FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/HNA/2020/0091 and 0092**
HMCTS code (video)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 29, Vesage Court, 8a Leather Lane, London EC1N 7RE**
Applicant	**:**	**Mrs Meena Shaikh (1) (0091)** **Mr Altaf Shaikh (2) (0092)**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Camden**
Representative	**:**	**Mr Sarkis, In House Lawyer**
Type of application	**:**	**Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Tribunal Judge I Mohabir** **Mr M Cairns MCIEH**
Date of Decision	**:**	**9 August 2021**

Covid-19 pandemic: description of hearing

This has been a remote video hearing, which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE**.** A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in the hearing bundles prepared by the Appellant and the Respondent, the contents of which we have noted. The order made is described at the end of these reasons.

Introduction

1. Unless stated otherwise, any page references are to the Appellants' bundle [AB] and the Respondent's bundle [RB].

2. This is an appeal made by the Appellants against the financial penalty imposed on them by the Respondent pursuant to section 249A of the Housing Act 2004 ("the Act") regarding the property known as Flat 29, Vesage Court, 8a Leather Lane, London EC1N 7RE ("the property").

3. It is common ground that following an inspection of the property on 30 October 2019 by Mr Iain Clark, a Principal Environmental Health Officer employed by the Respondent, served two separate notices of intent on the First Appellant, Mrs Sheikh and another separate notice of intent on the Second Appellant, Mr Skeikh, all dated 10 February 2020 [RB/400-412].

4. The first notice in respect of the First Appellant alleged that the property was let as an unlicensed house in multiple occupation (HMO) in breach of Part 2 and sections 61(1) and 72(1) of the Act and proposed a financial penalty of £15,000. A similar notice was served on the Second Appellant and proposed a financial penalty of £5,000.

5. In addition, the second notice served on the First Appellant alleged that she had specifically breached Regulations 4(4) of The Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations") and thereby committed an offence by virtue of section 234 of the Act. The proposed level for the financial penalty was £15,000.

6. The specific breaches of Regulation 4(4) alleged were that the First Appellant failed:

   (a) to take all such measures as are reasonably required to protect the occupiers of the HMO from injury. The property was arranged with an 'inner bedroom' where the only means of escape in the event of fire led through the open plan kitchen/living area and with two further bedrooms where the only means of escape in the event of fire was along a corridor that was open to the kitchen and

therefore not protected from the effects of smoke and flame.

(b) to take all such measures as are reasonably required to protect the occupiers of the HMO from injury. The door to the front right bedroom was a thin insubstantial panel door, which was unable to adequately resist the spread of smoke and flame. None of the three bedroom doors at the property or to the living area was fitted with intumescent strips, cold smoke seals or a self-closing device and could not adequately resist the spread of smoke and flame.

(c) to take all such measures as are reasonably required to protect the occupiers of the HMO from injury. The property had an inadequate Automatic Fire Detection system (AFD) fitted which did not give suitable coverage to the bedrooms and did not meet the requirements of a mains wired Grade D1 system giving LD2 coverage.

(d) to take all such measures as are reasonably required to protect the occupiers of the HMO from injury. The middle left bedroom (measuring approximately 4.8 sq. metres and which had no windows) was formed from thin insubstantial stud walls constructed in a manner which did not give 30 minutes resistance to the spread of smoke and flame contrary to section 234 of the Housing Act 2004.

7. Following representations made by the Appellant's solicitors, the Respondent served final notices on them dated 17 June 2020 in which the level of the financial penalty for the First Appellant had been reduced to £10,000 each in respect of the two notice of intent served on her. The financial penalty in respect of the Second Appellant remained at £5,000.

8. On 15 July 2020, the Appellants made this application to appeal the final notices.

9. The Appellants primary ground of appeal is that the property was let to two tenants and, therefore, it was not an HMO and the Regulations did not apply to the letting.

10. The issues to be determined by the Tribunal are:

(a) was the property let as an HMO at the relevant time;

(b) if so, had the First Appellant committed one or more alleged breaches of Regulation 4(4) of the Regulations; and

(c) if so, are the level of the penalties appropriate.

Hearing

11. The remote video hearing took place on 26 May 2021. The Appellants

appeared in person. The Respondent was represented by Mr Sarkis, an in house lawyer.

12. The factual evidence of the Appellants was contained in their respective witness statements dated 25 January 2021, the contents of which were largely similar. These statements contained extensive references to the Respondent's alleged breaches of the Police and Criminal Evidence At 1984 and/or alleged breaches of the Appellants' human rights under the same Act and/or alleged breaches of the London Borough of Camden's Private Sector Housing Enforcement Policy dated November 2020.

