



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

**Case reference** : **LON/00BK/HNA/2022/0078**

**Property** : **501 Jerome House, 14 Lisson Grove,  
London NW1 6TS**

**Applicant** : **Quest Estates Ltd trading as Fraser & Co**

**Representative** : **Keith Fraser, a director**

**Respondent** : **Westminster City Council**

**Representative** : **Tazafar Asghar of counsel**

**Type of application** : **Appeal against a civil penalty notice**

**Tribunal** : **Judge Adrian Jack, Tribunal Member  
Rachael Kershaw BSc**

**Date of Decision** : **15<sup>th</sup> May 2023; set aside and remade  
23<sup>rd</sup> June 2023**

---

**DECISION**

---

**Covid-19 pandemic:**

Description of hearing: This has been a face-to-face hearing on 9<sup>th</sup> May 2023.

## **Set aside and remaking**

The Tribunal made the decision set out below on 15<sup>th</sup> May 2023. Due to an administrative error on the part of the Tribunal, the decision was not sent to the parties. In consequence the time for the applicant to make the payment of the penalty at a reduced rate has elapsed. In accordance with rule 51(1) and (2)(a) of the Tribunal's Procedure Rules, the Tribunal sets aside its decision of 15<sup>th</sup> May 2023 and remakes the decision with effect from today's date. The time for the applicant to pay the penalty at the reduced rate accordingly runs from today.

## **The procedure**

1. On 1<sup>st</sup> September 2022 Westminster City Council issued a civil penalty notice against Quest Estates Ltd ("Quest"). The breach alleged was that on 1<sup>st</sup> April 2022 Quest had control of the property, which was an HMO ("house in multiple occupation"), without an HMO licence. Westminster imposed a civil penalty of £10,000, reduced to £8,000 if Quest paid within 28 days. Quest now appeal against both liability and quantum.

## **The facts and the law**

2. The property comprises a self-contained flat with one double bedroom and one single room. By an agreement dated 4<sup>th</sup> May 2021 Rimal Properties Ltd ("Rimal") let the flat to Alex Facciorusso, Kimberly Ruth Sing Tze Moh and Sofia Sanna Serrano for a term of one year from 13<sup>th</sup> May 2021 at a rent of £2,296.67 per month. The managing agent was and is Quest. By paragraph 8.1 of Schedule 1 to the lease, the tenants were obliged to "use the Property only as a private residence for the occupation of the Tenant and his immediate family."
3. On 21<sup>st</sup> April 2021, the local authority, Westminster City Council, had designated the whole of the City of Westminster as an area for additional licensing of houses in multiple occupation ("HMOs") with effect from 30<sup>th</sup> August 2021. It is unclear what publicity Westminster gave to the designation. There is no evidence that the 21<sup>st</sup> April designation was publicised or that the existence of the designation could or should have been known by Quest or Rimal by 4<sup>th</sup> May 2021, when the lease was agreed, or subsequently before 7<sup>th</sup> December 2021.
4. The first communication between Westminster and Quest was a letter of 7<sup>th</sup> December 2021, when Mr Clough on Westminster's behalf said that the flat was an HMO which required licensing.
5. By section 72(1) of the Housing Act 2004 "[a] person commits an offence if he is a person having control or managing an HMO which is required to be licensed..." Section 254 defines what an HMO is. The flat in question here was self-contained, so section 254(3) and section 254(2)(b) to (f) is relevant. The only issue between the parties was whether section 254(2)(b) was satisfied, namely that "the living accommodation is occupied by persons who do not form a single

household.” It was common ground that all the other conditions for the flat to be an HMO were satisfied.

6. By section 72(5) it is a defence for Quest to prove on balance of probabilities that it “had a reasonable excuse (a) for having control or managing the house in the circumstances mentioned in subsection (1)...”

7. Section 258 so far as material provides:

“(1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

(2) Persons are to be regarded as not forming a single household unless—

(a) they are all members of the same family, or

(b) their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.

(3) For the purposes of subsection (2)(a) a person is a member of the same family as another person if—

(a) those persons are married to, or civil partners of, each other or live together as if they were a married couple or civil partners;

(b) one of them is a relative of the other; or

(c) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.

(4) For those purposes—

(a) a ‘couple’ means two persons who... fall within subsection (3)(a);

(b) ‘relative’ means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;

(c) a relationship of the half-blood shall be treated as a relationship of the whole blood; and

(d) the stepchild of a person shall be treated as his child.”

### **The evidence**

8. We heard evidence from Mr Facciorusso. He said that he and Ms Moh were cohabiting. Ms Sanna Serano was a friend of Ms Moh. She was not related either to him or Ms Moh at all. None of the categories of “relative” in section 258(4)(b), (c) and (d) applied. Mr Facciorusso said that he was Italian. Ms Sanna Serano was also Italian, although she had a Spanish mother. Ms Moh was a New Zealander. All three had previously shared a flat together.

9. The tenants had been introduced to the flat by a man called Daniel, who had been employed by Quest. Mr Fraser explained that Daniel had since moved on and was no longer with the firm. Mr Facciorusso could not

remember the conversation he had with Daniel or how paragraph 8.1 of the lease came to be in those terms.

