**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | CHI/00HA/HNA/2023/0001 |
| **Property** | **:** | 12 Monmouth Place, Bath BA1 2AX |
| **Applicant** | **:** | Mrs Josephine Vercoe |
| **Representative** | **:** | Mr Hart, solicitor, Freemans Solicitors |
| **Respondent** | **:** | Bath and North East Somerset Council |
| **Representative** | **:** | Mr Cain. Employed barrister at the Respondent |
| **Type of Application** | **:** | Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004 |
| **Tribunal Member** | **:** | Judge J Dobson<br>Mrs A Clist MRICS<br>Ms J Dalal |
| **Date of Hearing** | **:** | 20th June 2023 |
| **Date of Decision** | **:** | 21st August 2023 |

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**DECISION**

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## Summary of Decision

1. **The Tribunal determines that the Applicant did not commit an offence in respect of the licensing of 12 Monmouth Place for the reasons explained below.**

2. **Amongst the many findings, the Tribunal found that the Respondent had not demonstrated there to be fewer than seven occupiers at the time of the grant of the Licence for 12 Monmouth. The Tribunal determined that there was no provision in the Licence that the information provided in the application form remained accurate at the date of the grant of the Licence on the wording of the Licence and other relevant documents and no condition precedent existed, such that the Applicant was entitled to rely on clause 25 of Schedule 2 to the Licence.**

3. **If it had been relevant, which it was not, the Tribunal would not have determined there to be a defence of reasonable excuse for commission of the alleged offence and in respect of the level of financial penalty imposed would have reduced that to £800.00.**

4. **The Tribunal further determines that the fees paid by the Applicant to the Tribunal in respect of this application, totalling £300.00, shall be re-paid to the Applicant by the Respondent within 21 days.**

## Introduction and the Background Facts

5. The case arises in quite particular circumstances and has turned on specific findings of fact and construction of quite limited words in documents. It is regrettable that this Decision is the length that it is in those circumstances. However, the Tribunal found it appropriate to address a number of issues raised in evidence and make findings and to consider the various points raised as to the approach to take. It is hoped that the various sub- headings will assist, including in respect of what the Tribunal has termed the "Key Point" of those arising.

6. The background facts are matters accepted by the parties in documents or in the hearing and which do not require any findings of fact by the Tribunal.

7. The address in question is 12 Monmouth Place, Bath BA1 2AX ("the Property"). The Property is arranged over five storeys with a room to the lower ground floor, a living room and kitchen to the ground floor and two bedrooms and a shower room/ WC to each of the first to third storeys. It is a House in Multiple Occupation ("HMO"), as defined- see below.

8. The Applicant is the freehold owner of the Property [70- 71] (although there was a now- redundant leasehold title obtained by the Applicant for the second and third floors when the Property was, the Applicant said, differently configured). The Respondent is the local housing authority with responsibility for licensing of HMOs and other housing enforcement. The Respondent has issued a policy in respect of licensing and related matters in 2022 [26- 58] (which the Tribunal perceives to be an update to an earlier policy although nothing turns on the matter). That includes at Annex A a specific Financial Penalty Policy.

9. The Applicant's property portfolio amounted to some eighteen properties and the Applicant had at least ten years' experience of letting properties.

10. Prior to the application for a licence made for this Property, the applicant had sought to vary licences on six other properties to permit increased levels of occupancy. The Respondent stated that in reply [254] that the licences for four of those could be varied subject to confirmation of certain matters, identifying the specific addresses.

11. On 21st December 2020, the Applicant applied [85- 98] to the Respondent for a licence for operating an HMO at the Property in respect of 6 households/6 occupants. Amongst other matters it was said that the lower ground floor was to be used for storage. It was said in the application that the Property had an Energy Performance Certificate with rating E. It was said that there would be one individual letting for six occupants. The Applicant completed the declaration that the contents of the application were true.

12. The Respondent acknowledged that the same day by email from Ms Gill Ley requiring up to date certificates and a floor plan before the application could be processed. It was also noted that planning permission and HMO licensing are different and that the grant of a licence would not mean that planning permission had been granted for that use of the Property. A plan was provided by the Applicant of the ground floor upwards, so excluding the lower ground floor (and consequently the room on that floor).

13. By email of 5th January 2021, the Applicant confirmed occupation would be by six persons, one per bedroom identified [225].

14. The Applicant entered an Assured Shorthold Tenancy agreement [182-202] dated 16 February 2021 and signed 22nd February 2021 for a tenancy commencing on 16 July 2021 and ending on 17 June 2022 ("the Tenancy Agreement"), a copy of which was first provided to the Respondent in May 2022.

15. Planning permission to resume use of the Property for occupation by six persons was granted by the Respondent on 18th February 2021.

16. A pre-licence inspection, undertaken by Paul Carroll, Environmental Health Officer at the Respondent, took place on 4th May 2021. An HMO Inspection pro- forma was completed [100- 115]. There were a few modest issues with Property identified which required attention and an Energy Performance Certificate was required. The limited details noted for the lower ground floor room included the word "storage".

17. A draft Licence [119- 129] was sent to the Applicant on 19th July 2021 permitting occupation by a maximum of six persons and describing the lower ground floor room as "Storeroom (Landlord)".

18. The Applicant was sent the draft licence with a letter dated 19th July 2021 [130- 131] in which she was given 14 days to inform the Council of any inaccuracies appearing on the HMO Licence, prior to the final HMO Licence being issued.

19. The Property was licensed on 21st September 2021 for occupation for up to six persons living in two or more households from then onwards for the period to 31st January 2026. The licence was granted by the Respondent to the Applicant ("the Licence") [137- 147]. That was sent with a covering letter [134].

20. There were seven occupants in the property from a date in 2021- see below for findings made.

21. On 31st March 2022, a tenant of the Property complained to the Respondent, informing the Respondent that there were seven occupants, having apparently become aware that the Licence stated on the first page [137] a maximum occupancy limit of six [149]. It was asserted that the Property was not suitable for seven persons.

22. On 26th April 2022, an inspection by Ms Ali Kenny, Environmental Health Officer with the Respondent, was undertaken at the Property. It was identified that there were seven occupants and that the lower ground floor room was occupied as a bedroom. The Property was found to be suitable for seven occupants, meeting HMO space and facility standards. An HMO re- visit inspection form was completed [159- 169].

23. The Respondent subsequently identified that there was no Energy Performance Certificate registered for the Property and that the Property was not exempt.

24. The Respondent requested evidence from the Applicant that the Property was licensed for seven persons and the Applicant asserted in response that she believed that she had permission to exceed the permitted maximum stated on the Licence. She also explained what she said to be the circumstances of the letting to seven persons (which she maintained throughout the case).

25. The Respondent was asked in writing, "When did the 7th tenant move into the property?" and replied in writing, "I don't know – we only know when

the first tenant checked in (in this case Lucinda Behrens), which was on the first date of the tenancy." ("We" appears to refer to her husband and herself although he is not a party and has not been identified as having any interest in the Property.)

26. A few weeks later Roman City, as agents for the Applicant, requested a variation in the Licence to cover seven occupiers, although in six households [203]. They had taken over management on 1st May 2022.

27. On 15th September 2022 (so within six months of the complaint), the Respondent served a Notice of Intent [236- 242] to impose a civil penalty of £5000.00 for commission by the Applicant of an offence under Section 72 (2) of the Housing Act 2004 ("the Act") because of occupation of seven persons in seven households. It was asserted that the level of culpability was very high although the level of harm was low and there were two aggravating features of "Poor track record of compliance with legal obligations" and "Deliberate concealment of illegal nature of activity". Representations were made on behalf of the Applicant by letter dated 17th October 2022.

28. On 22nd November 2022, the Respondent issued a Variation Notice with a revised assessment. Further representations were received on behalf of the Applicant dated 22nd November 2022.

29. On 13th December 2022, the Respondent served a Final Notice [307]. The Final Notice imposed a financial penalty of £1700.00.

30. A licence for the Property licensing occupation by seven persons in two or more households was granted in March 2023.

## The Licence

31. The Licence granted to the Applicant states:

> "a licence under section 64 of the Housing Act 2004, subject to the conditions set out in schedules 1 and 2 attached (and subject to the information provided in the licence application being accurate), in respect of premises situated at:
>
> 12 Monmouth Place, City Centre, Bath, BA1 2AX
> (licensed property address)
>
> Maximum occupancy limits:
> Number of persons is 6. Number of households is 6.
>
> The licence shall come into force on 21 September 2021 and shall remain in effect until 31 January 2026 unless revoked."

32. There are three schedules to the Licence, namely, Schedule 1 related to mandatory conditions, Schedule 2 related to conditions imposed by the Council and Schedule 3 related to HMO Licensing Works which may be necessary to comply with conditions of Schedule 2.