13. The Tribunal ruled that none of these matters were relevant to this application because they are, in part, relevant to the criminal jurisdiction whereas this was a statutory civil jurisdiction limited to the Act. Therefore, the Tribunal had no power to adjudicate on these matters.

14. The factual evidence relied on by the Respondent was contained in the witness statement of Mr Clark dated 11 December 2020, Miss Abdirahman dated 4 December 2020 (a graduate Environmental Health Officer who visited the property with Mr Clark), Jer Ning Teo and Xin Yi Yu (the de facto tenants) and Liong Cheng (the purported tenant) dated 30 October 2019 together with a joint statement dated 21 November 2019 who did not attend to give oral evidence.

15. The salient parts of the evidence from the witnesses are referred to in the body of this decision.

Decision
Was the Property an HMO?

16. In this instance, as a matter of law, the property is an HMO if:

    (i) it consists of one or more units of living accommodation not consisting of self-contained flat or flats;
    (ii) the living accommodation is occupied by persons who do not form a single household;
    (iii) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying;
    (iv) their occupation constitutes the only use of the accommodation;
    (v) two or more of the households who occupy the living accommodation share one or more of the basic amenities.

17. An additional licensing scheme covering all HMO's in the Borough came into force throughout Camden on 8 December 2015. This requires that property owners and managers apply to the Council for a licence for all HMO's within the Borough.

18. It was common ground that the property was let under an assured shorthold agreement dated 30 August 2018 (it is assumed that this is incorrect and should be 2019) granted by the First Appellant to Jer Ning

Teo and Xin Yi Yu for a term of 12 months commencing from that 30 August 2019 at a rent of £600 per week payable 4 weeks in advance ("the tenancy agreement").

19. It was also common ground that the leasehold of the property is/was owned by the Appellants jointly and it was being "managed" at the time by both of them and did not have an HMO licence.

20. The evidence of Mr Lex is set out in the contemporaneous witness statement taken by Mr Clark at the time of his inspection on 30 October 2019. Mr Lex stated that he commenced occupation of the property on 30 August 2019 after seeing the property advertised on Facebook. He viewed the flat accompanied by the Second Respondent. At the time he commenced occupation, he and Miss Yu were met by the First Respondent. He asserted that at all times there were 3 beds in the flat and that all of the furniture had been provided by the First Respondent. He paid a rent of £180 per week excluding bills, which he gave to Miss Yu who paid the rent to the First Appellant on behalf of all of the tenants. When he queried with the First Appellant why his name did not expressly appear on the tenancy, he was assured by the First Respondent that everything was fine. Prior to his occupation, he was not acquainted with Miss Teo or Miss Yu.

21. The evidence of Mr Lex regarding his occupation was materially corroborated in the contemporaneous witness statements given to Mr Clark by Miss Teo and Miss Yu on 30 October 2019.

22. Put simply, the Appellants case was that Mr Lex, Miss Teo and Miss Yu had lied in their witness statements regarding the occupation of the property because they had raised a dispute with them with the Tenancy Deposit Scheme as a result of Miss Teo and Miss Yu unlawfully sub-letting a room to Mr Lex. In support of this, the Appellants relied on the express wording contained in the tenancy agreement and the tenancy deposit certificate that only named Miss Yeo and Miss Yu as the tenants.

23. In addition, the Appellant submitted that the WhatsApp communications between the parties on 20 August 2019 confirming the Mr Lex would be the third tenant had somehow been electronically manipulated and, therefore, could not be relied upon in evidence.

24. Although Mr Clark was cross-examined by the Appellants on the basis that he was pursuing a vendetta against them, the Tribunal found him to be a highly credible and fair witness. Indeed, at the time the hearing took place, Mr Clark had in fact retired from his employment with the Respondent and any reason to continue with such a "vendetta" had ceased. In any event, the Tribunal was satisfied that Mr Clark's conduct could not properly be regarded as conducting a vendetta against the Appellants and they attached significant weight to his evidence that, at the time of his inspection, the property was being physically occupied by Mr Lex, Miss Yeo and Miss Yu.

