FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/29UM/HNA/2023/0022**
Property	**:**	**Coach House 3, 94 London Road, Sittingbourne, Kent ME10 1NS**
Applicant	**:**	**Mr Shalom Seidenfeld**
Representative	**:**	**Mr G Atkinson, counsel**
Respondent	**:**	**Swale Borough Council**
Representative	**:**	**Mr C Evans**
Type of application	**:**	**Appeal against a financial penalty – s.249A and Schedule 13 to the Housing Act 2004**
Tribunal members	**:**	**Judge Mark Jones** **Mr Colin Davies FRICS**
Venue	**:**	**Ashford Tribunals, 1st Floor, Ashford House, County Square Shopping Centre, Ashford, Kent, TN23 1YB**
Date of hearing	**:**	**18 November 2024**
Date of decision	**:**	**13 January 2025**

DECISION

Decisions of the tribunal

(1) This is an appeal against a financial penalty under s.249A of the Housing Act 2004 (*"**the 2004 Act**"*). For the reasons explained below, the Tribunal determines that:

1.1 A financial penalty should be imposed; but

1.2 The penalty of £6,000 imposed by the Respondent should be set aside and substituted with a penalty of £3,000

1.3 The said sum of £3,000 must be paid by the Applicant to the Respondent within 28 days of the date of this Decision.

The Tribunal's Reasons

The Law

1. The 2004 Act regulates the letting of dwelling houses in multiple occupation, and establishes a licensing regime. The 2004 Act and various Regulations issued under it, introduce a series of offences for non-compliance.

2. These offences include, under s.30 of the 2004 Act, a person commits an offence if they fail to comply with an improvement notice without reasonable excuse.

3. So far as penalties are concerned, s.249A of the 2004 Act provides that *"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."*

4. Subsection 249A(2) provides that a *"relevant housing offence"* includes offences under s.30 of the 2004 Act (failure to comply with an improvement notice).

5. Any financial penalty is itself imposed by the local housing authority.

6. Under Schedule 13A to the 2004 Act, such financial penalty may be appealed to the First-Tier Tribunal, Property Chamber. By paragraph 24(2) of Schedule 13A, such an appeal is to be by way of re-hearing, and may be determined having regard to matters of which the local housing authority was unaware when it imposed the original financial penalty. The appeal is a *"complete rehearing"*, but not one which disregards entirely the decision of the local housing authority: ***London Borough of Brent v Reynolds*** **[2001] EWCA Civ 1843.** The Tribunal's powers are to confirm, reverse or vary the decision of the local housing

authority. It may impose a penalty only if it is satisfied to the criminal standard of proof (that is, beyond reasonable doubt) that the offence was committed.

Background

7. The appeal relates to residential premises known as Coach House 3, which forms part of a block of what appear to have formerly been outbuildings, converted to residential use, situated in the rear yard of a large building currently in use as an HMO at 94 London Road.

8. We inspected the premises on the morning of 18 November 2024. We found it to comprise a two storey, self-contained dwelling, containing a kitchen, shower room and living room on the ground floor, and 2 bedrooms on the first floor. The premises appeared to us to be in an extremely poor state of repair, strewn with a variety of items which appeared to be a combination of rubbish, and possessions of the former occupier, Mr Michael de Valmency.

9. The background is relatively uncontentious, and indeed the document trail largely speaks for itself. The property at 94 London Road has been let historically as an HMO with 14 bedrooms, with 4 self-contained dwellings referred to as coach houses in the rear yard. From correspondence from Mr Mark Godson of the respondent dated 9 August 2021 it can be seen that this arrangement has subsisted since (at least) the 1990s.

10. The Applicant Mr Seidenfeld owns various properties (approximately 8 in total), which are held through a series of companies owned and/or controlled by him. The Company Quarry Road Inv Ltd (registered company no. 13163030) was first incorporated on 27 January 2021 (*"**the Company**"*). Mr Seidenfeld is the sole director and is registered as a person with significant control, holding 75% or more of the shares in the Company.