33. Clauses 24 and 25 of Schedule 2 (AK12, page 135) provide:

> "24. The layout of the property, including any numbering of rooms must not be altered without first gaining written permission from the Council. Requests to alter the layout should be made in writing and include a full description of the proposed changes and the reason for doing so.
> 25. The property is to be occupied in accordance with and by no more than the number of persons and households stated on the licence. If the present occupation of the property is in excess of this maximum permitted number, the occupation of the property must be reduced within a maximum of 12 months of the date of licensing unless otherwise stated on schedule 3 of the licence.
>
> | Floor | Room | Shared (S) or Exclusive (E) facilities | Sleeping for No of Persons) |
> |---|---|---|---|
> | Lower ground | Storeroom (Landlord) | E | |
> | Ground | Living room | S | |
> | Ground | Kitchen | S | |
> | First | Shower room with WC | S | |
> | First | Bedroom | E | 1 |
> | First | Bedroom | E | 1 |
> | Second | Shower room with WC | S | |
> | Second | Bedroom | E | 1 |
> | Second | Bedroom | E | 1 |
> | Third | Shower room with WC | S | |
> | Third | Bedroom | E | 1 |
> | Third | Bedroom | E | 1 |
>
> The permitted number for the property is 6 households and 6 persons."

34. The terms of clause 25 transpired to be of particular significance in this case, as discussed below. Whilst the Schedules contain numerous other provisions which are on a general level relevant to how clause 25 is construed, it is not necessary to set out any of them individually.

## Application and History of Case

35. The Applicant submitted an appeal against the financial penalty imposed by the Respondent in the Final Notice. The Tribunal received the appeal on 10th January 2023.

36. The Applicant appeals pursuant to section 249A of the Act. The Applicant's grounds for appeal were set out in the application.

37. Directions were given on 2nd March 2023 and amended on 11th April 2023 and subsequently in respect of unavailability of the Respondent's main witness, the hearing date was put back further to 20th June 2023.

38. The Directions provided for the Applicant to produce a bundle of documents relied on by the parties in relation to the issues for determination. The Applicant produced a PDF bundle amounting to 390 pages in advance of the final hearing. The hearing bundle included the Respondent's relevant policy amongst other matters.

39. Whilst the Tribunal makes it clear that it has read the bundle, the Tribunal does not refer to all of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored them or left them out of account. Insofar as the Tribunal does refer to specific pages from the bundle, the Tribunal does so by numbers in square brackets [ ], and with reference to PDF bundle page- numbering.

40. This Decision seeks to focus solely on the key issues. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned in the bundle or at the hearing require any finding to be made for the purpose of deciding the relevant issues remaining in this application. The Decision is made on the basis of the evidence and arguments the parties presented, save where clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred.

41. There has been a slightly longer delay in this Decision being produced than the target date principally arising from absence of one or other of the Tribunal members. The Tribunal apologises to the parties for that delay and for any inconvenience arising.

## The Applicable Law

42. The Tribunal must of course apply the relevant law, both statute and case law.

43. There is a fair amount of applicable law and of guidance as to how the local housing authority on the one hand and how the Tribunal on the other hand are to address matters. It merits setting that out in some detail given that the approach taken by the Tribunal to such cases rest very much on that.

44. Firstly, in terms of offence itself, the relevant law is contained in the Act and in particular sections 61 and 72.

45. Section 61 states:

> (1) Every HMO to which this Part applies must be licensed under this Part unless– (a) a temporary exemption notice is in force in relation to it under section 62, or (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.
> (2) A licence under this Part is a licence authorising occupation of the house concerned by not more than a maximum number of households or persons specified in the licence.

46. Section 72 provides that:

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if– (a) he is a person having control of or managing an HMO which is licensed under this Part, (b) he knowingly permits another person to occupy the house, and (c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—
(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
(b) for permitting the person to occupy the house, or
(c) for failing to comply with the condition,
as the case may be.

.....

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

47. Section 254 includes the definition of an HMO. Section 263 of the Act defines a "person having control" and "person managing" of a property. No issue arises about those matters, which do not therefore the sections setting out.

48. By amendments to the Act, effected by Schedule 9 to the Housing and Planning Act 2016, the power for local housing authorities to impose a civil penalty as an alternative to prosecution was introduced.

49. Section 249A of the Act deals with the imposition of a financial penalty on the basis of commission of a relevant offence, in relation to which it states the following:

> (1)The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.
> (2) In this section "relevant housing offence" means an offence under—
> .....
> (b) section 72 (licensing of HMOs),
> .....
> (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
> (4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
> (5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if— (a) the person has been convicted of the offence in respect of that conduct, or (b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

50. Hence, if a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to a relevant housing offence, that person may not be convicted of an offence under the relevant section in respect of that conduct and only one penalty can be imposed in respect of the same offence.

51. Nevertheless, a financial penalty may only be imposed where it is determined that a person has committed a criminal offence. Consequently, the standard of proof applicable in respect of matters relevant to the commission of an offence is the criminal standard, being beyond reasonable doubt as identified in section 249A or, as often alternatively expressed, such that the local housing authority, and now the Tribunal, is sure.

52. Schedule 13A to the Act sets out the procedure to be followed by the local housing authority and the requirements of the Notices required to be served, including the requirement for a notice of intent within six months, the information to be contained and the right to make representations and then the requirement to decide whether to serve a final notice and the contents of that. As no issue arises as to the procedure adopted by the Respondent, it is not necessary to set out the requirements in full.

53. The entitlement to apply to the Tribunal is also provided for in Schedule 13A of the Act and specifically Paragraph 10. That states as follows:

> (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against
> (a) the decision to impose the penalty, or
> (b) the amount of the penalty.
> (2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

Whilst the provision states a penalty "or" the level, it is clear that in practice both can be advanced as alternatives.

54. It is further explained that:

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

In terms of the powers of the Tribunal, it is added:

> (4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.
> (5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

55. So, as set out above, the Tribunal re- hears the matter but does so including on the basis of matters of which the Respondent may have been unaware and the Tribunal may decide to leave the Final Notice in place as issued, may quash it entirely or may appropriately vary it. The Tribunal has the power to determine that there was or was not an offence for which a civil financial penalty may be imposed and, if so, to confirm or vary the level of any penalty.

56. There is no mental element to a licensing offence. It is, subject to there being a reasonable excuse, what is termed a strict liability offence.

57. In the case of *Mohamed and Lahrie v London Borough of Waltham Forest* (2020) EWHC 1083 (Admin), it was said as follows:

> "48. For all these reasons we find that the prosecution is not required to prove that the relevant defendant knew that he had control of or managed a property which was a HMO, which therefore was required to be licensed. As noted above the absence of such knowledge may be relevant to the defence of reasonable excuse."

58. It is, as quoted just above, a defence to the offence of failure to licence, that the person has a reasonable excuse for failure to licence.

59. The cases of *Thurrock Council v Daoudi* [2020] UKUT 209 (LC), *I R Management Services Limited v Salford Council* [2020] UKUT 81(LC) and *Nicholas Sutton (1) Faiths' Lane Apartments Limited (in administration) (2) v Norwich City Council* [2020] UKUT 90(LC) dealt with the question of reasonable excuse as a defence to the imposition of financial penalties under section 249A of the Act. The principles identified by the above authorities are as follows:

- The proper construction of section 72(1) of the 2004 Act is clear. There is no justification for ignoring the separation of the elements of the offence and the defence of reasonable excuse under section 95(4).
- The offence of failing to comply with section 72(1) is one of strict liability subject only to the statutory defence of reasonable excuse.
- The elements of the offence are set out comprehensively in section 72(1). Those elements do not refer to the absence of reasonable excuse which therefore does not form an ingredient of the offence and is not one of the matters which must be established by the local housing authority.
- The burden of proving a reasonable excuse falls on the landlord and need only be established on the balance of probabilities.
- The burden does not place excessive difficulties on the Landlord to establish a reasonable excuse. Only the Landlord can give evidence of his state of knowledge at the time. The other party, on the other hand, has no means of knowing the state of knowledge of the Landlord. It is very difficult for the other party to disprove a negative.

- Whether an excuse is reasonable or not is an objective question for the Tribunal to decide. Lack of knowledge or belief could be a relevant factor for a Tribunal to consider whether the Landlord had a reasonable excuse for the offence of no licence. If lack of knowledge is relied on it must be an honest belief (subjective test). Additionally, there have to be reasonable grounds for the holding of that belief (objective).
- In order for lack of knowledge to constitute a reasonable excuse as a defence to the offence of having no licence it must refer to the facts which caused the property to be licensed under section 72(1) of the Act. The well- known statement that ignorance of the law does not constitute a reasonable excuse applies although there is some subtlety that bald statement does not capture.
- Where the Landlord is unrepresented the Tribunal should consider the defence of reasonable excuse even if it is not specifically raised.

60. It merits re-iterating that it is for the Applicant to therefore demonstrate a reasonable excuse, for which the standard of proof is the balance of probabilities.

61. Rather more recently, in *Marigold & Ors v Wells* [2023] UKUT 33 (LC) the Upper Tribunal (Lands Chamber) at paragraphs 45 to 49 provided guidance as to approach the question of whether a reasonable excuse exists- and the Applicant's representative referred specifically to this case authority- as follows:

> "(1) First, establish what facts the taxpayer (Applicant) asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer (Applicant) or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
> (2) Second, decide which of those facts are proven.
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?" (Paragraph 48 of the judgment quoting from a Tax and Chancery Chamber case of Perrin v HMRC [2018] UKUT 156)
> (4) In respect of "the much cited aphorism that "ignorance of the law is no excuse"... (i)t will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. (Paragraph 49 of the judgment quoting from a Tax and Chancery Chamber case of Perrin v HMRC [2018] UKUT 156)"

62. The case involved a specific situation in which it was found that the property owner was specifically told by the relevant council that the

property did not require a licence and that the council would tell the property owner when a licence was required.

