FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/HNA/2021/0049 and LON/00AE/HNA/2021/0051**
Type of hearing	**:**	**V:CVP**
Property	**:**	**140 Broadhurst Gardens, London NW6 3BH**
Applicants	**:**	**Wilmington Properties Limited ("the First Applicant") and Mr Nader Entessamia ("The Second Applicant")**
Representative	**:**	**Savannah Bullen-Manson of Counsel**
Respondent	**:**	**The London Borough of Camden**
Representative	**:**	**Ruwani Roberts of Counsel**
Type of Application	**:**	**Appeal against financial penalties – Section 249A of, and Schedule 13A to, the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn** **Mr S Mason FRICS**
Date of Hearing	**:**	**3rd March 2022**
Date of Decision	**:**	**30th March 2022**

DECISION

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Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was **V:CVP**. A face-to-face hearing was not held because it was not practicable in the context of the ongoing pandemic and all issues could be determined in a remote hearing. The documents to which we have been referred are in a series of electronic bundles, the contents of which we have noted. The decisions made are set out below under the heading “Decisions of the tribunal”.

Decisions of the tribunal

(1) All four of the final notices given to the First Applicant are cancelled.

(2) All four of the final notices given to the Second Applicant are cancelled.

Introduction and background

1. The First Applicant has appealed against a combination of four financial penalties imposed on it and the Second Applicant has appealed against a combination of four financial penalties imposed on him. In each case the penalties were imposed by the Respondent under section 249A of the Housing Act 2004 (“**the 2004 Act**”) in relation to the Property.

2. The financial penalties were imposed for alleged breach of the following regulations:-

   (i) Regulation 4(1)(a) & (b) of the Management of Houses in Multiple Occupation (England) Regulations 2006 (“**the HMO Management Regulations**”);

   (ii) Regulation 5(2) of the HMO Management Regulations;

   (iii) Regulation 7(1c), (2c), (4a) & (4b) of the HMO Management Regulations; and

   (iv) Regulation 8(2a) of the HMO Management Regulations.

3. The Property is a 4-storey mid-terrace building which has been converted into 15 self-contained flats with some facilities in the common parts.

4. It is common ground between the parties that at the time of the alleged breaches the Property was an HMO and the First Applicant was a person managing the Property. The notices served on the Second Applicant were addressed to him on the basis that as the company director of the First Applicant he was also guilty of each of the alleged

offences by virtue of section 251(1) of the 2004 Act. The Applicants have not taken issue with the proposition that if the First Applicant is guilty of any of the alleged breaches then the Second Applicant will also be guilty of the equivalent alleged breach set out in the relevant notice served on him.

5. The breaches allegedly committed by the First Applicant are essentially identical to those allegedly committed by the Second Applicant and neither party has sought to draw any distinction between the First Applicant's position and the Second Applicant's position.

6. The HMO Management Regulations were brought in pursuant to section 234 of the 2004 Act, and under section 234(3) of the 2004 Act a person commits an offence if that person fails to comply with an HMO regulation made under section 234. Under section 249A(1) of the 2004 Act the local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England, and by virtue of section 249A(2) a breach of management regulations in respect of HMOs constitutes a relevant housing offence for these purposes.

7. Under paragraph 10 of Schedule 13A to the 2004 Act a person to whom a final notice is given may appeal to the First-tier Tribunal against the decision to impose the penalty (or against the amount of the penalty).

<u>The Respondent's inspections and correspondence with the Applicants in June 2018 and October 2020</u>

8. In his witness evidence, Mr Adewale Adekoya – Environmental Health Officer for the Respondent – states that a Council employee, Mr Liam McIntyre, inspected the Property on 8th June 2018 due to a suspicion that the licence holder for the Property was in breach of various obligations under the HMO Management Regulations. He found various items of disrepair and emailed details to the Second Applicant on 11th June 2018. The following day the Second Applicant gave an assurance to the Council that he was fixing the issues identified and Mr McIntyre then closed the complaint following correspondence with the London Fire Brigade Officer and a satisfactory Fire Risk Assessment from the Second Applicant. No penalty notices were served in connection with the events of 2018 and therefore these events merely constitute background information, the relevance of which is open to debate.