11. 94 London Road was placed for sale at auction by its previous owner Mr Singh in August 2021, and the Company successfully bid. Completion of the purchase took place on 30 September 2021, according to the date of the appropriate entry in the Proprietorship Register under title no. K325524.

12. At the time of the auction the premises at Coach House 3 were subject to an outstanding improvement notice dated 18 June 2021 served by the Respondent upon the former owner, Mr Hardev Singh. This identified a series of some 15 distinct hazards both external and internal to the premises, which required rectification.

13. Following the Company's purchase, an HMO licensing application was made to the Respondent in respect of the main building at 94 London Road, and a licence to occupation of the property as a 14-bedroom HMO was granted on 2 March 2022, effective from 30 March for a period of 5 years. This was accompanied by a detailed schedule of works the local authority required to be carried out at the property, in short to bring it up to acceptable standards for occupation.

14. The Coach Houses to the rear did not form part of this HMO application: these were each self-contained dwellings, let on separate assured shorthold tenancy agreements.

15. On 5 May 2022 the Respondent local authority served an HMO Management Order containing a detailed list of works required to the main building, and on 8 July 2022 it issued 2 suspended prohibition notices in respect of Coach Houses 1 and 2, based upon inadequate room sizes therein.

16. In late April, and again on 10 June 2022 Mr San Nyunt, Senior Environmental Health Officer employed by the Respondent inspected the premises at Coach House 3, and found that virtually all of the items of work detailed in the Improvement Notice previously served upon Mr Singh remained unresolved.

17. Following this inspection and a series of exchanges of correspondence with Mr Seidenfeld and his agent, Mr Sedan, on 29 July 2022 Mr Nyunt, served an Improvement Notice regarding Coach House 3 upon Mr Seidenfeld, under ss.11 and 12 of the 2004 Act. This specified a series of works to remedy identified hazards, to be commenced not later than 27 August 2022 and to be completed by 9 October 2022. Mr Nyunt identified one category 1 hazard and 7 category 2 hazards, a number of which were made up of a series of discrete elements.

18. The identified hazards included:

    (i) Damp and mould within the premises, identified as Category 2, Band E hazards. This was based upon various leaks, missing sealant and a defective extractor fan in the shower room.

    (ii) Excess cold, Category 1, band H, based on a lack of fixed space heating throughout the premises.

    (iii) Carbon monoxide, Category 2, band H, based upon use of a bottle gas heater with no carbon monoxide detector.

    (iv) Incursions by pests, Category 2, band H.

    (v) Food safety issues, Category 2, band H.

(vi) Uneven flooring both internally and externally, Category 2, band F.

(vii) Electrical hazards, Category 2, band G.

(viii) Fire risks, Category 2, band E.

19. By email dated 30 August 2022 Mr Seidenfeld requested suspension of the notice, where it was proving extremely difficult to get access to Coach House 3.

20. Glyn Pritchard and Mr Nyunt of the Respondent attended a meeting with Mr Sedan at the premises on 14 September 2022 to discuss urgent remedial works. Mr Nyunt's evidence was to the effect that he told Mr Sedan that he was happy to assist in facilitating access for the works.

21. On 15 September 2022 Mr Nyunt wrote a detailed email to Mr Seidenfeld's agents, Kriens Management Ltd., containing 10 separate areas of work that were required to be effected in the premises to comply with the notice.

22. On 20 September 2022, Mr de Valmency complained to Mr Nyunt that he had arrived home to find a note stuck to his door to the effect that an electrician had called, but nobody was home, and asking him to call the council to arrange an appointment. The following day, Mr Nyunt wrote to Mr Sedan explaining that he was not in a position to make such arrangements, but was prepared to attend the premises to assist in facilitating access if the Applicant or his agent had made an appointment but encountered difficulty.

23. Following a request from Mr Seidenfeld for more time for compliance, the compliance date was extended to 30 November 2022 by Mr Nyunt upon being informed that Mr de Valmency was due to be away from 5 October 2022 to the end of that month.

