Case Reference	**:**	**CAM/26UL/HNA/2022/0003**
Property	**:**	**132 Aldykes, Hatfield, AL10 8EE**
Appellant	**:**	**Hongmei Wang** **Represented by Mr. Nwokeji (OJN Solicitors)**
Respondent	**:**	**Welwyn Hatfield Borough Council** **Represented by Mr. Berisha**
Date of Application	**:**	**14th April 2022**
Type of Application	**:**	**appeal against a financial penalty** **S 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge J. Oxlade** **M. Hardman FRICS IRRV (Hons)**
Date and venue of Hearing	**:**	**4th October 2022** **Stevenage Magistrates Court**

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DECISION

For the following reasons, the Tribunal sets a financial penalty of £500, payable by the Appellant to the Respondent within 28 days of this decision being sent to the Appellant in respect of a financial penalty issued to the Appellant on 17th March 2022 for failing to comply with regulation 11(1) of the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020.

REASONS

The background

1. The Appellant is the licence holder and named manager of the premises, a home of multiple occupation ("HMO"), which licence was issued to her on 20th August 2019, effective from 1st October 2018. In it, the licence set conditions, which placed a limit on the number of occupants; namely, a maximum of 5 persons from 2 or more households, living at the property at any one time.

2. On 27th and 28th October 2021 the Respondent by its Officer, Christiana Cooper, a private sector housing technician, carried out a mid-term inspection, which had been notified to the Appellant by letter dated 11th October 2021,at which the Appellant did not attend.

3. That inspection lead to concerns, as follows:

   (i) There was a fire risk because (a) a smoke detector head was missing in the ground floor entrance hall, (b) a heat detector head was missing from the kitchen, (c) a fire blanket was also missing from the kitchen, and the Respondent said that (d) there was no longer a valid fire alarm test certificate available on the date of inspection,

   (ii) This fire risk was compounded by a compromised escape route: (a) a protected fire escape route was obstructed by excess furniture/boxes/a large rolled carpet, and (b) the emergency light to the first floor escape route on the landing did not illuminate in isolation from the conventional lighting circuit, and (c) there was no valid emergency lighting test certificate for the day of inspection,

   (iii) There was a health and hygiene issue which arose because (a) the first floor communal bathroom was in an unclean condition and poor decorative state of repair, evidenced by black and orange mould, and (b) a spindle from the upstairs banister was missing,

   (iv) There was concern as to the standard of electrics, because having seen no electrical installation condition report ("EICR") at the premises on the day of inspection, and having on 17th November 2021 asked to be provided with a copy of it by 2nd December 2021 for the period 1st April 2021 to 27th October 2021 ("the electrical safety gap"), none had been provided,

   (v) The overall picture was indicative of poor management, direction, oversight.

4. After the first day of inspection Ms. Cooper reported her findings to the Appellant orally, and in a telephone call two days later. Further, a Schedule of works required was prepared and sent to the Appellant by letter dated 29th October 2021. The letter requested documentation, including gas safety, EICR from 28th May 2020, PAT testing, fire alarm testing, emergency lighting testing, fire risk assessment, legionella risk assessment.

5. It is common ground that by the end of 2021 the schedule of works was completed and the certificates that had all been requested were all provided, save the EICR for the electrical safety gap, which was only provided to the Respondent during the course of these proceedings.

Financial Penalties

6. In accordance with the discretionary power granted by s249A of the Housing Act 2004, the Respondent being satisfied beyond reasonable doubt that the Appellant's conduct amounted to a relevant housing offence under s234 (management regulations in respect of HMO's) and an offence under Regulation 11(1), on 2nd February 2022 issued three notices of intention to issue financial penalties, which invited the Appellant to make representations, but which she did not do.

NOI 1

7. The first notice of intention (" NOI 1") said that the Council believed that the Appellant should pay a penalty of £20,000; the reason given was that there was a failure to comply with the HMO Regulations 2006, reg 4, offences contrary to section 234 of the 2004 Act, because "during a routine licensed HMO inspection on 27th October 2021 numerous fire safety deficiencies were identified at the premises". The notice added that the Council considered that this was the most appropriate course of action (para 4), and in setting the penalty, the Council had taken into account (para 5) guidance (severity, culpability, harm, deterrent, and removal financial benefit from offending).

