



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

Case Reference : CHI/00HE/HNA/2023/0030

Property : 22 Trevail Way, St Austell, Cornwall PL25
4QT

Applicant : Richard O'Halloran

Representative : Mr K Hart, solicitor

Respondent : Cornwall Council

Representative : Mr K Hill, solicitor

Type of Application : **Appeal against a financial penalty -**
Section 249A & Schedule 13A to the
Housing Act 2004

Tribunal Member(s) : Regional Judge Whitney
Mr M Woodrow MRICS
Mr M Jenkinson

Date of Hearing : 15th March 2024

Date of Decision : 31st May 2024

DECISION

BACKGROUND

1. The Tribunal received an appeal from the Applicant against a financial penalty made under section 249A of the Housing Act 2004.
2. The appeal was first sent to the Tribunal by email from the Applicant on 3rd January 2023. Directions were issued on 20 December 2023 and the dates for compliance were amended following a case management application.
3. The parties substantially complied with the directions. The Tribunal had an electronic hearing bundle running to 473 pages, and references in [] are to the pdf page numbers. Each side had also supplied the Tribunal with a skeleton argument.
4. The Tribunal did not inspect the subject Property but had viewed the same using online resources including a floor plan. Neither party invited the Tribunal to inspect.

Hearing

5. The hearing took place at Truro Magistrates Court. Mr Hart appeared for Mr Richard O'Halloran. Mr Hill appeared for the Respondent and a number of other Council employees and other witnesses were in attendance. The hearing was recorded.
6. Below we set out a summary only of what took place at the hearing.
7. One of the Council's witnesses, Mr Thompson, a former occupant of 22 Trevail Way was unable to attend the hearing due to personal circumstances.
8. Mr O'Halloran gave evidence in support of his case. He relied upon a witness statement [465-468] which he confirmed was true and accurate. The Tribunal reminded him that he did not need to answer any questions which might incriminate him.
9. Mr Hill cross examined Mr O'Halloran.
10. Mr O'Halloran confirmed that there were 7 properties in total registered in his name. He confirmed he had given his father Mr Robert O'Halloran an Enduring Power of Attorney dated 6th April 2000 [469-472] whilst he was serving as a Royal Marine. His father had acquired the properties on his behalf and dealt with all matters relating to the same. This remained the position to this day.

11. Mr O'Halloran explained his father deals with the day to day running of the portfolio. He manages everything and uses an account which was originally taken out with the Abbey National, now Santander. He was referred to various pages in the bundle [348, 349 and 473]. It appeared the account was the same. Mr O'Halloran explained he had a separate personal bank account.
12. He explained he has a full-time job and that his father had suggested a property portfolio as a means to secure his future when he was serving in the Royal Marines. He explained he personally had no interest in running the portfolio. He thought his father was capable and experienced. He has a normal father and son relationship.
13. Mr O'Halloran explained his father was now 81 and not in good health. He relies on carers. He had been active until the last few years.
14. He confirmed his finances were as per his statement [466]. Due to interest rate rises he was now having to add some money himself towards the mortgages on the portfolio.
15. He confirmed he was aware of the layout of 22 Trevail Way. He knew his properties were let out by his father but not aware of how or to whom. He left this to his father, he did not micromanage. He stated he was told there were only 4 tenants.
16. He explained he had been living at 4 Eastbourne Close but was not any longer after he had separated from his partner. He explained he travelled with his work and so currently had no permanent address. He explained when he got the email from the council in the Autumn of 2022 he responded to the council explaining he did not run the properties. He said he did not talk again to the Council as he read online that you should not do so.
17. He explained he had derived no income from the properties throughout their ownership. The potential capital gain was the incentive for ownership. He confirmed tax returns were prepared and filed on his behalf but no copies or other documentation in support of his finances was in the bundle or exhibited to his statement.
18. Mr O'Halloran was then questioned by the Tribunal.
19. He explained he had not got a statement from his father as he was unwell. He explained his father had now taken on a lady called Amy who was managing the properties. He did not know her full name. It was his father who gave instructions to Amy.
20. He left matters to his father. His father had made the suggestion originally and he thought it was a good idea. He had a 'so so' relationship with his father. Mr O'Halloran stated his father never gave him specific details but that his father had told him the property was not let as an HMO.

