FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UC/HNA/2021/0021
Property	**:**	14A West Street, Bognor Regis, West Sussex PO21 1UF
Applicant	**:**	Michael Neve
Representative	**:**	Edward Bates, instructed by Glanvilles LLP
Respondent	**:**	Arun District Council
Representative	**:**	Amy Scott, Solicitor
Type of Application	**:**	Appeal against financial penalty – Section 249A and Schedule 13A to the Housing Act 2004
Tribunal Members	**:**	Judge E Morrison Mr M Woodrow MRICS Mr M R Jenkinson
Date and venue of Hearing	**:**	2 November 2021 (by video)
Date of decision	**:**	11 November 2021

DECISION

The appeal and procedural background

1. On 16 July 2021 the Applicant landlord appealed against a financial penalty of £22,500.00, made under section 249A of the Housing Act 2004 ("the Act") on 25 June 2021 by the Respondent local housing authority, on the ground that the Applicant had committed an offence under section 72(1) of the Act.

2. The Tribunal issued directions and the appeal was listed for 2 November 2021. On 25 October 2021 the Applicant made an application for an adjournment until March 2022, which was refused on 27 October 2021.

3. At the hearing on 2 November 2021, the Applicant was represented by Counsel and the Respondent was represented by its solicitor. The Applicant and the Council's witness, Chantelle Bashford, gave evidence, having previously supplied witness statements with accompanying exhibits.

The relevant statutory provisions and guidance

4. Under section 249A(1) of the Act a 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. The relevant offences are listed in section 249A(2) and include an offence under section 72 of the Act. The amount of the penalty is to be determined by the authority but must not exceed £30,000.00 (sect. 249A(4)). A civil financial penalty is an alternative to criminal prosecution.

5. Section 72(1) of the Act provides that a person commits an offence if he is a person having control of or managing an HMO (house of multiple occupation) which is required to be licensed but is not so licensed.

6. The definition of "person managing" appears in section 263(3) and means – so far as is relevant here - the person who receives, directly or through an agent or trustee, rents from persons in occupation of parts of the HMO.

7. Under section 72(5) it is a defence to an offence under section 72(1) that the person had a reasonable excuse.

8. Schedule 13A to the Act deals with the procedure for imposing penalties, appeals, enforcement and guidance. Under paragraph 10 a person may appeal to the Tribunal against the decision to impose the penalty or the amount of the penalty. The appeal is a re-hearing but may be determined having regard to matters of which the authority was unaware at the time. The Tribunal may confirm, vary or cancel the final notice imposing the penalty. Under paragraph 12 the authority must have regard to any guidance given by the Secretary of State.

9. Statutory Guidance issued in April 2018 states, at para. 3.3 that local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a civil penalty. Paragraph 3.5 states that the maximum amount should be reserved for the "very worst offenders". Seven factors should be considered to help ensure that the civil penalty is set at an appropriate level:

a) Severity of the offence
b) Culpability and track record of the offender
c) The harm caused to the tenant
d) Punishment of the offender
e) Deter the offender from repeating the offence
f) Deter others from committing similar offences
g) Remove any financial benefit the offender may have obtained as a result of committing the offence.

The Respondent's Enforcement Policy

10. This Policy adopted in July 2019 is a detailed document dealing with enforcement in the areas of environmental health, private sector housing, licensing and cleansing. At section 2 the principles of enforcement include a consideration of proportionality. Sections 4 and 5 consider the matters to be taken into account in deciding whether to take formal action, and if so, what such action should be. Section 13 deals specifically with civil penalties for offences under the Act. At 13.11 the factors to be considered in setting the level of a penalty are the same seven factors listed in the statutory guidance (see para. 9 above) plus an eighth factor, being "Assessment of assets and income".

11. There is then a discussion of how the levels of harm and culpability will be assessed, with examples. A matrix combines the harm/culpability levels to arrive at a banding for the penalty, each of the six bands spanning a range of £5000.00. The starting point for the penalty in each band will be the midpoint, and the penalty may be increased by £1000.00 for each aggravating factor up to the maximum for that band, or decreased by £1000.00 for each mitigating factor in the same way, but the penalty imposed must remain proportionate to the offence.