9. Mr Adekoya then inspected the Property again over 2 years later in October 2020 (meaning early October 2020 in this context), and in his witness statement he lists the breaches of HMO Management Regulations that he found at that time. Mr Adekoya then states that he sent both Applicants a notice requesting certain information on 5th

October 2020 (shortly after the date of the inspection), to which the Applicants' solicitors replied on 19th October 2020. He then sent both Applicants a letter of alleged offence on 20th October 2020. On 28th October 2020 Mr Adekoya carried out another inspection of the Property and found that the fire panel was now working adequately and the obstruction to the hallway had been removed, but his assessment was that repairs that were needed to Flat 5 had not been carried out.

The hearing

10. Both parties were represented by Counsel at the hearing. Each representative made oral submissions and referred to relevant written submissions. The Second Applicant was cross-examined on his witness evidence and Mr Adekoya was cross-examined on his own witness evidence.

Alleged breaches of Regulation 4

11. The first set of final notices specifies alleged breaches of Regulation 4(1)(a) & (b) of the HMO Management Regulations, which states that *"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"*.

12. In his witness statement Mr Adekoya states that the automatic fire detection system was not maintained in good working order as there was no power supply to the fire control panel. He also states that the second-floor landing was obstructed with stored items and personal belongings and building materials, thereby obstructing the fire escape route.

13. In his own witness statement the Second Applicant states that the washing machine from Flat 5 had been placed outside her door by the tenant of Flat 5. The Applicants asked her several times to remove it from the hallway and then in the end the Applicants disposed of it themselves. Regarding the fire detector, the fire system at the Property is an expensive, high-quality one and is routinely checked every 6 months. If there is a fault with the fire system the Applicants contact the maintenance company, and that company was contacted in this case and fixed the problem.

14. At the hearing Mr Adekoya referred the Tribunal to various copy photographs in the hearing bundle showing various obstructions. In relation to the washing machine in the hallway he was unable to say who had placed it there but he maintained that its presence nevertheless constituted a breach. It was put to him that a landlord cannot be expected to inspect the common parts constantly, and he

accepted this but added that a landlord still has a responsibility to ensure that the means of escape are kept clear.

15. In relation to Mr Adekoya's reference to there being "building materials" in the hallway, it was put to him that this was an exaggeration based on what could be seen on the relevant photograph but he said that the rules require any such items to be stored in cupboards. In relation to the obstruction in the hallway, Mr Adekoya accepted that this had been removed by 28th October 2020.

16. The Second Applicant accepted in cross-examination that the laundry room had been obstructed but said that it was only momentarily. He did not accept that the means of escape had been obstructed. Regarding the presence of a chair in the hallway, he said that it was being moved from Flat 14 but it was put to him that it was still there 8 days later. Regarding the washing machine, it was put to him that there was no mention in his solicitor's letter of 6th November 2020 that he had tried to get the tenant to remove it.

<u>Tribunal conclusion in relation to Regulation 4</u>

17. The Respondent's evidence in relation to the fire alarm system is merely that there was a fault when it was inspected. It is common ground between the parties that the fault was remedied at the very latest by 28th October 2020 when the Respondent returned to inspect. Under section 234(4) of the 2004 Act, *"in proceedings against a person for an offence under subsection (3) [breach of regulations] it is a defence that he had a reasonable excuse for not complying with the regulation"*. Under Regulation 11(2) of the HMO Management Regulations, *"any duty imposed by [the] Regulations to maintain or keep in repair are to be construed as requiring a standard of maintenance or repair that is reasonable in all the circumstances, taking account of the age, character and prospective life of the house and the locality in which it is situated"*.

18. The Applicants' evidence is that the fire alarm system is a high-quality one which is checked every 6 months, and in our view in the absence of proper evidence of neglect the mere fact that there existed a fault at one particular moment in time cannot by itself mean that the manager was guilty of a criminal offence. In our view, the evidence indicates that the Applicants had a reasonable excuse under section 234(4) of the 2004 Act as they had been taking reasonable steps to maintain the system, including making periodic checks, but were unaware that it had developed a fault. There is no evidence from the Respondent that the Applicants were generally failing to maintain the fire alarm system to a standard which was reasonable in all the circumstances under Regulation 11(2), and the Applicants fixed the system reasonably promptly on being notified of the fault.