24. On 25 November, and then on 2 December 2022 Mr Seidenfeld's agents, Kriens Management Ltd. wrote to Mr Glyn Pritchard of the Respondent, explaining that the occupier of Coach House 3 had made it extremely difficult to access the premises, but that their contractors had managed to repair leaks complained of, replace bathroom taps, fix the external gutter and install a smoke alarm on the first floor. They explained that installation of heating required a substantial degree of rewiring which was practically impossible unless and until the occupier cleared a vast quantity of his possessions that filled the rooms and prevented effective access for such works. They explained that on at least 4 separate occasions the electrician had arranged to attend to carry out works, but had been refused access on each occasion.

25. Following a compliance visit to the premises by Mr San Nyunt on 7 December 2022, by letter dated 12 December 2022 headed *"Housing Act 2004 – Section 30 – Failure to comply with Improvement Notice"*, Mr Nyunt informed Mr Seidenfeld that he was considering a potential offence under s.30 of the 2004 Act, for failure to comply with the notice. The letter was accompanied by a questionnaire, taking the form of a written interview, to which Mr Seidenfeld provided answers, in which he stated that a smoke alarm had been fitted to the first floor of the premises. That interview suggested that from Mr Nyunt's perspective, besides some plumbing works and works to the front gutter, all remedial works remained outstanding as at the date of his inspection on 7 December.

26. On 31 January 2023 Mr Seidenfeld wrote to Mr Nyunt detailing works that had been undertaken within the premises, including installation of storage heaters in the living room and bedroom, a blow heater in the bathroom and kitchen, and moving the oven socket.

27. On 14 February 2023 Mr Seidenfeld confirmed that additional measures had been undertaken at the premises, including installation of an extractor fan in the bathroom and the tidying of electrical cables at the front of Coach House 3.

28. There remained several outstanding items of work specified in the Improvement Notice, including a fire risk assessment and levelling of the exterior yard area, which was uneven and irregularly surfaced.

29. On 24 May 2023, with the authorisation of the Respondent's Private Sector Housing Manager Mr Pritchard, Mr Nyunt sent to Mr Seidenfeld a notice of intent to issue a civil penalty, and invited representations from him.

30. On 19 June 2023 Mr Seidenfeld made representations to the local authority regarding the outstanding works to Coach House 3, attributing his non-compliance principally to difficulties in gaining access, based upon his tenant's non-cooperation. The email including the following:

"Now in regards to the notice served on Coach house 3, the notice included a list of 10 items the council wanted us to carry out In CH3 (see email dated 15the Sep/22). I will try in a few lines to outline the issues we have had with this tenant making it extremely difficult to comply with the notice.

"The tenant has been causing us immense difficulties with access, even when we had pre-arranged appointments with the tenant that we will be attending with a workman he still on loads of occasions refused us entry for no reason resulting in us having to spend huge amounts of money just for call out charges whilst we did not even gain access.

"I attach 2 statements of a local Plumber and our electrician of their experience with the tenant.

"I have numerous emails between us and the council both Mr Glyn Pritchard and Mr San Nyunt detailing the difficulties we are having to fully comply with the works listed in the notice…"

31. The email went on to state that Mr de Valmency was prone to refusing to answer calls, to texting dates on which he stated he was unavailable to allow access to Coach House 3, but would not speak with Mr Seidenfeld outside those periods. Upon gaining access, the interior of the Property was in such a state, where Mr de Valmency was said to be a hoarder, that getting him to move his possessions to enable work to be done was very difficult. His alleged behaviour was compounded, it was said, by making false allegations against his neighbours.

32. Mr Seidenfeld's email was accompanied by a letter headed *"To Whom It May Concern"* from Mr Paul Santos, a certified electrician trading as *TopStar* Electrical, confirming difficulties with the occupier of Coach House 3 denying access despite having made prior arrangements, and keeping the interior of the property in such a poor condition that working inside was very difficult, even when access could be obtained. It was also accompanied by a letter dated 14 June 2023 from Jan Whitlock, trading as JW Domestics, described by Mr Seidenfeld as a plumber, who similarly described having been refused access by the occupier of Coach House 3 on quite a few occasions despite prior arrangement, resulting in Mr Seidenfeld having to pay call out charges for nothing.