The factual background

12. The following chronology derives from undisputed factual evidence contained in the bundle and/or given in oral evidence at the hearing.

- The Applicant has been a landlord in the Bognor/Littlehampton area for over 20 years. He currently rents out about 22-23 properties. For over 20 years he has engaged A&C Lettings to manage these properties.

- On 22 March 2018 the Respondent wrote to the Applicant informing him that two of his properties, Flat 1 Kenya House and 28A Richmond Avenue, were being used as HMOs and were overcrowded. Although not requiring a licence at the time, the Respondent told the Applicant

that the properties might be become licensable HMOs on 1 October 2018 due to an anticipated change in the law.

- A second letter saying much the same and pointing out the Applicant's responsibility to reduce the overcrowding, was sent on 25 March 2018 in respect of 28A Richmond Avenue, and on 24 May 2018 in respect of Kenya House.

- On 15 August 2019 the Respondent wrote again to the Applicant regarding 28A Richmond Avenue, which had been inspected and found to be operating as an unlicensed HMO. Subsequently an Improvement Notice was served listing Category 1 & 2 hazards which were required to be remedied. A copy of the Improvement Notice was sent to Lee Hopkins of A&C Letting, and to a person named as Magdalena Kostrzewa of 6 Hawkins Close, Bognor Regis. The Respondent accepts that the Notice was sufficiently complied with.

- On 2 January 2020 the Applicant entered into an assured shorthold tenancy for six months starting 17 January 2020 with a person named as Radu Erhan for 14A West Street. Clause 1.5.2 of the tenancy agreement states that the property was not let as an HMO and does not require a licence. The rent was £950.00 per month.

- On 23 September 2020 following a complaint from an occupier Ms Bashford, the Respondent's HMO Officer, hand-delivered a Power Of Entry Notice to the Applicant's home address, advising that there would be an inspection on the following day. The covering letter said that it had been brought to her attention that the property was operating as an unlicensed HMO.

- On 24 September 2020 the Respondent inspected the property and found that it was being used as an HMO without a licence. Mr Hopkins of A&C Lettings was in attendance at the inspection. On 29 September 2020 the Respondent wrote to the Applicant informing him of this and advising that as he was the person managing, he must either submit a licence application within 7 days, or make an application for a temporary exemption notice (TEN) if he wished to reduce the number of occupants so that it would no longer be an HMO.

- Neither course of action was taken by the Applicant but due to the departure of some occupants, the property ceased to be a licensable HMO after 13 October 2020.

- Subsequently an Improvement Notice was served requiring remedial work addressing Category 1 & 2 hazards found at the property. The Respondent accepts that the Notice has been sufficiently complied with.

- On 19 March 2021 the Tribunal issued its decision in Case Ref. CHI/45/UC/HMF/2020/0037, granting a rent repayment order to

Anna Nocula-Giza against Magdalena Holubowska (whose address is 6 Hawkins Close, Bognor Regis). Ms Nocula-Giza had rented a room at 14A West Street from Ms Holubowska between 30 April 2020 and 27 September 2020. Ms Holubowska told the Tribunal that she had been the guarantor under Mr Erhan's tenancy agreement, and after he had returned to his home country at the start of the Covid-19 lockdown in March 2020 she had rented out the property herself. She admitted that the number and type of occupiers meant that the property required a HMO licence and that she did not apply for one.

- The Respondent has prosecuted Ms Holubowska for being in control of an unlicensed HMO under section 72(1) of the Act and she has been convicted, having pleaded guilty. The Respondent is also prosecuting A&C Lettings for the same offence; the trial has recently been adjourned to March 2022.

- Meanwhile, on 13 January 2021 the Respondent wrote to the Applicant explaining it was considering taking enforcement action against him, providing a formal Caution, and inviting comments. The Applicant says he did not receive this letter and so did not respond.

