FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KG/HNA/2019/0016**
HMCTS code (audio, video, paper)	**:**	**F2F**
Properties	**:**	**521 London Road, South Stifford Grays, Essex RM20 4AD**
Applicant	**:**	**Palmview Estates Limited**
Representative	**:**	**Mr Mordechai Sternlicht**
Respondent	**:**	**Thurrock Council**
Representative	**:**	**Mr Nicholas Ham, instructed by Thurrock Council**
Type of application	**:**	**Appeals against financial penalties** Section 249A & Schedule 13A to the Housing Act 2004
Tribunal members	**:**	**Judge David Wyatt** **Judge Wayte** **Mr John Francis QPM**
Date of decision	**:**	**29 September 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a face-to-face hearing. The documents we were referred to are described in paragraph 28 below. We have noted the contents.

Decision

The tribunal varies the final notice dated 9 August 2019 to impose a penalty of £4,000 for the offence under section 72(1) of the Housing Act 2004 of between 1 October 2018 and 15 July 2019 having control of or managing a house in multiple occupation which was required to be licensed but was not.

Reasons

The applications

1. Originally, the Applicant applied to the tribunal to appeal against three financial penalties imposed by the Respondent local housing authority under section 249A of the Housing Act 2004 (the "**Act**").

2. As explained below, the only remaining issues for us to decide in these proceedings concerned the financial penalty for the alleged offence of having control of or managing a house in multiple occupation ("**HMO**") which was required to be licensed under Part 2 of the Act but was not so licensed.

Background

3. The Property has two storeys. The Applicant purchased it in 2014 as a three-bedroom house. They obtained planning approval for a rear extension. They converted the Property to an HMO accommodating six flats sharing cooking facilities in a small communal kitchen. On 31 March 2015, the planning department at the Respondent granted a certificate of lawful use of the Property as a house used by six individual tenants.

4. The Property was managed for the Applicant by Palmview Investments Ltd. Their business had started in commercial property but they had found the HMO market: "*not only to be more profitable but also a robust need for the most unfortunate and vulnerable in society*". They said many of their residents would otherwise be homeless and nearly all relied on housing benefit or universal credit to pay the rent. They said residential lettings were arranged by external agents, including Pointview Estates Ltd ("**Pointview**"). They said all their other HMO units were let through housing associations, avoiding the need for an HMO licence, or licensed.

5. Since 2017, apparently following complaints from occupiers, the parties had been in correspondence about the condition of the Property. Christopher Cooper (an environmental health officer of the Respondent, specialising in private sector housing) had first visited with his colleague, Tara Miller, in July 2017. They had given advice about the Management of Houses in Multiple Occupation (England) Regulations 2006 (the "**Regulations**"), giving time for compliance and requesting information.

6. After the requested information was provided, they visited again in September 2017 for a fuller inspection. They realised that, although there were some work surfaces and sinks in the bathrooms in the flats, the actual cooking facilities in the kitchen were undersized. The flats were not large enough for individual cooking facilities to be provided in them. Unsurprisingly, the Essex amenity standards require larger flats/rooms if they are to include cooking facilities.

7. By September 2017, the main issues the Respondent had been concerned about under the Regulations (including defective lighting and extract vents) had been addressed. Accordingly, the Respondent decided that an improvement notice would not be necessary. However, they were now concerned about space. At that time, the Property could not be controlled through licensing because mandatory licensing (under Part 2 of the Act) applied only to HMOs with at least three storeys.

8. Accordingly, on 20 September 2017, the Respondent served:

   a. suspended prohibition orders in relation to rooms 1, 5 and 6 (which were occupied; the orders did not take effect until the current tenants vacated); and

   b. a prohibition order in respect of room 2 (the Respondent had assumed the room was vacant, but in fact the tenant had been in prison when they inspected; on 8 January 2018, the order was suspended until that tenant vacated).

9. The prohibition orders required works, including creation of a larger kitchen suitable for six occupiers, before those rooms could be occupied by new tenants. The Applicant sought to appeal out of time against the prohibition orders, but a tribunal refused to extend time for those appeals. Mr Sternlicht was very critical of the documents produced by the Respondent, alleging the plans attached to the HMO licence (ultimately granted in April 2020 but not produced in the bundles) showed that the Respondent's measurements from 2017 were wrong and the rooms were larger than had been claimed, so there was no need for the other works specified in the prohibition orders (which had, amongst other things, included removal of sinks from the flats).

