FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CL/HNA/2020/0002**
Property	**:**	**184 Dean Street, South Shields, Tyne and Wear NE33 4AQ**
Applicant	**:**	**Mr Jon Moore**
Respondent	**:**	**South Tyneside Council**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal Members	**:**	**Mr S Moorhouse LLB** **Mr IR Harris BSc FRICS**
Date of Decision	**:**	**22 April 2021**

DECISION

DECISION

The Final Notice imposing a financial penalty, issued to the Applicant in respect of the Property on 19 December 2019, is varied as follows: the amount of the penalty is amended to £16,349.04.

REASONS

The Application

1. The Applicant Mr Jon Moore is the freehold proprietor of land at 184-186 Dean Road, South Shields. 184 Dean Road ('the Property') comprises a four-bedroom flat, situated above ground floor shop premises (186 Dean Road).

2. On 19 December 2019 the Respondent local authority issued to the Applicant a Final Notice imposing a financial penalty of £16,487.52 for committing an offence under sections 61 and 72(1) of the Housing Act 2004 ('the Act'). Section 72(1) provides 'a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed'.

3. The Final Notice stated that during an inspection of the Property conducted on 3 September 2019 the Property was found to be occupied by 5 persons, that no HMO licence was in place and that no application had been made. The Final Notice further stated that no representations had been received from the Applicant pursuant to an earlier Notice of Intent.

4. The reasons for imposing the financial penalty, noted in the Final Notice, were that: (1) the Property falls within the national mandatory licensing regime and was not licensed at the date of inspection; (2) the Applicant had confirmed the Property was not licensed; and (3) the Applicant was not managing the movement of tenants in and out of the Property and had ceased to exert appropriate control over occupancy.

5. On 9 January 2020 the Applicant lodged an appeal under paragraph 10, Schedule 13A to the Act in relation to the financial penalty imposed.

6. An Improvement Notice had been served on the Applicant in relation to the Property on 12 September 2019. This has not been appealed.

Submissions

7. Following the lodging of the Application the Respondent confirmed their opposition to it, providing a summary of reasons, a witness statement by Mr Paul Woodley and copy emails dated 1st and 3rd October 2019.

8. Pursuant to Directions a written statement of case and accompanying documents was submitted by the Respondent, and a written statement of case with accompanying documents submitted by the Applicant. No reply to the Applicant's statement was submitted by the Respondent.

9. The Application form submitted by the Applicant and his Statement of Case set out the grounds of appeal. These can be summarised as follows:

    - In his Application form the Applicant submits that the Property has been rented to Mr Paul Woodley since 1 January 2016. With his Statement of Case he provides a copy tenancy agreement and bank statements showing amounts received;
    - In the Application form it is submitted that the Property was sublet by Mr Woodley to 4 tenants and that the Applicant was advised that one tenant had her boyfriend stay a few times per week;
    - In the Statement of Case it is stated that the Applicant had no idea that the Property was being sublet to more than 4 people with one room being shared by a couple until he was notified by the Respondent;
    - The Statement of Case states that the Applicant suffers from dyslexia and that Paul Woodley rented the properties from him and managed them as this is not something he is comfortable with;
    - The Applicant states that the first meeting with the Respondent took place in February 2019 and that works identified by the Respondent in an Improvement Notice were completed by February 2020 at a cost of £25,000.
    - It is stated that the Applicant issued eviction notices to the tenants however the Respondent advised the tenants that these were invalid until repairs had been made;
    - It is submitted that whilst the Respondent advised that the Applicant had 23 years experience in property management the Applicant had no knowledge of HMO licensing, rules and regulations and he purchased the Property with 4 rooms to let.
    - The Applicant submits that he is on the verge of bankruptcy, had taken debt advice and is managing a payment arrangement for the moment.

Requirement for a hearing

10. The parties were both content for the matter to be determined on the papers, however it was directed that a remote hearing (Full Video Hearing) be convened. This was scheduled for 17 March 2021. On the date of the hearing neither party was able to reliably connect. The hearing was reconvened on 15 April 2021 and, whilst delayed due to technical difficulty, it did ultimately proceed with connection levels that were adequate. The hearing was attended by the Applicant, and was attended for the Respondent by Environmental Health Officers Miss Rowland and Mr Wear, Miss Rowland being the lead officer in this case.

11. The tribunal did not consider it necessary to inspect the Property in view of the matters in issue and the time that had elapsed.

