FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BR/HNA/2021/0026**
Premises	**:**	**44 Parkway** **Little Hulton** **Salford** **M38 0DB**
Appellant	**:**	**AM Houses Limited**
Representative	**:**	**Mr M Santos**
Respondent	**:**	**Salford City Council**
Representative	**:**	**Mr P Whatley, Counsel**
Type of Application	**:**	**Appeal against a financial penalty: Housing Act 2004 – Schedule 13A, paragraph 10**
Tribunal Members	**:**	**Judge J Holbrook** **Regional Surveyor N Walsh**
Date and venue of Hearing	**:**	**28 April 2022** **Manchester**
Date of Decision	**:**	**10 May 2022**

DECISION

DECISION

The Final Notice which is the subject of this appeal is confirmed: AM Houses Limited must therefore pay a financial penalty of £18,500 to Salford City Council.

REASONS

INTRODUCTION

The appeal

1. On 23 February 2021, AM Houses Limited appealed to the Tribunal against a financial penalty imposed on it by Salford City Council under section 249A(1) of the Housing Act 2004 ("the 2004 Act"). The financial penalty related to an alleged housing offence in respect of premises known as 44 Parkway, Little Hulton, Salford M38 0DB ("the Premises").

2. To be more precise, the Appellant appealed against a final notice dated 26 January 2021 given to it by Salford Council under paragraph 6 of Schedule 13A to the 2004 Act ("the Final Notice"). It imposed a financial penalty of £18,500 for conduct allegedly amounting to an offence under section 234(3) of the 2004 Act.

The hearing

3. The appeal was heard at the Tribunal's hearing centre at Piccadilly Exchange in Manchester on 28 April 2022. The Appellant was represented by its sole director, Mr Michael Santos, and Salford Council was represented by Mr Paul Whatley of counsel.

4. Mr Santos gave sworn oral evidence for the Appellant and the Tribunal also heard sworn oral evidence from two witnesses for Salford Council: Liz Mann (a Housing Standards Officer employed by the council); and Karina Daniels (another of the council's Housing Standards Officers). Opportunity was given for each witness to be cross-examined and oral submissions were also made by both parties. In addition, the Tribunal considered extensive documentary evidence provided by the parties in support of their respective cases.

5. The Tribunal did not inspect the Premises prior to the hearing, but we understand it to comprise a two-storey five bedroom residential house.

6. Judgment was reserved.

STATUTORY FRAMEWORK

Power to impose financial penalties

7. New provisions were inserted into the 2004 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.

8. Relevant housing offences are listed in section 249A(2). They include the offence (under section 234) of failing to comply with the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the HMO Management Regulations").

9. 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

10. Schedule 13A to the 2004 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.

11. 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.

12. 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.

13. 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.

Appeals

14. A final notice given under Schedule 13A to the 2004 Act must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given. However, this is subject to the right of the person to whom a final notice is given to appeal to this Tribunal (under paragraph 10 of Schedule 13A).

15. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.

16. The appeal is by way of a re-hearing of the local housing authority's decision, but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.

RELEVANT GUIDANCE

17. 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 HCLG 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 HCLG 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 record of offending."

18. The HCLG Guidance also sets out the following list of factors which local housing authorities should consider to help 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.

19. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, Salford Council have adopted the policy devised by the Association of Greater Manchester Authorities on *Civil Penalties as an alternative to prosecution under the Housing and Planning Act 2016* ("the AGMA Policy"). We make further reference to this policy later in these reasons.

BACKGROUND FACTS

20. On 9 March 2020, officers of Salford Council made an unannounced visit to the Premises to assess whether they were being occupied and operated as a house in multiple occupation (HMO). The Premises were then found to be occupied by three individuals and the council decided to carry out a full inspection of the Premises, which they did on 28 July 2020, in the company of Mr Santos who advised that he/his company managed the Premises pursuant to an agreement with the freeholder, Mr Varun Kapur.

21. When the Premises were inspected on 28 July 2020, the council's officers formed the view that they were being operated as a four bedroom, 'bedsit-style', HMO. Three of the bedrooms were occupied by individuals who did not know each other and who had separate tenancy agreements. Two of the bedrooms were empty (and one of those was considered too small to be occupied).

22. The following defects in the condition of the Premises were noted:

- There was no fire door separating the dining room from the hallway (escape route).
- Bedrooms 2, 3, 4 and 5 were not fitted with fire doors and had excessive gaps between doors and frames, which would not prevent smoke or flames from getting onto the escape route.
- Bedrooms 2, 4, and 5 were not fitted with overhead self-closers.
- Bedroom 3 had an overhead closer but it was not connected to the door frame and was held together with a zip tie.
- The kitchen was not fitted with a fire door. The overhead closer was
- broken and the door was wedged open with a piece of wood.
- The consumer unit located on the escape route was not properly encased to provide 30 minutes protection in the event of a fire.
- Bedrooms 2, 3, 4 and 5 had transform light windows above the doors
- Key operated front door lock rather than thumb turn.