10. On 8 January 2018, Mr Cooper and Dulal Ahmed (described below) visited Mr Sternlicht at the Property. They confirmed that a properly sized communal kitchen would need to be built, perhaps using room 2 or extending the existing kitchen, before the prohibition orders could be revoked.

11. Following that advice, between February and May 2018, the Applicant carried out works to extend the kitchen. In February 2018, one of the tenants (Mr Goodman) called the Respondent to complain about the works and claim no alternative cooking facilities had been provided. Another (Ms Levett) said tenants had been asked to move flats. As a result, officers in the Respondent's private sector housing team were

aware that the kitchen extension works were being carried out. They wrote to the Applicant warning it not to harass tenants. Mr Sternlicht insisted that the tenants had wanted to stay, not least because they had nowhere else to go, and had felt harassed by the Respondent's efforts to obtain evidence from them against the Applicant.

12. Separately, the Applicant had notified the Respondent's planning department of their proposed extension of the kitchen to six metres from the original rear wall, seeking confirmation under the "prior approval" process that this was permitted under the Town and Country Planning (General Permitted Development Order) 2015 ("**GPDO**"). On 3 May 2018, the Respondent's planning department refused prior approval, deciding the extension was outside the GPDO because the Property was not a dwelling house in class C3 but an HMO in class C4. The Applicant was confident that this decision was wrong and appealed against it.

13. On 18 May 2018, the Applicant wrote to the Respondent saying that the kitchen works were complete and asking that the prohibition orders be revoked. We accept this letter was probably sent, but did not reach Mr Cooper or the other environmental/housing officers at the Respondent.

14. The Applicant said they had instructed Pointview not to let two of the flats (which had become vacant) until further notice. Mr Sternlicht provided a copy of a letter dated 9 December 2019, in which Ian Margolis of Pointview said that in March or April 2018 they had been told not to let two of the flats at the Property. He said they had contacted Mr Sternlicht's secretary in "*June/July*" and been told that she believed all units were "*now O.K. to be re-let.*" Mr Sternlicht said this was not the whole truth and while his secretary had said she understood the requisite works had been done she had added that Pointview would still need to check with Mr Sternlicht on his return whether the two vacant units could be let.

15. On 1 October 2018, the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 came into effect. It extended mandatory licensing to most HMOs with at least five occupiers. Mr Sternlicht acknowledged he had been aware of this at the time.

16. In a decision notice dated 13 February 2019, the Applicant's planning appeal in respect of the refusal of prior approval for the extension was in effect successful. The Planning Inspector decided that prior approval was not required; the extension fell within the permitted development provisions under Article 3 of and Schedule 2 to the GPDO.

17. On 8 March 2019, Mr Cooper and Karen Kingsnorth made an unannounced inspection of the Property. They found no water supply to the new kitchen (Mr Sternlicht said a tenant had turned it off), fire safety and property condition concerns. They visited again on 11 March 2019. On 14 March 2019, the Respondent wrote to the Applicant

alleging (amongst other things) that in breach of the prohibition orders new tenants were occupying flats 2 and 5 and from 1 October 2018 a mandatory HMO licence had been required but no application had been received. That letter specifically warned: "*…It is an offence for a person managing or having control of a licensable HMO to fail to apply for a licence…*".

18. On 23 March 2019, as requested, Mr Sternlicht sent to the Respondent details of the current occupiers. These confirmed that the new tenant of room 2 (Mr Breeds, previous tenant Mr Prince) had been in occupation since 23 July 2018 and the new tenant of room 5 (Ms Bailey, previous tenant Mr Thackerall) had been in occupation since 21 November 2018. We accept Mr Sternlicht's evidence that (because Mr Breeds' rent was not paid until November 2018, as a result of delays in processing his universal credit payments) the Applicant did not discover that the new tenant(s) had been let into occupation until December 2018, when Mr Sternlicht received the bank statements.

19. On 7 April 2019, Herscht Sternlicht signed an "*application information sheet*" for "Legal Property Solution" ("**LPS**") detailing six tenants and referring to a licence fee of £1,180 plus LPS' fees. On 9 April 2019, the Respondent warned they were considering prosecution for failure to comply with the prohibition orders and financial penalties for the licensing and other issues identified. On 24 May 2019, Mordechai Sternlicht attended an interview under caution. By notices of intent dated 20 June 2019, the Respondent proposed to impose various financial penalties, including a penalty of £15,000 for the alleged licensing offence.

