

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – joint landlords – whether joints landlords are a person in control of or managing an HMO – whether only one civil penalty may be imposed on two joint landlords – sections 72, 249A and 263, Housing Act 2004 – appeal dismissed

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)

BETWEEN:

**GURMAIL GILL (1)
JARNAIL S GILL (2)**

Appellants

-and-

THE ROYAL BOROUGH OF GREENWICH

Respondent

**Re: 68 Conway Road,
Plumstead,
London SE18**

Martin Rodger QC, Deputy Chamber President

18 January 2022

Royal Courts of Justice

The first appellant represented himself and the second appellant *Ali Dewji*, instructed by the Legal Services, Royal Borough of Greenwich, for the respondent

The following cases are referred to in this decision:

Ficcara v James [2021] UKUT 38 (LC)

London Corporation v Cusack-Smith [1955] AC 337

Pollway Nominees Ltd v Croydon London Borough Council [1987] 1 AC 79

Introduction

1. Does section 249A of the Housing Act 2004, allow a financial penalty to be imposed on each of two joint landlords for the offence of having control of an unlicensed HMO contrary to section 72(1) of the Act, or may only one penalty be imposed jointly on them both, or none at all? These questions arise on this appeal from a decision of the First-tier Tribunal (Property Chamber) (the FTT) by which it confirmed separate financial penalties of £10,000 originally imposed on each of the two appellants, Mr Gurmail Gill and Mr Jarnail S Gill, by the respondent, the Royal Borough of Greenwich.
2. The financial penalties were imposed because the respondent and the FTT were satisfied that the appellants were both persons having control of an HMO at 68 Conway Road, London SE18 which was required to be licensed under Part 2 of the 2004 Act but which was not licensed.
3. 68 Conway Road is a small mid-terrace house which at the relevant time was occupied by five elderly people who were unrelated and who shared kitchen and bathroom facilities. On 1 October 2017 it became subject to an additional licensing scheme introduced by the respondent under Part 2 of the 2004 Act.
4. The appellants are brothers who had inherited the property from their parents in March 2017. At that time the whole building was let to a single tenant, Mr Pradhan, who was holding over under an expired tenancy granted to him by their father. The original tenancy had included a prohibition on sub-letting but, as the appellants were aware, Mr Pradhan did not live at the property but instead sub-let it to the five residents. He paid £1,400 a month to the appellants and collected rents totalling £1,800 a month from his sub-tenants.
5. At the hearing of the appeal helpful submissions were made by Mr Gurmail Gill on behalf of himself and his brother, and by Mr Ali Dewji on behalf of the respondent. I am grateful to them both for their assistance.

The relevant statutory provisions

6. The expression “HMO”, meaning a house in multiple occupation, is defined by sections 254 to 259 of the 2004 Act. There is no dispute that the appellant’s property is an HMO and that it was required to be licensed under the respondent’s additional licensing scheme.
7. By section 72(1) of the 2004 Act it is an offence to be a “person having control” of an HMO which is required to be licensed under Part 2 of the Act but is not so licensed. Section 72(5) provides a defence where the person having control of the HMO has a reasonable excuse for doing so without a licence.
8. For most purposes (including those with which this appeal is concerned) the expression “person having control” is defined in section 263, as follows:

“Meaning of “person having control” and “person managing” etc

- (1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack rent.
 - (2) In subsection (1) “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises.”
9. Section 263 must be read in the light of section 6 of the Interpretation Act 1978 which provides that, unless the contrary intention appears, words in the singular include the plural. There is nothing in the 2004 Act to suggest any contrary intention as far as section 263 is concerned, so in an appropriate case the reference to “person having control” can mean “persons having control” and where a rack rent is received by more than one person the expression “the person” includes them all.
10. By section 249A of the 2004 Act a local housing authority may impose a civil financial penalty of up to £30,000 if it is satisfied beyond reasonable doubt that a person’s conduct amounts to a relevant housing offence in respect of premises in England. The offence under section 72 of failing to licence an HMO is a relevant housing offence for this purpose.
11. By section 249A(3) it is provided that:

“Only one financial penalty under this section may be imposed on a person in respect of the same conduct.”
12. A financial penalty is intended as an alternative to prosecution for a housing offence. Thus, a penalty may not be imposed for an offence of which the person in question has already been convicted in respect of the conduct in question, or where criminal proceedings have been instituted and not yet concluded (section 249A(5)). Nor may a person be convicted of an offence under section 72 if a local housing authority has already imposed a financial penalty on them in respect of conduct amounting to an offence under the section (section 72(7B)).
13. Schedule 13A of the 2004 Act deals with the procedure for imposing financial penalties, including appeals. By paragraph 10 of Schedule 13A a person on whom a financial penalty is imposed has a right of appeal to the FTT. By paragraph 10(3) such an appeal is to be a re-hearing of the local housing authority’s decision. A “re-hearing” means that the FTT is required to decide for itself whether a financial penalty should be imposed and, if so, to decide the amount of that penalty, rather than simply considering whether the authority was entitled to impose the penalty it did. A further right of appeal lies to this Tribunal.
14. A local authority is required by paragraph 12 of Schedule 13A to have regard to any guidance given by the Secretary of State about the exercise of its functions in relation to financial penalties. Relevant guidance was issued by the Department for Communities and Local Government in April 2017, but it does not touch on the issues raised by this appeal.