19. In relation to the alleged building materials, we were shown a photograph of these building materials and it is clear that they are very small items which can comfortably fit onto a narrow shelf. For the Respondent to have categorised these as building materials and then to have relied on their presence in the hallway as evidence of criminal activity is indicative of a complete lack of proportion on the Respondent's part.

20. In relation to the other obstructions referred to by the Respondent, some of them did not actually constitute obstructions in the sense that there was no real evidence before us that they were blocking or even obstructing the means of escape. But in any event, the evidence before us indicates that these items were removed at least by 20th October 2020 and possibly earlier than that. Given that there is no evidence before us that any of these items belonged to the Applicants and some evidence that all or some of them did not belong to them, it is reasonable for the Applicants to argue that they needed a period of time within which to arrange for their removal and we are not persuaded that the length of delay was unreasonable for the purposes of Regulation 11(2) or that the Applicants did not have a defence in the circumstances under section 234(4) of the 2004 Act.

21. It is also fair to acknowledge that these concerns were all raised by the Respondent in the middle of a pandemic. Whilst the existence of a pandemic cannot be used to excuse a failure to take reasonable steps to comply with one's legal obligations, it does provide some context in that it can be relevant to the question of what constitutes a reasonable response time.

22. In conclusion, therefore, we do not accept that the Respondent has proved beyond reasonable doubt that there has been a breach of Regulation 4.

<u>Alleged breaches of Regulation 5</u>

23. The second set of final notices specifies alleged breaches of Regulation 5(2) of the HMO Management Regulations, which states that *"the manager must not unreasonably cause or permit the water or drainage supply that is used by any occupier at the HMO to be interrupted"*.

24. In his witness statement Mr Adekoya states that there was no water supply to the sink in the shower room of Flat 5.

25. In his own witness statement the Second Applicant states that there is only one pipe coming into the flat supplying all of the kitchen and bathroom taps. The water supply was undisturbed in the kitchen and shower and therefore the water could not have been stopped from

outside the flat. After the tenant left the flat, the Applicants found that the water had stopped because the stopcock underneath the sink had been closed.

26. Mr Adekoya was unable to comment further as to the cause of the lack of water supply to the sink.

Tribunal conclusion in relation to Regulation 5

27. The Applicants' evidence that the stopcock underneath the sink had been closed is credible and it is something that Mr Adekoya by his own admission had not checked. Mr Adekoya is unable to shed any light on the question of who might have turned off the stopcock and therefore is not in a position to state that it was turned off by the Applicants or under their direction or even with their knowledge. The Applicants' position is further supported by the evidence that there was a continuing water supply to the kitchen and shower.

28. Therefore, the Respondent is very far from being able to prove beyond reasonable doubt that the Applicants unreasonably (or otherwise) caused or permitted the water supply to be interrupted. We therefore do not accept that the Respondent has proved beyond reasonable doubt that there has been a breach of Regulation 5.

Alleged breaches of Regulation 7

29. The third set of final notices specifies alleged breaches of Regulation 7(1c), (2c), (4a) & (4b), which read as follows:-

30. *"(1) The manager must ensure that all common parts of the HMO are … kept reasonably clear from obstruction.*

(2) In performing the duty imposed by paragraph (1), the manager must in particular ensure that … any stair coverings are safely fixed and kept in good repair;

(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".

31. In his witness statement Mr Adekoya states that there were big holes in the floor board on the stair landing covered with the carpet, there was

rubbish accumulation in the garden of the Property and the front yard of the Property had some waste materials stored.

32. In his own witness statement the Second Applicant states that he could find no holes in the floor boards. Regarding the rear garden, he states that rubbish is periodically thrown into the garden by people from the neighbouring council estate but that in any event the rear garden is not available to be used by tenants of the HMO. In relation to the front garden, he states that whenever a tenant vacates the Applicants refurbish the empty flat. They will sometimes keep materials in the front garden until the refurbishment has been completed, but this is usually for about a week.

33. At the hearing it was put to Mr Adekoya that there were no significant holes in the floorboards, but he said that the main issue was that there was a potential trip hazard as the floorboards were uneven at a certain point.

34. Regarding the rear garden, Mr Adekoya maintained that the evidence showed that the tenants did in fact have access to it. He also said that much of the rubbish in the rear garden looked as though it had been there for a long time and he referred the Tribunal to various photographs in the hearing bundle.