23. Both the Appellant and the owner of the Premises were subsequently provided with a summary of these defects and the Appellant was invited to complete a written interview under caution, which Mr Santos agreed to do. In his answers to the interview questions Mr Santos confirmed that he acted as manager of the Premises and was responsible for finding

tenants and issuing tenancy agreements. He said that he visited the Premises once a month and that he was aware of the management regulations applicable to HMOs. Furthermore, Mr Santos confirmed that the defects listed at paragraph 22 above had existed when he began managing the Premises in 2018. He had understood that the owner would rectify these defects but, since the council's intervention, he was working with the owner to ensure they were attended to. We understand that Mr Santos did indeed then arrange for the necessary works to be carried out, and that these works were signed off by the council in December 2020.

24. On 23 November 2020, Salford Council gave the Appellant a notice of intent under paragraph 1 of Schedule 13A to the 2004 Act. That notice stated that Salford Council intended to impose a financial penalty of £18,500 in respect of an alleged breach of regulation 4(1) of the HMO Management Regulations. Mr Santos submitted written representations in response to the notice in which he said that, as a result of the Covid-19 pandemic, it had been impossible to commission a fire risk assessment of the Premises. Mr Santos also said that the pandemic had delayed his efforts to remedy the defects following the council's inspection in July 2020.

25. On 26 January 2021, Salford Council issued the Final Notice which is the subject of this appeal. The council stated that it had given consideration to Mr Santos' representations, but the amount of the financial penalty imposed on the Appellant remained unchanged from the amount proposed in the notice of intent.

ALLEGED OFFENCE

26. Salford Council assert that the Appellant's conduct amounts to a relevant housing offence in respect of the Premises; namely, to breach of regulation 4(1) of the HMO Management Regulations[1] and thus to the offence under section 234(3) of the 2004 Act of failing to comply with those regulations.

27. Regulation 4(1) provides:

> *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.*

28. As already noted, section 234(3) of the 2004 Act makes it an offence to fail to comply with the HMO Management Regulations. However, by virtue of section 234(4), a defence is available: a person does not commit the offence if he has a reasonable excuse for not complying with the regulation in question.

[1] As noted above, the full title of these Regulations is: The Management of Houses in Multiple Occupation (England) Regulations 2006.

GROUNDS OF APPEAL

29. The grounds on which the Appellant challenges the Final Notice may be summarised as follows:

- First, the Appellant argues that it did not breach the HMO Management Regulations because the Premises were not an HMO at the relevant time (and the Regulations therefore did not apply).

- Second, even if the HMO Management Regulations did apply to the Premises, and thus there was a breach of regulation 4(1), the difficulties caused by the Covid-19 pandemic constitute a reasonable excuse for the Appellant's failure to comply.

- Third, in the alternative, the amount of the financial penalty imposed by the Final Notice is disproportionate given the absence of harm to the occupants of the Premises. The amount was also determined without adequate regard to the Appellant's financial circumstances.

- Fourth, as Salford Council is also seeking to impose a financial penalty on the owner of the Premises in respect of the same or similar conduct, it is seeking to have "two bites of the apple" and this approach is improper.

DISCUSSION AND CONCLUSIONS

Procedural compliance

30. The Appellant has not challenged Salford Council's compliance with the procedural requirements in Schedule 13A to the 2004 Act and, based on our own consideration of the documentary evidence provided to the Tribunal in this case, we are satisfied that those requirements were indeed met.

Relevant housing offence

31. Salford Council's decision to impose a financial penalty can only be upheld if the Tribunal is itself satisfied, beyond reasonable doubt, that the Appellant's conduct amounts to an offence under section 234(3) of the 2004 Act.

32. Salford Council assert that, as manager of the Premises, the Appellant was subject to the duty in regulation 4(1) of the HMO Management Regulations at the time of the inspection in July 2020 because the Premises satisfied the 'standard test' for an HMO in section 254(2) of the 2004 Act. However, the Appellant disputes this: it asserts that the Premises did not satisfy the standard test because the individuals who occupied the Premises did not occupy them as their only or main residence.

33. In support of the Appellant's argument, Mr Santos told us that rooms in the Premises were let to individuals for short-term (three-month) occupation for work or leisure purposes and that the agreements under which they occupied did not constitute assured shorthold tenancies. Copies of several of these agreements were produced in evidence, and Mr Santos referred us to standard clause 2.4, which provides:

> "You agree that the booking is for a short term stay for leisure, business or temporary purposes and does not give rise to an assured shorthold tenancy or lease and is an excluded agreement the meaning of s.3A(7)(a) of the Protection from Eviction Act 1977."

