applicant's business to the Council Tax office, (2) the witness statement of The Respondent's Housing Standards Team Leader, and (3) the screen shot messages supplied to the Respondent by tenant Amber Swales, all support a conclusion that the following five individuals were in occupation throughout that period: Amber Swales, Molly Giddings, Philip Clitheroe, Bradley Webb and Cameron Swire. The tribunal finds this evidence particularly compelling because a consistent view is expressed from three separate sources (1) the Applicant's business, (2) the Respondent's officer and (3) electronic records supplied to the Respondent by a tenant. The evidence from these three sources is explored further below.
 25. The copy email to the Council Tax office is dated 3 May 2019 and was sent from the email address for the Applicant's letting business. It is included at page 194 of the Respondent's bundle. The Applicant submits that he believes that this email may have been sent by his wife who sometimes helps with the paperwork, but disputes its accuracy. The email states that in relation to the period 1 April 2018 to 31 March 2019 the Property was occupied by the following full-time students: Amber Swales, Molly Giddings, Philip Clitheroe, Bradley Webb and Cameron Swire. For the period commencing 1 April 2019 the occupants are stated to be the same. The Applicant submits that the email is incorrect as it has the incorrect tenancy start date however, as is pointed out by the Respondent in reply, the dates simply coincide with Council Tax years. The Applicant claims that the information given is incorrect, but it is not disputed that it came from his own email address used for the purposes of his lettings business.
 26. The Respondent's Housing Standards Team Leader, Mr Crosbie, supplied a witness statement in which he details (inter alia) an inspection at the Property conducted by two of his Housing Standards Officers on 11 December 2018, which the Applicant did not attend. Mr Crosbie states:

'Present within the property during the inspection were 5 occupiers: Bradley Webb in the ground floor front bedroom, Cameron Swire in the first floor rear annex, Amber Swales in the first floor front right bedroom, Philip Clitheroe in the first floor front left bedroom and Molly Giddings in the first floor centre bedroom. Mr Cryer confirmed by questioning that the housemates were unrelated to each other. All occupiers were students at the University of Central Lancashire and informed Mr Cryer that each occupier paid rent to Student Accommodation Preston of £370.00 per month...'
 27. The copy 'screen shot' messages, which the tribunal finds were obtained by the Respondent from tenant Amber Swales, are consistent with both the email to the Council Tax office and to the above inspection findings. In particular:

- An email from the Applicant to Amber Swales dated 30 July 2018 reads '...we are still outstanding your 4 Co-Tenants paperwork...';
- In response to an email from Amber Swales to the Applicant dated 8 August 2018 asking whose cheques had been received the Applicant replies the same day stating 'Cameron's and Philip's';
- On 22 August 2018 the Applicant emails Amber Swales stating 'We just await Bradley's rent cheques';
- Additionally the message referred to earlier states 'We have signed for 5 tenants and 5 tenants occupy the home...!'

28. It is notable that two of the names listed in the email to the Council Tax office and confirmed by the Respondent's officers at inspection appear as named tenants in the copy tenancy agreement supplied by the Applicant and the copy supplied by the Respondent. One other, Philip Clitheroe, appears as a tenant signatory on the copy final page of the tenancy agreement supplied by the Respondent, but not the copy supplied by the Applicant. Of the two copy final pages the tribunal prefers the Respondent's copy, the Applicant's copy clearly being truncated and incomplete.

29. The tribunal concludes, relying on evidence from the three sources referred to above, that there were 5 occupants throughout the period 1 October 2018 to 17 June 2019, of which three (Amber Swales, Molly Giddings, Philip Clitheroe) were signatories to the tenancy agreement and two (Bradley Webb and Cameron Swire) replaced two of the original signatories. The tribunal finds, relying in particular on the email to the Council Tax office, that the identity of the occupants was known to the Applicant.

30. The tribunal has considered carefully the degree of certainty attaching to the conclusions it has reached and considers that the criminal standard of proof has been met. The Respondent has proved beyond all reasonable doubt that the Applicant has committed an offence contrary to section 72(1) of the Act by being in control of a House in Multiple Occupation required to be licensed which was not so licensed. The tribunal is also satisfied that the statutory defence of 'reasonable excuse' set out at section 72(5) of the Act is not made out in this case since the Applicant is a professional landlord who should have known of the licensing changes coming into effect on 1 October 2018, and who knew that he had 5 occupiers in the Property.

The amount of each financial penalty

31. The Applicant challenges the amount of each financial penalty, contending that they are excessively high having regard to the framework set out in Government guidance. The Respondent's 'Civil Penalty Policy and Matrix of Penalty Charges' is criticised as being only three and a half pages in length with the level of penalty largely dependent on just two factors: culpability and harm, with no guidance as to how other aggravating and mitigating factors are to be applied. It is contended that the lack of detail prevents the Government guidance being fairly implemented, leading to an excessively high penalty in the present case. The Applicant goes on to set out factors and mitigations the tribunal is asked to take into consideration in applying the Government guidance, both in relation to the licensing offence and the failure to comply with the Improvement Notice.