33. Finally, on 18 September 2023, a final civil penalty notice was served upon Mr Seidenfeld, imposing a penalty of £6,000.

34. Mr Seidenfeld appealed that financial penalty, by application dated 21 September 2023.

The Hearing

35. Following our inspection of the premises, the hearing proceeded from 11.20 am on 18 November 2024 at the Ashford Tribunal Centre. The Applicant was represented by Mr Atkinson, of counsel. Mr Shalom Seidenfeld attended in person, accompanied by his son Mr Naftali Seidenfeld, and Mr A Ormonde.

36. While the bundle contained a statement and response signed by Mr Shalom Seidenfeld, somewhat unusually it transpired that these documents had in fact been prepared in substantial degree by his son, Mr Naftali Seidenfeld, who had (we were told) been dealing with issues relating to the premises on his father's behalf. At the outset of the hearing, Mr Atkinson requested permission to call Mr Naftali Seidenfeld,

to give oral evidence, essentially speaking to the statements in his father's name. Mr Evans for the Respondent very pragmatically agreed that this would be a pragmatic course, in the circumstances. Not without some misgivings, upon the application of our general case management powers under Rule 6 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, seasoned by the overriding objective, we agreed to this course, and heard oral evidence from Mr Naftali Seidenfeld.

37. The Respondent was represented by Mr C Evans, solicitor. It called evidence from Mr Nyunt, Mr Pritchard (now happily retired, as he told us), and from Mr De Valmency.

38. We thank all witnesses for their attendance and for their evidence, and both representatives for their careful and measured submissions.

39. Each witness gave evidence in accordance with their statements, save for Mr N Seidenfeld, who spoke to those in his father's name. Save for the matters addressed below, we found each witness to be honest, credible, and seeking to assist the Tribunal in relation to the issues we must consider.

40. As the hearing progressed, the issues (as they appeared to the Tribunal) coalesced to 3 matters:

    (i) Whether Mr De Valmency was, indeed, 'difficult' in permitting access to the Applicant's contractors seeking to effect works;

    (ii) Whether the Respondent, through the person of Mr Nyunt in particular, took appropriate notice of the difficulties Mr Seidenfeld may have encountered in gaining access to the premises, in formulating its penalty decision;

    (iii) Whether, consequently, the penalty imposed should be confirmed, reversed, or varied.

41. We find that for reasons best known to himself, Mr De Valmency was, indeed, repeatedly 'difficult' in permitting access to the Applicant's contractors seeking to effect works. We accept Mr Seidenfeld's evidence that on repeated occasions pre-arranged attendance by contractors was frustrated by Mr De Valmency either not being present or, if present, by refusing to allow access. We place particular reliance upon the letters from Paul Santos and Jan Whitlock, who (while neither was called as a witness) had no conceivable purpose in writing as they did had Mr De Valmency not created difficulties in gaining access.

42. In this regard, we accept the evidence for the Applicant, corroborated as it is by repeated assertions in correspondence of the difficulty experienced in accessing the premises.

43. We are reinforced in these conclusions in having heard the evidence of Mr De Valmency himself. While he doubtless has his own justification, it became apparent in the course of his evidence that he is a very private man, who was on occasions extremely inflexible in permitting access to the Respondent's contractors. We have seen a series of text messages in which he was awkward to his landlord regarding access, and letters sent by him seeking to impose restrictions on communication, and upon the timing of any attendance by contractors.

44. We find that Mr De Valmency did, repeatedly, agree to attendance by tradesmen to whom he then refused access, whether in person or by not being present. On other occasions, we find, he failed or refused to respond to reasonable requests for access to the premises to effect works, and was otherwise very obstructive.

45. Consequent upon such findings, while in no way seeking to impugn his professional and personal integrity, we find that Mr Nyunt on behalf of the Respondent, and those with whom the decision to serve the penalty notice in issue was determined, paid insufficient regard to the practical difficulties experienced by the Applicant and his contractors in attempting to deal with Mr De Valmency, and gain access to the premises. In particular, while hindsight frequently adds clarity to any analysis of events, we find that Mr Nyunt's dismissal of the observations of Paul Santos and Jan Whitlock as forwarded to him on 19 June 2023 to have been, objectively, unreasonable.