- The Respondent's Enforcement Review Panel (ERP) convened on 9 February and 4 March 2021 and decided to impose a financial penalty. The Penalty Assessment Form noted culpability as Medium, and level of harm as High, producing a Band 5 penalty on the matrix with a starting penalty of £22,500.00. No aggravating or mitigating factors were noted. On 19 March 2021 formal Notice of Intention to impose the penalty was sent to the Applicant.

- The Applicant's solicitors subsequently made representations, notably in letters dated 4 May 2021 and 2 June 2021 (an extension of time having been agreed). The Applicant denied any knowledge of the property having been used as an HMO, and said that it was A&C Lettings rather than the Applicant who was "managing" the property under section 72 of the Act. Liability for any financial penalty was disputed.

- On 25 June 2021 the ERP considered the representations received, and confirmed the final penalty at £22,500.00. It was noted that no representations had been received as regards to the Applicant's assets as a mitigating factor.

The issues

13. It was not disputed that the Respondent has complied with the procedural requirements contained in Schedule 13A to the Act.

14. The Respondent confirmed at the start of the hearing that the only period relied on in respect of the offence was 24 September – 13

October 2020 (20 days). This restriction of the time duration of the offence is critical to the Tribunal's analysis and findings set out below.

15. Although the Applicant's witness statement argued that he should not be liable for any penalty because it was A&C Lettings rather than him who was "managing" the property, at the outset of the hearing his Counsel Mr Bates accepted that because the Applicant was in receipt of the rent, he was "managing" for the purposes of an offence under section 72(1) of the Act. It was also not disputed that the property had been occupied as an HMO without the necessary licence.

16. The Tribunal had already made a finding in Case Ref. CHI/45/UC/HMF/2020/0037 that the property had been operated by Ms Holubowska as an unlicensed HMO, and there was no submission made that this finding was wrong. In addition Ms Bashford's witness statement in this case corroborates the finding.

17. Combining that evidence with Mr Bates' concession, the Tribunal is satisfied beyond a reasonable doubt that the Applicant has committed an offence under section 72(1) of the Act, subject to any defence of reasonable excuse. Knowledge that the property is being used as an HMO and should be licensed is not an element of the offence: *R on the application of Mohamed v London Borough of Waltham Forest* [2020] EWHC 1083 (Admin).

18. Thus the remaining issues for the Tribunal were:

    (i) Did the Applicant have a defence of reasonable excuse?
    (ii) If not, should a financial penalty be imposed?
    (iii) If so for how much?

(i) Defence of reasonable excuse

19. The burden of proof in respect of this defence falls on the Applicant and the standard of proof is the balance of probabilities.

20. The Applicant's case was that he employed A&C Lettings on a "fully managed" basis to deal with his rental properties. They had historically dealt with everything arising. He had no knowledge that 14A West Street was possibly being used as an HMO until he received the Respondent's letter of 23 September 2020. He sent the Respondent's letter of 29 September 2020, following the inspection, to A&C Lettings and told them verbally to do what was necessary to sort it out. This was also what he had done back in 2018 and 2019 when letters had been received from the Respondent regarding the flat in Kenya House and 28A Richmond Avenue. They had dealt with arranging the work required by the Improvement Notices.

21. The Applicant said he had had no dealings with Mr Erhan and did not know he had left 14A West Street until after 29 September 2021. A&C

Lettings did not tell him before that date. He was receiving the net rent after management fees in the normal way.

22. The Tribunal asked why a copy of the 2019 Improvement Notice in respect of 28A Richmond Avenue had been sent to Magdalena Kostrzewa, who appeared to be the same person as Magdalena Holubowska. The Applicant said he thought it was because she was the tenant, but he did not know her and had never met her. He was then asked how a brief witness statement from Ms Holubowska, submitted as part of the Applicant's case, and dated 4 May 2021 had been obtained. The Applicant said that Mr Hopkins of A&C Lettings had "sent this through". The statement, unverified by a statement of truth, says that she did not tell A&C Lettings or the Applicant that she was operating an unlicensed HMO. The Applicant was unable to explain the coincidence of this lady being involved with operating both 28A Richmond Avenue and 14A West Street as unlicensed HMOs.

