First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	:	**CAM/38UC/HNA/2018/0010**
Property	:	**26a and b Burchester Avenue, Barton Headington, Oxford, OX3 9NA**
Applicant	:	**Ali Murat Terzi**
Respondent	:	**Oxford City Council**
Type of Appeal	:	**against a financial penalty (Paragraph 10 of Schedule 13A of the Housing Act 2004 ("the Act"))**
Date of Appeal	:	**23rd August 2018 (accepted out of time)**
Tribunal	:	**Bruce Edgington (lawyer chair)** **David Brown FRICS**

DECISION

1. The determination of the Tribunal is that the Financial Penalty Notice dated 25th June 2018 recording a penalty against the Applicant of £19,374 is varied in that the Financial Penalty is now £2,000.

Reasons

Introduction

2. The **Housing and Planning Act 2016** ("the 2016 Act") introduced an ability on the part of local housing authorities to issue Financial Penalty Notices against people who are guilty of various offences, one of which is the failure to comply with conditions on a Housing in Multiple Occupation ("HMO") licence. This is an alternative to prosecution.

3. This appeal is against one of those Notices which was served on the Applicant on 25th June 2018. This process has been controversial because the monies payable under these Notices is kept by the local authority in

question to help pay for enforcement of housing laws rather than being paid into general public funds as would happen with a fine payable following a criminal conviction.

4. The appeal application was late but it was accepted by the Tribunal as notification that the Applicant wanted to appeal was received in time but it took him some time to complete the correct form.

5. The Respondent has claimed that the appeal does not specify whether the appeal is against the grounds for serving the notice or against the amount of the penalty. The Tribunal does not see this as a valid criticism. The Applicant complains that nothing was done about his "*request for some reduction request before the Appeal stage it had been reduced to £14,374.00. A sum beyond acceptance and hence I have decided to appeal*". In other words, it seems clear to the Tribunal that he accepts that the offence has been committed but is complaining and appealing about the need for and amount of the penalty.

The Facts

6. The bundle of documents is some 883 pages. However, the basic facts themselves are fairly straightforward.

7. The Applicant bought 26 Burchester Road as a 3 bedroom house in about 2002 when he converted it into 2 flats. He says that this was his first attempt at a buy to let purchase and his statements, particularly at pages 549 and 550 in the bundle indicate that he has further properties and that he has and continues to house tenants in receipt of Oxford City Council's housing benefit. The reason why the property was designated as an HMO is because The Applicant did not obtain Building Regulation approval when the house was converted.

8. This clearly caused the Applicant a great deal of consternation at the time. The Respondent's additional licensing applied to a 1 or 2 storey property with 3 or 4 occupiers in self contained flats. In its statement of case, at page 9 in the bundle, the Respondent describes the property as a 'converted block of flats' which is an unfortunate way to describe a single house split into 2 flats. However, it must be said that this case is not an appeal against the classification of the property as an HMO.

9. The Applicant applied for and obtained an HMO licence on 30th December 2016. It limited occupation of the building to 3 people and had conditions on it including requirements for the licence holder to (a) fit a mains operated fire alarm system linked between the 2 flats, (b) to hang a fire blanket in one of the kitchens and (c) install fire protection doors. These were to be finished by 29th March 2017, 29th January 2017 and 29th June 2017 respectively.

10. It is said that the Applicant claimed not to have received that licence and the conditions were therefore varied on the 29th June 2017 so that the completion dates were changed to within 8 months of the licence for all 3 conditions. On 1st September 2017, the property was visited and none of the conditions had been complied with. There was an interview under caution on the 20th November 2017.

11. On the 4th December 2017, the Respondent received an application to renew the licence and on the 20th December 2017 a notice of intention to grant the new licence was sent out with the same conditions to be complied with plus a further condition to repair a door. That licence was granted on the 5th January 2018 and the conditions were to be met within 1 month i.e. by 5th February 2018.