63. There is Government guidance in respect of the Act and the offences created. The Ministry of Housing, Communities and Local Government published non-statutory guidance in April 2018 entitled "Civil penalties under the Housing and Planning Act 2016 - Guidance to Local Authorities", ("the Guidance") [6-25]. Local authorities must, pursuant to paragraph 12 of Schedule 13A to the Act, have regard to the guidance in respect of their functions in respect of civil penalties, as the Guidance itself repeats.

64. The Guidance states the Government's intention to crack down on a "small number of rogue or criminal landlords [who] knowingly rent out unsafe and substandard accommodation" and to disrupt their business model.

65. Paragraph 1.9 of the Guidance states that civil penalties are intended to be used against landlords who are in breach of one or more of the sections of the Housing Act 2004 and Housing and Planning Act 2016 listed in the Guidance.

66. Paragraph 3.5 of the Guidance addresses in some detail the factors that a local housing authority should consider when deciding on the level of a civil penalty, as follows:

> a) **Severity of the 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 legal 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 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 civil 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.

67. The Guidance also states that local housing authorities are expected to develop and document their own policy on when to impose a civil penalty and should decide which option to pursue on a case- by- case basis and also says that housing authorities "should develop their own policy on determining the appropriate level of civil penalty in a particular case" and, in line with that policy.

68. So, the local housing authority must have a policy to cover when a penalty should be imposed and how much that should be.

69. The approach to the Tribunal's consideration of local policies was summarised in the Upper Tribunal by Judge Cooke in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC); [2020] 1 WLR 3187, which involved appeals against penalties imposed under section 249A of the Act. At para 54 the Judge stated:

> "The court [or Tribunal] is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed."

70. Judge Cooke also considered the weight to be attached to the local housing authority's decision in any appeal at para 62, stating as follows:

> "the court is to afford considerable weight to the local authority's decision but may vary it if it disagrees with the local authority's conclusion".

71. In *Sutton* it was said by the Upper Tribunal that:

> "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. The authority is well placed to formulate its policy and in *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC) the Tribunal (Judge Cooke) gave guidance on the respect that should be afforded to a local authority's policy by the FTT when hearing an appeal from a civil penalty imposed by the authority. As Wilkie J put it, concerning the approach which should be taken by magistrates, in *Darlington Borough Council v Kaye* [2004] EWHC 2836 (Admin): "The Justices ... ought to have regard to the fact that the local authority has a

> policy and should not lightly reverse the local authority's decision or, to put it another way, the Justices may accept the policy and apply it as if it was standing in the shoes of the council considering the application."
> 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."

72. Nevertheless, as explained in Marshall at paragraph 76:

> "... if a court or tribunal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or of which it took insufficient account, it can substitute its own decision on that basis."

73. The policy of the local housing authority is therefore the starting point, although not the end point.

74. With regard to the amount of the penalty, the Tribunal's power to vary it includes a power to increase as much as it does to reduce it, subject to the maximum of £30,000.00.

75. It was also explained in Sutton as follows:

> "The ability to pay, or the means of the offender, is relevant to any financial punishment; although not mentioned specifically in the Secretary of State's Guidance, it is an important component of both punishment and deterrence.
>
> A corporate or individual appellant who wishes the Tribunal to have regard to their own financial standing when considering the appropriate financial penalty to impose, should provide up-to-date evidence of their assets and liabilities."

## The Hearing

76. The Tribunal sat at Havant Justice Centre. Judge Dobson did so in person and Mrs Clist and Ms Dalal sat remotely. The parties and representatives also all attended remotely by video. There was some regrettable delay in progress at the start of the hearing arising from technical problems experienced by the Applicant's representative.

77. The Applicant was represented by Mr Hart, solicitor, of Freemans Solicitors. The Respondent was represented by Mr Cain, employed barrister, of the Respondent.

78. The Tribunal noted that there may be a need for reasonable adjustments in light of matters touched on in the hearing bundle but was informed that no adjustments were required for the Applicant in the event. As returned to below, the Applicant relied on a medical report of Dr P

Rajpal, which was included in the bundle [259], in respect of her being autistic and/ or neurologically diverse.

79. The Tribunal received written evidence from Mrs Josephine Vercoe, the Applicant [335 onward]. The Tribunal received written evidence from Ms Ali Kenney, Environmental Health Officer for the Housing Standards and Improvement Team [59– 68], Ms Rachel Crowley, Senior Environmental Health Officer for the Housing Standards and Improvement Team on behalf of the Respondent [231- 233] and Ms Gill Ley, Team Administrator – HMO Licensing for the Housing Standards and Improvement Team [317- 318]. The first dealt with most matters on behalf of the Respondent. The second dealt specifically with the issue of the Notices and the process followed and the third about a conversation with the Applicant about a different property.

80. Oral evidence was given by the Applicant. No oral evidence was given on behalf of the Respondent and so the Tribunal took their written evidence as unchallenged in respect of the matters they could address.

81. Both representatives also provided Skeleton Arguments. That of the Applicant (four pages) started with the Applicant seeking that the Tribunal debar the Respondent from taking part in the hearing or otherwise in the proceedings further. It identified the other issues as reasonable excuse and the amount of any financial penalty.

82. The Respondent's Skeleton Argument was rather lengthy (fourteen pages). That argued with regard to the question of strike out that what the Applicant sought to advance was in fact a substantive defence and one which was in dispute. Specific reference was made to clause 25 of the Licence granted for six persons and that, Mr Cain asserted, it relied on there being six persons both at the time of the application being made and of the Licence being granted, an issue explored by the Tribunal below. It was explained that the particular basis for the alleged offence in this instance is section 72(2) because the Property had a licence for six persons but was occupied by seven persons, so one more than the Licence provided for on its first page. It was suggested as an alternative that the Licence as a whole was invalidated by there being seven occupiers.

83. The Tribunal is grateful to all of the above for their assistance with this application, which has some unusual features as addressed below.

84. The Tribunal was not requested to inspect the Property and did not do so. The Tribunal had the benefit of the documents provided by the parties and no suggestion was made as to that information being insufficient for the Tribunal to be able to determine the matter before it, nor did the Tribunal find it insufficient.

**Application to strike out**

85. The Applicant's representative asserted that in light of the HMO licence for the Property, the Applicant could not have committed an offence under section 72(2) of the Act and asserted that there was in any event a reasonable excuse for any offence otherwise committed. He sought to apply to debar the Respondent.

86. As the Tribunal identified, there had not been any case management application submitted that the Respondent be debarred. The Tribunal also indicated its preliminary view based on what it had read that it would be unlikely to grant the application and that the matters raised by the Applicant as bases for strike out could and would be addressed when the Tribunal considered the substance of the case.

87. The Applicant's representative took instructions and did not seek to proceed with the application, which the Tribunal did not therefore determine.

**Consideration of the substantive cases**

88. The three essential questions for the Tribunal to answer in cases such as these are:

1. Has the Respondent followed the correct procedure when imposing the financial penalty?

2. Has the relevant housing offence been proved to the correct standard and any defence not proved?

3. Is the amount of penalty appropriate in the circumstances considered in the light of a local authority's policy?

89. There was in the event no issue about essential question 1. i.e., the decision- making process or the procedure followed by the Respondent in respect of the imposition of the financial penalty. There was also no issue that the Applicant was a person managing or in control of premises which were required to be licensed. The offence is, it was accepted, one of the housing management offences on the basis of which a civil financial penalty can be issued.

90. The issue in relation to the commission of an offence related to the terms of the Licence granted, as referred to above in respect of the Respondent's Skeleton Argument and in particular therefore clause 25.

91. With regard to the defence of reasonable excuse, to be determined on the balance of probabilities, it was, in brief summary, said that the reasonable excuse arose due to a combination of significantly high levels of stress together with misreading of emails from the Council primarily caused by Applicant's neurodivergence/autism spectrum disorder and/ or the practical and personal effects of the Covid- 19 pandemic, combined with a belief that the agreement made for another property owned by the Applicant was also made for this property.

92. There were a number of points raised by the Applicant in respect of the level of penalty, assuming one to be applicable- including whether any breach of licensing requirements by the Applicant was deliberate.

93. It can usefully be added that there was no dispute about the approach which ought to be taken by the Tribunal. In particular, it was common ground that the proper approach was for the Tribunal to apply the national guidance and The Bath and North East Somerset Council Housing Services: Enforcement & Licensing Policy ("the Policy. The issue was the appropriate outcome of that. The Tribunal makes it clear that it is in respect of the above, where relevant, not simply reviewing the process undertaken by the Respondent, but detailing its own views of the correct approach to be taken by itself.

## Facts Found by the Tribunal

94. The Tribunal makes findings where matters were not agreed, or at least clearly agreed, by the parties and where relevant to determining the application. Those facts found add to the factual matrix set out in the Background and which were accepted by the parties and so required no finding to be made.

Application

95. The Tribunal accepts the evidence of Ms Kenny that in August 2020, the Applicant applied to vary HMO licences for six HMOs operated by her (not including the Property) and also the Respondent wrote to the Applicant in respect of a different property – 184 Coronation Road Bath – in respect of the need to apply for variation to a licence if the Applicant intended to let to more persons than the given licence permits [204].

