FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/HNA/2021/0004**
HMCTS code (paper, video, audio)	**:**	**V: CVP REMOTE**
Property	**:**	**161 Praed Street, London W2 1RL ("the Property")**
Appellant/applicant	**:**	**Adil Catering Limited**
Representative	**:**	**Mr Edward Blakeney of Counsel**
Respondents	**:**	**The City of Westminster Council**
Representative	**:**	**Ms Kirsty Panton of Counsel**
Type of Application	**:**	**Appeal under s.249A and schedule 13A of the Housing Act 2004**
Tribunal Members		**Judge Professor Robert Abbey and Mr Chris Gowman MCIEH**
Date of Hearing	**:**	**28 September 2021**
Date of Decision	**:**	**1 October 2021**

DECISION

- This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice CVP platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in two bundles of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it a pair of electronic/digital trial bundles of documents prepared by the applicant and the respondent, in accordance with previous directions.

Decision

1. The decision by the respondent to impose two financial penalties is upheld but subject to a reduction in the total sum. The total of the two penalties amounted to a gross sum of £20000 but reduced by 20% to £16000. The first penalty was £15000 but reduced by the respondent by 20% to £12000. The second penalty was £5000 but also subject to a discount of 20%. For the reasons set out below the Tribunal has determined that the second penalty of £5000 should be subject to a discount of 25% to £3750. This makes a final total financial penalty of £15750.
2. In the light of the above, the appeal by the appellant against the imposition of a financial penalty by the respondent under section 249A and schedule 13A of the Housing Act 2004 is therefore allowed in part as set out above.

Introduction

3. This is the hearing of the applicant's application regarding **161 Praed Street, London W2 1RL** ("the Property"), pursuant to Schedule 13A of the Housing Act 2004 ("the 2004 Act"), to appeal against a financial penalty imposed by the respondent under s249A of the 2004 Act. The financial penalty arises from purported breaches of the Licensing and Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations"), which would amount to an offence under section 243(3) of the 2004 Act. The applicant was the leaseholder of the property and the respondent is the local authority responsible for the locality in which the property is situate.

The Hearing

4. The appeal was set down for hearing on 28 September 2021 when the applicant was represented by Mr Blakeney of Counsel and Ms Panton of Counsel appeared for the respondent. This hearing is a a re-hearing of the local authority decision, see paragraph 10(3)(a) of Schedule 13A

to the 2004 Act. The Tribunal is therefore to consider whether to impose a financial penalty afresh, and is not limited to a review of the decision made by the respondent.

5. The breaches purportedly identified by the respondent fall into two categories, first, breach of 'Regulation 4: Duty of manager to take safety measures. In particular, the applicant had to ensure that all means of escape from fire in the Property were kept free from obstruction and maintained in good order and repair. The applicant also had to ensure that any firefighting equipment and fire alarms were maintained in good working order. The breach(es) related to items in the communal parts, fire doors, the alarm system and fire extinguishers.

6. Secondly, breach of 'Regulation 7: Duty of manager to maintain common parts, fixtures, fittings and appliances. This related to the condition of lights on the common parts.

7. At the hearing the applicant maintained that no financial penalty should have been imposed at all. On the other hand, the respondent considers that the financial penalties should remain as imposed but discounted to take account of remedial works completed by the appliant. As the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.)

Decision and Reasons

8. The Tribunal noted that the applicant advanced four grounds for the appeal: -

   i. Breaches not made out;
   ii. Failure by the respondent to follow their Private Sector Enforcement Policy from 2018;
   iii. Defence of reasonable excuse, and,
   iv. Level of the penalty

   Each ground will therefore be considered in turn as more particularly set out below.

9. Starting with breaches not made out. The applicant says in this regard that on the facts the Tribunal cannot be sure that the applicant has committed the offences beyond a reasonable doubt. The applicant says that neither of the alleged breaches of the Regulations "impose strict liability – if the means of escape from fire in the HMO are obstructed or not maintained, that would not automatically amount to a breach; were it otherwise then a landlord could be subject to fines immediately upon the occurrence of actions outside his control (e.g. actions of tenants)."