21. Mr O'Halloran was re-examined by Mr Hart. He confirmed he thought that, with the Bank Holidays, lodging the appeal by 3rd January 2023 meant it was in time.
22. The Council then presented their evidence.
23. The Respondent called Mr Steven Lewis who had given two statements [48-53]. He confirmed both were true.
24. On cross examination he stated that on 18th June 2022 there were 5 people including himself living in the house.
25. He accepted he might possibly have given a further statement of the council different from the two in the bundle. He had not been happy with the way the house was run. He also explained he had issued a claim against Robert O'Halloran. This was ongoing but was not the motivation for appearing as a witness.
26. Mrs Amanda Evans, Private Sector Housing Officer then gave evidence. She confirmed her statement was true [22-33].
27. She explained she had first inspected in January 2022 and then again in July 2022. On both occasions she was satisfied that the Property was being occupied as an HMO with at least 5 occupants.
28. On the second occasion she explained she met all 5 occupants save a for a lady known as Doris. She thought she was in her room as her colleague Stuart Kenney could hear a television or radio but no one answered the door when she knocked.
29. She explained she first did a statement for the legal department in 2022. She stated she had not prepared the statements of others. She had sent Mr Lewis a template statement for use in the Magistrates Court which is what he would have completed and returned to her. She understood these Magistrates templates would have then been used to put in the correct format for these proceedings.
30. She understood Steve Thompson had lost his tenancy agreement and that no one else at the house, as she understood it, had a written agreement. She spoke to Steven Thompson following her January visit. She had not been able to speak to Ben. She made notes in her PACE notebook [65]. Mark had not wanted to speak to her. She could not recall any issue communicating with Raj.
31. She stated she was confident on her first visit the Property was being used as an unlicensed HMO.
32. She confirmed she visited again in July with Mr Kenney. She confirmed she did not specifically ask any of the occupants if it was their sole or main residence. Following the visit she requested a NAFN

report [101- 107]. This shows who may have been registered at the address. This linked people associated with the Property including Doris. She had tried to contact her but without success.

33. Mrs Evans stated she was satisfied that it was clear 5 people were living full time at the Property.
34. Mrs Evans explained the process adopted for applying the civil financial penalty and the fact that initially she recommended a penalty of £7,500 [190]. She could not recall the details of the panel discussion.
35. On questioning by the Tribunal she explained that there was no immediate harm identified at her visit. She had tried to speak to Doris but didn't push it as did not want her to feel harassed.
36. The Council then called Mr Quint. He confirmed his statement was true [42-44] and was cross examined.
37. Mr Kenney then gave evidence and confirmed his statement [34-37] was true.
38. In cross examination he confirmed he was Mrs Evans's line manager. He had made an earlier statement which was not in the bundle. He had used a digital camera to take the photographs of the Property which were within the bundle.
39. On being questioned by the Tribunal he confirmed Mrs Evans took the notes at the inspection whilst he took the photographs. In his opinion the letting was established. There was no lounge but a communal kitchen diner leaving 5 rooms to be used as bedrooms. There was some evidence people were cooking in their rooms.
40. The Council then called Ms Storer, the Private Sector Housing Manager. She confirmed her statement was true [38-41].
41. In cross examination she explained that all notes were made on the panel decision record (relating to the meeting to determine the penalty). She confirmed she had input into the creation [355]. She explained it did not separate out all parts of the matrix and does not require specific comment on all elements such as, for example, past track record or culpability[353].
42. Ms Storer explained there is a new policy effective from February 2024.
43. She explained the council had no information to show that one person over the other had greater involvement due to the lack of response from either the applicant or his representative hence father and son had the same penalty imposed.

44. Mr Hills then made his closing speech. He relied on his written submission. He suggested that on two occasions when inspected on 18th January 2022 and on 7th July 2022, it was clear there were 5 occupied bedrooms at the property.
45. Further he suggested the appeal should have been lodged by 27th December 2022 and no real reason had been given for the delay.
46. Mr Hart relied on his skeleton argument.
47. He suggested that the notes to the penalty [233] say 28 days and in the section referring to payment this is said to mean by 3rd January 2023. Mr O'Halloran therefore accepted this was the correct date for lodging an appeal by as well as making payment. Further, the Tribunal can extend the time and he would invite us to do so.
48. Mr Hart suggested there was insufficient evidence that the Property was being used as a sole or main occupancy for those living there. He referred to the fact that there was no information about Doris. The Council had no evidence of the specific status of the individuals.
49. Mr Hart referred to the fact that the council had not disclosed the original statements made by all the witnesses. Only recent statements prepared for these proceedings have been included.
50. He suggested even if we are not with him, his client has a reasonable excuse. He has been frank and open about the circumstances of the letting.
51. As to the policy, he suggests it is not fit for purpose. He does not believe you should start at the top of the level. He submitted that the penalty is 18 times higher than any benefit. He suggests the council did not apply the policy properly.