35. The Second Applicant accepted at the hearing that there was no signage telling the tenants not to use the garden, but they did not in fact use it. He also insisted that he did clear the garden periodically.

Tribunal conclusion in relation to Regulation 7

36. In relation to the obstructions referred to by the Respondent, there is an overlap with the relevant part of the Regulation 4 notice and for the same reasons we do not accept that an offence has been committed.

37. Specifically in relation to the stair coverings, the notice refers to there being huge gaps in the floor on the staircase, but the evidence does not bear that out. At the hearing Mr Adekoya was invited to substantiate this claim but he was unable to do so. When asked to provide evidence of the existence of holes, he referred the Tribunal to some tiny holes by the skirting board. These were nowhere near the stairs and there was no evidence to indicate that they constituted a hazard. Mr Adekoya's fallback position was that one or more of the stairs was slightly uneven, but he could give no real evidence as to the extent of the problem and in a property of this age it is hardly surprising that there would be a degree of unevenness in one or more stairs. We do not accept that this constitutes evidence of a criminal offence.

38. In relation to the front yard, the Applicants accept that from time to time there might be materials placed there whilst a room is cleared out ready for the next occupier. The Respondent has not produced any evidence that materials were left in the front yard for an extended period of time and there is no evidence of any problems from any of the photographs, and so we do not accept that the Respondent has demonstrated that a criminal offence was committed in this regard. Again, applying section 234(4) of the 2004 Act and Regulation 11(2), it cannot be the case that briefly placing an item in the front yard constitutes the criminal offence of failing to ensure that this area was maintained in repair, clean condition and good order.

39. In relation to the back garden, we are not persuaded by the Second Applicant's assertion that the accumulation of rubbish was caused simply by passers-by throwing things over the fence. Nor are we persuaded that he made much of an effort to maintain the garden, as the photographs seen by us appear to show items which by virtue of their condition had been sitting in the back garden for a considerable period of time. However, in order to conclude that a criminal offence has been committed the Tribunal needs to be satisfied beyond reasonable doubt, and we are not satisfied beyond reasonable doubt that the garden was part of the HMO and/or that the tenants had a right to use it or did use it in practice. The Respondent has provided no witness evidence from any tenant, there is no other tangible evidence before us that the garden was part of the HMO and the Applicants deny that it was. We are therefore simply being asked to rely on the Respondent's speculation that it formed part of the HMO, based on factors such as the positioning of the bins, and this is insufficient for the offence to be proved beyond reasonable doubt.

40. In conclusion, therefore, we do not accept that the Respondent has proved beyond reasonable doubt that there has been a breach of Regulation 7.

Alleged breaches of Regulation 8

41. The fourth set of final notices specifies alleged breaches of Regulation 8(2a) of the HMO Management Regulations, which states that *"… 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"*.

42. In his witness statement Mr Adekoya states that the flats inspected were poorly maintained and had defects. In particular he states that there was a leak under the sink of the kitchen of Flat 5, there was evidence of severe damp and mould under the sink, the worktop in the kitchen and the kitchen cupboards were broken, there was severe damp and mould growth in the bedsit's main sleeping area and around the windows and the shower area, there was a leak from the flat above

dripping into Flat 5, there was a socket above the kitchen sink which was too close to the tap thereby creating an electric hazard, and in Flat 4 the wooden floor was not properly fitted and was getting dislodged and attracting detritus.

43. At the hearing Mr Adekoya withdrew the point about the socket above the kitchen sink being too close to the tap.

44. In his own witness statement the Second Applicant states that the tenant of Flat 5 decided to instal a washing machine without his permission, which was inadequately installed and leaked, and that she started running a laundry business. He believes that this caused much dampness and mould in the flat. In relation to the worktop, he states that it was obvious that someone must have stood on it or placed a heavy object on it. As regards the alleged leak from the flat above Flat 5, he had received no complaint about this. Generally in relation to Flat 5, the Applicants requested entry to inspect but this was denied on several occasions.

Tribunal conclusion in relation to Regulation 8

45. In relation to the allegation that there was a leak from above into Flat 5, in our view Mr Adekoya has failed to demonstrate beyond reasonable doubt that there was a leak from above when he inspected or that any damp was the result of a failing on the part of the Applicants rather than on the part of the tenant of Flat 5.