96. In addition, in October 2021 the Applicant informed the Respondent of her intention to seek to increase occupancy at another Property and requested an amendment of the HMO licence. No mention was made of this Property.

97. The subject Property was well maintained and did not suffer from any identified category 1 or category 2 hazards under HHSRS, being suitable to be licensed. .

98. At the time of the application for a licence being made, the Property was not in use as HMO and had been used for holiday letting. At the time of the Licence being granted, it was in use as an HMO and was occupied by seven persons.

99. The application form completed by the Applicant required the Applicant to state the number of intended occupiers. The Applicant correctly completed the form on the basis of the situation which existed at that time and her intention at the time. The Tribunal notes that Mr Cain argued that limiting occupants to six persons at the time of the

application was not the Applicant's intention, but the Tribunal rejects that. The Tribunal considers that argument conflates what actually happened later with what the Applicant did or did not intend at the time of applying.

100. The Tribunal accepted that at the time of applying for the Licence, the lower ground floor room was used for storage and the Applicant had no intention at that time of using it another manner, most notably as a bedroom for another occupier.

Tenancy

101. The Tribunal accepts that the Property was advertised by the Applicant in February 2021 for occupation for the academic year commencing 2021 as a residence for six occupiers at a rent of or the equivalent of £4,669.00 per month for the whole Property. She said that the site on which the Property was advertised gave weekly rent but that ended up as an odd figure when translated into a monthly one. The Tribunal considers that to be strong evidence of the intention of the Applicant at that time. Indeed, the Tribunal goes so far as to say that it wholly undermines an argument of there being an intention of occupation by seven persons.

102. There was a viewing on 13th February 2021 and the persons who sought to take a tenancy of the Property asked whether a seventh tenant could occupy so that the rent per occupier would be lower. They had been shown the lower ground floor room, although used as storage, and asked whether they could have it as a seventh bedroom. The Applicant agreed to seven on the basis of one of the rooms being shared. The prospective tenants did not wish to share. It was agreed instead that the seventh person could occupy the lower ground floor room.

103. The Applicant agreed to remove the items, she said in oral evidence a huge amount of furniture, stored in the lower ground floor room and to furnish it as another bedroom (it is not clear to the Tribunal whether involving any cost to the Applicant or whether furniture already owned was utilised). The occupiers agreed to take the tenancy, hence the agreement entered into.

104. The rent for the Property was not increased by the Applicant to reflect a seventh occupier. Whilst in the event not of direct relevance, it is of some note that the Applicant therefore obtained no financial benefit in return for allowing a seventh occupier, save insofar as the particular persons agreed to take the tenancy and there might have been any lack of interest from other potential tenants, which the Tribunal regards as very unlikely. The Tribunal infers from the suitability of the Property for students and its experience of properties in Bath and demand for them, that there would have been no great difficulty experienced by the Applicant in obtaining alternative tenants had she sought to do so. The Tribunal accepts her oral evidence that the Applicant now regrets agreeing to the seventh occupier.

105. The Tribunal should record for completeness that the Applicant said in oral evidence that she did add an extra element for the increased use of utilities because of seven occupiers rather than six. However, the Tribunal accepts that was simply covering additional cost. Likewise, the Tribunal accepts that charging for more parking permits which the Applicant obtained for the tenants from the Respondent simply reflected the cost of the permits.

Contact between the parties after the tenancy and inspection

106. The Tribunal does not accept the Applicant's evidence that the Applicant contacted the Respondent and that the Respondent agreed to the Applicant letting this Property to seven occupiers for the next academic year utilising the lower ground floor room and provided that was not used the following year after the inspection by Ms Kenney.

107. By the time of the issue of the Licence by the Respondent, the tenancy agreement had been entered into and the firm intention of the Applicant, and the tenants, was for occupation by seven persons and for the period of the tenancy. That intention on the part of the Applicant commenced before- and when she decided that seven tenants would be accepted- the tenancy agreement was entered into- and so after the application for the Licence but before the grant of the Licence.

108. The Applicant met with Paul Carroll at the pre- licence inspection. The Applicant showed Mr Carroll the lower ground floor room. The room was being used for storage and had not started to be cleared, nor had any other steps yet been taken to change the use of the Property from a holiday let to a student let. The Property was vacant.

109. The Respondent's case is that the Applicant told Paul Carroll that the room would not be let out as a bedroom.

110. The Applicant stated specifically that when asked what the room was used for and that she said that it was used for storage [339 and oral evidence]. The Tribunal finds that the use of the room for storage was obvious at that point in time.

111. The Tribunal does not accept that the Applicant was more specifically asked what she intended to use the room as at any and all future dates, or at all. The Tribunal does find that she did not volunteer any information about what the room would be used for at a later time. The Tribunal notes what was said in oral evidence by the Applicant, namely that she was led by the questions asked by Mr Carroll and that if he had asked a different question, she would have given a different answer.

112. The Tribunal is mindful that the change to seven intended occupiers has subsequently taken on significance but where that significance was entirely unknown to Mr Carroll at the time of the inspection. The

Tribunal does not accept that it is likely that he would have asked a question about a matter which was not identifiably relevant at the time.

113. In any event, the Tribunal has no evidence from Mr Carroll about what he asked and what was said to him. The Tribunal only has direct evidence from Ms Vercoe, the Applicant.

114. The Tribunal finds that the Applicant's evidence is correct and that the question she was asked and the answer she gave both related to use at the time of the inspection only. Despite the effect on her credibility of the matters discussed below, the Tribunal does not consider that her evidence on this point can be rejected.

Draft licence and communications

115. The draft licence sent to the Applicant in July 2021 invited comments but did not demand them. The Applicant made none.

116. The wording of the letter sent by the Respondent includes the following:

> "Further to the above, please find enclosed a legal notice and the proposed Licence. The notice formally acknowledges the application made for a HMO Licence and gives you the opportunity to tell us if you disagree with anything in the proposed Licence.
>
> .....
>
> Please read the licence carefully and if you disagree with, or want to comment on, either the content or conditions of the Licence you must tell us, in writing, within the next 14 days."

117. The first paragraph provides an invitation- it gives "an opportunity". The second says that the Applicant "must" tell the Respondent in writing if the content or conditions are disagreed with.

118. The Tribunal finds that the Respondent expected to be informed in the event of anything within the Licence being incorrect.

119. There was no correspondence or other communication from the Applicant to the Respondent informing the Respondent about the tenancy agreement entered into or otherwise about a change in the Applicant's intention from there being six occupants to seven occupants.

120. At no point relevant to the alleged offence, for the avoidance of doubt, did the Respondent give permission for seven occupants.

121. There was similarly none from the Respondent to the Applicant asking whether anything had physically changed or whether any intention had changed.

122. The Respondent's assertion that it had no opportunity to become aware of the seven tenants or the use of the lower ground floor storage room as a bedroom and therefore satisfy itself as to health and safety, public health or minimum standards until after receipt of a complaint from one of the tenants on 31 March 2022 is not accepted as factually correct. It is right to say that the Respondent did not know about seven tenants and was not told about seven tenants. However, the Respondent was able to contact the Applicant checking those matters if it wished to. It did not do so. The Respondent could also have undertaken a further inspection to check whether the matters identified at its previous inspection remained correct.

123. It would be right to say that adopting one or other of those courses, or any other course involving itself checking matters, would have added to time and expense, the extent of which would have depended on the step(s) taken and which may or may not have been considered by the Respondent proportionate or otherwise appropriate. It is not right to say that the Respondent was unable to check matters if it sought to do so.

Occupation by seven persons- the most significant factual matter

124. The Tribunal does not find that occupation by seven persons commenced later than 21st September 2021 (the date of the Licence).

125. The Tribunal makes no finding as to the specific date on which there were seven occupiers, lacking the evidence on which to make any positive finding.

126. Given the significance of this point, it is appropriate to explain the basis for the finding made.

127. The Applicant stated in her response to the Notice of Intention dated 17th October 2022 [240], sent by her solicitor that, "The seventh tenant did not move into the property until 10th October 2021 at the earliest" and in the response dated 1 December 2022 to a Notice to vary a Financial Penalty [303] the Applicant stated, "The dates as stated are incorrect. The earliest date that 7 people were living at the property is 9th October 2021 and the latest date is 16th June 2022 which was the end of the tenancy."

128. Whilst the Respondent referred to occupation by seven persons from at least October 2021, October 2021 being after the date of the Licence commencing, the Respondent had no direct evidence of the precise actual date. The Tribunal considers that the Respondent relied on the assertions on behalf of the Applicant set out above.

129. The Tribunal particularly notes that the Applicant's first response to the Respondent in relation to occupation by six persons stated that she did not know when anyone moved in other than the first tenant to occupy, who moved in on the first date of the tenancy, so 16th July 2021. That response [179] has been quoted above.

130. That first response was dated 24th May 2022. At that time the Applicant denied that she had committed any offence because of asserted agreement with the Respondent. Nothing of that turned on the date on which the seventh occupier with a right to occupy from July commenced that occupation. There is nothing to suggest the answer given by the Applicant was anything other than an honest one.

131. The Tribunal further took account of the Applicant's oral evidence that in October 2021 a tenant sought a further parking permit (it was not specifically clear whether that was a seventh one or not, although that was the implication). The Applicant said that she assumed when responding to the Notices that the seventh tenant had not been there earlier. She said that she did not know when the tenant moved in.