20. The HMO licence application form received by the Respondent was completed by Yuda Stern of LPS on behalf of Hersch Sternlicht/"*Palmway Estates Ltd*", signed and dated 16 July 2019. By letter dated 17 July 2019, the Applicant made written representations that the penalties should not be imposed and asked the Respondent to revoke the prohibition orders.

21. By a final notice dated 9 August 2019, the Respondent sought to impose a financial penalty of £17,500 (increased from the £15,000 proposed in the notice of intent "*after considering your representation and the financial gain*") for the alleged licensing offence under section 72(1) of the Act. By separate notices with the same date, the Respondent also sought to impose financial penalties for alleged offences of failure to comply with regulations 4 and 7 of the Regulations of £12,000 and £4,000 respectively.

22. On 19 November 2019, since the communal kitchen had been provided and the Respondent accepted the other works specified in the prohibition orders were not required, the Respondent revoked all the prohibition orders (those made in respect of rooms 1, 2, 5 and 6). We understand the HMO licence application fee was paid in early 2020 and the licence was ultimately granted in April 2020.

Procedural history

23. On 6 September 2019, the tribunal office received the Applicant's appeal applications against the financial penalties. On 23 September 2019, a procedural judge gave case management directions. Pursuant to those directions, the Respondent produced a bundle of their case documents and the Applicant produced a bundle of their case documents. It was not disputed that the Property had been required to be licensed from 1 October 2018 and the application for an HMO licence was not submitted to the Respondent until 16 July 2019. There was no suggestion that the application was not duly made on that date.

24. In their decision dated 18 February 2020, a differently constituted tribunal cancelled the licensing penalty, deciding that the offence had not been committed because the Applicant had a reasonable excuse defence under section 72(5) of the Act. Part of their decision suggested that it was for the prosecution to show beyond reasonable doubt that the excuse was not reasonable and part suggested that the real question was whether the landlord had a reasonable excuse for not applying for a licence. They were not satisfied that there was a reasonable excuse defence in relation to the two offences of failure to comply with the Regulations, but reduced those penalties:

    a. in relation to Regulation 4 (for fire safety matters including missing fire alarms from the common parts and the rooms, an external door which could not be opened and problems with lighting in the common parts) to £6,000; and

    b. in relation to Regulation 7 (for property condition matters including a torn/frayed communal carpet on the stairs) to £1,500.

25. The Respondent appealed on three grounds: the burden of proof in respect of reasonable excuse ("ground 1"), whether there was a reasonable excuse in relation to the alleged licensing offence ("ground 2") and matters relating to the property condition offence. On 15 March 2020, the original tribunal gave permission to appeal on ground 1 and refused permission on the other grounds. On 20 March 2020, that tribunal refused permission to cross-appeal on other grounds sought by the Applicant.

26. On 4 May 2020, the Upper Tribunal (noting in relation to the burden of proof the decision in IR Management Services Ltd v Salford [2020] UKUT 0081 (LC), made after the decision by the original tribunal) gave permission to appeal on ground 2 in addition. The Upper Tribunal commented that *if the appeal succeeded on ground 1* the appropriate course would be for the Upper Tribunal to conduct a rehearing of the appeal against the penalty imposed for the licensing offence and the property condition offence. On 15 May 2020, the Upper Tribunal refused permission to cross-appeal, observing that there was no prospect of a successful cross-appeal on the issue of whether the Applicant had a reasonable excuse for its failure to comply with the

Regulations in relation to fire precautions and maintenance of common parts.

27. At the substantive hearings in the Upper Tribunal (Thurrock Council v Palm View Estates [2020] UKUT 0355 (LC)), the parties agreed that the original tribunal had actually applied the correct standard of proof (for the Applicant to prove any reasonable excuse on the balance of probabilities), so the appeal on ground 1 failed. However, Judge Cooke decided that the appeal in relation to the licensing offence succeeded on ground 2 because (in essence) the tribunal should have assessed what the reasonable excuse was for (continuing to manage and have control, not failing to apply for a licence). In this respect, Judge Cooke set aside the original decision, including its findings of fact, and remitted the matter to the tribunal for a re-hearing. An appeal to the Court of Appeal against that decision was dismissed (Palmview Estates Limited v Thurrock Council [2021] EWCA Civ 1871).