46. Regarding the damp and mould itself in Flat 5, we accept that there does exist some evidence of this, but the Respondent has in our view failed to demonstrate that it constituted a breach by the Applicants of their management obligations. In particular, the Respondent has failed to provide compelling evidence as to what the Applicants knew in relation to the damp and the mould and what they should have known, and it is also possible (as the Second Applicant maintains) that the tenant refused entry to enable the Applicants to deal with the matter. Again, the Respondent's case suffers from a lack of witness evidence. There is a statement from the tenant of Flat 5 in the hearing bundle, but that statement contains no information of any relevance to the alleged breaches, and the Respondent is therefore forced to fall back on some assumptions. The offence needs to be proved beyond reasonable doubt, and in our view it has not been.

47. In relation to the worktop, it is common ground between the parties that it was broken, but a plausible explanation is that the damage was caused by the tenant and there is simply insufficient evidence that the damage resulted from a breach by the Applicants of their management obligations.

48. In relation to the wooden floor in Flat 4 not being properly fitted, we accept on the evidence before us that it arguably could have been finished to a higher standard. However, by itself we do not consider that this constitutes a criminal offence. First of all, the Applicants assert that it was fixed straight away. Secondly, there has to be some seriousness threshold, and in any event under Regulation 11(2) the level of maintenance required is a standard that is reasonable in all the circumstances taking into account the age and character of the building. Furthermore, the Tribunal has to satisfied beyond reasonable doubt, and in the absence of witness evidence from the tenant it is possible for example that the Applicants were simply unable to gain entry at the relevant time to fix the floor.

49. As with Regulation 4 it is also fair to acknowledge that these concerns were all raised by the Respondent in the middle of a pandemic. Whilst the existence of a pandemic cannot be used to excuse a failure to take reasonable steps to comply with one's legal obligations, it does provide some context in that it can be relevant to the question of what constitutes a reasonable response time.

<u>Conclusion</u>

50. We do not accept that the Applicants have committed any of the criminal offences to which the final notices relate. Pursuant to Schedule 13A to the 2004 Act we therefore hereby cancel each of the eight final notices.

<u>Cost applications</u>

51. No cost applications were made.

Name: Judge P Korn **Date:** 30th March 2022

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Housing Act 2004

234 Management regulations in respect of HMOs

(1) The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations – (a) there are in place satisfactory management arrangements; and (b) satisfactory standards of management are observed.

(2) The regulations may, in particular – (a) impose duties on the person managing a house in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it; (b) ...

(3) A person commits an offence if he fails to comply with a regulation under this section.

(4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation.

...

249A Financial penalties for certain housing offences in England

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

(2) In this section "relevant housing offence" means an offence under—

(a) section 30 (failure to comply with improvement notice),

(b) section 72 (licensing of HMOs),

(c) section 95 (licensing of houses under Part 3),

(d) section 139(7) (failure to comply with overcrowding notice), or

(e) section 234 (management regulations in respect of HMOs).

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if— (a) the person has been convicted of the offence in respect of that conduct, or (b) criminal proceedings for the offence have been instituted against

the person in respect of the conduct and the proceedings have not been concluded.

(6) Schedule 13A deals with—

(a) the procedure for imposing financial penalties,

(b) appeals against financial penalties,

(c) enforcement of financial penalties, and

(d) guidance in respect of financial penalties.

(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9) For the purposes of this section a person's conduct includes a failure to act.

SCHEDULE 13A

FINANCIAL PENALTIES UNDER SECTION 249A

Appeals

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

10

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

(3) An appeal under this paragraph – (a) is to be a re-hearing of the local authority's decision, but (b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

The Management of Houses in Multiple Occupation (England) Regulations 2006

4 Duty of manager to take safety measures

(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.

5 Duty of manager to maintain water supply and drainage

(2) The manager must not unreasonably cause or permit the water or drainage supply that is used by any occupier at the HMO to be interrupted.

7 Duty of manager to maintain common parts, fixtures, fittings and appliances

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

(c) kept reasonably clear from obstruction.

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

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

(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; …

8 Duty of manager to maintain living accommodation

(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; …

(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.

11 General

(2) Any duty imposed by these Regulations to maintain or keep in repair are to be construed as requiring a standard of maintenance or repair that is reasonable in all the circumstances, taking account of the age, character and prospective life of the house and the locality in which it is situated.