132. The Tribunal accepted that the oral evidence given to the Tribunal in respect of the above was cogent, credible and correct, not least in light of its consistency with the written evidence of the Applicant's response to the Respondent prior to any action against her.

133. The Tribunal finds the time of request for a parking permit is good evidence of no more than that. It does not indicate when the seventh tenant moved in, whether the tenant only obtained a car or moved the car to Bath in October 2021, or anything else about what caused the permit to be requested at that time. It is not positively inconsistent with the tenant moving in around or about that time- which could be a number of days either side of it- but goes hardly anywhere in enabling the Tribunal to be sure that the tenant moved in after 21st September 2021.

134. The Tribunal regards the weight of evidence against known occupation of the seventh occupier in October 2021 to substantially outweigh the contrary evidence.

135. The Tribunal is acutely conscious of the finding made by it and the fact that, as explained below, that is favourable to the Applicant's case. The Tribunal is similarly conscious that it does so in the face of the previous contrary written statements by or on behalf of the Applicant.

136. The Tribunal has considered carefully whether those statements should have led it to reject the Applicant's evidence that she does not know when the seventh tenant moved in and that it was after 21st September 2021. The Tribunal has considered carefully whether the evidence should have led it to be sure that there were seven persons in occupation only after the date on which the Licence was granted. The Tribunal has considered carefully how to deal with the statements by the Applicant prior to proceedings.

137. The Tribunal considers that it can only impact on the credibility of the Applicant's evidence that the position adopted at the time of the Notices when it may have suited the Applicant to assert that she had done nothing which might be criticised prior to the issue of the Licence had

changed substantially upon the identification of the potential argument about clause 25.

138. The Tribunal nevertheless finds that the information stated in the responses on behalf of the Applicant to the Notices was not correct. The Tribunal is unimpressed by that. Nevertheless, that fact of being unimpressed is not determinative of the case.

139. The Tribunal does find that the oral evidence of the Applicant that she did not know the date of occupation of the tenants other than the first to move in is correct.

140. There is no specific evidence that the Applicant knew that the asserted dates in October were correct at the time of them being stated to the Respondent as opposed to them conveniently fitting the Applicant's arguments being run at the time. There is no evidence that the earlier statement made in June 2022 was wrong.

141. If the June 2022 statement had not been made, matters may have taken on a different complexion but there is no merit in pondering situations which did not arise. As it is, the statement in June 2022 is the only one which pre-dates formal action by the Respondent and nothing else contemporaneous with it casts doubt on it.

142. That leaves the Tribunal unaware of the dates on which the occupiers commenced occupation. That is regrettable. It is possible that there were not seven occupiers by 21st September 2021: it is possible that there were.

143. It is especially regrettable for the Respondent, the case of which would have been greatly assisted had the Tribunal found that there were not seven occupiers until after 21st September 2022.

144. The Tribunal mentions that the impact on the credibility of the Applicant of its finding that the statements in response to the notices later in 2022 were not correct did affect the Tribunal's consideration of her evidence in respect of reasonable excuse, although that was not determinative of anything in the event.

145. The Respondent did not send to the Applicant any communication following the application for the Licence asking the Applicant to confirm that the information provided in the application remained correct or asking for any information as to any change in the position. The Respondent did send to the Applicant the draft licence on 19th July 2021, which stated that it would be a licence for six persons. However, it did not require her to respond about it.

Other matters

146. The Applicant did not inform the Respondent when the seventh person moved into the Property and did not inform the Respondent of anything

else with regard to the particular room to be occupied ceasing to be used as storage or about the agreement for the seventh person to move in. The Applicant did not respond to receipt of the draft licence by informing that Respondent that in fact there would be seven occupiers of the Property rather than six.

147. The Property was suitable to be licensed for seven persons living in seven households, as has subsequently been permitted by the Respondent.

148. There was no change to the layout of the Property between the application for the Licence and the grant of the Licence.

149. There was of course the change to the use of the lower ground floor room. However, that room in itself remained the same shape and size and otherwise the same. The contents of it being altered does not constitute a change to the layout of it or of the Property as a whole.

150. Save for the change to the use of the lower ground floor room and the contents of it, the Property remained as it had been at the time of the application for the Licence.

151. The Respondent has a neurologically divergent condition which may fall within the autistic spectrum. The Tribunal cannot make any finding beyond that.

152. The Tribunal does not make any positive finding that the condition is such as to be medically defined as autism itself. The undated report [259] on which the Applicant relies is only five lines long, of which three are only part lines. The first and second state that the Applicant was given a neurodevelopmental assessment in January/ February 2021. The last invites contact for further information.

153. That leaves one and a half lines of medical opinion, which reads as follows:

> "She provided background details which, in addition to the clinical interview, indicated that she would fulfil the diagnostic criteria for autistic spectrum disorder."

154. The Tribunal finds that statement falls some way short of a firm diagnosis of autism spectrum disorder, gives no hint of where on what is a wide spectrum the Applicant falls and further gives no indication of any particular features pertinent to the Applicant- and indeed still less features pertinent in relation to the circumstances of this case.

155. The medical evidence provided on behalf of the Applicant, which the Tribunal understands to be in response to the Respondent asking for such evidence in light of comments by the Applicant, stating relevant medical features is inadequate for the Tribunal to have evidence of any specific features of the Applicant's condition, including the severity of it and the effect of it hence its relevance to the issues in this case.

156. The Tribunal was mindful that the Applicant appointed managing agents from 1st May 2022 and that she stated to the Respondent that the management of the portfolio was placing "far too much stress on me and having an (sic) significant adverse affect (sic) on my health". That is accepted by the Tribunal as evidence of just what it says. However, that is very general.

157. The Tribunal also noted the oral evidence of the Applicant herself that her condition- she described it as autism but the Tribunal does not accept the evidence receives enables it to go that far. She said that required her to be extremely, almost excessively, consistent and to have rules about how to go through life, which was indicated to support her belief that she had permission for this Property for seven in line with the permission for increases in occupancy for other properties. The Tribunal makes clear that it does not discount that- and finds it is of some assistance as explained below where relevant- but still finds that inadequate on which to reach any clear conclusions about the specific nature of the Applicant's condition.

158. For the avoidance of doubt, this case is not on all fours with *Marigold*. The Respondent did not positively tell the Applicant the equivalent to what was found in that case, i.e., it did not state that the Property was licensed for seven occupiers or was permitted to be so occupied (save effectively in clause 25), at least prior to mid- 2022.

## Application of the Facts found

- **Was an offence committed?**

159. The Tribunal determined that no offence was committed by the Applicant in the quite particular circumstances, for the reasons explained below.

160. In a nutshell, the Tribunal determines that the Applicant is entitled to rely on clause 25 of the Licence. The Tribunal deals with each relevant element of the dispute under a separate sub- heading below, explaining why it agrees with the Applicant's representative and the Applicant about that and why it rejects the Respondent's arguments to the contrary.

161. That determination in no ways seeks to condone the Applicant's approach, which is quite rightly criticised. However, that does not alter the proper approach to be taken to the legal questions. The Tribunal has had careful regard to the purpose, practice and statutory provisions of licensing, all which serve important aims. Whilst this Decision arguably does not aid those in this particular case, that reflects it being so particular and where the outcome must properly be regarded very much as an exception and not a rule.

162. The Tribunal also takes the opportunity to clarify one matter with regard to the findings of fact made. That is that given the argument raised by the Applicant that there had been no offence in light of the terms of the Licence, the Tribunal considers that it was for the Respondent to prove to the criminal standard that the Applicant could not rely on the effect of clause 25 of the Licence and to prove that there were six or fewer occupiers at the date of grant of the licence. There being more occupiers than the Licence allowed is an element of the offence which the Respondent sought to prove had been committed. It was for the Respondent in the course of that to prove that there were not already seven occupiers as at the date of the Licence. (It is not in contrast part of the defence of reasonable excuse which is for the Applicant to prove.)

163. Given the Tribunal's finding that the Respondent failed to prove that, necessarily the fact applied in respect of the number of occupiers is that there were not only six or fewer occupiers as at the date of the grant of the Licence.

Does clause 25 apply-

164. Whilst there had been no hint of it during the course of matters until a few weeks before the final hearing, in the Applicant's "Submissions against Imposition of a Civil Financial Penalty" dated 11th May 2023 [321- 328], the argument was advanced that in fact there was no licensing offence committed because of the terms of clause 25. Specifically, because the number of occupiers exceeded the number allowed for in the Licence at the time of the Licence being granted and the terms of the Licence only required that the number of occupiers was reduced to six no later than twelve months after the start date for the Licence.

165. Whilst not specifically stated, it must necessarily have formed part of the Applicant's case in order to run the argument that Schedule 3 of the Licence did not state otherwise, as indeed it did not.

166. Mr Cain argued that there was a clear statement from the Applicant that the occupation of the property was not in excess of the Maximum permitted number at the time of grant of the Licence- see the Applicant's statements in response to the Notices- and therefore Clause 25 would not apply. He said that at the time of the issue of the licence the "present occupation of the property" was not in excess of the maximum permitted number. Hence, clause 25 was not relevant.