12. As one of the Applicant's complaints about this process was its complexity, it is right to record that the licence has 10 pages of conditions plus 2 pages of small font single spaced 'notes'.

13. On the 9th February 2018, the evidence of Matthew Kidger ("Mr. Kidger") at page 25 in the bundle is that he examined the licence and carried out an inspection of the property. He does not say whether the inspection was carried out on that day. He says that he found that none of the 4 conditions had been met. That was clearly a breach of the terms of the licence and the Tribunal is satisfied that this was an offence under section 72(3) of the **Housing Act 2004** ("the 2004 Act"). An interview under caution was organised for the 6th March.

14. As was its choice, the Respondent decided that it would impose a Financial Penalty Notice which it did, after giving the appropriate notice of intent, on the 25th June 2018 and is at page 259-263 in the bundle. The amount is £19,374 and the Applicant says that this was unnecessary and is excessive.

15. On the 16th July 2018, the Applicant wrote to the Respondent stating that the conditions were either complied with or were in the process of being complied with. An e-mail response was then sent by the Respondent on the 19th July saying, in effect, that if an appeal did not take place the penalty would be reduced to £14,374. The formal appeal was then lodged. On the 6th November 2018, the Respondent wrote to the Applicant withdrawing its proposal for a reduced penalty of £14,374 and saying that at this hearing they would propose £15,000.

The Decision to Serve the Notice

16. At pages 13 and 14 in the bundle, the Respondent says that the decision was made to pursue action because non-compliance with the HMO licence included matters relating to fire safety and health and safety and a matrix in their guidance shows that a score of less than -39 should result in

action. These circumstances, so they say, scored -55. There is then a discussion about whether this should have been a prosecution or a Financial Penalty Notice but this is largely irrelevant as the Applicant is not suggesting that there should have been a prosecution.

17. The Respondent's protocol commences at page 437 in the bundle. On page 438, under the heading 'Decision Making', there are 4 bands with various scores but no indication about which band to use in which circumstances. In band 3, consisting of -31 to -40, several actions are suggested, one of which is 'formal action'. In band 4, consisting of greater than -41, the only action recommended is 'formal action'.

18. The documentation relating to the decision to proceed in this case appears at pages 48-51 in the bundle. At page 48 is a summary which refers to a threshold of -31 and not the -39 referred to in pages 13 and 14. It attaches what appear to be 2 copies of a matrix, one dated 9th February and the other dated 23rd April 2018. They have Mr. Kidger's name on them and have 10 'conditions' and numbers against each. There is no statement from Mr. Kidger explaining why he has put various numbers against each.

19. The summary lists the matters considered by the Respondent i.e.

    a. The gravity of the offence;
    b. The general record and approach of the person responsible;
    c. Whether it is in the best interests of the public to ensure remedial action or to deter others from similar failures to comply with notices;
    d. Whether the evidence available provides a realistic prospect of a conviction;
    e. Whether the Council has been obstructed in carrying out its duties.

The Level of the Civil Penalty

20. The Government Guidance at page 427 in the bundle sets out the matters to be considered when setting the 'appropriate level'. These, together with the printed comments are:

    a. **Severity of offence**. The more serious the offence, the higher the penalty should be
    b. **Culpability and track record of the offender**. A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew or ought to have known, that they were in breach of their responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.
    c. **The harm caused to the tenant**. This is a very important factor when determining the level of penalty. The greater the harm or the

potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.

d. **Punishment of the offender**. A civil penalty should not be regarded as an easy or lesser option when compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.

e. **Deter the offender from repeating the offence**. The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.

f. **Deter others from committing similar offences**. While the fact that someone has received a penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.

g. **Remove any financial benefit the offender may have obtained as a result of committing the offence**. The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

21. Local authorities are encouraged to 'develop and document their own policy on determining the appropriate level of civil penalty in a particular case'. This Respondent's policy is set out commencing at page 437. Unfortunately, it is not easy to understand exactly what the policy is for actually calculating the penalty. In paragraph 14. it is said that a spreadsheet has been developed.