The issues

15. Permission to appeal was granted by the Tribunal on two grounds:
 - (1) Whether the two appellants were each persons having control of the HMO and therefore each guilty of the offence under section 72(1), 2004 Act; and
 - (2) If they were, whether it was permissible for a separate penalty to be imposed on each of them.

Issue 1: Were the appellants each persons having control of the HMO?

16. The status of being a person having control depends on being entitled to receive the rack rent of the property, and section 263(2) of the Act explains that the “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises. Mr Gill suggested that, in a case involving joint landlords, there were three possible interpretations of the phrase “person having control”.
17. One possibility was that the person having control must be a single person, and that where more than one person was entitled to receive the rack rent none of them would be a person having control. Mr Gill discounted that interpretation because he acknowledged that by the application of section 6 of the Interpretation Act 1978 there could be more than one person having control.
18. An alternative approach might be that each of two or more landlords could individually be a person having control, irrespective of the proportion of the rent which they were entitled to receive.
19. A third approach, which Mr Gill favoured, was that two or more people could jointly be persons having control. On that basis, he suggested, only one penalty could be imposed because there was only one “person having control”, albeit that that person comprised two individuals.
20. Mr Gill submitted that where more than one person owned property and received rent from it, that fact should be taken into account when the definition of “person having control” in section 263 was applied to them. Mr Gill suggested that only a person who is entitled to receive at least two-thirds of the full net annual value of the premises can be a person having control and, where the rent is received by more than one person, only that portion which each is entitled to receive on their own behalf should be taken into account when deciding whether they have the necessary entitlement to qualify as a person having control.
21. On the evidence in this case the full value of the HMO could not be more than £1,800 a month, since that was the amount which the occupational tenants were paying to Mr Pradhan, their immediate landlord. Mr Gill explained that he and his brother were entitled to equal shares in the property and that the rent of £1,400 a month which they received from Mr Pradhan was shared equally between them. Each of them was entitled to £700 a month, which was less than two-thirds of the full value of the property. It followed, Mr Gill

submitted, that neither of them received the rack rent of the property and that neither of them was a person having control who could commit the relevant offence under section 72(1) of the 2004 Act.

22. Mr Gill understood that this point had not been determined before and he suggested that when deciding it the Tribunal should bear in mind the principle that a person should not be penalised except under clear law (a principle which it had applied when resolving a somewhat similar issue in *Ficcara v James* [2021] UKUT 38 (LC)). The closest analogy Mr Gill's had discovered was *London Corporation v Cusack-Smith* [1955] AC 337 in which the House of Lords had decided that where the same house was let successively on a chain of leases and subleases over a period of years, more than one person could be said to be in receipt of the rack rent of the house because the question whether a rent was or was not a rack rent was to be determined at the time of the letting. As Mr Gill pointed out, although *Cusack-Smith* determined that a superior landlord and an immediate landlord could both be in receipt of a rack rent, it did not address the position of joint landlords at the same level.
23. In my judgment the application of section 263 to cases of joint ownership is not free from relevant authority, and is not in doubt.
24. In *Pollway Nominees Ltd v Croydon London Borough Council* [1987] 1 AC 79 the House of Lords considered who was the person having control of a block of 42 flats for the purpose of identifying the proper recipient of a notice under the Housing Act 1957 requiring the person having control to carry out repairs to the structure of the building. The flats were let on long leases and the owner of the freehold had covenanted to repair the structure, but it was in receipt of ground rents only and it argued successfully that it was not the person having control of the building because it was not in a position to grant a lease at a rack rent. Section 39 of the 1957 Act was in the same terms as section 263 of the 2004 Act and included the same two limbs, the first of which applied where the property was let at a rack and the second where it was not so let. In the latter case the person having control was the person "who would so receive it [the rack rent] if the premises were let at a rack rent". *Pollway* was concerned with the second limb of the definition of "person having control".
25. The argument accepted by the House of Lords was identified by Lord Bridge at page 91 A-C, as follows:

"The argument for the respondent is that the definition is only apt to apply to a person whose interest in the property entitles him to dispose of the right of occupation. It is for the right of occupation that rack rents are paid. Hence the person entitled to grant that right will receive the rack rent if the property is let at a rack rent or would receive it if it were so let. In the case of a house comprising a multiplicity of residential units let on long leases at ground rents, there is either no person to whom the definition can apply or the definition applies collectively to all the long leaseholders who between them either receive the rack rents of units sub-let at rack rents or would receive the rack rents if the units were so sub-let."