10. The respondent advanced the opposing argument and in support cited the recent case *of I R Management Services Limited v Salford City*

Council [2020] UKUT 81 (LC) where Martin Rodger QC the Deputy Chamber President wrote at paragraph 27 "*The offence of failing to comply with a relevant regulation is one of strict liability, subject only to the statutory defence.*"

11. This Tribunal must be bound by the decisions of the Upper Tribunal and as such these are therefore strict liability offences and if they existed and were identified at the time of an inspection by the respondent then at the point a notice is issued the strict liability arises there and then. This is what occurred in this case.

12. Furthermore the Tribunal had the benefit of hearing evidence from Trevor Withams (employed by the respondent as an Environmental Health Enforcement Officer) who gave details of the breaches he saw when he attended the property. Consequently, the Tribunal rejects this ground for the appeal.

13. Turning next to ground two, the failure of the respondent to follow their Private Sector Policy from 2018. The *Marshall* case mentioned above makes it clear that the respondent must accept and utilise any express enforcement policy such as the one in this dispute from 2018. The applicant says that the respondent failed to do so. The applicant asserts that "Primarily, the respondent failed to give an informal indication to the applicant of the potential contraventions 1-2 and 5. The first time these were brought to the applicant's attention was in the formal indication that they were in breach of the Regulations [100 in the applicant's bundle], and that gave no opportunity to the respondent to remedy them before a penalty was imposed. That is not in accordance with the respondent's own policy [53-54 in the respondent's bundle], and the penalty should therefore be set aside."

14. The Tribunal took time to carefully consider the 2018 Westminster Enforcement Policy. This states that: -

> "*The type of enforcement taken will vary according to the legislation being applied. In some cases, taking enforcement action is a statutory duty, provided certain criteria are met. In other cases, officers have the ability to use informal action as a first option when appropriate through working with landlords and residents and others offering advice, information and assistance to aid them to reach compliance with housing related legislation.*
>
> *Where an informal approach fails to achieve the desired result, or a failure to comply is of a serious nature, officers will use the full range of enforcement options available to them under the relevant legislation to achieve compliance to protect those at risk. In the most*

serious contraventions possible action will include prosecution.

The type of enforcement action pursued is always considered on a case by case basis, based on its own merits. Following consideration of the specific circumstances of the particular case the most appropriate enforcement option will be applied accordingly. In every case enforcement seeks to:

• Promote and achieve sustained compliance with the law

• Ensure that landlords take action to deal immediately with serious risks

• Ensure that landlords who breach legislative requirements are held to account"

15. It was apparent to the Tribunal that the respondent had properly applied this policy in its dealings with the property and the respondent. The applicant complained that there had been no informal activity prior to the serving of the notice of intent. It seemed to the Tribunal that the policy did not require this to take place. The policy was not prescriptive in this respect and as such the way the respondent progressed this matter was entirely in compliance with the Policy. On 30 July 2020 Trevor Withams (employed by the respondent as an Environmental Health Enforcement Officer) attended the Property and found apparent breaches of the Regulations. Thereafter, on 12 November 2020 the respondent served a Notice of Intent to impose a financial penalty. There is nothing in this process that contravenes the 2018 policy. (Moreover, the respondents conceded a discount on the proposed penalty to further confirm their approach to this process.) Consequently, the Tribunal rejects this ground for the appeal.

16. Turning now to the third ground the defence of reasonable excuse. The applicant seeks to rely on the statutory defence contained within s234(4) of the 2004 Act: "*In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation*." The applicant asserted that the following issues or factors provide support for such a defence: -

- *"The issues identified by R in their letter of 3 June 2020 had been investigated and resolved in June and July 2020.*
- *The recent inspection of the Property for maintenance purposes had also identified the Property as being in a satisfactory condition.*
- *A therefore had, to the best of their knowledge, complied with the Regulations and they had no notice of issues*

identified by R during the inspection on 30 July 2020. The Notice of Intent raised new issues for the first time.