22. There are then discussions about 6 'Bands' being used with some vague comments and then some financial limits to each band with Band 1 being £0 to £4,999 and Band 6 being £25,000 to £30,000 which is the maximum figure a single financial penalty can be. One then needs to look at pages 59-64 which appear to be Mr. Kidger's calculations set out in what could be described, somewhat loosely, as a spreadsheet for an assessment on the 15th May 2018 (page 61) and then a similar spreadsheet prepared by Katherine Coney on the 19th July 2018 (page 63).

23. The commentary at page 59 is prepared by Mr. Kidger with a Mr. Ian Wright stated to be a Review Officer. This does, perhaps, give an indication of what has happened i.e. the most significant figure is

described as being 'culpability and harm combined' and is put at £17,499. How the other £2,000 or so is added is difficult to understand and the way in which the Applicant's means have impacted is, again, difficult to understand, particularly as there is no evidence of the Applicant's means..

The Hearing

24. Those who attended the hearing were the Applicant, Mr. Terzi and one of his tenants. From the Respondent were Mr. Kidger, Katherine Coney (Principal Lead Officer) and Paul Smith (Building Control Team Leader).

25. By and large, the hearing was conducted in a civilised and constructive way by all who attended. The Tribunal expresses its gratitude for that. The first matter to be clarified was the breach of building control. Mr. Terzi accepted that in or about 2002, when the conversion was taking place, the Building Control Officer said that certain work had to be undertaken to comply with regulations. If not, Mr. Terzi would not be able to sell the property although he would be able to let it. He decided not to have the work done and this admission, of course, was enough to establish the offence for which the Financial Penalty was issued.

26. The Tribunal then had a discussion with those from the Respondent on the whole issue of how Financial Penalties should be calculated. It became clear to the Tribunal and was admitted by those present that the government guidance was too general in its wording to give the Respondent any specific indication of how much the penalties should be. Each local authority is encouraged to set out its own 'policy' which means, of course, that unless guidance was issued by some organisation representing local authorities and followed by them, each local authority would have its own policy which was likely to be different from all others without appropriate liaison which does not seem to have happened.

27. Ms. Coney, who appeared to act as the Respondent's advocate, then said that the Respondent was receiving Tribunal decisions and the 'policy' was being reconsidered as a result of those decisions.

28. Mr. Kidger was then asked about how he had (a) come to the decision to proceed with formal action and (b) calculated the penalty. He was as helpful as he could be.

29. Finally, Mr. Terzi made a speech in which he said that he was fully behind the HMO culture so far as it impacted on students who were vulnerable. This was the only one of his properties with an HMO although when asked how many properties he had, he refused to answer the question.

30. He had hoped to resolve the problem by building an extension to the property with Building Regulation approval but that had not proved possible before this hearing. He apologised if he had been somewhat

rude in his formal interviews but he was, and remains, quite incredulous that this property could be described as an HMO and he was just trying to make a point.

Discussion

31. It should be remembered that the Financial Penalty is described in the government guidance as not being an easy or lesser option than prosecution. Equally, this Tribunal's view is that it should not be a much more expensive and punitive remedy for house owners. Whilst it is of no evidential value whatsoever, the Tribunal recalls 5 prosecutions just before the 2016 Act came into force covering similar 'offences' and the average fine over those 5 cases was £2,480.60, one of which was for £9,000.

32. This does rather highlight a particular problem namely that no mention is made in the guidance or the policy document of any of the criteria applied by the criminal courts to ensure that there is compliance with the general principle of ensuring that decisions are 'just and equitable'. Various detailed statements and guidance issued by the Sentencing Council and the Judicial College would no doubt assist.