Decision

52. The Tribunal thanked both sides for their helpful and measured submissions. We have read and considered all within the bundle and skeleton arguments. We considered the authorities which Mr Hart provided.
53. In determining this matter we address those points which were in issue between the parties. It was accepted within the Applicant's submissions [454 & 455] that the Respondent had adopted the correct procedure for imposing a Civil Financial Penalty.
54. We were surprised that Mr Robert O'Halloran did not give any evidence in these proceedings. Whilst we acknowledge his age and infirmity, we would have expected given that Richard O'Halloran describes his relationship with his father as "so so" to have had some evidence from him. This would be so even if he was not able to attend at the hearing.

We note he was able to attend a hearing relating to his own penalty in December 2023.

55. Mr Richard O'Halloran's evidence was essentially that he only knew what his father told him. Even now, having been accused of committing a criminal offence he still has not taken charge of a portfolio which he himself values at about £1.8 million. He told us his father relies on carers and has a terminal condition. The day to day management is conducted by a lady whose name and experience were not known to him.
56. When questioned, Mr O'Halloran stated at no point during his ownership had the portfolio ever produced any income or profit. He stated that he had tax returns prepared showing this, although he did not exhibit any. He seemed to suggest that because of the power of attorney he could not control his affairs. We find these points damaged his credibility. We cannot believe that a portfolio of this size has never produced a profit in the approximately 20 years it has been operating. As an expert panel experienced in property matters, this does not survive judicial scrutiny.
57. We also note that Mr O'Halloran has instructed solicitors to represent him throughout this appeal. Those solicitors could, and we are sure would, have advised him as to the consequences of the power of attorney and how the same may operate.
58. We find that Mr Richard O'Halloran has at best shut his eyes, ears and mind to what was going on with his portfolio and deliberately chosen to not question his father or learn what has been happening. This is the most generous approach to his evidence which did at points lack credibility.
59. In respect of Mr Lewis we find his evidence in these proceedings was motivated by the claim he was brining. His answers were at points defensive. However we find that he was living at 22 Trevail Way on 7th July 2022 as a tenant paying rent and accept what he said about the other occupants at that time.
60. Mr Thompson could not be cross examined. Mr Hart did not appear to challenge his evidence and we accept he was living at the Property and paying rent.
61. We found that all other witnesses were credible.
62. We agree with Mr Hart that it is unfortunate that the council failed to disclose the original statements which were prepared contemporaneously with the events relating to this appeal. We are however satisfied that there was no malicious intent on the part of the council, simply they felt the statements for these proceedings should be in a different format.

63. We must first determine whether or not we should extend time for bringing this appeal. We can deal with this shortly. We accept Mr Hart's submission that the notes to the financial penalty notice when referring to requiring payment within 28 days stated this meant by 3rd January 2023. We are satisfied that by including this date it would lead the reasonable recipient to believe this was the date for lodging an appeal. Given all the circumstances we are satisfied that the appeal should be accepted and we extend time for lodging the appeal.

64. Mr Hart did not appear to suggest that 22 Trevail Way could not be occupied by 5 or more persons. We are satisfied from the floor plan we obtained from RightMove and the evidence of all witnesses that the Property could be configured as 5 rooms with a shared kitchen diner.

65. Further it was accepted that there was no HMO licence in place in respect of 22 Trevail Way.

66. We are satisfied beyond reasonable doubt that on 7th July 2022, 22 Trevail Way was being occupied by 5 persons paying rent being:

- Stephen Lewis
- Stephen Thompson
- Mark Hutchinson
- Virajas Thevathas
- Doris Anyanwu

67. We must now consider whether or not it was being occupied as their sole or main residence. We were referred by Mr Hart to Camfield and others v Uyiakpen and others [2022] UKUT 2324(LC). We have considered carefully this decision of the Upper Tribunal. This decision suggests it is for this Tribunal to consider the evidence and come to a finding.