23. In his witness statement the Applicant said that he thought it "entirely unfair" that Ms Holubowska had "received her own financial penalty". When asked why he felt this way, if her actions had not been authorised or lawful, he could not explain it and then said she had put him in a difficult position,

24. In the Applicant's bundle he had included only two pages of what was clearly a detailed professionally-drawn management agreement of at least six pages dated 3 January 2020 between him and A&C Lettings. On 27 October 2021 the Tribunal had directed that a complete copy of the agreement be produced. This was not done, the Applicant saying that he only had the two pages that had been sent to him for signature, and that previously arrangements with A&C Lettings had been verbal, until A&C Lettings merged with a firm of chartered surveyors last year. A&C Lettings were contacted on behalf of the Applicant during the hearing and asked to supply a full copy of the agreement, but they did not do so.

25. Ms Bashford accepted that the Applicant must have informed A&C Lettings about the Power of Entry Notice of 23 September 2020 because Mr Hopkins was in attendance the following day. Although some occupiers had left the property by 13 October 2021, she did not accept this was due to any action taken by the Applicant or formal notice given by A&C Lettings. She did not know what action A&C Lettings might have taken but she thought three residents left of their own accord. One left because she didn't feel safe. The Applicant had neither applied for an HMO licence nor applied for a TEN as directed in the letter of 29 September 2020.

26. She accepted that the Respondent regarded A&C Lettings and Ms Holubowska as being more responsible for the offence under section 72(1) than the Applicant.

Determination

27. Lack of knowledge that the property is being used as an HMO may be relevant to a defence of reasonable excuse: *Thurrock Council v Daoudi* [2020] UKUT 209 (LC). There is no cogent evidence that the Applicant had the requisite knowledge before the Respondent became involved in September 2020, and if the Respondent was alleging an offence had been committed before 24 September 2020 that lack of knowledge could be important. However, the Tribunal must focus on the period of the offence as stated by the Respondent, being 24 September – 13 October 2020. On 23 September 2020 the Applicant was made aware of the Council's suspicions by virtue of the Power of Entry Notice. He instructed A&C Lettings to attend the inspection on the following day. The Applicant has not suggested that he did anything else or that he made follow up enquiries. But he was left in no doubt about the situation once the Respondent's letter of 29 September 2020 was received. That letter clearly told him he must apply for a licence or a TEN. The Applicant did neither; nor did he dispute that the property was an HMO. Instead he purported to pass all responsibility for action to A&C Lettings, without even confirming this in writing. However, there is no evidence that under the management agreement, it was A&C Lettings, rather than the Applicant as owner, who would be responsible for applying for any necessary licence or exemption.

28. The purported inability of the Applicant to produce a full copy of the management agreement has various possible explanations, not one of which reflects well on him. Either he signed a detailed legal agreement without reading the missing pages, or he did not bother to retain a copy, or he has deliberately not produced a complete copy. Nor did he, or his solicitors, request a copy from A&C Lettings until it was too late. Whatever the explanation, there is no evidence to support the Applicant's assertion that it was A&C Lettings, rather than him, who was legally responsible to take steps to regularise the situation.

29. In our view the defence of reasonable excuse is therefore not made out. Despite the concerns set out in the Respondent's letter and Notice of 23 September 2020, there is no evidence that the Applicant did anything at all between the inspection on 24 September and receipt of the letter of 29 September. After receiving the letter of 29 September 2020 at the latest the Applicant should have taken positive steps to regularise the situation. A phone call to the managing agents, without even any follow up prior to 13 October 2020, was wholly inadequate, and indicative of the Applicant's "hands-off" approach to his responsibilities as a landlord which is wholly inappropriate in the current regulatory environment, whatever the management agreement might say. His actions, or more accurately his omissions, cannot amount to a defence of reasonable excuse during the stated period of the offence.

Should a financial penalty be imposed?

30. It was not submitted by Mr Bates that no penalty at all should be imposed. However the Tribunal must make its own decision about this. The matter can be dealt with briefly. At paragraph 30 of her witness statement, Ms Bashford sets out the reasons considered by the ERP, and the Tribunal has reviewed these. Not all of these are considered valid, e.g. it is said that "Mr Neve lets out other HMO properties" but there is no evidence of this. Reaching its own decision, the Tribunal finds that given the nature of the offence, the category 1 hazards found at the property, the presence of vulnerable occupiers (children), and previous informal action regarding overcrowding at two other properties, it was reasonable to take formal action including the imposition of a financial penalty.