32. As noted earlier the tribunal's remit is to conduct a re-hearing of the Respondent's decision. In doing so the tribunal may have regard to matters of which the Respondent was unaware.
33. The Respondent's Civil Penalty Policy and Matrix of Penalty Charges is set out at page 170 of the Respondent's bundle. In applying the policy, severity of the offence is considered by reference to culpability and harm. Culpability is categorised as 'deliberate', 'reckless', 'negligent' and 'low/none'. Harm has 3 categories each defined by reference to the adverse effect and/or risk of an adverse effect on individuals. A matrix allocates a band (starting point being the mid-point) and non-exhaustive lists of aggravating factors and mitigating factors are provided to determine whether to adjust upward or downward from the starting point. The policy states that all 7 factors in the Government guidelines are reflected in the financial penalty matrix. This indicates that the banding levels were determined having regard to punishment, deterrence (of the offender and others) and the removal of financial benefit.
34. The Respondent's assessment is set out at page 174 of the Respondent's bundle. In relation to the failure to comply with the Improvement Notice the assessment categorises culpability as 'deliberate' and harm as category 2 (medium harm) owing to the 4 category 1 and 22 category 2 hazards in the Property. In relation to the licensing offence, the assessment categorises culpability as 'deliberate' and harm as category 2 owing to the presence of category 1 and 2 hazards in the Property. This places each financial penalty in Band 5 (£20,000 to £24,999). As per the policy the assessment takes a mid-point and then for each offence considers aggravating and mitigating factors, concluding that none of the aggravating factors for either offence would give rise to an upward adjustment, and none of the mitigating factors for either offence would give rise to a downward adjustment. The assessment then goes on to give further consideration to the Applicant's financial situation and makes no adjustment for this. In applying the financial penalties the Respondent reduces the level of each by 45% to take into account the total of the penalties imposed at that time.
35. The tribunal is satisfied that the Respondent's Civil Penalty Policy and Matrix of Penalty Charges is properly based upon the Ministry of Housing, Communities & Local Government Guidance (page 150 in the Respondent's bundle) and that this worked effectively to distribute the weight of the allocated criteria across the range of possible fines up to the total of £30,000. In deciding on the scores for each of the individual criterion, the officer concerned is required to apply their expertise to the circumstances of, and background to, the offences. The officer in this case justified the scores and additionally consulted with the Respondent's legal services team. The discretion for upward or downward adjustment for aggravating or mitigating factors was considered, as were issues around financial standing.
36. The tribunal has reviewed the Applicant's submission to determine whether there were significant considerations known to the Respondent that were not reflected in the assessment, or significant errors in the facts that were applied. The tribunal considers that alleged inaccuracies in a reference to activity in Salford and issues raised by the Applicant around timing and eventual completion of works were not so significant that they would have affected the overall assessment. Contentions by the Applicant that delaying works does not give rise to financial benefit and that HHSRS hazards should not be counted in more than one assessment are not accepted by the

tribunal. In the latter case the fact that the Property did not meet licensing standards due to the risk of harm from hazards was relevant in assessing the financial penalty for operating an unlicensed HMO - Government guidance specifically states that 'the greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be'.

37. Certain matters are apparent to the tribunal from the papers that were not known by the Respondent at the time the Final Notices were issued. Financial information has been submitted for the Applicant including evidence that he is operating at a loss for tax purposes and that the Property is mortgaged for £156,456 yet estimated to be worth £146,000. A witness Robert Ellison has prepared an inspection report dated 27 February 2020 and witness Peter Littlefair states that he has been unable to access the Property in the period September 2018 to July 2019. The Respondent has also submitted two First-tier Tribunal decisions awarding Rent Repayment Orders against the Applicant for operating two other unlicensed HMO's in Preston, in order to counter evidence submitted by the Applicant as to his good character.
38. The tribunal has considered these additional matters and determines that they do not justify adjustment to the Respondent's decisions. The tribunal is cognisant that whilst the Applicant contends that he could face bankruptcy, the tribunal has no evidence before it of his overall net worth. The tribunal accepts that Peter Littlefair's evidence indicates difficulties accessing the Property however access difficulties were raised by the Applicant in his representations following receipt of Notices of Intent and taken into consideration by the Respondent prior to issuing the Final Notices.
39. The tribunal has also reviewed the alleged shortcomings in the Respondent's policy referred to in the Applicant's submission, and considered whether the tribunal should depart from the policy as a consequence. These include failures to differentiate in the policy between size of HMO, failure to specifically consider duration of offence, and failure to consider severity of offence. The tribunal considered that severity was directly addressed by reference to harm and culpability. The other matters would not, even if accepted by the tribunal, be sufficiently material to justify the substitution by the tribunal of a different decision.
40. Overall, having considered all of the submissions and evidence before it, the tribunal considers the amounts of the financial penalties arrived at by the Respondent to be very reasonable. The tribunal is particularly concerned about the risks to the safety of the 5 students living in the conditions evidenced by the Improvement Notice - in a property that had been owned by the Applicant for over 10 years at that time. The Final Notices are confirmed by the tribunal.

S Moorhouse
Tribunal Judge