8. At paragraph 6 the Council said that ("the overcrowding point")

"in particular, the authority had to consider that:

- You let the property to unrelated tenants and were award that the property was occupied by five occupants in four unrelated households,
- In order to fall outside of the licensing requirements there should be no more than four residents in the property,
- You took no steps to reduce the numbers in the property,
- You did not approach the council for the HMO for an exemption for the period the property became licensable".

9. In fact, the HMO licence permitted 5 people from unrelated households to occupy the premises, so the inclusion of paragraph 6 was inaccurate. It is acknowledged by the Respondent that it does not form part of its case that the Appellant did permit overcrowding, and no action has been taken against the Appellant in this regard.

NOI 2

10. The second notice of intention ("NOI 2") said that the Council believed that the Appellant should pay a penalty of £1,000; the reason given was that there was a failure to comply with the HMO Regulations 2006, reg 7, offences contrary to section

234 of the 2004 Act, because "during a routine licenced house of multiple occupation inspection of 27th October 2021 there was poor management and disrepair, and poorly maintained deficiencies were identified at the premises".

11. At paragraphs 4-6, the Council again said that in particular it had taken into account all of the points set out as in the first notice (summarised at paragraph 8 herein).

NOI 3

12. The third and final notice imposed a penalty of £2500, because there was no valid EICR for the period identified as "the electrical safety gap", at the time of inspection nor was it received by deadline imposed, namely 2nd December 2021.

13. Again in the reasons for imposing the penalty, the Respondent repeated the points made at paragraphs 4 to 6, including "the overcrowding point".

14. The Appellant made no representations, and so the Respondent issued three final financial penalty orders on 17th March 2022, confirming the amounts £20,000, £1000, and £2500.

Final Financial Penalties

15. The Respondent issued the notices, but in these notices the complaints as to the Appellant's failings were set out in accordance with the level of detail given in paragraph 3 above; they omitted the reference in the NOI to overcrowding. It is against those notices that she now appeals to the First-tier Tribunal.

Appeal

16. This appeal, which comes by way of de novo hearing, was started with an application.

17. The grounds of appeal said that the inspection on 27th October 2021 was flawed, as it took place without any notice having been given. Nevertheless, the Appellant complied with the schedule of works resulting from the inspection, including production of the documentation sought. The Appellant referred to the COVID-19 pandemic, which had made good management more challenging: tenants spent more time at home in lockdown, and during changing work patterns, and tenants ignored repeated warnings to stop doing certain things (I.e. disabling alarms to prevent them going "off" when food was frequently fried; i.e. putting a sofa in the say of a fire escape; making a collection of items in the fire escape route). Further, the bathroom was more heavily used and planned upgrade works were delayed.

18. In expanded grounds of appeal the Appellant said that the third penalty of £2,500 should be withdrawn as the Appellant did arranged for an EICR immediately, that she did have an EICR for the electrical safety gap after all; further, the Appellant would rely on a reasonable excuse for the non-compliance if proved, namely the

Appellant's evidence that covid was prevalent, and so inspection was difficult, she had taken adequate steps to ensure that the house was inspected, the difficult tenant routinely interfered with the fire safety measures. The Respondent failed to give credit for previous compliance.

Hearing

19. The appeal came before the Tribunal for hearing on 4th October 2022, at Stevenage Magistrates Court. Both parties were represented: the Appellant was in person and represented by Mr. Nwokeji, the Respondent was represented by Mr. Berisha, the Council licensing team leader, with the Private Sector Housing Technician in attendance to give evidence.

20. At the commencement of the hearing the Tribunal identified the evidence relied on by both parties, and admitted (without opposition from either party) late evidence from both the Appellant and Respondent.