28. On 7 April 2022, following a case management hearing, Judge Wayte gave directions to prepare for the re-hearing of the remaining issues. These provided for the parties to exchange updated statements of case and the Respondent produced a supplemental bundle of additional documents from the parties (together with copies of the original bundle from the Respondent and the original bundle from the Applicant).

29. There was no inspection. At the hearing on 6 September 2022, the Applicant was represented by Mr Mordechai Sternlicht, who also gave evidence. Unless otherwise indicated, references in this decision to "Mr Sternlicht" are to Mordechai Sternlicht. The Respondent was represented by Mr Nicholas Ham of counsel. Mr Ahmed, Karen Kingsnorth and Mr Cooper gave evidence for the Respondent.

30. As agreed at the start of the hearing, the remaining issues for the tribunal to decide were: (a) whether the Applicant had a reasonable excuse for having control of or managing the Property during the period from 1 October 2018 to 15 July 2019; (b) if not, whether a penalty should be imposed; and (c) if so, what penalty to impose. Mr Ham confirmed the Respondent withdrew any remaining appeal in relation to the other penalties even if that had still been live.

31. This decision explains the matters which are critical to the decisions we have made. It will not describe every argument in relation to this case, but we have considered all the points made by the parties in their documents and at the hearing.

Whether the Applicant had a reasonable excuse

32. As noted above, we accept the Applicant probably did not become aware until December 2018 of the occupation by the new tenants. However, we are not satisfied that this gave the Applicant a reasonable excuse in relation to October or November 2018. There was no suggestion that Pointview had been informed of the prohibition orders or licensing position, or required to return the keys to the vacant

rooms. Nor did there seem to be any arrangements for Pointview to keep the Applicant informed of new lettings or changes in occupation. In any event, we are not satisfied that the Applicant had done enough to ensure that their agents were reliable and to ensure that new tenants would not be allowed into either of the two vacant rooms. Even ignoring the prohibition orders, if either or both of these rooms were re-let the Property would become licensable from 1 October 2018, as the Applicant was aware.

33. Otherwise, the Applicant had argued their defence in slightly different ways over time. For example, in their representations on 17 July 2019, they said a licence: "*would not be granted any way with the inforcement [sic] in place*" and a temporary exemption notice: "*only applies where a landlord wants to revert the HMO back in to a one family house*". In their appeal application form in September 2019 they said a licence: "*would not be granted according to the council itself*". In their final statement of case, they said: "*…it was obvious to us … that an application for an HMO would never succeed and is a waste of time applying for…*", but also said their understanding from Mr Ahmed was: "*…because the enlarged kitchen was not permitted by the council and needed to be crushed down and removed, the P/O will not be revoked & similarly HMO licence was pointless to apply for, as the house is not licensable without the enlarged kitchen and with P/O in place, and will never be allowed to operate under these circumstances…*". They said advice from the Respondent to apply for a temporary exemption notice led them to believe the Respondent was: "*…aware of the difficulties of applying for a regular HMO licence…*".

34. The most specific allegation in relation to Mr Ahmed was made in the original witness statement from Mr Sternlicht, which says: "*Around July-August 2018 I spoke with Mr Ahmed and explained that I am torn from all sides with prohibition orders that the units are too small and after enlarging them I have the planning enforcement which I know is completely wrong. His advice just got the planning sorted and it will all full in place [sic]. At that point I mentioned the HMO licensing requirement coming up in Oct and he said just to leave that for now which I took as saying it would be pointless to apply anyway.*"

35. Unfortunately, the very brief and undated witness statement produced by Mr Ahmed to describe his contact with Mr Sternlicht had been poorly prepared and Mr Ahmed was not an impressive witness. At the relevant time, he managed various teams at the Respondent, including environmental health officers, and Mr Cooper reported to him. Initially, his evidence was that there had been no conversation about HMO licensing and he recalled speaking to Mr Sternlicht only once, at the meeting at the property on 8 January 2018, and then writing to him on 17 January 2018 (a copy of that letter was in the bundle). When asked, Mr Ahmed said the Respondent had a database which records contact for each property, he had checked that and he did not "recall" seeing record of any other contact.