10. The tenants, Mr Facciorusso said, became dissatisfied with the flat, because there were problems (a) with the heating and (b) with mould. They therefore contacted the council, which is how Mr Matthew Clough, who is and was an environment health officer in Westminster's HMO team, came to be involved.
11. Mr Clough gave evidence to us. He said that there had been a problem with the heating and the landlord had arranged for mobile heaters to be provided temporarily. This raised no health or safety concerns. The mould, he considered, was minor and down to the tenants' use of the premises. He did not consider there was any criticism to make of the landlord in regard to the state of the premises. He explained how he applied Westminster's "civil penalty matrix" to produce the penalty of £10,000.
12. Mr Fraser gave evidence. He said that, although he was a director of Quest, the company was owned by his brother. He had been brought in at the end of 2021 to help. He was initially only working limited hours but these increased in 2022. He said that he had not seen the letter of 7<sup>th</sup> December 2021, but it is apparent he was aware of the contents, because he discussed it in emails with the landlord's representatives starting on 13<sup>th</sup> December 2021 and continuing into January 2022. The landlord's representative wanted more details of how the flat came to need a licence.
13. The fee for a licence of an HMO is £975, which is a substantial sum, representing just under half a month's rent or a large proportion of a letting agent's fee for finding a tenant. It is not surprising that Rimal wanted more information before authorising Quest to apply for a licence.
14. Mr Fraser gave evidence that it was impossible to get through to the council on the telephone, so he was not able to discuss the issues with the council. This evidence was not challenged by Mr Asghar on Westminster's behalf.
15. Mr Clough wrote to Quest again on 12<sup>th</sup> April 2022 pointing out that it was a criminal offence not to license an HMO. The letter included a criminal-style warning that Quest did not have to incriminate itself but that, if it failed to mention something, that might harm its defence in any subsequent proceedings. The letter concluded:

"[T]he Council expects you to have made a complete and valid HMO licence application within 4 weeks of the date of this letter at the latest. The Council will not institute criminal or civil proceedings before that date."
16. This was followed by letters of 27<sup>th</sup> April 2022 one to Mr Fraser and one to his brother pointing out that directors had personal liability if their companies fail to apply for an HMO licence.

17. Quest did apply for a licence on behalf of Rimal on 4<sup>th</sup> May 2022 within the four weeks. Westminster granted the licence on 27<sup>th</sup> June 2022.

### **Conclusion on liability**

18. It is no longer in dispute that Ms Sarrano was not related to either Mr Facciorusso or Ms Moh. We are satisfied beyond reasonable doubt that the three tenants comprised two households and that the flat was, from 30<sup>th</sup> August 2021 an HMO.
19. We then consider whether Quest has a defence under section 72(5)(a). We note that at the time the lease was granted the licensing requirements had not been brought into force. Quest had no reason to enquire as to whether the parties to the lease were blood relations. Once the licensing requirements came into force on 30<sup>th</sup> August 2021, it was reasonable in our judgment for Quest to rely on paragraph 8.1 of Schedule 1 to the lease to form the view that the tenants formed one household. However, once Quest received Westminster's letter of 7<sup>th</sup> December 2021, it was on notice that there was a problem. It was in our judgment incumbent on Quest and Rimal thereafter to investigate whether the tenants comprised one or two households.
20. We find on balance of probabilities that by 1<sup>st</sup> April 2022 Quest had no defence of "reasonable excuse". Accordingly we find it proved beyond reasonable doubt that Quest committed the offence under section 72(1) of the Housing Act 2004 as alleged by Westminster.

### **Quantum of the civil penalty**

21. Westminster have adopted a matrix which it uses to assess the amount of a civil penalty. Caselaw shows that this Tribunal should use the matrix in assessing whether the penalty is correct and, if not, what the penalty should be. The hearing before the Tribunal is, however, a rehearing, so we have to reach our own view on how the matrix stands to be applied. (Theoretically there might be a challenge to a matrix under public law so as to render it a nullity, but no question of that arises in this case.)
22. The matrix comprises five heads: culpability; track record and deterrent from committing further offences; removal of financial incentive; weight of harm; and exposure to risk. The minimum score which can be given is zero for track record and exposure to risk and one for each of the other three heads. The maximum score is five points under each head, except for weight of harm, where up to ten points can be given. The minimum score is thus three and the maximum is thirty.
23. A separate table provides that a civil penalty should be £1,000 for each point scored. "Minor" offending attracts awards of one to seven points (in other words £1,000 to £7,000), "moderate" offending awards of eight to fifteen points, "significant" offending sixteen to twenty-four points, and "severe" offending twenty-five to thirty points. The document suggests that awards will fall within the boundaries of £300 to £30,000. However, as can be seen, the minimum number of points which can be

awarded under the matrix is three. Mr Asghar suggested that the £300 is a typo and that £3,000 was intended.

