FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/HNA/2020/0070**
Property	**:**	**171, Dickenson Road, Manchester M13 OYN**
Applicant	**:**	**Mecca Properties (M/cr) Limited**
Respondent	**:**	**Manchester City Council**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal Members	**:**	**Tribunal Judge C Wood** **Tribunal Member J Faulkner**
Date of Decision	**:**	**27 May 2021**

DECISION

Order

1. The Tribunal orders as follows:

    1.1 In accordance with paragraph 10(4) of Schedule 13A to the Housing Act 2004, ("the 2004 Act"), the final notice dated 21 August 2021 is confirmed so as to impose a financial penalty of £21,499 on the Applicant.

    1.2 The financial penalty is payable by the Applicant within 28 days of the date of this Order.

Application

2. By an application dated 15 September 2020, ("the Application"), the Applicant appealed against a financial penalty imposed by the Respondent under section 249(a) of the Act.

3. Directions dated 29 January 2021 were issued pursuant to which both parties submitted written representations.

4. A hearing of the Application took place remotely on 20 April 2021 at 10:30, at which both parties attended.

Law and Guidance - Power to impose financial penalties

5. New provisions were inserted into the 2004 Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. One of those provisions was section 249A, which came into force on 6 April 2017. It enables a local housing authority to 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.

6. Relevant housing offences are listed in section 249A(2). They include the offence, under section 234(3) of the 2004 Act, of failing to comply with regulations relating to the management of houses in multiple occupation. The relevant regulations are the Management of Houses in Multiple Occupation (England) Regulations 2006, ("the Management Regulations").

7. Only one financial penalty under section 249A may be imposed on a person in respect of the same conduct. The amount of that penalty is determined by the local housing authority (but it may not exceed £30,000), and its imposition is an alternative to instituting criminal proceedings for the offence in question.

Procedural requirements

8. Schedule 13A to the 2004 Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent setting out:

    - the amount of the proposed financial penalty;
    - the reasons for proposing to impose it; and
    - information about the right to make representations.

9. Unless the conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct.

10. A person who is given a notice of intent has the right to make written representations to the local housing authority about the proposal to impose a financial penalty. Any such representations must be made within the period of 28 days beginning with the day after that on which the notice of intent was given. After the end of that period, the local housing authority must decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount.

11. If the local housing authority decides to impose a financial penalty on a person, it must give that person a final notice setting out:

- the amount of the financial penalty;
- the reasons for imposing it;
- information about how to pay the penalty;
- the period for payment of the penalty;
- information about rights of appeal; and
- the consequences of failure to comply with the notice.

Relevant guidance

12. A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions in respect of the imposition of financial penalties. Such guidance ("the HCLG Guidance") was issued by the Ministry of Housing, Communities and Local Government in April 2018: Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities. It states that local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty and should decide which option to pursue on a case by case basis. The HCLG Guidance also states that local housing authorities should develop and document their own policy on determining the appropriate level of penalty in a particular case. However, it goes on to state: "Generally, we would expect the maximum amount to be reserved for the very worst offenders. 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."

13. The HCLG Guidance also sets out the following list of factors which local housing authorities should consider to help ensure that financial penalties are 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. Deterrence of the offender from repeating the offence.

f. Deterrence of others from committing similar offences.

g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.

14. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, the Association of Greater Manchester Authorities, ("AGMA"), of which the Respondent is a member, adopted the AGMA Policy on Civil Penalties as an Alternative to Prosecution under the Housing and Planning Act 2016, as revised on 2 January 2020, ("the Policy").

Appeals

15. A final notice given under Schedule 13A to the 2004 Act 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. However, this is subject to the right of the person to whom a final notice is given to appeal to the Tribunal (under paragraph 10 of Schedule 13A).

16. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.

17. The appeal is by way of a re-hearing of the local housing authority's decision, but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.

Evidence

18. Both parties made written submissions prior to the hearing. Oral submissions were made at the hearing by Mr. M Rahi on behalf of the Applicant and by Mr. N Flanagan of Counsel on behalf of the Respondent.