34. In cross-examination, however, Mr Santos conceded that occupants had the right to exclusive possession of the rooms which were let to them and that, whilst the agreements were for an initial period of three months, they stated that they would automatically convert into one-month rolling contracts thereafter. Moreover, whilst clause 4.2 stated that "Your booking is for serviced accommodation", Mr Santos accepted that no services were in fact provided to the occupants.

35. We find that, contrary to their formal provisions, the legal effect of these agreements was to create assured shorthold tenancies. In any event, Mr Santos' assertion that the individuals in question did not occupy the Premises as their only or main residence is undermined by the evidence of Mrs Mann and Miss Daniels (the officers of the council who carried out the inspection in July 2020). They told us that the individuals who were residing at the Premises at that time appeared to have "all their worldly belongings" in their rooms and did not appear to be short-term occupants: there was nothing to indicate that they were staying at the Premises whilst on holiday or on a business trip. One occupant had been in residence for more than 12 months. Subsequent enquiries showed that three individuals had given the Premises as their address when applying for credit; one when applying to rent an allotment nearby; and another when requesting caddy bin-liners from the council. The council's witnesses said that each of these things suggested more than short-term temporary occupation, and we agree. In most cases, Mr Santos had no record of an alternative 'home' address for the individuals he let rooms to. He said that the individual who had been in occupation for more than 12 months actually lived on the other side of Manchester but stayed at the Premises on a temporary basis while he undertook a work placement at Aldi. This assertion was unsupported by evidence and seems to us to be improbable. We note that two other occupants had home addresses in Italy, but that they were living in the UK whilst looking for work. During the period when they were residing at the Premises, these individuals appear to have had no other accommodation available to them in the UK.

36. Having considered all of the above, we are satisfied that the Premises did satisfy the standard test for an HMO and that the HMO Management Regulations applied to them. We are further satisfied that, by virtue of

the defects summarised in paragraph 22 above, the Appellant failed to comply with regulation 4(1) of those Regulations.

37. It does not necessarily follow from our finding that the Appellant failed to comply with regulation 4(1) of the HMO Management Regulations that we should also find its conduct to amount to the offence under section 234(3) of the 2004 Act: a breach of the Regulations does not amount to a criminal offence if the Appellant had a reasonable excuse for its failure to comply. Whilst the Tribunal must be satisfied, beyond reasonable doubt, that each element of the relevant offence has been established on the facts, an appellant who pleads a statutory defence must then prove, on the balance of probabilities, that the defence applies.

38. In the present case, the Appellant argues that, as a result of the Covid-19 pandemic, it had been impossible to commission a fire risk assessment of the Premises. However, Mr Santos accepted that he had been aware of the defects summarised in paragraph 22 above when his company had started to manage the Premises in 2018. The defects had also been present when the council visited the Premises on 9 March 2020. This was before the imposition of the first national lockdown and it is readily apparent that the pandemic affords the Appellant no excuse for not having acted sooner.

39. For these reasons, we are not persuaded that the Appellant had a reasonable excuse for failing to comply with regulations 4(1) of the HMO Management Regulations. It follows that we are satisfied, beyond reasonable doubt, that its conduct amounts to the offence of failing to comply with those regulations.

Amount of the financial penalty

40. We are satisfied that it is appropriate for Salford Council to impose a financial penalty on the Appellant in respect of its failure to comply with the regulation in question. We must therefore determine the amount of that penalty.

Guiding principles

41. The Tribunal's task is not simply a matter of reviewing whether the penalty imposed by the Final Notice was reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In doing so, the Tribunal should have regard to the seven factors specified in the HCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 18 above).

42. The Tribunal should also have particular regard to the AGMA Policy applied by Salford Council (see paragraph 19 above). As the Upper Tribunal (Lands Chamber) observed in *Sutton & Another v Norwich City Council* [2020] UKUT 0090 (LC):

> "It is an important feature of the system of civil penalties that they are imposed in the first instance by local housing authorities, and not by courts or tribunals. The local housing authority will be aware of housing conditions in its locality and will know if particular practices or behaviours are prevalent and ought to be deterred."

43. The Upper Tribunal went on to say that the local authority is well placed to formulate its policy and endorsed the view that a tribunal's starting point in any particular case should normally be to apply that policy as though it were standing in the local authority's shoes. It offered the following guidance in this regard:

> "If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision."