The Law

12. The power of a local authority to impose financial penalties is set out at section 249A of the Act. Subsection (2) lists 'relevant housing offences'. The Final Notice in the present case relies upon subsection (2)(b) (section 72 - licensing of HMOs). Subsection (4) provides that the amount of a financial penalty imposed under section 249A is to be determined by the local housing authority, but must not be more than £30,000.

13. Schedule 13A to the Act sets out the procedure for imposing financial penalties, provision for appealing financial penalties, provisions concerning enforcement and a requirement for local housing authorities to have regard to guidance given by the Secretary of State.

14. Paragraph 10(1) of Schedule 13A provides that a person to whom a final notice is given may appeal to the First-tier Tribunal against the decision to impose the penalty or the amount of the penalty. Sub-paragraph (3) provides that such an appeal is to be by way of a re-hearing of the local housing authority's decision, but may be determined having regard to matters of which the authority was unaware. Sub-paragraph (4) provides that the First-tier Tribunal may confirm, vary or cancel the final notice.

15. Guidance issued by the Ministry of Housing, Communities & Local Government sets out 7 factors that should be considered by a local housing authority to help ensure that a civil penalty is set at an appropriate level: severity of the offence; culpability and track record of the offender; the harm caused to the tenant; punishment of the offender; deterring the offender from repeating the offence and deterring others from committing similar offences.

16. It is alleged in this case that the Applicant is 'a person having control of or managing an HMO which is required to be licensed.....but is not so licensed' (section 72(1) of the Act). The meaning of 'person having control' and 'person managing' are set out at section 263 of the Act. A person has control if they receive the 'rack rent' or would so receive it if the premises were let at a rack rent, 'rack rent' being defined as a rent which is not less than two-thirds of the full net annual value of the premises.

17. In proceedings against a person for an offence under section 72(1) it is a defence that an application for a licence has been made (section 72(4)(b)) or that the person had a 'reasonable excuse' for having control of or managing the house in the circumstances mentioned in subsection (1) (section 72(5)).

Findings of Fact & Reasons for Decision

18. The tribunal considered the key issues to be determined to be the following:

- Whether the Applicant had been 'a person having control of or managing' the Property within the meaning of section 72(1) of the Act.
- Whether the occupancy of the Property was such that it was required to be licensed as an HMO.
- Whether the Applicant had a 'reasonable excuse' within the meaning of section 72(5) of the Act.
- Whether the Respondent had followed the Guidance issued by the Ministry of Housing, Communities & Local Government and appropriately calculated the level of financial penalty.

Person having control of or managing the Property

19. The Applicant was a 'person having control' if he received the 'rack rent' or would have received it if the premises were let at a rack rent, 'rack rent' being defined as a rent which is not less than two-thirds of the full net annual value of the premises (section 263 of the Act). Under this definition the freeholder is not necessarily the

'person having control', it may be a tenant who sublets, or it may be both the freeholder and a tenant. The tribunal reviewed the structure of the arrangements in place in relation to the Property.

20. The tribunal found that on 1 January 2016 the Property (along with the ground floor shop) was let by the Applicant to Mr Woodley. The tenancy continued until at least October 2019, and the Applicant then (in his words) 'took back control of the Property' in order to carry out the works required by the Improvement Notice.

21. The Respondent did not have a copy of the tenancy agreement at the time the financial penalty was imposed and did not take it into consideration, but the tribunal was able to take it into consideration having regard to paragraph 10(3) of Schedule 13A to the Act. At the hearing it was accepted for the Respondent that the tenancy agreement had been entered into between the Applicant and Mr Woodley.

22. Whilst the tenancy agreement is expressed to be an 'Assured Shorthold Tenancy' the tribunal found that the terms were varied by agreement between the parties. It was the intention from the outset that Mr Woodley would not occupy the Property (or the shop) as his home, but that he would continue to operate his shop as a business and that he would sublet the rooms in the Property to individual tenants. Some outgoings were met by Mr Woodley but repairs and maintenance remained the Applicant's responsibility. The tenancy agreement states the monthly rent to be £700. The tribunal accepted the Applicant's testimony that this was split equally between the shop and the Property.