167. That would of course have been a good argument in the event that the Tribunal had found the statements about the date of occupation of seven persons in response to the Notices were correct. It necessarily falls away on the basis of the finding of fact made by the Tribunal that it has not been demonstrated that there were only seven occupiers after the date of issue of the Licence. There was also the statement by the Applicant at the time of application for the Licence that occupation would be by six persons but that was made some approximately nine months earlier. The

Tribunal need not repeat the findings of fact about that and subsequent matters.

168. So, at first blush on the facts found, clause 25 applies.

The first page of the Licence point

169. Mr Cain's referred in oral closing to wording on the first page of the Licence. Of all the matters raised and discussed, the Tribunal considers that the key point, other than findings of fact, on which this case ultimately turns is the construction of the words "the information provided in the licence application being accurate".

170. The Respondent's argument rests on the specific wording used being construed to mean not only those clear words but also in effect the additional words or meaning 'and is still accurate as at the date of the grant of this Licence". The particular series of words plainly do not appear on the face of the Licence (nor indeed any similar words).

171. In construing the wording of the Licences, the usual approach to construction of documents must apply- there is no reason to depart from that. However, rather stating the obvious, the Licence is not a contractual document: it has not been agreed between the parties. The Licence is the Respondent's document and the content of it is not a matter for the Applicant. There are requirements imposed on the Applicant but they are not contractual ones.

172. The Tribunal is not therefore seeking to identify the agreement between the parties as demonstrated by the wording used and other relevant considerations in order to discern the nature of the agreement. The Tribunal often refers to, and indeed quotes, the judgment of Lord Neuberger in *Arnold v Britton* [2015] UKSC36 , in which it is said that provisions should be construed in the manner that the reasonable reader (an objective test) "having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean…….. by focussing on the meaning of the relevant words……. in their documentary, factual and commercial context." That meaning has to be assessed "in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

173. The Tribunal often goes on to observe that context is therefore very important, although it is not everything and that Lord Neuberger went on to emphasise that "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the

parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

174. That relates specifically to the interpretation of a lease but applies as well to construction of other contractual documents. The Tribunal re-iterates that the Licence is not one of those. There was no negotiation as to its contents. Those were decided by the Respondent alone. The Applicant could take them or leave them.

175. If relevant, the Tribunal would determine that a position akin to the contra proferentem rule applies and so any ambiguous clause should be construed giving a meaning which works against the interests of the party who provided the wording for the clause. The rule itself relates to contractual interpretation and so does not directly apply where the Licence is not a contract.

176. That said the fact the Respondent has "control over the language that they use..... And ..... the parties must have been specifically focusing on the issue covered by the provision when [deciding]the wording of that provision" is of relevance.

177. The Tribunal accepts that there is some merit in the Respondent's contention. It is possible to construe the words as meaning that the information was and is still accurate. However, it is also entirely possibly to construe them as meaning exactly what they appear to say, namely that the information in the application was accurate.

178. The Tribunal can well understand that the Respondent wished the information which had been provided in the application form to be correct as at the date of grant of the Licence, and why. The Tribunal is mindful of the purposes of the licensing regime.

179. However, the Tribunal does not consider that it can place the interpretation on the Respondent's own words that the Respondent wishes and considers that to attempt to do so would be to seek to stretch them too far in favour of the party which supplied and contrary to that which the words used clearly and simply state. That is that the applicant for a licence provided accurate information in the application.

180. The Respondent's argument on this point therefore fails.

<u>The wider condition precedent argument</u>

181. Mr Cain also submitted that if the Applicant was resiling from the statement in the application (or he may have meant the statements in response to the Notices but it matters not which of those it is for these

immediate purposes) then for the Applicant to be able to invoke clause 25 it is a condition precedent of the Licence that the information contained within the application (including layout) was accurate at the time of issue of the licence.

182. He argued that in this case, the information was not and therefore Clause 25 cannot be invoked.

183. The Tribunal understood that to rely in part on the wording quoted above but not to be limited entirely by that, such that it was argued that there was a condition precedent more generally.

184. The Tribunal determines that whether or not there was a condition precedent is separate to whether the Applicant may seek to resile from a previous statement. The wording of the Licence is either such as to include a condition precedent or it is not.

185. There is not, the Tribunal determines, a condition precedent on a basis going beyond the particular wording discussed above that the Licence rests on the information in the application remaining accurate at the date of grant of the Licence. In particular that the provision in clause 25 that there will be no breach of the Licence if there are more occupiers than permitted by the Licence already in occupation at the time of the grant of the Licence is not determined to rest on such accuracy.

186. The Tribunal has found that the information in the application for the Licence was accurate. Hence, any condition precedent resting on such accuracy would be fulfilled in any event.

187. There is nothing else within the Licence which the Tribunal determines demonstrates that the grant of the Licence is subject to the information in the application form remaining accurate as at the date of the grant. The question then becomes one of whether any other document creates that condition.

188. Mr Cain argued (setting it out verbatim from the Skeleton Argument) that by having accurate information as to occupancy before the issue of the licence it allows the housing authority to consider any transitional requirements that may be necessary relating to health and safety, public health, and minimum standards that any existing excess occupational limits may cause and it also ensures that any occupants, whether present or with a right to occupation, are aware of the position in respect of their occupation in an HMO.

189. The Tribunal entirely understands the sense and logic in that. However, the question is not one of the wider sensibleness and logic of what the Respondent wants but rather whether the Applicant was in breach of the actual terms of the Licence as granted.

190. It is said, and not unreasonably, that an applicant ought to make the Respondent aware of any change in the position between the application

for the Licence and the grant of the Licence. That is doubly so if the given applicant knows the terms of the licences granted by the Respondent- which the Tribunal considers that the Applicant ought in general terms given her other properties- and in particular knows of the existence of the particular clause and seeks to take advantage of it.

191. In relation to that point, it is clear that the Applicant does know about it now. However, there is no evidence that she did at the time and indeed the way the Applicant's case was argued in response to the Notices and prior to its rather late change, strongly supports the view that the Applicant was entirely unaware.

192. The Tribunal finds that the fact that their ought to be knowledge of the terms of the licences generally does not equate to a finding that there ought to have been knowledge of the specific provision, whether in general or more specifically as the foundation of a breach by the Applicant of the Licence granted.

193. As the Tribunal has noted above, there was correspondence to the Applicant in July 2022 with a draft Licence. It is apparent that there was an expectation on the part of the Respondent that the Applicant would inform the Respondent if anything were not correct.

194. The first quoted paragraph simply giving an "opportunity" to comment does not take the Respondent anywhere. The second that "you must tell us" "if you disagree" gets closer to sustaining the Respondent's case.

195. The letter does not, on the other hand, adopt what would have been the clearest approach and require the Applicant to inform the Respondent if anything is (now) incorrect. Disagreement with the contents is somewhat subjective. The contents being as a fact correct or not is objectively identifiable.

196. The Tribunal does not know whether the Applicant disagreed or not in terms. That was not stated in her case and not specifically put to her in questioning.

197. The Tribunal infers that the Applicant gave the point no thought at all and hence did not actively disagree. That would leave nothing for the Applicant to tell the Respondent about under the particular terms of the correspondence sent to her.

198. The letter did not indicate any consequence of the content of the draft licence being incorrect. It did not state any consequence of the Applicant not taking the "opportunity" or of not informing the Respondent if she did indeed disagree with anything. It did not state in clear terms that the Licence which it was proposed would be granted specifically relied on the details set out in the draft being correct and in the absence of the Applicant informing the Respondent otherwise.

199. The letter did not state that there would be any impact on the validity of the Licence or on the Applicant seeking to rely on any provision contained within it.

200. The letter attached some additional information, but none of that takes matters any further in the Tribunal's determination.

201. It was never beyond the realms of reasonable possibility that in the nine months between the application and the grant of the Licence there might have been a change. It was entirely sensible for the Respondent to seek confirmation close to the date for issue of the Licence.

202. However, whilst the Tribunal repeats that it understands what the Respondent intended, in the event the Tribunal determines that the Respondent did not go far enough to create a position that lack of response by the Applicant and lack of information about any changes affects various contents of the Licence and in particular affects the application of clause 25.

203. The Tribunal unhesitatingly determines that the Applicant should, using the term in a general sense, have contacted the Respondent. However, any obligation of what might be termed a moral nature is somewhat different to the License actually requiring it. Whilst the Respondent's Skeleton Argument sought to suggest that there may be a legal obligation, the Tribunal rejects that.

204. It follows that the Tribunal finds that the Respondent has not proved that the lack of response to the letter or any other lack of information from the Applicant goes so far as to prevent clause 25 operating as it states.

205. The later letter dated 21st September 2021 enclosing the actual Licence does not add anything to the Respondent's case. Whilst the Applicant is quite properly informed that an offence is committed if the conditions are not met, those conditions include there being no offence if the maximum occupancy is exceeded for less than twelve months and ask nothing of the Applicant other than to display the Licence at the Property.

206. If clause 25 were not included in the wording of the Licence, the issue would not arise. The Licence would be for a given number of persons to occupy and if there were actual occupation by more persons than that, the terms of the Licence would be breached. An offence would be committed.

207. It is, however, entirely right the Tribunal considers that clause 25 or an equivalent clause is included in the wording of a licence. In the absence of such a clause, a landlord might be persuaded to seek to reduce the number of occupiers to a number which complied with the terms of the Licence and to find ways of obtaining possession against one or more

occupiers, whether by legal means or otherwise. Such landlord ought not to do so of course but that is not the point.