36. However, after Mr Ahmed had been asked several times to cast his mind back, with prompts from Mr Sternlicht about what had been discussed, he remembered having gone to the Property to meet Mr Sternlicht for an earlier meeting in December 2017. Mr Sternlicht insisted there had also been several telephone conversations with Mr Ahmed from about May 2018. Mr Ahmed said he did not recall any telephone conversation or e-mail from Mr Sternlicht after the meeting and Mr Ahmed's letter in January 2018. He said casework was not his role. He could not explain why the last paragraph of his witness statement reads: "*The Council's planning team served him an enforcement notice He added he completed the extension and changed the whole downstairs but the council planning department served an enforcement notice because he could not extend the property under permitted development*."

37. On the balance of probabilities, we accept Mr Sternlicht's evidence that he did speak to Mr Ahmed between about May and August 2018 to talk about the extension and probably was left with the impression that he would not be granted an HMO licence until the planning issue in relation to the kitchen was resolved in his favour. Even during the hearing, Mr Ahmed forgot and then remembered the earlier meeting. The end of his witness statement may, as was put to Mr Ahmed at the hearing, be recalling a conversation about the extension, which was not started until after the second meeting and letter in January 2018 and where the planning refusal was in May 2018. Mr Sternlicht then felt trapped between the Respondent's (wrong) planning decision about the kitchen and the impending mandatory licensing requirement on 1 October 2018. He knew Mr Ahmed was responsible for enforcement and was Mr Cooper's manager. He probably did try several times to contact Mr Ahmed about the situation and he was probably was given the impression we have described above.

38. However, we are not satisfied that the Applicant had a reasonable excuse for having control of or managing the Property from 1 October 2018. In our assessment, Mr Sternlicht was not told that he did not need to apply for a licence or that he could not apply. At the hearing, Mr Sternlicht said that he had not asked Mr Ahmed about the licensing requirements because "*I know about licensing*". In his interview under caution, when asked why no application had been made, Mr Sternlicht said: "*…obviously Mr Cooper you wouldn't have given us the licence…*". In our assessment, Mr Sternlicht <u>assumed</u> there was no point in applying (whether or not until December 2018 part of his reason for that assumption was that he thought there were only four occupiers). That is consistent with his original witness statement, which says: "*…given all the facts of above and the way the council conducted this whole case it was my decision and advice to my superiors at Palmtree Investments Lts [sic] not to apply for the HMO Licence while the P/O is in place and the room sizes are in dispute … what's the point of applying for Licence on a house which according to the council need complete demolishing of the communal kitchen …*".

39. But there was plainly good reason to apply. Mr Sternlicht seemed to acknowledge that at the hearing, saying: "*maybe I was wrong*". As is obvious from the Act, if the Applicant had duly made an application for an HMO licence, they would have had the separate defence under section 72(4) to the alleged licensing offence. As Mr Ham pointed out, the Applicant is an experienced and substantial landlord and had confidently appealed the planning decision in relation to the kitchen. Even if the Respondent had refused to grant an HMO licence (whether by reference solely to the planning issue, the prohibition orders or otherwise) before the planning appeal decision was made, the Applicant would still have had the benefit of the defence under s.72(4) while any appeal against that refusal had not yet been determined or withdrawn.

40. Mr Sternlicht made it clear that the Applicant had decided not to take steps to seek to evict any of the occupiers (despite the fact that two had been allowed into occupation in breach of the prohibition orders) to reduce the occupiers from six to four so that the Property no longer needed to be licensed. He confirmed they made that decision because they wished to maximise income (saying that if they did not their lender would take the Property away) and were sure that the Respondent's planning decision was wrong and the prohibition orders should have been revoked.

41. For similar reasons, the Applicant assumed there was no point in (or simply decided not to) notify the Respondent under section 62(1) of their intention to take particular steps with a view to securing that the house was no longer required to be licensed. Mr Sternlicht said the Applicant had no intention of reducing occupancy, so such notification would be untrue and pointless. But that is not an adequate explanation; the Applicant could have started the process of seeking to reduce occupancy and, again, notification under section 62(1) would have given the Applicant a separate defence under section 72(4) until the two new occupants left or the position was resolved. If the Respondent had refused to grant a temporary exemption, the Applicant could have appealed that decision, and again the Applicant would still have the benefit of the defence while any appeal against that refusal had not yet been determined or withdrawn.