24. We note that most local authority matrices have a final step when determining the amount of a civil penalty. After assessing the points the authority then considers mitigating and aggravating features of the particular case and adjusts the amount of the civil penalty accordingly. Westminster do apply this approach to some types of breach, for example, for a landlord's failure to join a redress scheme. However, there is no such flexibility in ordinary cases, such as the present, where the calculation of points under the matrix is the end of process. This in our judgment must affect the proper interpretation of the wording of the matrix.
25. We also note that the matrix with which we are concerned covers the entire range of HMO offences. Many of these involve serious risk of harm to tenants, for example if the smoke detectors do not work or there is no safe exit in the event of fire. Others are administrative breaches, such as failure timeously to obtain a licence. Again this consideration needs to be taken into account in interpreting the matrix.
26. In the current case, Mr Clough scored culpability as 3 points. The matrix says: "Score = 1-2: Low. **Significant efforts were made to address offences/breaches/risk.** A reasonable defence for non-compliance provides a level of mitigation. Failing to comply with recently introduced requirements. Score = 3-4: Medium. **Offender fell far short of the appropriate standard.** For example: failing to put in place measures that are recognised standards/legal requirements. Failing to apply for a HMO licence. Partial compliance that falls short [of] expected standard. Less serious breach of licence requirement." Mr Clough's assessment was: "Applied for HMO Licence very late and after having been warned on three separate occasions. On the third occasion the both companies directors [sic] were warned of their obligations under section 251 of the Housing Act 2004. Tenancy documentations show the agency managing the flat is aware of HMO licencing."
27. The matrix admittedly puts "failing to apply for an HMO licence" under medium culpability. However, the category of "medium culpability" requires that the offender "fell far short of the appropriate standard". The "low culpability" head includes "reasonable defence" and "failing to comply with recently introduced requirements". "Reasonable defence" appears to refer to mitigating factors, rather than a defence in law. If there were a defence in law, there would be no basis for imposing a civil penalty at all.
28. In the current case, the licensing requirements were introduced after the tenancy was granted and in our judgment amounted to "recently introduced requirements". Further paragraph 8.1 of the tenancy agreement provided some excuse for the failure to apply for a licence. The problems of contacting Westminster are also mitigating factors. In our judgment Quest did not fall "far short" of its obligations.

Accordingly, this was a “low” rather than medium case. We award two points.

29. On track record, Mr Clough awarded one point. He said in evidence that he had a discretion whether to award zero or one point, but could not explain why he exercised the discretion the way he did. Quest manages some 800 properties. It has no regulatory or criminal findings against it. This is the first time it has faced a civil penalty. We do not see how it can be scored at any more than the lowest amount, namely zero and that is what we allocate.
30. Under financial incentive, Mr Clough awarded three points. He reasoned: “It is not known if this Company Landlord has a portfolio of properties. Affairs for the landlord handled by a company based in the Channel Islands. However managing agent offers a service to landlords to complete HMO licence application process for a fee. As of 06/06/22 the website indicates fees for arranging Licence start at £350. There is some financial gain from committing offence.”
31. With respect, this reasoning is in our judgment confused. The civil penalty with which we are concerned is against the managing agents, Quest, not against the landlord, Rimal. Rimal obviously saves the £975 application fee by not applying. Quest, however, gains nothing. In fact, it loses the £350 fee it could charge for an application. In our judgment, this aspect of the matrix had to be approached on the basis that the managing agent made no financial gain from the failure timeously to licence the property. We award one point.
32. On harm, Mr Clough awarded the minimum amount of one point. We agree.
33. On risk, Mr Clough awarded two points. The matrix provides: “Score = 0-1. **Low.** Single family dwelling or Limited duration and exposure to risk as a result of offence. Score = 2-3. **Medium.** 3-5 people. Small block of flats/S257 (6+ flats). Moderate duration and exposure.”
34. In our judgment, this is an example of the problems which arise from Westminster including both regulatory and safety issues in the same table. The flat is a simple two bedroom flat, and, save for the definition of an HMO, would count as a single family dwelling. Further the length of time the property was unlicensed was reasonably limited. There was no exposure to risk, because the property was safe and met all statutory requirements. We consider that one point is appropriate.

### **Conclusion on quantum**

35. It follows that we award five points on the Westminster matrix. This equates to an award of £5,000.

36. It is Westminster's practice to give a 20 per cent discount if payment is made within 28 days. Mr Asghar submitted that this Tribunal has the same power. We will therefore provide that the civil penalty can be satisfied by payment of £4,000 if payment is made within 28 days of the date of this decision.

### **Costs**

37. The Tribunal has a discretion as to the fees payable to the Tribunal. These comprise the £100 issue fee and the £200 hearing fee. In our judgment, the honours in this case are roughly even. Quest has lost on its appeal on liability, but succeeded in halving the penalty. In our judgment Westminster should pay £150 to Quest.

### **DETERMINATION**

- a) The applicant's appeal on liability is dismissed.
- b) The applicant's appeal on quantum succeeds. The amount of the civil penalty is reduced to £5,000, with only £4,000 payable if payment is made to the respondent within 28 days of the date of this decision.
- c) The respondent shall pay the applicant £150 in respect of the fees payable to the Tribunal.

**Name:** Judge Adrian Jack

**Date:** 23<sup>rd</sup> June 2023