208. The occupiers would have security of tenure to one extent or another dependent upon the basis of their occupation but most commonly that would be as assured tenants from whom possession could not lawfully be recovered unless a ground for that existed. It is right for the Respondent to include a provision which does not unduly impact on that security of tenure. (The Tribunal observes that if there were for example seven occupiers who had security of tenure beyond twelve months from the date of grant of the Licence, there would still be an impact on them and the Respondent might need to vary the terms of a given licence where that arose, but that is no directly relevant to this case).

209. The Tribunal has no doubt that a purpose of clause 25 is to avoid any difficulties with existing occupiers continuing to occupy the given property and to recognise their right to so occupy.

210. The Tribunal records that it does not, albeit that it is directly relevant to the determination, consider that clause 25 or an equivalent clause ought to be removed. Rather the Licence ought, if the Respondent considers that a step appropriate to avoid the probably very rare issue which arose in this instance, be linked to the information in the application remaining accurate or there ought to be a very specific requirement for an update to that information prior to grant in some fashion and perhaps sufficient to create a condition precedent, perhaps coupled by suitable terms in the Licence. However, the precise mechanism and any effects of accurate up to date information being given or not given are beyond the scope of the Tribunal's jurisdiction and it is not for the Tribunal to proffer advice. The Tribunal observes that if a situation such as this one is as very rare as the Tribunal perceives, it may be that any attempted solution may prove more problematic than the ill it seeks to secure.

211. It is not relevant to the determination reached by the Tribunal but it may be of relevance to the Respondent when considering whether the terms of its licences should be amended, that the current wording limiting the period of over- occupation to twelve months imposes a limit to the benefit achieved by the landlord. The Tribunal considers that the ill of having over- occupation for a period is a lesser one than no licence being applied for and a property therefore continuing to be unlicensed. It is also not relevant to the determination of the condition precedent point or any breach of the Licence, but it merits repeating nevertheless, that the Applicant achieved no additional rent for the Property than she would through letting to six, unusual thought that perhaps is.

Implied terms?

212. The Tribunal has, it will be appreciated, considered above the actual wording of the Licence granted. It has not considered additional wording which might be implied as added into the terms of the Licence, which is in effect what the Respondents seeks to argue should occur.

213. The Respondent seeks wording to be implied to make there a provision that the accuracy of the information given at the time of the application remains accurate at the time of grant of the Licence.

214. The Tribunal does not consider that terms can properly be implied.

215. As discussed above, the Licence is not in terms an agreement between the parties. There is no negotiation as to its provisions. Save for the number of occupiers sought to be permitted to occupy, the landlord has no say in the provisions. The Respondent is able to decide the terms of the licences it grants.

216. The Tribunal considers that there is no basis for taking an approach equivalent to implying terms to give business efficacy. Nor does the Tribunal consider that there is any other legal basis for implying terms into the Licence granted by a local authority, whether in favour of the local authority whose own wording the Licence contains or otherwise.

217. The notion of implying a term not required for business efficacy or similar but to correct any arguable defect in drafting by a party and in favour of that party's interest and thereby causing the other party to commit a criminal offence is a very difficult to entertain. The Tribunal does not do so.

Other related points

218. The Tribunal is mindful that there may be an argument which could be run if circumstances went beyond a condition precedent that the housing authority should be informed of changes to the situation and went so far as to amount to bad faith on the part of the applicant landlord. However, no such argument was advanced by the Respondent, no submissions were received about the potential point and the Tribunal does not consider it appropriate to speculate about the appropriate answer if such an issue fell for consideration in a future case.

219. The Tribunal did not in the event consider that anything turned on the Applicant's medical situation, insofar as the evidence enabled that to be discerned and taken into account.

220. However, insofar as the Respondent asserted that the Applicant should at the pre- licence inspection not only stated what the lower ground floor room was being used for but should have also explained what it would be used for a few months later, it may have had bearing on the approach to be taken that the Applicant is said in the brief medical report to be on the autistic spectrum. It may be that widely-held belief that persons with autism are likely to take matters more literally than others without autism- which may or may not be correct for any given individual person and to any specific extent- would have been relevant to an assessment of what she said to the Respondent's officer and the significance of that in

the context of this case, including how the Respondent should have approached matters.

221. In light of the matters above, it is not necessary to venture into that and in the absence of more than cursory medical information, the Tribunal considers that it would have been dangerous to attempt to do so.

222. Similarly, given the finding of fact made, it is not determinative whether the tenants having the right occupy the Property from July 2021 means that there were seven occupiers for the purpose of clause 25 irrespective of whether they actually physically occupied at that time. Mr Hart sought to argue that the date of the right to occupy was the irrelevant one in any event.

223. The Tribunal observes that for the purpose of whether there has been a licensing offence committed, the Tribunal have considered actual occupation and have not treated occupation occurring and, where relevant, an offence as committed until the relevant occupier or occupiers who meant a licence was required went into physical occupation. Likewise, the offence has been treated as ceasing to be committed when the number of physical occupiers fell below the number required for licensing because another or others had left for good (temporary absence during student holidays or other temporary absences from the given property being entirely different).

224. If this case had turned on seven persons having a right to occupy as at the date of grant of the Licence but not, let us assume for these purposes, being in physical occupation, the Tribunal would similarly have found no offence committed, the tenancy starting before the date of the grant of the Licence. The Tribunal considers that there is a potential distinction between cases such as this in which there is one joint tenancy and arguably the occupiers can come and go from the time the first enters until the last leaves, on the one hand, and cases in which multiple occupiers have individual tenancies for individual rooms, on the other. The exception in section 259 of the Act about properties occupied by students being treated as their only or main residence would not have been regarded as relevant on the particular issue.

225. However, as nothing turns on the matters in the above paragraph in this instance, it is not necessary to say more about them.

Licence invalidated generally?

226. Finally, the Skeleton Argument of Mr Cain ventured briefly into an argument that the Licence as a whole might be invalidated entirely by the information contained in the application for the Licence being inaccurate. Wisely he did not pursue that argument at length in the hearing.

227. The Tribunal has not found the information contained in the application to be inaccurate, or the information subsequently provided in response

to any specific later request of the Applicant to be inaccurate (none having been demonstrated). Hence the basis for the argument as advanced falls away.

228. However, even if it had found the information to be inaccurate, the Tribunal considers that it is very likely that it would have determined there to be a licence in place and any effects would not be sufficient to invalidate the Licence in its entirety. The Tribunal again does not find it beneficial to dwell on an issue which does not arise where so much else does and this Decision is consequently lengthy.

- **Was there a reasonable excuse?**

229. The Tribunal seeks to deal with this aspect without undue length in light of the above determination that no offence was committed.

230. In the absence of there being an offence unless reasonable excuse were made out, it matters not whether there would have been a reasonable excuse or there would not. In contrast, the defence would have been of significance in the event of a licensing offence being committed. The Tribunal sets out it determination with to regard to reasonable excuse briefly and in case it should subsequently be held to be wrong in its determination of the lack of an offence. In those circumstances the question merits less discussion than it would have in the event that the case had turned on the point.

231. In brief terms, the Applicant contended that due to her personal circumstances (stress) and a misreading of emails primarily caused by her medical condition and a belief that an agreement made for at least one other HMO owned by the Applicant (55 Claude Avenue) also applied to the Property [317]. The Applicant had set out her position at some length prior to the Notices, by email 24th June 2022 [217]. The Respondent expressed sympathy for Applicant in respect of her medical condition and the circumstances that she found herself in with the Covid- 19 pandemic, it argued that those matters must be considered alongside the Applicant's experience and involvement with HMOs. Hence, the Respondent contended that there was no reasonable excuse.

232. The reasonable excuse would have been for failing to have a licence for seven persons rather than six. That is somewhat different to the usual situation in which it is argued that there was a reasonable excuse for there being no licence at all. The question would have been therefore whether there was a reasonable excuse for permitting seven occupiers rather than the six occupiers maximum licensed.

233. The Tribunal determines that the Applicant did not have such a reasonable excuse.

234. If clause 25 had not applied and resulted in the lack of commission of an offence, the Applicant's evidenced medical problems and the fact of the Covid-19 pandemic would not have amounted to a reasonable excuse.

The pandemic made many matters difficult for a very large number of people with medical conditions of one type or another, but the Tribunal considers is not relevant in this instance.

235. It is not apparent that there was a problem with lack of contractors for necessary works because of the effects of the pandemic, for which there might have been clear evidence. There is not medical evidence demonstrating a certain level of exacerbation of medical condition or effects of that- the actual report produced by the Applicant in evidence says nothing of assistance to her. There is only somewhat general assertion by the Applicant, which is insufficient in this instance.

236. The Tribunal accepts that the Applicant appears to have perceived that she would be able to sort out a licence for seven persons with the Respondent and would be able to sort out any relevant planning permission, although that seems to the Tribunal to be more based assumption than anything which the Respondent demonstrably induced her to believe. The Tribunal does not accept, even allowing as far as it can for such of the Applicant's asserted medical position as the evidence supports, that there was a basis for the Applicant considering that she had been given permission for seven.

237. The Tribunal accepts that as the Applicant received no increased rent, there was little incentive to accept a seventh occupant which might cause her difficulties for what the Tribunal has found to be no gain. Hence, some support is lent to the Applicant's position that she thought seven occupiers would be agreeable by that, and indeed by the Respondent's later acceptance of the Property as suitable for seven.