21. The Tribunal identified the burden and standard of proof resting on the Respondent to establish the offences committed, and the penalty sought; the burden would then pass to the Appellant to establish a reasonable excuse for committing the offences, and then if not, then the correct level of financial penalty (bearing in mind any mitigation).

Preliminary issue raised by the Tribunal as to NOI 1 and NOI 2

22. The Tribunal raised with the Respondent a question as to the validity of the process because the Tribunal had noted the following.

23. Firstly, paragraphs 3 of NOI 1 and 2 under the heading "reasons", gave the very briefest summary of the allegations: NOI 1 said "numerous fire safety deficiencies"; NOI 2 said "poor management and disrepair, and poorly maintained deficiencies" which had been identified at the inspection on 27th October 2021. By stark contrast, the Tribunal had noted that the final notices went into *considerable* detail, referring to each and every specific failing.

24. Secondly, at each paragraph 6, the Respondent said that it had "in particular" taken into account the overcrowding point, though it admitted that there was no such allegation and so it was an immaterial factor.

25. Thirdly, in the "reasons" to justify the proposed financial penalty, the Respondent simply said that it was justified because there was an offence, listed the heads suggested in the guidance (culpability etc), and said in particular that there was overcrowding. The NOI did not specify the actual reason for proposing it: that there is an offence provides a discretion to impose it, but it is not a mandatory requirement to impose a penalty; the guidance relates to the amount; whilst it does say that a financial penalty is the most appropriate course of action, it does not say why this is.

26. In short, we raised with the Respondent whether the process was invalid, because the allegations in the NOI were sparse, and meant that the recipient would not know from the notice specifically what they were alleged to have done, and so to be in a position to make effective representations. Further, the reasons did not really justify why a financial penalty was being imposed (rather than the threshold conditions being met). Finally, immaterial considerations (the overcrowding point) erroneously appeared to play a significant part in the decision-making process.

27. The case was put back for the Respondent to consider it's case, and to reply.

Respondent's representations

28. The first point made by the Respondent was that the Appellant already had the letter and a schedule of works – although not specifically mentioned/incorporated in the NOI, as a document to which reference should be made. The Respondent's view was that the detail of the allegations was contained therein and so none of this would have taken the Appellant by surprise. This was the Respondent's standard procedure.

29. Secondly, paragraphs 6 (the overcrowding point) was a "typo", in that a template was used and had not deleted this paragraph; Mr. Berisha assured us that overcrowding was not an allegation made against the Appellant, and had not played a part in the Respondent's setting a penalty.

Appellant's reply

30. The Appellant said that the Respondent had failed to follow procedure; the point of the NOI is to set out the nature of the allegation in sufficient detail for the Appellant to understand the allegation made in it, and the reasons for the Respondent taking action, so that effective representations could be made. In respect of NOI 1 and 2, the details were sparse, and wholly inadequate.

31. Further, there was reference in earlier documents to the Respondent's suspicion that the house was overcrowded; so, it was not a case that this was a "typo" at all; it suggests that the Respondent "changed horses" along the way.

Respondent's final point

32. In reply, the Respondent said that the reference to overcrowding made in the Appellant's submissions was on the day of inspection, and not the reason for the inspection or the justification for the notices.

33. The Respondent believed that they had been transparent in all dealings.

Decision on validity of NOI 1 and 2

34. Having shortly deliberated the point, the Tribunal concluded that the Respondent had not adhered to the process set in paragraphs 3 to 8 of Schedule 13 A, and that the

NOI and Final penalty be struck out as failing to follow the statutory procedure, for the following reasons.

35. The legislation provides that the Respondent can impose a criminal penalty. The burden of showing a breach of the legislation is on the Respondent to show to a high standard – namely, beyond reasonable doubt – that there is a breach. An Appellant is entitled to know *precisely* what allegation is being made against them in the NOI, to enable the representation process to be as effective as possible: clear allegation met by apposite representation; it is akin to counts on an indictment or a charge sheet. To provide sufficient information is to know the allegation, and it is not adequate to rely on previous correspondence, which might have been had up to 6 months before, and when the nature of the works and allegations may well (and usually does) evolve over time; had it been attached or referred to as the detailed allegations made therein, the matter could have been different.