68. Mrs Evans and Mr Kenney gave evidence and have submitted photographs. They explained to whom they spoke and what they saw. Their evidence was all the rooms they saw appeared to show that people had a settled intention to occupy the rooms as their main residence. Much was made as to the position of the lady known and referred to as Doris. She did not wish to speak to the council. It was suggested that not all people are comfortable speaking to authoritarian figures. We accept that submission.

69. We had the benefit of hearing from Council officers who inspected and from one person who had lived in the Property. Mr O'Halloran could add little. He stated his father had told him it was not a house in multiple occupation but without any real explanation as to whom his father said was living in the Property. He knew and accepted this Property, as with his other properties, was let to residential tenants.

We take account of the fact that Mr O'Halloran accepted the Property was let to tenants and yet had not obtained any details of who those people were on 7th July 2022 despite having sight of the evidence from the Council.

70. We find beyond reasonable doubt that the 5 people living at the Property on 7th July 2024 were occupying the Property as their main residence and were all paying rent. As a result we are satisfied that the Property was being used as a house in multiple occupation without a licence.
71. Further we are satisfied that Mr Richard O'Halloran was a person in control or managing an HMO pursuant to Section 263 of the Housing Act 2004. It is said that due to the power of attorney granted to his father, Richard O'Halloran did not have control. We do not agree with this. The power of attorney is an old style enduring power of attorney document. It has not been registered (nor could it be given as Mr Richard O'Halloran plainly has capacity) and as such could be revoked at any time and does not prevent Mr Richard O'Halloran managing his own portfolio. We are told, and it was not challenged, that the rents are all paid into a bank account in the Applicants name. The fact his father can also access the account does not change the account being the Applicants. Taking account of all the evidence we find that Mr Richard O'Halloran was a person in control or managing an HMO.
72. We must now consider whether or not Mr O'Halloran had a defence of reasonable excuse. Essentially he suggests he did not know what was happening and relied on the fact his father told him the house was not run as an HMO.
73. We have found that Mr O'Halloran made a conscious choice to not know what was happening. We are not satisfied that this provides him with a reasonable excuse. We find that at best this was a deliberate course of conduct which cannot, in our judgment, amount to a reasonable excuse.
74. We are satisfied on the evidence we heard that the Applicant has committed an offence pursuant to Section 72(1) of the Housing Act 2004 of controlling an HMO which is required to be licensed but is not so licensed.
75. Having so determined, we now stand back and consider if a civil financial penalty should be applied. In all the circumstances of this case we are satisfied that it should. It is now for us to consider the Councils policy and consider what penalty should apply.
76. We must say we were not satisfied that the Council properly applied their policy. Mrs Evans initially suggested a penalty of £7,500 [190] although the Council determined that the top figure in the range should be adopted prior to any representations.

77. The policy was within the bundle [411-452]. We have had regard to the Matrix at Annex B [439] and the policy generally to determine the correct level of penalty to be applied.
78. We are satisfied that a Level 3 penalty should apply as an offence pursuant to Section 72 of the Housing Act 2004 has been committed. The Council accepted in its evidence there was no imminent risk of serious harm to the tenants.
79. We are satisfied there is no adverse history we should take account of.
80. We find that Mr O'Halloran has been reckless as to his duties. He has deliberately failed to adequately educate himself as to what use was being made of his properties.
81. As to potential for harm, we have already determined that there was no imminent risk of harm.
82. We are satisfied that a Level 3 Penalty is appropriate. We do not accept that the starting point is the top of the band. A band is given and consideration should be given to the facts of the particular case to determine the level. We record that Mr O'Halloran provided no representations in respect of the Notice of Intent. We have taken account of his evidence before us.
83. We are satisfied that there are no aggravating factors. The Respondent's own witnesses did not appear to suggest that there were. Mrs Evans in her evidence appeared to accept the Property was in good order. Given the evidence before us, we consider the starting point to be £7,500, being the bottom of the band.
84. We have considered whether or not there are any mitigating factors we should consider. Whilst Mr O'Halloran tells us he has to currently subsidise the portfolio, no proper financial information or evidence such as tax returns and the like were produced. On his own figures he has substantial capital in the portfolio and he has interests in other properties in his oral evidence. We are satisfied that he can afford to pay the penalty and that there are no further mitigating factors.
85. We therefore impose a civil financial penalty but substitute the sum of £7,500 (seven thousand, five hundred pounds) as the amount to be paid.

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 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.