42. The Applicant's frustration may be understandable, given the (wrong) planning decision from the Respondent, the costs of the works which had been carried out, the delays in the planning appeal process and the failure to review and revoke the prohibition orders sooner. But it had been the Applicant's failure to ensure that the prohibition orders were complied with which led to two new tenants taking up occupation in the latter part of 2018, without whom the Property would probably not have been licensable. If the Applicant was not prepared to correct that by temporarily seeking to reduce occupation and make a notification seeking a temporary exemption (as suggested by the Respondent) until it could achieve that or the planning issue was resolved, it was even

more important for it to make the necessary preparations and apply for an HMO licence immediately.

43. Further, the above analysis focuses on the initial period from 1 October 2018 until February or March 2019, when the Applicant received the successful planning appeal decision in relation to the kitchen. The Applicant was aware of that decision by March 2019 at the latest. As noted above, the Respondent's letter of 14 March 2019 had specifically warned the Applicant that it was an offence to manage or have control of a licensable HMO but "*fail to apply for a licence*".

44. Mr Sternlicht said the Applicant's agents (LPS) had insisted on many supporting documents, all of which had been provided by 7 April 2019, and then wished to inspect the Property themselves and carry out further work before making the application ultimately on 16 July 2019. Mr Sternlicht said LPS had suggested the Respondent would not be concerned about the delay in making the application to them after the documents were provided to LPS. That is a matter between the Applicant and its agents; no such explanation was given until the hearing before us. Even if LPS did give such an assurance, it was not reasonable to rely on it. Mr Sternlicht said it was common not to hear anything from local authorities for many months after applications were submitted, but again he had nothing to suggest he had been told that the application had been made to the Respondent. In any event, the Applicant should have ensured the HMO licence application was delivered to the Respondent promptly following the successful planning appeal. Accordingly, even apart from all the other issues, we are not satisfied that the Applicant had a reasonable excuse for having control of or managing the Property for the period between mid-March 2019 and 15 July 2019.

Should a penalty be imposed and, if so, what penalty?

45. When considering imposition of financial penalties, the Respondent was required by paragraph 12 of Schedule 13A to the Act to have regard to the MCHLG guidance: *Civil Penalties under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities*. In line with this, the Respondent's enforcement policy sets out general principles and Appendix 1 to that policy sets out principles for determining the amount of a civil penalty. This includes consideration of whether the public interest would properly be served by imposing a civil penalty on the landlord in respect of the offence.

46. If the application for an HMO licence had been made in March 2019, we would probably not have imposed any penalty in relation to the licensing offence. The Applicant does not have a reasonable excuse, but if it had not been for the confusion caused by the Respondent's (wrong) planning decision about the extension and what was probably said by Mr Ahmed, causing the Applicant to focus on the planning appeal and chasing the planning inspector, the Applicant might well have pressed

successfully for the prohibition orders to be revoked and/or applied for an HMO licence for 1 October 2018.

47. When we asked Mr Cooper about this, he ultimately accepted that given the background it was appropriate for the penalty to be based on the period between mid-March 2019 (following the planning appeal decision, the further inspections and the formal warning in the letter of 14 March 2019) and 15 July 2019. We agree, and we consider that in the circumstances it is appropriate to impose a penalty.

48. The Respondent's policy says at Appendix 1: "*When calculating the penalty amounts for multiple offences … care should be taken to ensure that the total amount being imposed is just and proportionate to the offences involved.*" In line with the MCHLG guidance, the policy expects (in essence) consideration of: (a) the severity of the offence; (b) the culpability and record of the offender; (c) the harm caused to the tenant (including the potential for harm); (d) punishment of the offender; (e) deterrence of the offender from repeating the offence; (f) deterrence of others from committing similar offences; and (g) removing any financial benefit the offender may have obtained as a result of committing the offence.

49. The Respondent's policy does this in stages, which are examined in turn below. Stage 1 uses a matrix to assess scores for culpability, harm and "*aggravating factors*".