Analysis

46. The Respondent's policy regarding civil penalties is set out in its document entitled *"Swale Borough Council Housing Enforcement – Civil Penalties Policy"*, a copy of which was helpfully included in the hearing bundle.

47. The Respondent's starting point is to determine the severity of the offence in issue, within a range of potential penalties between £500 to £30,000. This involves consideration of 7 steps of assessment, viz:

    (1) The severity of the offence.

    (2) The culpability of the offender.

    (3) The harm caused to the tenant.

(4) The punishment of the offender.

(5) Deterrence of the offender.

(6) Deterrence of others.

(7) Whether punishment will remove any financial benefit the offender has acquired from committing the offence.

48. There follows a table of examples of culpability. Materially, for this case, Medium Culpability is summarised thus:

"The Landlord/Agent has knowledge of the specific risks entailed by his actions: even though they do not intend to cause harm to the tenants they fail to comply or act in a reasonable manner (negligent), for example, partial compliance with a schedule of work to an enforcement notice but failure to fully comply with all schedule items."

49. Low Culpability is defined as:

"*The offence committed has some fault on the part of the landlord or property agent or there are other circumstances for example obstruction by the tenant to allow a contractor access for repairs, or damage caused by tenant negligence. Minor breaches, isolated occurrence or where significant effort has been made to comply but was inadequate in achieving compliance."*

50. There is, then, a table concerned with levels of harm to the tenant. Materially, Harm level 2 is expressed thus:

"There will be one or more Category 1 and/or multiple Category 2 hazards which carry some risk of life changing injury or death to the occupants."

51. Table 3 sets out fine levels, in a manner akin to the Sentencing Council Guidelines for criminal offences. Harm level 2 with medium culpability attracts a fine in the range £4,000 to £7,999; the same level of harm with low culpability carries a fine between £2,000 and £3,999.

52. At the hearing, Mr Nyunt explained the Respondent's assessment of the offence to the Tribunal. As he explained, the penalty applied in the present case was based on the mid-point of Harm level 2 with medium culpability, at £6,000.

Determination

53. The *Guidance on Civil Penalties* issued to local authorities by the Ministry of Housing, Communities and Local Government under the Housing and Planning Act 2016 contains a list of factors that may be relevant to the quantum of a civil penalty. The Guidance requires local housing authorities to draw up their own policy on civil penalties. In ***Sutton v Norwich CC*** **[2020] UKUT 90 (LC)**, the Upper Tribunal summarised the proper approach at **[245]**:

"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."

54. Paragraph 3.5 of *Guidance on Civil Penalties* provides that *"the actual amount levied in any particular case should reflect the severity of the offence, as well as taking account of the landlord's previous record of offending."* It goes on to list factors to be taken into account to ensure that the civil penalty is set at an appropriate level, in terms mirrored by the Respondent's policy, as summarised in §47, above.

55. The Tribunal has regard both to the national guidance, and the Respondent's policy, in considering this case.

56. In considering culpability, in light of our findings as to the realities of gaining admission to the premises, we substitute for the Respondent's basis of medium culpability our own finding of low culpability. This is based on our findings as to the persistent difficulties as to access to the premises on the part of the tenant.

57. This is balanced, as we find, by the legal and factual reality that the landlord could have employed more robust legal and contractual means to secure access.

58. As to harm, we accept the Respondent's characterisation of Harm level 2, consequent upon the defects identified.

59. We discern no reason to depart from any other of the issues identified in the penalty notice.

<u>Penalty Level</u>

60. Applying these findings to the penalty tables in the Respondent's policy, the penalty level is £2,000 to £3,999.

61. We agree with approach of imposing a penalty in the middle of the appropriate range, thus £3,000.

Mitigating and Aggravating features

62. We discern no particular mitigating or aggravating features in this matter.

Summary and Conclusion

63. For the above reasons, we vary the penalty imposed by the Respondent, setting aside the sum of £6,000 and substituting a penalty of £3,000.

Name: Judge Mark Jones **Date:** 13 January 2025

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).