23. The £350 paid monthly in relation to the Property was a fixed sum, regardless of the income derived by Mr Woodley from room rentals by sub-tenants. There were two months in which the £700 due to the Applicant was reduced to £500, and these instances were explored in the hearing. Generally however a monthly rent of £700, representing £350 for the shop and £350 for the Property, was paid by Mr Woodley to the Applicant, including payments of £700 evidenced by the Applicant's bank statements to have been received in September and October of 2019.

24. The tribunal considered whether the letting to Mr Woodley of the whole of the Property on 1 January 2016 was at a 'rack rent' within the meaning of the Act. This would be so if the rent level, expressed as a monthly figure of £350, was not less than two-thirds of the full net value of the Property. Put another way, the tribunal considered whether the full net value of the Property at 1 January 2016 was no more than £525 per calendar month.

25. The Property (and ground floor flat) was acquired by the Applicant at auction in 2015. The Applicant confirmed at the hearing that there was no gas supply to the Property and that the electric panel heaters had been replaced with portable electric heaters as they had been running continuously. The Improvement Notice served in 2019 refers to inadequate insulation and the risk of unhealthy, cold, indoor temperatures. It evidences that in 2019 a large section of the ceiling / floor was exposed and that wet rot was widespread and significant, with risk of structural collapse to the bathroom and utility. The Property was also found to offer poor protection against fire and smoke detection and spread within high risk premises.

26. With the benefit of the tribunal's own knowledge and experience of letting values in the area of the Property (the valuer member having specific experience of the South Shields market) and having regard to the evidence summarised above, the tribunal considered that the (gross) rental value of the Property on a letting of the whole at 1 January 2016 would have been in the order of £350.

27. To reach a 'net' value the tribunal took into consideration the landlord's liabilities, in particular the cost of repairing and maintaining premises. The tribunal considered that a deduction in the order of 20% would be appropriate. The 'full net value' was therefore in the order of £280 (80% of £350).

28. The standard of proof in determining whether an offence has been committed is the criminal law standard. Taking the above findings into consideration the tribunal was satisfied beyond reasonable doubt that the test at subsections 263 (1) and (2) of the Act was met and that the Applicant was a 'person having control' of the Property for the purpose of section 72(1) of the Act, at the time the Respondent found an offence to have been committed, namely 3 September 2019.

29. Having determined that the Applicant was a 'person having control' it was unnecessary to consider whether he was a 'person managing' under the definition at section 263 (3) of the Act.

Occupancy and Licensing requirement

30. It was not in issue that the Property was being occupied as an HMO at the time the Respondent found an offence to have been committed. The Respondent's decision to impose a financial penalty was based upon a finding on inspection on 3 September 2019 that there were 5 occupants of the Property. In this respect, Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 provides (in effect) that mandatory licensing applies if (amongst other things) an HMO is occupied by 5 or more persons.

31. On the evidence before the tribunal the Applicant had not applied for, nor been granted, an HMO licence for the Property at 3 September 2019. The Respondent states that the Applicant first submitted an HMO application for the Property on 9 October 2019 but this application was deemed invalid because it was without the necessary supporting documentation.

32. In the hearing the tribunal cross-examined both the Applicant and Miss Rowland on the issue of occupancy. The issue was whether the 5th potential occupier (referred to as 'GR'), the partner of one of the tenants ('JR'), was actually in occupation or was just a visitor.

33. The Applicant stated that he had been told by the Respondent that GR was the partner of one of the tenants and was stopping 1 or 2 days per week. When the Judge checked that the Applicant was saying the Council had given this information, the Applicant replied that he thinks so – they informed him. The Applicant also stated that he met GR after taking back control of the Property, that GR had a flat directly across the road and that JR had then moved in with GR across the road.

34. Later in the hearing, having cross-examined Miss Rowland on a number of issues, including occupancy level, the tribunal again addressed the issue of occupancy with

the Applicant. The Applicant stated that he did not recall having said earlier in the hearing that the Respondent informed him GR was stopping over. He stated that the information that GR had been staying with JR at the Property for only for part of the time had come from the couple, after he had taken back control of the Property.

35. The Respondent maintained that there had been 5 occupants at 3 September 2019. In support of this Miss Rowland gave evidence that at the 3 September inspection it was clear that there was a male and female in JR's room, and that the Respondent's officers had been unable to discuss their tenancy with them despite knocking on the door several times – it was suspected that they had been sleeping. Two other tenants had informed Miss Rowland at the inspection that there were 4 males and 1 female in occupation of the Property. One had stated that Miss Rowland would not get an answer from the couple because they took drugs and barely roused themselves during the day. In cross-examination Miss Rowland said that one of these other tenants thought it was JR who had moved in with GR, whereas the Applicant thought it was GR that had moved in with JR. Miss Rowland also stated that it was clear from her conversations with these other tenants at inspection that both JR and GR were there all of the time, barely leaving the room - one was not just visiting.