- *The Covid-19 pandemic had imposed substantial difficulties in managing the Property."*

17. It is the case that the respondent wrote to the applicant on 3 June 2020 to raise with the respondent concerns taken from a complaint made by a tenant in the property regarding fire safety worries, mice infestation and damp ingress. It is also the case that the applicant did seek to address these concerns. For example, the Tribunal were told that pest control works were quickly put in place to deal with the mice. Notwithstanding this action when Mr Witham attended the property on 30 July 2021, he found apparent breaches of the Regulations and these eventually prompted the issue of the Notices.

18. Similarly, there may have been maintenance inspections that confirmed the property "as being in a satisfactory condition" but this did not deal with the breaches identified. The notice of intent did raise new issues and the respondent was entitled to raise them and this was in no way an action that could provide a defence. Finally, it is the case that the Covid pandemic will have had an effect but Government Guidelines made it clear that there was still an expectation on landlords to carry out important repairs such as those required in this dispute even in the midst of the pandemic. Also, as the defects were in the common parts, access was not an issue. Consequently, the Tribunal rejects this ground for the appeal.

19. Finally, the Tribunal considered the final ground, namely the level of the penalty. The applicant says he level of the penalty is excessive as the offences were not severe. On culpability the applicant says their actions were not deliberate and that with regard to harm the offences were not severe and several tenants had already vacated the property. Accordingly, the level of the penalty was disproportionate to the offences and that because the lease has been given back to the superior lessor a deterrent effect is not necessary. The applicant says it was renting the property at a loss and that all the issues were remedied following the initial letter.

20. The respondent highlighted the fact that the applicant had been involved in a previous case with the respondent in 2018. In that year the respondent had served on the applicant an Improvement Notice that related to fire safety issues. A civil Penalty Notice had been issued at £20,000 in July 2019 and a Final notice in February 2020 at £18,000. Eventually a settlement was reached with a payment by the applicant of £14,000 spread over 4 months.

21. So, it was apparent to the Tribunal that there was a history of failure on the part of the applicant to comply with appropriate and important regulations. Accordingly, with regard to this ground the Tribunal was

for the most part unconvinced by the applicant's representations. Several of the breaches related to fire precautions and were very important to the safety of tenants. For example, the Tribunal saw a photo of a fire extinguisher that had a note on it saying it had been "condemned" from some point as long ago as 2009. Furthermore, the lobby fire door to the second floor was broken did not close and had a large hole in it. Also, the fire alarm system control panel indicated a fire in zones 2 and 3. It showed that there was a fault in zone 4 and also indicated a general fault. The Tribunal, in the light of the foregoing, rejected this final ground in relation to the first penalty imposed by the respondent.

22. However, regarding the second penalty, this related to failure to comply with Regulation 7 in that the respondent found that two of the three lights for the common corridor on the third floor were not working. While this is a concern it is perhaps not to the same degree as fire safety breaches. Therefore, although the respondent had reduced the penalty of £5,000 by 20% the Tribunal thought that this was not appropriate or proportionate and substituted 25% giving a final figure in this regard of £3,750 in place of the figure set by the respondent.

23. Therefore, the appeal by the appellant against the imposition of the financial penalty by the respondent under section 249A and schedule 13A of the Housing Act 2004 is allowed in part.

24. Rights of appeal are set out in the annex to this decision.

Name:	Judge Professor Robert Abbey	**Date:**	1 October 2021

Annex

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).

Appendix

249A Financial penalties for certain housing offences in England

(1)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.

(2)In this section "relevant housing offence" means an offence under—

(a)section 30 (failure to comply with improvement notice),

(b)section 72 (licensing of HMOs),

(c)section 95 (licensing of houses under Part 3),

(d)section 139(7) (failure to comply with overcrowding notice), or

(e)section 234 (management regulations in respect of HMOs).

(3)Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4)The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5)The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a)the person has been convicted of the offence in respect of that conduct, or

(b)criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6)Schedule 13A deals with—

(a)the procedure for imposing financial penalties,

(b)appeals against financial penalties,

(c)enforcement of financial penalties, and

(d)guidance in respect of financial penalties.

(7)The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8)The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9)For the purposes of this section a person's conduct includes a failure to act.