25. It was also suggested to Mr Clark in cross-examination by the Appellants that he had coerced the occupiers into making the statements they gave to him and Miss Abdirahman on 30 October 2019. This was expressly rejected by Miss Abdirahman in cross-examination. Furthermore, Mr Lex, Miss Teo and Miss Yu again corroborated in their joint witness statement dated 21 November 2020 the witness evidence they gave to Mr Clark on 30 October 2019. The Tribunal took judicial note of the fact that at the time they were all studying to become barristers and to, in effect, to give dishonest evidence could potentially have serious consequences for their intended careers. Apparently, when the joint statement had been prepared, all of them had returned to their countries of origin. The inference drawn by the Tribunal was that the joint witness statement had been prepared independently and without any external influence. Although they did not attend the hearing to given evidence, nevertheless, the Tribunal attached significant weight to their evidence also.

26. Compelling evidence that the Appellants had let the property to Mr Lex, Miss Yeo and Miss Yu can be found in the WhatsApp and email communications between the parties [RB/530-540]. This not only confirms that the Appellants had let the property from the outset to the 3 tenants, but it seems that the First Appellant sought to alert them to the fact the Respondent may attempt to carry an inspection and that under no circumstances should they allow entry. This is consistent with the evidence given by Mr Clark about his many frustrated attempts to gain access to the property. Understandably, the Appellants sought to discredit this evidence by submitting that somehow it had been electronically manipulated. The Tribunal was satisfied that there was no evidence of this and, indeed, the end-to-end encryption used in WhatsApp messaging prevents such manipulation taking place.

27. Furthermore, the Tribunal was presented with contemporaneous video evidence of the First Appellant showing a viewing of the property, which clearly demonstrated that it was being let as a 3 bedroom flat with shared facilities.

28. The Tribunal had little difficulty in finding beyond reasonable doubt that:

    (a) the property was let as a 3 bedroom flat to Mr Lex, Miss Yeo and Miss Yu with shared facilities as assured shorthold tenants commencing on 30 August 2019.

    (b) the living accommodation was occupied by the tenants who did not form a single household.

    (c) the living accommodation was occupied by the 3 tenants as their only or main residence or they are to be treated as so occupying.

    (d) their occupation constituted the only use of the accommodation.

(e) two or more of them who occupied the living accommodation shared one or more of the basic amenities.

29. The Tribunal attached no weight to the fact the tenancy agreement and other tenancy documents only expressly referred to Miss Yeo and Miss Yu as the tenants. The Tribunal was satisfied that, in the light of the compelling evidence otherwise, these were sham documents prepared by the Appellant in an attempt to evade the statutory HMO regime.

30. Accordingly, the Tribunal concluded that the property was an HMO within the meaning of section 254(3) of the Act and it was unlicensed in breach of Part 2 and sections 61(1) and 72(1) of the Act.

Breaches of Regulation 4(4)

31. In relation to the breaches of Regulation 4(4) set out at paragraph 6 above, the Tribunal was presented with the uncontroverted evidence of Mr Clark set out at paragraphs 6-11 [RB/3-6] of his witness statement. He concluded that the Applicants had variously breached Regulation 4(4) based on his knowledge and experience as a Principal Environmental Officer.

32. The Applicants' evidence was that although they owned a portfolio of buy to let properties, it did not necessarily mean that they understood all of the requirements of the Regulations. For example, the First Applicant asked Mr Clark to clarify the definition/measurement of the lounge kitchen was, as there was a separating low wall or the function of the balcony going from the inner bedroom.

33. The Tribunal accepted the evidence of Mr Clark at paragraph 7 of his witness statement that, certainly, in his previous dealings the First Applicant in relation to their other buy to let properties, he had made her aware of the statutory minimum bedroom size for licensable HMO bedrooms. Indeed, the Applicants had made an earlier unsuccessful appeal to the Tribunal on the same point regarding their property at Flat 19, Cavendish Mansions (LON/00AG/HMV/2019/003).

34. The obvious point to be taken in relation to the other alleged breaches of Regulation 4(4) is that the Applicants would have been made of these requirements had they applied for an HMO licence.

35. The Tribunal noted that the licensing legislation is intended to assist local Authorities in locating and monitoring HMO's. Multi occupied property has historically contained the most unsatisfactory and hazardous living accommodation with particular concerns about inadequate fire safety provision in such properties. Against this background the failure to licence is potentially extremely serious, hence the significant associated penalties and forfeit of rents that the legislation sanctions. We are also aware of the argument that good landlords who licence promptly may otherwise feel that those failing to licence would be gaining unfair benefit in avoiding controls and licencing costs if licencing was not heavily

incentivised. There are then sound public policy reasons for the provisions.