26. All but one of other members of the House agreed with Lord Bridge in accepting the respondent's argument that the person having control of a let block of flats was not the freeholder but was, collectively, all of the leaseholders of the flats. Lord Goff agreed in the result but reached his conclusion by a different route; in doing so he considered the case of a house separate parts of which were owned by different people (which he acknowledged was improbable) and stated at page 97H:

“ I consider that the words “the person who receives the rack rent of the house” in the first limb of section 39(2) can, with the aid of the Interpretation Act 1889, be read as applicable to the case where a number of persons, having interests in different parts of the house which together comprise the totality of the house, join together to grant a lease of the whole house at a single rack rent”.

27. *Pollway* dealt with the problematic case of multiple ownership of different parts of a building (the individual flats) but it shows that there is no reason why the person having control must be understood to mean one person only. The person having control may mean 42 separate individuals who have no property in common. In the commonplace and more straightforward situation where two persons have a joint interest in the whole of the building there is no reason why they should not collectively be persons having control of the house if they are in receipt of the rack rent (or would be if the property were let at a rack rent).
28. I do not accept Mr Gill's analysis of the requirement that to be the person having control one must be in receipt of the rack rent, being not less than two-thirds of the full value of the property. If it was necessary for each of those having an interest in the building to be entitled to receive two-thirds of its full value none of the 42 leaseholders in *Pollway* would have qualified; it was enough that, acting collectively, they could have received a rack rent by letting the whole of the residential parts of the building, and the fact that each would have been entitled to only their share of that rent was not identified as an obstacle to that conclusion.
29. The true position in cases of joint ownership is much simpler than Mr Gill suggested. Joint owners of the whole of the building are entitled to receive the whole of the rent of the building, and it is immaterial that the terms on which they hold their joint interests give each of them an entitlement, as against the other, to only a proportion of the total rent. For that reason, where there are joint landlords, any one of them may give a good receipt for the rent, and on the death of one of them the rent is payable in full to the survivor (see *Woodfall: Landlord and Tenant*, para 7.073). For the purpose of section 263 both of the appellants were therefore persons entitled to receive the rack rent of the HMO and both were persons having control of it.

Issue 2: Are the appellants liable to separate penalties?

30. Mr Gill's alternative argument was that joint landlords should jointly be liable to a single financial penalty and that the FTT was wrong to impose separate penalties on him and his brother. He suggested that where two or more persons having control of an HMO fail to obtain a licence, contrary to section 72(1), section 249A, 2004 Act should be applied in such

a way that only one joint penalty is imposed on them both. This was said to be the natural effect of section 263 and section 249A(3).

31. I do not accept Mr Gill's argument and I am satisfied that it is permissible for separate financial penalties to be imposed on each of two or more joint landlords where each has committed a relevant housing offence based on the same acts and omissions.
32. As Mr Dewji pointed out, Mr Gill's argument is concerned not simply with the financial penalty regime under section 249A, 2004 Act, but goes also to the prosecution of criminal offences which may be committed by a person having control of an HMO and to the prosecution of other housing and public health offences which depend on the same definition. The offence under section 72(1) is that of being "a person having control of or managing an HMO which is required to be licensed ... but is not so licensed". On the findings of the FTT each of the appellants was such a person. Each was a person having control of the HMO, and each held that status while the HMO was occupied in circumstances which required a licence but where none had been obtained. The appellants did not jointly commit the offence, they each committed it and each could have been separately prosecuted. In the same way, each could be the subject of a separate financial penalty because each has committed his own offence.
33. Section 249A(3), 2004 Act provides that only one financial penalty "may be imposed on a person in respect of the same conduct" (and by section 249A(9) a person's conduct may include a failure to act). But this prohibition does not stand in the way of each of two individuals being subject to a separate penalty in respect of separate offences which they have each committed because each penalty is imposed on a different person. Nor is it possible to say that the conduct in each case was the same: the conduct relevant to each appellant's liability was his own conduct and not that of his brother, although the things which each of them did or omitted to do was the same.
34. I therefore accept Mr Dewji's explanation that the purpose of section 249A(3) is not to limit the number of joint landlords on whom financial penalties can be imposed, but is to prevent the same facts being used to justify the imposition of more than one financial penalty on the same person.
35. Those are my reasons for dismissing the appeal in this case.
36. I would add a note of caution to decision makers dealing with cases such as this. In this case neither of the grounds of appeal challenged the quantum of the financial penalties or raised any issue about the assessment of the appropriate penalties to be imposed on joint landlords where each has committed an offence arising out of substantially the same facts.
37. When the FTT applied the respondent's penalty matrix in this case it did not differentiate between the appellants and treated them as equally culpable for the fact that the HMO was not licensed. But it is important that the penalty imposed on each joint landlord reflects his or her degree of responsibility, and a local authority or FTT should give separate consideration to the conduct of each person on whom a penalty is to be imposed. There may be cases where one of two joint landlords is responsible for the management of jointly owned

property and where the other plays no part. There may be cases where one joint landlord has a relevant history of similar offences while the other does not. The proper response to cases of that sort will depend on the facts found. What is important is that the responsibilities, actions and circumstances of each landlord are separately assessed.

Martin Rodger QC,
Deputy Chamber President

1 February 2022

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.