19. The Applicant's oral and written submissions reflected the grounds of the appeal set out in the Application as follows:

    19.1 the appeal is a challenge to the amount of the financial penalty which the Applicant believes should be waived or substantially reduced;

    19.2 the appropriate harm category should have been assessed as medium because, although it is accepted that defects existed at the Property, no actual harm resulted;

    19.3 the categorisation of culpability as high was also inappropriate as steps were taken to manage the Property although it is also accepted that those steps were "insufficient";

    19.4 the Applicant refers to paragraph 5.5 of the Policy which gives discretion to the Respondent to reduce the financial penalty by up to a maximum of 30% in certain circumstances, and claims that such a reduction was more appropriate than the £1000 reduction applied by the Respondent;

    19.5 all of the works had been carried out prior to the issue of the final notice dated 21 August 2020, ("the Final Notice"); and,

    19.6 the imposition of the financial penalty at the amount assessed would amount to 2 years' rent from the Property and cause the Applicant financial hardship.

20. The Respondent's oral and written submissions are summarised as follows:

20.1 the chronology of events which preceded the issue of the Final Notice was outlined;

20.2 reference was made to the witness statements of Mr.K.Sadique and Ms R.Ransome dated 17 and 18 February 2021 respectively which contain detailed information relating to the inspection visits to the Property and the events leading up to the issue of the notice of intention to impose a financial penalty dated 19 December 2019, ("the Notice of Intent"), and the Final Notice, including, without limitation, the following:

(i) as at the inspection dates, the Property was occupied by 4 people living as 3 separate households and was therefore an HMO;

(ii) the relevance and importance of fire protection measures and the application of the Management Regulations to the Property;

(iii) the Applicant's failure to take any action in relation to the Emergency Remedial Notice, ("the ERN"), relating to the installation of battery-operated smoke alarms as a temporary mitigation, and the continuing failures of compliance with the Management Regulations as noted at the 2nd inspection on 15 October 2019;

(iv) in view of defects in the electrical installation noted at both inspections, concerns regarding the electrical safety certificate which dated 21 September 2019 pre-dates the 1st inspection; and,

(v) the Applicant and Mr.Rahi's involvement as landlord/manager of a significant portfolio of similar properties and a history of enforcement action in respect of some of these properties.

20.3 These matters were also referenced in the Respondent's Statement of Reasons and Response to the Application.

20.4 In view of the Applicant's acknowledgments that the Property was an HMO to which the Management Regulations applied and that there were defects at the Property which had required remediation, the Respondent considered that the principal issue for determination by the Tribunal was the Respondent's quantification of the amount of the financial penalty, rather than its imposition.

20.5 The following oral submissions were made in respect of quantification:

(i) the revision of the Policy was introduced between the issue of the Notice of Intent and the Final Notice. The principal difference between the revised Policy and its precursor is in the financial ranges of the banding levels. The determination of the amount of the financial penalty as included in the Final Notice was made in accordance with the revised Policy;

(ii) the Applicant had provided no evidence to support the claim that the penalty equated to 2 years' rent nor of any other financial hardship;

(iii) as at 12 November 2019, Mr.Rahi had confirmed to the Respondent that the Applicant/Mr.Rahi owned and/or managed a portfolio of c45 properties, some of which were HMOs;

(iv) severity of the offence: it was claimed that the inadequate fire protection measures at the Property, including lack of smoke alarms, lack of fire doors, electrical defects, obstructed escape routes, posed a "clear and obvious" risk of danger/harm for the tenants. Whilst the Respondent acknowledged that the corrective works had been completed by August 2020, it had taken the Applicant 11 months to take that action in respect of certain of the defects;

(v) culpability/track record: the Respondent claimed that the history of previous enforcement action in respect of other properties owned and/or managed by the Applicant/Mr.Rahi was evidence of a failure on the Applicant's part to learn lessons from past breaches, or to take reasonable care to avoid circumstances giving rise to defects/breaches by failing to act pro-actively. In this respect, the size of the property portfolio owned and/or managed by the Applicant/Mr.Rahi was considered relevant by the Respondent as it was considered reasonable to expect that they should be aware of the legal obligations in relation to HMOs, including the need for compliance with the Management Regulations;