50. In his revised scores, Mr Cooper accepted that culpability was "medium" (a score of 3, compared to a score of 2 for low, 4 for high and 5 for very high). We agree. As Mr Cooper put it, the Applicant had been under the "*…apprehension that he would not obtain a licence…*" and "*…his attention was drawn away from applying for a licence…*" because he was dealing with the planning appeal about the kitchen extension. That gives some explanation for the failure to prepare all the documents needed for the HMO licence application in readiness and submit it immediately in March 2019, but the Applicant was in the medium range of culpability for failing to ensure that was done (whether they applied themselves or ensured their agent applied). The Applicant was a large professional landlord with experience of HMOs and had been specifically warned about the licensing offence in the letter of 14 March 2019.

51. In his revised scores, Mr Cooper had suggested there was "medium" likelihood of harm (a score of 10, compared to 5 for low and 15 for high). When we asked at the hearing, Mr Cooper accepted that in the circumstances of this case there was a low likelihood of harm in relation to the licensing offence. We agree. The Respondent was already well aware of the Property and the relevant circumstances. The fire safety and other risks mentioned by the Respondent previously were the subject of the separate penalties. There was a low risk of an adverse effect on individuals (the wording used in the policy). We do not reduce the score below 5 because we do not consider it appropriate to

depart from the Respondent's policy in this respect, as explained to Mr Sternlicht at the hearing. Since the likelihood of harm was low, the score is 5.

52. The matrix in the policy then gives examples of various possible aggravating factors, each with a score of 0 for low, 2 for medium and 4 for high. In his revised scores, Mr Cooper had added 2 for "*motivated by financial gain*", 2 for "*established evidence of wider/community impact*", 2 for "*record of providing substandard accommodation*" and 2 for "*record of poor management*". At the hearing, he accepted that the penultimate score was really for poor management, the issues relating to substandard accommodation having been dealt with by the penalties for failures to comply with the Regulations, so that should be reduced to 0 (low). We agree. As to the others:

    a. we are not satisfied that "*established evidence of wider/community impact*" was anything other than low; we bear in mind Mr Cooper's assertion at the hearing that there was a general problem with HMOs in the local area and the evidence about antisocial behaviour by some tenants, but there was no evidence of any wider or community impact other than that already taken into account in the score below for poor management. Accordingly, we reduce this score to 0;

    b. we are not satisfied that the licensing offence was "*motivated by financial gain*". The Applicant's decision not to seek to reduce occupation was motivated by financial gain, but it need only have applied for a licence. It failed to apply for a licence, or ensure its agent did so, promptly. The rental income during the relevant period and application licence fee is taken into account under stages 2 and 3 below. Accordingly, we reduce this score to 0; and

    c. we are satisfied that there was a "*record of poor management*". The Applicant's business was letting to vulnerable tenants who caused damage and whose behaviour was difficult, including broken doors, a fire outside and other alleged damage (largely described by Mr Sternlicht). Mr Cooper referred to complaints from neighbours. The Applicant needed to carry out more regular inspections and proactive management, whether by itself or ensuring any agent managed the tenants and the Property effectively on its behalf. In our assessment, Mr Cooper's score of 2 is appropriate for this.

53. Accordingly, the total basic score is 10 (3 for culpability, 5 for harm and 2 for record of poor management). Under the Respondent's matrix, this gives a starting point of £2,500 (for scores of 7-10; the starting point for scores of 11-14 is £4,000). Before the hearing, the Respondent's total earlier revised scores had been miscalculated at 23 (giving a starting point of £10,000, for scores of 23-26) when they would have been 21 (£8,000, for scores of 19-22).

54. Finally under stage 1, deductions are to be made for any mitigating circumstances. Again, the policy gives examples. Mr Cooper said that 30% was appropriate, deducting 10% each for lack of deliberate concealment, obstruction of justice and previous convictions. We agree. Accordingly, the starting point produced by stage 1 is £1,750 (£2,500 less 30%).

55. Stage 2 of the policy required the Respondent to "*consider*" all the landlord's income. It explains that, for property owners, this will be based on the income declared in the tenancy agreement or evidence of the rental income at the time of the offence. It allows estimates to be made where appropriate. The Applicant had assessed the total income specified in the tenancy agreements at £3,360 per month. Assuming the relevant period of the offence was six months, they had estimated gross income at £20,160. To allow for potential expenses, they decided to reduce their estimated six months' rent to one month, £3,360, and add this to the starting point from stage 1 (which under their earlier scoring would have taken this to £8,960, miscalculated at £10,360) as an appropriate amount for the landlord's income.