254 Meaning of "house in multiple occupation"

(1)For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if—

(a)it meets the conditions in subsection (2) ("the standard test");

(b)it meets the conditions in subsection (3) ("the self-contained flat test");

(c)it meets the conditions in subsection (4) ("the converted building test");

(d)an HMO declaration is in force in respect of it under section 255; or

(e)it is a converted block of flats to which section 257 applies.

(2)A building or a part of a building meets the standard test if—

(a)it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b)the living accommodation is occupied by persons who do not form a single household (see section 258);

(c)the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d)their occupation of the living accommodation constitutes the only use of that accommodation;

(e)rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f)two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

(3)A part of a building meets the self-contained flat test if—

(a)it consists of a self-contained flat; and

(b)paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4)A building or a part of a building meets the converted building test if—

(a)it is a converted building;

(b)it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);

(c)the living accommodation is occupied by persons who do not form a single household (see section 258);

(d)the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(e)their occupation of the living accommodation constitutes the only use of that accommodation; and

(f)rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

(5)But for any purposes of this Act (other than those of Part 1) a building or part of a building within subsection (1) is not a house in multiple occupation if it is listed in Schedule 14.

(6)The appropriate national authority may by regulations—

(a)make such amendments of this section and sections 255 to 259 as the authority considers appropriate with a view to securing that any building or part of a building of a description specified in the regulations is or is not to be a house in multiple occupation for any specified purposes of this Act;

(b)provide for such amendments to have effect also for the purposes of definitions in other enactments that operate by reference to this Act;

(c)make such consequential amendments of any provision of this Act, or any other enactment, as the authority considers appropriate.

(7)Regulations under subsection (6) may frame any description by reference to any matters or circumstances whatever.

(8)In this section—

“basic amenities” means—

(a)a toilet,

(b)personal washing facilities, or

(c)cooking facilities;

“converted building” means a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed;

“enactment” includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30);

“self-contained flat” means a separate set of premises (whether or not on the same floor)—

(a)which forms part of a building;

(b)either the whole or a material part of which lies above or below some other part of the building; and

(c)in which all three basic amenities are available for the exclusive use of its occupants.

Schedule 13A

Notice of intent

1Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a “notice of intent”).

2(1)The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2)But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a)at any time when the conduct is continuing, or

(b)within the period of 6 months beginning with the last day on which the conduct occurs.

(3)For the purposes of this paragraph a person's conduct includes a failure to act.

3The notice of intent must set out—

(a)the amount of the proposed financial penalty,

(b)the reasons for proposing to impose the financial penalty, and

(c)information about the right to make representations under paragraph 4.

Right to make representations

4(1)A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2)Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given (“the period for representations”).

Final notice

5After the end of the period for representations the local housing authority must—

(a)decide whether to impose a financial penalty on the person, and

(b)if it decides to impose a financial penalty, decide the amount of the penalty.

6If the authority decides to impose a financial penalty on the person, it must give the person a notice (a “final notice”) imposing that penalty.

7The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8The final notice must set out—

(a)the amount of the financial penalty,

(b)the reasons for imposing the penalty,

(c)information about how to pay the penalty,

(d)the period for payment of the penalty,

(e)information about rights of appeal, and

(f)the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

9(1)A local housing authority may at any time—

(a)withdraw a notice of intent or final notice, or

(b)reduce the amount specified in a notice of intent or final notice.

(2)The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

10(1)A person to whom a final notice is given may appeal to the First-tier Tribunal against—

(a)the decision to impose the penalty, or

(b)the amount of the penalty.

(2)If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3)An appeal under this paragraph—

(a)is to be a re-hearing of the local housing authority's decision, but

(b)may be determined having regard to matters of which the authority was unaware.

(4)On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

(5)The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

Recovery of financial penalty

11(1)This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2)The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3)In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a)signed by the chief finance officer of the local housing authority which imposed the penalty, and

(b)states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4)A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5)In this paragraph "chief finance officer" has the same meaning as in section 5 of the Local Government and Housing Act 1989.

Guidance

12A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A