(vi) concern was expressed regarding Mr.Rahi's possible involvement in the attempt by the tenant who accompanied Mr.Sadique on his 1st inspection to mislead him regarding the number of tenants who lived at the Property. This was important because of its relevance to the categorisation of the Property as an HMO;

(vii) having considered the relevant factors, the Respondent's assessment was of high culpability;

(viii) harm: the Respondent conceded that no actual harm had been suffered by any of the tenants as a result of the defects. Having regard to the layout of the Property, its location above commercial premises, the ongoing failure to take adequate fire protection measures (mitigated only by the installation by the Respondent of smoke alarms following the Applicant's failure to comply with the ERN), and the number of people in occupation, the Respondent considered that it was reasonable to conclude that there was a high risk of harm if a fire had broken out. As such, it was reasonable to assess the matter as one of high harm;

(ix) in accordance with the Policy, an assessment of high culpability and high harm placed the financial penalty in Band 6 where the range was £21000 - £23999, with a mid-point of £22499.50. This was the amount set out in the Notice of Intent. Following consideration of the Applicant's representations set out in the Applicant's email of 18 February 2020, this was reduced by £1000 to £21499.50;

(x) in making its assessment, the Respondent also considered that it was appropriate that the financial penalty (a) act as a deterrent against future similar conduct by the Applicant, and (b) remove any financial benefit from renting the Property in its unremedied condition. The point was made that it was always cheaper to rent unsafe properties, a matter of particular concern in this case to the Respondent having regard to the number of properties owned and/or managed by the Applicant;

(xi) it was also made clear by the Respondent that, whilst it had to some extent focussed on the absence of adequate fire safety measures at the Property, both the Notice of Intent and the Final Notice contained a series of other breaches of the Management Regulations.

21. In response to questions from Mr.Rahi and the Tribunal, the Respondent confirmed as follows:

21.1 that paragraph 5.5 of the Policy, (discretion to reduce a financial penalty by up to 30%), was only relevant where corrective action was taken promptly, where culpability was assessed as low or medium and the corrective action was taken before the issue of a final notice. It was not relevant to this case because culpability had been assessed as high;

21.2 that the financial penalty relates to the Property alone. The references to other properties are relevant only because of the Respondent's determination of high culpability/high harm in relation to the Property. It was considered relevant by the Respondent that the Property is located above the Applicant's office where the opportunity to ensure proper management control was presumed to be at its highest.

22. In response to a question from the Tribunal, Mr.Rahi confirmed that he/the Applicant managed 30-35 properties of which only 6 were owned by him, and that had been the position for the last 2 years. He confirmed that he had been managing properties for over 20 years. He also stated that he needed to recover the rent on these properties to be able to pay the financial penalty.

23. In closing submissions for the Applicant, Mr.Rahi requested that the Tribunal "waive" the financial penalty in full. He stated that there had been maximum co-operation with the Respondent and that he/the Respondent deserved a "last chance". He also claimed that the imposition of the financial penalty would cause financial hardship as it equated to 2 years' rent on the Property.

Reasons

24. The Tribunal was satisfied beyond reasonable doubt that the Applicant's conduct amounted to an offence under s234(3) of the 2004 Act, entitling the Respondent to impose a financial penalty under s249A of the 2004 Act.

25. The Tribunal was also satisfied that, in respect of the Notice of Intent and the Final Notice, the Respondent had complied with the following procedural requirements as required under Schedule 13A to the Act:

25.1 the offence under s234(3) of the 2004 Act was continuing as at the date of the Notice of Intent, namely, 19 December 2019;

25.2 the Notice of Intent and the Final Notice contained the information as required under paragraphs 3 and 8 of Schedule 13A to the Act; and,

25.3 the Notice of Intent contained information about the right to make representations.

26. In this respect, the Tribunal noted that the Respondent had considered the Applicant's representations, even though they had been received after the 28 day period for submission, and, after such consideration, had reduced the financial penalty by £1000.