36. All HMOs, licensable or not, are subject to the provisions of the Management of Houses in Multiple Occupation Regulations 2006. Having found that the property was an HMO the Respondent also found that the conditions did include breaches of the Regulations and, in particular, defects and deficiencies relating to fire safety in multi-occupied accommodation. We were directed to the provisions under s4(1)(a) and s4(4) of the Regulations which the Respondent referenced in their 'Letter of Alleged Offence' and the 'Notice of Intention to Issue a Financial Penalty' documents addressing management breaches.

37. Mr Clark noted that the layout of the flat by had been altered following acquisition by the Applicants. The main change had been the sub-division of the original living room to form an additional bedroom. In this new layout this additional bedroom opened directly into the combined kitchen/dining area. In the event of a fire emergency that room's occupier(s) would need to pass through the kitchen to access the hall and the flat's exit door. The concern here was that kitchens are a common seat of fire and any occupant(s) may then be trapped in their room. Compounding matters the kitchen also lacked a fire door onto the hall so that a kitchen fire could make the exit route unavailable to all rooms. In addition, room doors and some room partitioning failed to meet appropriate fire safety separation standards so potentially allowing smoke and heat to permeate other rooms in a fire emergency. Adding still further to this highly unsatisfactory state of affairs the flat also lacked an appropriate fire alarm system.

38. Further, the internal bedroom had no openable window. Borrowed light glazing blocks had been fitted into the top section of the rear bedroom partition wall onto which this room backed as the only source of natural lighting but these were inherently inadequate from a fire separation perspective and did not provide any ventilation. The Applicants stated that there was apparently an airbrick in the room's hall partition wall but aside from the inadequacy of such provision for ventilation of a bedroom it would be inappropriate for fire safety reasons as smoke and heat could penetrate between the hall and this room.

39. The Tribunal was satisfied that Mr Clark was entitled to conclude that there were significant and serious breaches of the Regulations as well as the failure to licence and that the related assessments for financial penalty purposes were appropriate.

40. Accordingly, the Tribunal found beyond reasonable doubt that the various breaches of Regulation 4(4) had occurred as set out in the final notice served by the Respondent on the Appellants.

Level of Penalties

41. The Tribunal found it difficult to depart from the circumstances that Mr Clark had regard to and the reasoning he adopted in paragraph 74 of his witness statement [RB/25] when calculating the appropriate level of penalty to impose on the Applicants respectively. These have been borne out by the Tribunal's findings above.

42. No express guidance is provided in paragraph 10 in Schedule 13A to the Act about what matters the Tribunal should have regard to when an appeal against the level of penalty is made. We suggest that this was deliberate on the part of Parliament because each appeal will turn on its own facts.

43. As to the facts of this case, the Tribunal was satisfied that the ill health of the Applicants did not provide a valid defence to culpability, especially having regard to the its finding that the tenancy agreement was a sham from the outset. The Tribunal also had regard to the fact that the Applicants are, on their own case, experienced buy to let landlords of many years experience of HMO lettings and attempted to deliberately avoid applying for a licence with the knowledge that one was required for the property. Indeed, the inventory provided by the Applicants to Mr Clark stated "The 'Small Room' was provided with "1 x Single Bed Frame - Good; 1 x 3 Drawer bedside Cabinet – Good; 1 x Study Desk– Good; 1x Wardrobe – Good; 1x Swivel Chair – New; 1 x Smoke alarm – Working; 1 x 3ES Screw bulb Ceiling Light fittings – Working; 1x Oil Paintings Excellent; New Black Porcelain floor tiles: no cracks / chips". The Tribunal agreed with Mr Clark's conclusion that this shows the 'small room' was clearly furnished as a bedroom for a single person, including a 'new' swivel chair. It was not furnished as a shared study, or shared living space, or storage space, all of which might be expected if this had been a small flat shared by 2 people with very limited space. This points to a high level of culpability on the part of the Applicants.

44. Although the Applicants professed that they were of limited financial means, they provided no real financial disclosure. In any event, the Act makes no express reference to a landlord's financial means as being a relevant criteria when assessing the level of penalty to be imposed. If this was so, then even though a landlord was culpable he could escape or significantly reduce a penalty imposed if he could establish he was of limited means. The Tribunal was satisfied that this could not have been the intention behind the Act. In other words, a landlord's ability to pay the penalty is not a relevant factor to be taken into account by the Tribunal.

45. Accordingly, for the reasons given, the appeal is dismissed and the Tribunal confirms both the decision of the Respondent to impose the financial penalties on the Applicants and the respective amounts. The Tribunal does so pursuant to paragraph 10(4) in Schedule 13A to the Act

Name: Tribunal Judge I Mohabir **Date:** 9 August 2021

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).