33. The spreadsheet on pages 49 and 51 lists out a number of items used in coming to a determination that formal action had to be taken, many of which are linked together. The item for non compliance with fire safety conditions is -10 but it is then multiplied by 3. Why? This was one item of offending behaviour that continued. There is then an item for 'prior convictions/caution for housing related offences'. Surely that is the same thing i.e. the failure to comply with licence conditions.

34. It seems to this Tribunal that the decision to proceed with formal action could well be open to question. However, that is not an issue raised by the Applicant in these adversarial proceedings and the Tribunal will therefore just proceed with the assessment of the penalty.

35. Mr. Kidger's comments on page 59 state that the culpability and harm categories should be combined to create a band 4 mid point assessment of £17,499. He says that the building was occupied 'by multiple victims' which, again, is an unfortunate description for no more than 3 people. The problems with fire precautions "*put the occupiers at much higher risk of harm should a fire occur*".

36. The difficulty with this comment is twofold. Firstly, section 5 of the 2004 Act says that "*If a local housing authority consider that a category 1 hazard exists on any residential premises, they* ***must*** (our emphasis) *take the appropriate enforcement action*". In other words make a Prohibition Order or serve an Improvement Order which could be enforced by direct action at the cost of the house owner is there was no compliance. Secondly, this local authority actually renewed the HMO licence, knowing that these

problems still existed, that the Applicant had been told about them several times and had taken no action.

37. One must therefore ask the very obvious question i.e. if the risk was that serious, why did the Respondent not take enforcement action and why did it renew the licence if the conditions had still not been complied with? Ms. Coney said, during the hearing, that section 67 of the 2004 Act provided local authorities with an alternative way of proceeding i.e. by making conditions on HMO licences. The Tribunal does not accept this. All section 67 says is that local authorities must seek to identify, remove or reduce category 1 or category 2 hazards and they can also impose licence conditions. However, this does not reduce the mandatory duties imposed by section 5.

38. The other relevant considerations according to government guidance are virtually all fairly small matters in this case. Despite the comments made on page 47 in the 'Investigation Details', no evidence has been produced of problems involving the Applicant before apart from those relating to this property; there has been no actual harm caused to occupiers and the element of punishment and deterrence could be achieved with a relatively modest penalty. The penalty as determined by the Tribunal will be more than the cost of complying with the conditions and may be even double the cost. No commercial landlord would want that in addition to the actual cost. There is therefore sufficient punishment and deterrence for what is, after all, a 'first time' offender.

Conclusions

39. As Mr. Kidger accepted, the most important band in the spreadsheet is the risk of harm and culpability. The Tribunal finds that 'medium culpability/low harm' is the correct assessment. The reason for this is that this is a 2 storey building with each occupier having his or her own entrance and there were battery operated fire alarms in each. In the event of a fire this is not a multi storey block where the risk of being able to get out of the building in the event of fire increases dramatically.

40. With or without the mains operated alarms (as opposed to the battery operated ones in place), the fire blanket and the fire doors, the likelihood is that an occupier would be able to vacate this building in the event of fire. The risk of more smoke inhalation or burns whilst getting out of the door or windows does increase but only marginally.

41. The midpoint is £7,500. Some concession must be made for the fact that the Applicant has never tried to assert innocence i.e. it is the equivalent to a guilty plea and the usual concession for that is one third which brings the figure down to £5,000.

42. The mitigating factors on page 61 amount to £3,000. The Tribunal does not considered that any of the other adjustments should affect the final figure which is determined at £2,000.

43. As a further point, the Tribunal was somewhat concerned to note the terms of 'negotiations' between the parties. The suggestion by the Respondent that a reduced figure was conditional upon no appeal is not, in this Tribunal's view, an appropriate way of proceeding. If an agreement had been reached and the appeal had gone ahead, no doubt the Respondent would have informed the Tribunal of the agreement. Putting terms which are conditional on withdrawal is using inappropriate pressure. The parties were not 'negotiating' on equal terms.

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Bruce Edgington
Regional Judge
23rd November 2018

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.