Assessment of the penalty

31. It is now clearly established that in undertaking its own assessment the Tribunal must start with the local housing authority's policy and give weight and respect to the authority's assessment. However the Tribunal must consider for itself what penalty is merited by the offence under the terms of the policy, and there may be situations where a policy has been applied too rigidly. It should start with the policy but give proper consideration to arguments that it should depart from it, asking if the objectives of the policy will be met if the policy is not followed. *London Borough of Waltham Forest v Marshall* [2020] UKUT 0035 (LC), *Sutton v Norwich City Council* [2020] UKUT 90 (LC)

Culpability

32. The statutory Guidance and the Respondent's Policy include track record within culpability. The assessment form explained the Respondent's finding of Medium culpability rather than High on the basis that the Applicant had employed a letting agent, but noted that he "also lets out other HMO properties and has an awareness of requirements". This was a reference to the letters sent in 2018 and 2019. It concluded that this was a "Negligent Act" which attracted a Medium culpability under the policy.

33. On being questioned by Mr Bates, Ms Bashford clarified that there had been no breach of HMO licensing requirements in respect of Kenya House or 28A Richmond Avenue back in 2018, and that even after the letter of 15 August 2019 had been sent about 28A Richmond Avenue, no formal action had been taken regarding it being an unlicensed HMO. She thought the occupancy numbers had been reduced. She accepted that there was no other evidence of unlicensed HMOs belonging to the Applicant or of the Applicant being put on notice of neglectful practices by A&C Lettings. The Improvement Notices had been addressed.

34. Mr Bates submitted that in light of these factors culpability should have been assessed as Low.

Determination

35. Applying the Respondent's policy, the Tribunal understands why it arrived at Medium Culpability but disagrees with that conclusion. We assess culpability as Low. This is because, while taking into account both sides' submissions, and agreeing with Mr Bates that the 2018/19 matters should have fairly minimal impact, there are two other factors we regard as highly significant, but which do not appear to have been taken into account by the Respondent in assessing culpability.

36. Firstly, the Applicant was not the direct landlord of the occupants of the HMO. He did not participate in setting up or running the HMO and did not profit from it. There is no cogent evidence that he knew about the HMO use until it was almost over. The tenancy agreement with Mr Erhan said that the property was not let as an HMO and there was to be no subletting. The Respondent's policy lists tenant misconduct as a situation where culpability could be assessed as Low. Ms Holubowska's conduct can be regarded in the same light. Ms Bashford told the Tribunal that these matters had been considered by the ERP, but their impact was reflected in the decision to impose a civil financial penalty rather than prosecute. In our view, they also affect the level of culpability and should have been taken into account at that stage.

37. Secondly, the duration of the offence was only 20 days. Ms Bashford accepted that this was the first time that the Respondent has imposed a penalty for such a brief period of offending. She confirmed that the Panel did consider the short period of the offence but "thought it was irrelevant because an offence had been committed". We disagree. That the offence was brought to an end so quickly may not have been due to anything done by the Applicant, but nonetheless the duration of the offence must be a highly relevant matter. It cannot be right that the culpability for an offence lasting for months or even years is of the same degree as for an offence of very short duration.

Harm

38. The Respondent assessed the level of harm (actual or potential) as High on the ground that "lack of appropriate fire detection and protected escape route to the property, combined with some of the other housing defects, posed a serious and substantial risk of harm to the occupants and/or visitors".

39. Mr Bates took Ms Bashford to the Schedule of Hazards prepared following her inspection on 24 September 2020 and noted that in many instances the hazard described was potential, requiring investigation, rather than proved. She accepted no actual harm had been caused to the residents. Mr Bates suggested that in light of this, and the brevity of

duration of the offence, the level of harm should be assessed as Medium.