56. Mr Sternlicht had said the net monthly rent during the period to 7 April 2019 (after deduction of management fees, insurance, cleaning and repair costs) had been £1,276.37. He said that, if the interest on the mortgage loan was also deducted, this would reduce to £601.37. As noted above, it could take several months for universal credit payments to come through to pay the rents and the Applicant appears to allow for that as part of this business. We also bear in mind that four of the tenants could have been in occupation without the licensing offence being committed.

57. In our assessment, it is appropriate to add £2,250 under stage 2 in respect of the Applicant's income during the period of about four months from mid-March to mid-July 2019. This is in line with four sixths of the Respondent's figure of £3,360 (which would reduce to £2,240 to reflect four rather than six months, the period which Mr Cooper agreed for the purposes of assessing the penalty). It is slightly less than Mr Sternlicht's net monthly figure of £601.37 would be if multiplied by four (£2,405.48). We arrive at this figure bearing in mind that we do not have calculations from Mr Sternlicht for 8 April to 15 July 2019. The policy requires income to be considered, not automatically added to the starting point in every case. The actual income during the four months will have been greater, but this is the figure we consider appropriate to add for this penalty. Accordingly, stage 2 takes the penalty up to £4,000 (£1,750 plus £2,250).

58. Stage 3 of the policy checks whether £4,000 is a proportionate penalty. It notes the offender should be deterred from committing further offences and there should be no financial gain from committing the offences. It suggests that for licensing offences this can take into account rental income as well as the cost of the application for the HMO licence.

59. An appropriate figure for rental income has already been taken into account when assessing the Applicant's income in stage 2. Given the nature of the licensing offence and all the circumstances, it would not be appropriate to increase this. The HMO licence application fee was about £1,180 and Mr Cooper explained that licences are granted for five years. As a proportion, the potential saving in relation to the licence fee from delay of about four months was probably only about £80. A £4,000 penalty is substantially more than it would have cost the Applicant to comply, as required by the Respondent's policy, and sufficient to deter the offender from repeating the offence, being about £1,000 for each month after the planning appeal and specific warning. Although other matters are not specifically mentioned under the stage 3 section of the policy, we have also taken into account the severity of the offence, punishment of the offender and deterrence of others from committing similar offences. In line with the earlier part of the policy, we also take into account the separate penalties totalling £7,500 for the failures to comply with the Regulations; the proposed penalty of £4,000 would take the total penalties up to £11,500.

60. In our assessment, the penalty of £4,000 is proportionate. It is relatively high for a licensing offence, but this is a substantial professional landlord which has for the purposes of the penalty been given the benefit of the doubt in relation to the period from 1 October 2018 to mid-March 2019. Despite the successful planning appeal decision, inspections and specific warning from the Respondent in March 2019, it then took far too long for the application to be made. The licensing penalty relates to conduct over a rather later and longer period than the other penalties. As Mr Ham pointed out, the Applicant had something of a habit of blaming its agents (who may or may not have been negligent) but on the evidence produced it remained responsible for what was done by its agents. Landlords, particularly substantial professional landlords, need to be careful about how they select and appoint reputable, professional and reliable agents and need to understand that, generally, they will remain responsible for what their agents do or fail to do on their behalf.

61. Finally, stage 4 of the policy checks any impact of the penalty on the offender's ability to comply with the law or make restitution to victims. The Applicant did not suggest there would be any such impact and we consider that the penalty of £4,000 should not be reduced.

Costs

62. Mr Sternlicht mentioned costs during the hearing and sent an e-mail to the tribunal office after the hearing asking how he could claim costs from the Respondent, suggesting (in effect) that they had acted unreasonably.

63. The tribunal cannot advise the parties, who should take their own independent legal advice. In any event, the tribunal has no jurisdiction to make any order in respect of the costs of the appeal proceedings in

the Upper Tribunal or the Court of Appeal. In relation to the proceedings in the first-tier tribunal, the tribunal would only have power under Rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to make a costs order in respect of wasted costs or if the other party has acted unreasonably in bringing, defending or conducting these proceedings. Any application for such costs must be made within 28 days after the date on which this decision was sent to the parties. However, the tribunal should not be taken to be encouraging either party to make any such application. The parties may find it helpful to read Willow Court Management Company 1985 Ltd v Alexander [2016] UKUT 0290.

Name: Judge David Wyatt **Date:** 29 September 2022

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).