36. Both Miss Rowland and the Applicant were asked by the tribunal about an email dated 1 October 2019. In this Miss Rowland sets out the dates of occupancy of 5 tenants of the Property. In the case of JR and GR, they are both listed as tenants of 'Room 1' and as having a tenancy start date of 13/5/19. On 3 October 2019 the Applicant replies by email to confirm that these are the tenants currently living at 184 Dean Road.

37. In the hearing Miss Rowland stated that these tenancy dates had been given to her over the phone by the Applicant, and she had then confirmed these with Mr Woodley who maintained records in an A4 red book. Miss Rowland also stated that before the tribunal proceedings had commenced, there had been no suggestion of one of the 5 occupants having an informal arrangement.

38. Taking into consideration the inconsistencies in the Applicant's evidence to the tribunal, the evidence put forward by the Respondent and the email confirmation by the Applicant on 3 October 2019 that there were 5 tenants currently living at the Property, the tribunal was satisfied, beyond reasonable doubt, that at 3 September 2019 there had been 5 occupants of the Property. Accordingly, the Applicant was, at 3 September 2019, a person having control of an HMO which was required to be licensed but was not so licensed.

Reasonable excuse – section 72(5)

39. The tribunal considered whether the Applicant had a reasonable excuse for having control of an unlicensed HMO.

40. In this respect the tribunal found that whilst the Applicant had some 23 years of experience as a residential landlord, he had limited up to date knowledge of a landlord's responsibilities. He states himself in his statement of case that he has not known anything about HMO licensing. In response to the tribunal's questions the Applicant indicated that in letting the Property to Mr Woodley, with the intention that Mr Woodley would sublet rooms, he obtained no references and gave no

consideration to Mr Woodley's qualifications. The tribunal noted that a witness statement by Mr Woodley dated 25 February 2020 is, on the evidence before the tribunal, incorrect and misleading. In particular Mr Woodley states 'at no point had I rented the upstairs'.

41. The tribunal considered that the Applicant should have taken reasonable steps to ensure that the room letting business in relation to the Property was operating within the law. The tribunal accepted that the Applicant did not directly let rooms to 5 occupants, however the intention from the outset of Mr Woodley's tenancy was that Mr Woodley would be operating a room letting business. The Applicant took no steps to ensure that Mr Woodley complied with the relevant legal requirements, or that Mr Woodley was familiar with these. In these circumstances the tribunal considered that the Applicant did not have a 'reasonable excuse' within the meaning of section 72(5) of the Act.

Financial penalty – guidance and calculation

42. The Respondent's Private Sector Housing Civil Penalties Policy (dated April 2019) and Public Health and Housing Enforcement Policy were included in the Respondent's submission. The tribunal considered that the Civil Penalties Policy both referred to and applied the seven factors from the Guidance issued by the Ministry of Housing, Communities & Local Government.

43. The Applicant did not specifically challenge the calculation of the financial penalty, however the tribunal nevertheless asked the Respondent to work through the basis of calculation in the hearing. This was done by reference to the Respondent's Civil Penalty Calculation Sheet. The tribunal took no issue in general with the way in which the Respondent had approached its calculation.

44. In one area the tribunal found that an incorrect figure had been used. In calculating the relevant weekly income, the Respondent had been content to include only the Applicant's income from the Property, however a rental figure of £500 pcm had been adopted. In view of the tribunal's findings, the correct rental figure would have been £350. It was accepted by the Respondent in the hearing that the relevant weekly income should have been £80.76. This variation would reduce this element of the financial penalty calculation by £138.48 (£461.52 – (£80.76 x 400%)), giving a total penalty of £16,349.04.

Overall

45. Overall therefore the tribunal determined (beyond reasonable doubt) that the offence referred to in the Final Notice dated 19 December 2019 had been committed, determined that the statutory defence of 'reasonable excuse' did not apply and determined that the Final Notice should be varied by amending the amount of the penalty to **£16,349.04**.

S Moorhouse
Tribunal Judge