40. The Tribunal asked Ms Bashford whether the defects would have had to be remedied before an HMO licence was granted. She said No, but that any licence would have imposed conditions requiring specified remedial works to be carried out by a certain date. For example Category 1 hazards such as fire might have to be attended to within 4-6 weeks.

Determination

41. The Tribunal concludes that the level of harm should be assessed as Low. This is because the risk of harm has to be viewed against the short period of time when the offence was being committed. It must be just and equitable for a higher level of harm to be assessed for situations of longer duration, and a lower level for risk of harm which is transitory. Some of the listed hazards are not insignificant, e.g. lack of proper fire alarm system, but over that short period of 20 days there was no actual harm. Moreover, we take into account that even if the Applicant had immediately applied for an HMO licence on 29 September 2021, he would have been given until a date much later than 13 October 2020 to remedy the defects. Therefore the level of harm would not have been reduced by actions avoiding the commission of the offence. Putting it another way, unlike an offence of failing to comply with an Improvement Notice, the commission of this offence did not increase the level of harm. The Respondent failed to take account of these matters when assessing the level of harm.

Other factors affecting assessment

42. Having assessed culpability as Medium and harm as High, and applying the matrix to produce a starting point penalty of £22,500.00 the ERP did not consider that any other factors justified a departure from this figure. Although not mentioned on the assessment form, Ms Bashford told the Tribunal that the ERP did consider all the Applicant's representations by way of mitigation but did not consider that they justified a reduced penalty. However, when questioned by Mr Bates, Ms Bashford agreed that a penalty of £22,500.00 for an offence lasting no more than three weeks was disproportionate, and that there was no written record that the ERP considered proportionality.

43. Mr Bates submitted that the matrix provided a starting point of £12,500.00 (Band 3) for Low culpability and Medium harm. Given the mitigating factors of lack of knowledge and reliance on A&C Lettings, the penalty should be reduced to £10,000.00.

Determination of penalty

44. The Tribunal has considered all seven factors set out in the statutory guidance. Aside from culpability and harm these are:

- Severity of the offence. The Tribunal considers that lack of an HMO licence is serious, but the duration of the offence reduces its impact.
- Punishment of the offender. A financial penalty should be of a sufficient sum to represent a penal measure which has real economic impact but should be proportionate.
- Deter the offender from repeating the offence. So the penalty should be high enough to constitute a deterrent.
- Deter others from committing similar offences. Similar considerations apply.
- Remove any financial benefit. The Tribunal notes that the Applicant did not receive any financial benefit from the offence.

45. It is unclear where in the Respondent's assessment these five factors were explicitly taken into account, even though they are set out in the Policy.

46. The Respondent's policy also requires a consideration of the offender's assets and income but the Applicant did not suggest that he could not afford the penalty.

47. We find that the Respondent's assessment of £22,500.00 is clearly disproportionate. If a £30,000.00 penalty is to be reserved for the worst offenders, it is obvious that the offence committed by the Applicant for 19 days, although serious -as are all the offences covered by section 249A of the Act - must fall much nearer to the bottom of the range of penalties than to the top.

48. The Tribunal adopts the Respondent's matrix to arrive at a starting point for the penalty. Assessing culpability and harm both as Low, Band 1 (£0 - £5000.00) produces a midpoint of £2500.00. However, the Tribunal concludes that this figure should be increased by £1000.00, both to reflect the aggravating factor of the Applicant's lack of engagement and responsibility as a landlord, and to ensure the penalty is set at a level which is penal and a deterrent. Based on the sparse evidence before us, £3500.00 would appear to be not far off the net rent received by the Applicant during the entire period of about five and a half months during which the property was an unlicensed HMO.

49. Stepping back from the detail of the Respondent's policy and looking at the matter in the round, the Tribunal finds that a penalty of £3500.00 is both proportionate and satisfies the Respondent's stated aim of ensuring "the minimum burden compatible with achieving the desired objectives of regulation" (Policy para. 2.2.2).

50. We therefore vary the Final Notice of Financial Penalty to substitute a penalty of £3500.00 in place of £22,500.00, to be paid within 28 days of the date of this decision.

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.

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.