238. Equally, the extent of the Applicant's property portfolio- eighteen properties with variously 4 to 8 occupiers permitted, so over 100 occupiers overall- and at least ten years of letting properties, as the Tribunal found, is such that she had a high degree of experience and knowledge. The fact that there had been previous communication from the Respondent to the Applicant specifically related to the numbers of persons for which properties were licensed and about the need to vary that is also relevant to the Applicant's reasonable knowledge. So too is previous communication about planning permission.

239. There is nothing in the communications related to 55 Claude Avenue which demonstrates or even reasonably indicates that the Respondent had given permission for seven households in this Property prior to there being seven occupiers or that the Respondent had said that it would do so.

240. In any event, ignoring clause 25 and the findings made, a licence stated on its face as being for six persons would plainly have been for just that. The Tribunal does not accept that any communications about other properties owned by the Applicant some time prior to the grant of the Licence reasonably could lead to the Applicant believing that a licence specifically stated to permit six persons in fact intended to apply a wider

potential agreement and so permit seven contrary to what it stated. The planning permission did not enable more than six occupants and cannot reasonably be interpreted as doing so.

241. There could be no reasonable belief that the Respondent had permitted occupation beyond the stated maximum permitted.

242. The Tribunal determines that even allowing for what little is demonstrated of the Applicant's medical conditions, there was no reasonable basis for belief that occupation of the Property by seven persons was permitted (save in the particular circumstances found regarding clause 25 in the event). Hence, if there had been an offence committed, there would have been no reasonable excuse for it.

- **What would be the correct level of financial penalty?**

243. In a similar vein to the approach to the question of reasonable excuse, the Tribunal deals briefly with the level of financial penalty and again in case it may subsequently be held to be wrong in relation to the previously addressed elements of the case. The Tribunal does not, for example, address each of the factors set out in the Guidance one by one.

244. The Respondent argued that the level of £1700.00 was appropriate. Mr Cain cited in his Skeleton Argument the following factors:

- The Applicant was a significant HMO Portfolio holder.
- The Applicant had been provided with information and advice about all aspects of HMO licensing including variations (see above).
- The Applicant had made application for a licence for 6 occupants and had not advised the Respondent of the change in intention regarding occupancy of the property either during the pre-licence inspection nor at the time of the circulation of the proposed licence and therefore there had been some form of concealment.
- The Applicant had already had the benefit of educational letters in respect of section 72 offences
- Poor general legal obligations compliance in respect of the property (no Energy Performance Certificate and absence of correct planning permission).

245. The Respondent had, it was explained in the written statement of Ms Crowley, met to consider the representations made by the Applicant in response to the Notice of Intention. The Applicant particularly argued that the contention by the Respondent that there had been a "deliberate breach and flagrant disregard for the law" was incorrect and there was double counting. The level of culpability was original assessed as very high with two aggravating factors, for reasons explained. The Tribunal considers that the Respondent had gone too far at that stage, as the Respondent plainly later accepted.

246. The Respondent reduced the level of culpability to "High" and removed the above aggravating feature following a meeting on 19th October and legal advice [270- 271 in particular], so leaving the "poor track record……." factor. The Respondent reconsidered matters at a meeting on 6th December 2022 [272].

247. The Tribunal determines that the Respondent considered and applied its policy.

248. It is not an easy task to assess the particular matter of the level of financial penalty for the alleged licensing offence ought to have been where the Tribunal has found there to be no offence committed. However, the Tribunal does consider that the Respondent's application of its policy could stand as correct in light of the findings of fact made by the Tribunal.

249. The level of harm being low must be correct given, amongst other matters, the Property was suitable to be licensed and was assessed as being suitable for seven occupiers as well as six. The Tribunal accepts that in general the standard of the Property was good to high.

250. The Tribunal considers that culpability as medium would have been correct.

251. The Tribunal finds that the Applicant treated matters as being that the Respondent would permit what she needed it to and was unduly blasé about what are important matters. That is considered by the Tribunal to reflect her previous experience of certain dealings with the Respondent, so to a modest extent it was contributed to by the previous approach adopted by the Respondent. However, the Tribunal considers that it would be wrong to attribute much fault to the Respondent and rather the Applicant bears the bulk of that.

252. The most obvious feature of the Respondent's approach to the assessment in the Final Notice which could be called into question is the reliance on the assertion that Mrs Vercoe advised Mr Carroll that the lower ground floor bedroom would be used for storage purposes only and not let as a bedroom, which the Tribunal has not found to be proved. The Tribunal does not find its decision in respect of tenant fees on a very particular basis to support the Respondent's approach, whereas the Respondent regarded that as relevant. Whilst a tenant complained that the kitchen was not suitable for seven persons, it was unchanged from the date of the tenancy agreement and was not found by the Respondent to be unsuitable, and so that ought to have been given no weight.

253. Taking those matters with the other facts found by the Tribunal, the Tribunal determines that the Respondent's assessment of high was excessive.

254. Given the Applicant's extensive portfolio and experience and the other circumstances found, the Tribunal considers that the culpability cannot properly be assessed as low.

255. The Tribunal notes that the Respondent's Policy provides for the starting point for low harm and medium culpability to be £600, with a range from £250 to £1200. The Tribunal considers £600 to be appropriate.

256. The Tribunal notes that the Guidance require that local housing authorities- and by extension the Tribunal in the event of an application to the Tribunal, make an assessment of a landlord's assets and any income they receive (not just rental income). That is of course subject to the information received on which any assessment can be undertaken.

257. The Applicant appears to have provided to the Respondent a statement of the financial position of a company Javerline Limited [267] but the precise relation of that to the Applicant in terms of capital and income is unclear. The Tribunal does not find it or any other evidence to alter the level of the penalty from the starting point got medium culpability and low harm

258. The Tribunal considers that the Respondent would have been correct to apply an aggravating factor and that there was a poor previous record of compliance for the reasons set out by the Respondent in the last Financial Penalty Assessment Sheet [279-282]. The Tribunal notes that there was no Energy Performance Certificate registered for the Property and that the Property was not exempt.

259. However, the Tribunal considers that an aggravating factor of £500 on a figure of £600 would require the aggravation to be extreme. The Tribunal does not regard it as being. The Tribunal notes that where the original figure had been £3000, the aggravating factor (and the other original one) had been set at £100, so one- third of the figure for the harm/ culpability matrix. When the Respondent reduced the figure harm/ culpability figure to £1200, it had reduced the aggravating factor to 40%, so £500.

260. The Tribunal determines that one- third is the appropriate level and hence the aggravating factor should add a further £200.00.

261. If the Tribunal had determined there to have been an offence committed, the Tribunal would have considered the level of financial penalty to be £800.00.

**Conclusion and observation**

262. The Tribunal is not satisfied beyond a reasonable doubt that the Applicant was committing an offence under section 72(2) of the Act, the Property being licensed and the Respondent having failed to prove the Applicant to be in breach of the terms of the Licence.

263. Given that the Tribunal has found that the Applicant could not reasonably have believed that seven occupiers had been agreed to by the Respondent and she did not inform the Respondent of the fact that there would be seven occupiers, despite the Respondent being unaware of that and the Licence, save because of clause 25, permitting six, the Tribunal could understand dissatisfaction with the Applicant not having been found to be in breach of the Licence and thereby to have committed an offence.

264. The Tribunal considers that it is less than entirely satisfactory that this case turned on precise wording of the Respondent's Licence to the Applicant and to a lesser extent the precise wording or correspondence. However, the Tribunal observes that the issue identified is a very particular one and turns on the quite specific circumstances encountered in this individual case. This is not a decision which is likely to be relevant to many, if any, other cases.

265. The Tribunal further considers that the issue may be easily resolvable going forward, should the Respondent wish to address it, by modest change to that wording, although that is a matter on which the Respondent must take its own advice and it is not for the Tribunal to proffer that.

266. It might also be considered that it is better for the point to have arisen in a case where the Property was entirely suitable to have been licensed for seven persons as well as six and no detriment was caused to any of the occupiers by the lack of a Licence for that extra person for the relevant period.

267. It should be made very clear, for the avoidance of any possible doubt, that the above observations are no more than that. Nothing in this Decision turns on those matters.

**Fees**

268. The Tribunal determines that as the Applicant has succeeded in the application, the fees paid by her should be repaid to her by the Respondent.

269. The most common outcome is that fees follow the event, so a successful party will usually have its fees paid by the unsuccessful party. The Tribunal considers that to be appropriate in this case. The Applicant had been considered to have committed a criminal offence and necessarily was required to apply to the Tribunal if she sought any contrary determination.

270. The fact that the Property was not in fact licensed for the seven occupiers and there was no reasonable excuse and the Applicant's success rests on the particular wording of the Licence granted by the Respondent only argued by the Applicant after the proceedings had commenced and where statements had previously been made contrary to that, all merits

weighing in relation to whether the fees should be repaid by the Respondent. They lend some weight to determining that the Respondent should not have to repay the fees.

271. However, the Tribunal considers those features are ultimately insufficiently weighty overall to result in it being appropriate for the successful Applicant to bear any or all of the fees, hence the determination made.

## RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case and is to be sent by email to rpsouthern@justice.gov.uk.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.