36. Paragraph 3 of Schedule 13A sets out the matters to which the NOI must refer, which includes the reasons for proposing to impose a financial penalty, and details as to how to make representations against it. In NOI 1 and 2, the Respondent's allegations which (if proved) could give rise to the power to make the penalty, are given in sparse detail – very much less so than the final penalty notice, and without good explanation for this difference. It is not adequate to rely on the fact that there was previous correspondence about the matter, some months before. In this case the schedule of works was issued at the end of October 2021 and this notice of intent was issued in February 2022. The Appellant is entitled to have clarity over what she is being accused, which is not apparent from NOI 1 and 2.

37. The waters are muddied by the reference to "overcrowding"; we accept that this was a case of a template being used, inappropriate parts not having being deleted. However, to the recipient, it can only have been received as indicating that the Respondent gave great weight to immaterial matters which played a significant role in the decision-making and penalty set.

38. It is also apparent that the Respondent has not explained the reasons for deciding to impose a penalty with the detail which justifies taking the action. That the Respondent has the discretion to do so, but does not explain why that step was taken. That it is "the most appropriate course of action" does not take the matter very much further. That there is guidance which assists in setting the level of penalty, but does not justify why imposing a penalty itself is appropriate. That there is alleged overcrowding is a distraction, and irrelevant.

39. For the reasons given above, we find that there is has not been compliance with the legislation, specifically Schedule 13A, para 3 (b) and this invalidates NOI 1 and 2, and so the final penalties issued.

Level of penalty for final penalty 3

40. The Appellant conceded that though she had an EICR for the electrical safety gap, it was not provided to the Respondent in the allotted time (by 2nd December 2021), and

very much later in the course of these proceedings. In short, the Appellant had not realised that she had the certificate and only came across it when preparing her appeal.

41. During the hearing the Respondent took the Tribunal through and explained the matrix, which lead to the imposition of the penalty of £2500. Whilst conceding that the Tribunal's jurisdiction permitted the Tribunal to take into account matters not known to the Respondent at the time that the penalty was set, the Respondent did not consider the fact that the Appellant did have the EICR, to be a reason to reduce it. In fact, it rather, showed poor management.

42. The matrix relied on seeks to marshal the facts according to the various factors set out in the Local Authority guidance (p 317) and which forms the Respondent's policy.

43. The Respondent considered that the Appellant's culpability incurred a high score of 20 (mid-way between 16-24), which applied where the landlord showed "some awareness of the law, but the person still committed/allowed the offence", applied an asset/profits score of 10, because the Appellant had two properties and so fell within the band 5-10 for those with "little asset value and little profit made by the offender", there was nothing given for offending history as there had been no previous offences, and as for harm/potential harm the Respondent doubled the score of 5, to 10, which band applies where there is likely to have been some low level harm to health of tenants.

44. The Appellant's submissions on this were brief, pointing out that the Appellant had been engaged in the process of undertaking the schedule of works, which had been completed, that many certificates had been provided on time, that there was one which had not, but it existed.

45. The Tribunal finds that the appropriate penalty is £500, for the following reasons.

46. Using the Respondent's guidance on culpability we set at a score of 5 because we conclude on the evidence that the Appellant had an awareness of the legal system in place – shown by commissioning and having the certificate - but that her system was defective in not ensuring that it could be provided timeously. We agree with the Respondent's assessment that there was little profit/ gain from the failure to comply, so give a score of 5 for asset/profit made. There was no offence history so the score of 0 is apposite. As for harm, there was no harm caused to the tenants; this we conclude because the electrics had been checked by the electrician before issuing the certificate, as there were no vulnerable occupants and there was no evidence provided by the tenants of any impact on them. That being so, the score of 10 applies, which leads to a penalty of £500.

47. Accordingly on FP 3 we find the penalty of £500 payable.

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Judge Joanne Oxlade

10th November 2022