27. In determining the amount of the financial penalty to be imposed, the Tribunal considered the following factors to be of relevance:

27.1 the Tribunal noted that the Applicant had not produced any evidence of financial hardship;

27.2 the Tribunal was unimpressed by the discrepancy between Mr.Rahi's oral evidence to the Tribunal and his statement to the Respondent on 12 November 2019 regarding the number of properties within the Applicant's/Mr.Rahi's management and/or ownership. At best, it demonstrated a continuing failure by Mr.Rahi to recognise the need to adopt a professional approach to the management of the portfolio;

27.3 severity of the offence: the Tribunal agreed with the Respondent that the lack of adequate fire protection/safety measures is a matter of great concern in any property, and more particularly in an HMO occupied by tenants comprising a number of separate households, as is the case with the Property. The Applicant's failure to take prompt or, in the case of the installation of the smoke alarms as required under the ERN, any, corrective action, even after defects had been pointed out to it, heightened that concern. In particular, the Tribunal noted that some of the defects had remained unremedied for 11 months. A further issue of concern to the Tribunal was the question raised regarding the integrity of the electrical installation certificate. Viewed in the context of the Respondent's ownership/management of a significant portfolio of properties, the Tribunal concluded that the offence was one of substantial severity;

27.4 culpability/track record: the Tribunal was satisfied that there was evidence to support an assessment of high culpability, namely, that the Applicant's approach to the management of the Property as an HMO demonstrated "systemic failings" and a "wilful blindness to risk of offending". The Tribunal had regard, in particular, to the evidence of enforcement action by the Respondent in respect of other properties owned and/or managed by the Applicant/Mr.Rahi where the breaches identified were of a similar nature to those identified at the Property, namely, inadequate fire safety/protection measures. The Tribunal also noted that these defects had been allowed to arise and persist at the Property notwithstanding the proximity of the Property to the Applicant's office, to Mr.Rahi's statements in the PACE interview suggesting that he made frequent visits to the Property and that they had been set out in writing to the Respondent/Mr.Rahi, as requested, following both inspection visits;

27.5 the harm:

(i) in considering the assessment of harm, the Tribunal noted that no actual harm had resulted to any of the tenants at the Property but also noted that, in accordance with the Policy, it was appropriate to consider "the relative danger that persons have been exposed to as a result of the offender's conduct, the likelihood of harm occurring and the gravity of harm that could have resulted". The Respondent had identified the absence of a fire alarm system, lack of fire doors, the need for keys to unlock doors, the security shutter at the front entrance and the Property's location above commercial premises as a combination of factors which "substantially increases the risk of injury or even death in the event of a fire";

(ii) the Tribunal noted the following:

(a) the Tribunal was not persuaded that the security shutter posed any substantial risk to the tenants of the Property; and,

(b) the Tribunal did not accept that the Property's location above commercial premises per se was a relevant contributory factor. The Tribunal considered that office premises present a far lower risk than, eg, a food outlet;

(iii) however, the Tribunal also noted the following:

(a) at the time of the Notice of Intent, it appears that the smoke alarm installation at the Property was still the battery-operated system installed by the Respondent (in default of the Applicant), although it was noted that this had been replaced with a mains interlinked system as at the date of the Applicant's representations dated 17 February 2020;

(b) the Tribunal was satisfied that the absence of fire doors and the need for keys for exit doors presented substantial risks to the tenants of the Property in the event of a fire;

(c) the Property was occupied by 4 people as 3 separate households;

(d) it was also noted from the Applicant's representations that "All the obstruction property removed", but it was not clear to the Tribunal that the Applicant had recognised the need to introduce processes to ensure that escape routes were kept clear at all times.

(iii) Having considered the matters in paragraphs (ii) and (iii), the Tribunal considered that the defects identified at the Property presented a significant danger to its tenants in the event of a fire and assessed the harm as high accordingly. In this respect, the Tribunal's assessment agreed with the Respondent's assessment.

27.6 The Tribunal also agreed with the Respondent's decision to reduce the penalty by £1000 to £21,499 by reason of the Applicant's completion of the corrective works prior to the issue of the Final Notice.

28. The Tribunal's determination therefore confirms the Final Notice by imposing a financial penalty on the Applicant of £21,499, payment to be made within 28 days from the date of this Decision.

C Wood
Tribunal Judge
27 May 2021