44. Upper Tribunal guidance on the weight which tribunals should attach to a local housing authority's policy (and to decisions taken by the authority thereunder) was also given in another decision of the Lands Chamber: *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC): whilst a tribunal must afford great respect (and thus special weight) to the decision reached by the local housing authority in reliance upon its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review: the tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

45. It follows that, in order to determine this appeal, it is necessary for us to consider the provisions of the AGMA Policy, together with the decision which the council made in reliance upon that Policy in this case.

The AGMA Policy

46. The AGMA Policy is itself based on the relevant factors specified in the HCLG Guidance. However, it places particular emphasis on an assessment of the seriousness of the relevant conduct in terms, firstly, of the harm it caused (or its potential for harm) and, secondly, on the culpability of the offender. Both harm and culpability are given a rating of low, medium or high. The interrelation between harm and culpability then feeds in to a matrix which determines which of six bands the penalty should fall into. The amount of the penalty is taken to be the mid-point of the relevant band, subject to further adjustment to take account of additional aggravating or mitigating factors. The six penalty bands are as follows:

Band 1	£0 - £4,999
Band 2	£5,000 - £9,999
Band 3	£10,000 - £14,999

Band 4	£15,000 - £19,999
Band 5	£20,000 - £24,999
Band 6	£25,000 - £30,000

The financial penalty imposed on the Appellant

47. Salford Council assessed the seriousness of the relevant conduct as medium in terms of its potential to cause harm and as high in terms of the Appellant's culpability. We agree with those assessments.

48. The defects identified in the Premises posed a serious risk of harm to the occupants and to any visitors. The condition of the internal doors (where there were such doors) would allow smoke and flames to pass onto the escape route and would not provide the requisite 30-minute fire resistance. The Premises were let as a bedsit-style HMO and this mode of occupation requires a high level of protection from fire due to the increased fire risk it poses. Indeed, had the Premises not been fitted with an adequate fire alarm system, an assessment of high harm would have been justified.

49. The Appellant's culpability is high: it amounted to a reckless disregard for the safety of occupants of the Premises. Mr Santos had been aware of the Premises' safety deficiencies since 2018 and had visited the Premises regularly since then but, prior to Salford Council's intervention in March 2020, he failed to take any action to address those deficiencies. He nevertheless let rooms in the Premises, regardless of the risks. Moreover, the Appellant's business is that of property management, and the Premises were let as a bedsit-style HMO, posing an increased fire-safety risk.

50. An assessment of medium harm and high culpability places the appropriate financial penalty within Band 5 for the purposes of the AGMA Policy and the mid-point of Band 5 is £19,500. However, the financial penalty imposed by Salford Council was £18,500, allowance having been made for the mitigating factor of the Appellant's co-operation with the council in the period following its inspection of the Premises in 2020. We consider £18,500 to be the appropriate amount of the financial penalty to impose on the Appellant. Not only does it reflect the seriousness of the offending conduct, but it should also have an appropriate punitive and deterrent effect.

51. We do not accept that setting the amount of the penalty at this level fails to have adequate regard to the Appellant's financial means. Neither the HCLG Guidance nor the AGMA Policy specifically mentions the means of the offender as a relevant factor to be taken into account when setting the amount of a financial penalty. However, it is obviously relevant to have regard to any reliable information about an offender's means in order to set a penalty at a level which will be appropriately punitive; which will have the right deterrent effect; and which will remove any financial benefit obtained from committing the offence. Indeed, the HCLG Guidance states that local housing authorities should, where

possible, use their existing powers to make an assessment of a landlord's assets and income. The AGMA Policy states that an offender should be assumed to be able to pay a penalty up to the maximum amount unless they can demonstrate otherwise. In the present case, no evidence has been provided about the Appellant's income, assets or liabilities save the fact that its management fee in respect of the Premises amounted to 50% of the rental income.

52. Finally, we turn to the Appellant's challenge to the Final Notice based on the fact that Salford Council have imposed a separate financial penalty on the owner of the Premises based on a similar breach of the HMO Management Regulations. This challenge is clearly misconceived: a local housing authority may not impose more than one financial penalty on a person in respect of the same conduct, but they may impose multiple penalties on multiple persons in respect of similar, but separate, conduct.

OUTCOME

53. For the reasons explained above, we uphold the decision of Salford Council to impose a financial penalty on the Appellant. We are satisfied that the AGMA Policy was properly applied in determining that the amount of that penalty should be £18,500. The imposition of such a financial penalty is appropriate in the circumstances of this case: not only does it reflect the seriousness of the offending conduct, but it should also have a suitable punitive and deterrent effect.

54. Accordingly, we confirm the Final Notice. The Appellant must therefore pay a financial penalty of £18,500 to Salford Council.

Signed: J W Holbrook
Judge of the First-tier Tribunal
Date: 10 May 2022