FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/HNB/2021/0001**
Property	**:**	**20, Hamilton Road, Manchester M13 0PB**
Applicant	**:**	**Mr. Yiu San Tou**
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	**:**	**28 October 2021**

ORDER

Order

1. In accordance with paragraph 10(4) of Schedule 13A to the Housing Act 2004, the Tribunal confirms the final notice dated 1 December 2020 imposing on the Applicant a financial penalty of £20500.

Application

2. By an appeal dated 25 December 2020, ("the Appeal"), the Applicant appealed against a financial penalty of £20500 imposed under section 249(a) of the Housing Act 2004, ("the 2004 Act"), by a final notice dated 1 December 2020, ("the Final Notice").

3. Directions were issued pursuant to which both parties submitted written representations.

4. A remote video hearing of the Appeal was held on Monday 20 September 2021 at 10:30. Mr. Yiu San Tou attended the hearing in person. The Respondent was represented by Mr. P. Whatley of Counsel and Ms. L. McCann of the Respondent and Mr. C. Hickson, witness and former employee of the Respondent.

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 of the 2004 Act of failing to comply with management regulations in respect of houses in multiple occupation, ("HMOs"). The relevant regulations are the Management of Houses in Multiple Occupation (England) Regulations 2006, ("the 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, Manchester City Council has adopted the Association of Greater Manchester Authorities Policy on Civil (Financial) Penalties as an alternative to prosecution under the Housing and Planning Act 2016, ("the Policy"). We make further reference to the Policy later in these reasons.

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

Respondent's submissions

18. The Respondent's submissions are summarised as follows:

18.1 the Property is a 3-storey terraced house in which, as at 7 August 2020 (the date of the 1st inspection), 6 tenants were occupying as separate households;

18.2 at the 1st inspection, a number of defects were identified which the Respondent determined constituted breaches of the Regulations, including: the fire alarm system was not operational throughout the Property; defects in the fire doors/frames which would significantly impact on their efficacy to prevent escape of fire/smoke into the escape route; some doors had mortice locks, in addition to thumb turn locks, which, at least in one case, appeared to be in use; and a leak from the soil stack into the rear yard;

18.3 it took 7 days for the Applicant to effect the necessary repairs to the fire alarm system, other defects remained unremedied as at the inspection on 19 November 2020, and final confirmation of all repairs having been undertaken was not received until 21 December 2020, after the issue of the Final Notice and more than 4 months after the date of the 1st inspection;

18.4 no evidence had been produced to the Tribunal of monthly inspections of the Property by the Applicant prior to the national lockdown on 23 March 2020;

18.5 by the time of the 1st inspection, many of the covid-19 restrictions had been relaxed (particularly in the context of landlord/tenant and the rights of landlords to access properties for the purposes of inspection/undertaking remedial works) of which the Applicant appeared to be unaware;

18.6 the Applicant owns a significant number of properties, some of which are HMOs. He is also the director and sole shareholder of YMP Limited which he described in his Statement of Case as "the designated management agent for the day-to-day management of the house";

18.7 the Applicant had not responded to the invitation to complete a written PACE interview, and nor had he made any written representations in response to the Notice of Intent;

18.8 in determining the amount of the financial penalty in accordance with the Policy, the Respondent had assessed the situation as one of:

(1) medium harm : the design of the Property and the nature of its occupation required a high level of protection which was compromised by the poor condition/fit of the doors at the Property, the existence of mortice locks on some of the doors and evidence of the use by at least one tenant of that mortice lock on their bedroom door. This was mitigated by the existence of the correct fire alarm system for the Property, in full working order from 14 August 2020, and because the electrical installation appeared to be in sound condition;

(2) high culpability: most significant in this respect was the Respondent's assessment of the Applicant as a professional landlord who was responsible for the management of a significant number of properties, including other HMOs;

(3) in accordance with the banding matrix, the relevant band was Band 5, with a "starting" point of £19500; and,

(4) the Applicant's previous conviction in 2017 was regarded as an aggravating feature which resulted in an increase to the financial penalty of £1000 to £20500.

Applicant's submissions

19. Mr. Tou's submissions are summarised as follows:

19.1 he acknowledged the existence of certain defects at the Property as identified by the Respondent at the inspection on 7 August 2020, e.g. defects in the fire alarm system, but others were disputed e.g. he had been advised that the provision of an alternative thumb turn lock as well as the mortice lock was a satisfactory arrangement; no issues had been raised regarding the condition/fit of the doors at the Property at the time of the issue of the HMO licence; it was reasonable to suggest that some of the defects e.g. damage to the fire alarm system, door closers etc. had been caused by the actions of the tenants;

19.2 insufficient credit had been given for remedial action taken by the inspection on 19 November 2020, some of which the Respondent still determined to be unsatisfactory e.g. the ground floor bedroom window had been re-grouted following the August inspection but was determined not to be to the Respondent's satisfaction;

19.3 he accepted that he had ultimate responsibility for the safety of the tenants at the Property;

19.4 regular monthly inspections of the Property had been interrupted by the national lockdown in March 2020 as a result of the covid-19 pandemic;

19.5 to address this, he had taken out two insurance policies to ensure that tenants would have access to contractors to effect emergency repairs, but accepted that these did not cover routine maintenance;

19.6 the day-to-day management of the Property had been delegated to colleagues, and he rejected the idea that merely being a director of the management company, YMP Limited, made him a professional manager. In particular, he was a layman in respect of e.g. fire and building regulations but took advice where necessary;

19.7 as far as he was aware, all of the keys to the mortice locks had been removed but it was not possible to stop a tenant from having another cut;

19.8 the speed of effecting the remedial works from August 2020 onwards was affected by difficulties of getting contractors to do work because of ongoing pandemic restrictions;

19.9 new procedures have since been introduced to ensure that properties are now managed more pro-actively;

19.10 the financial penalty was "excessive", out of proportion to the circumstances and would result in financial hardship;

19.11 he owned 23 properties of which 4 are HMOs; and,

19.12 he stated that there was a mortgage/bridging loan on the Property but could not explain the absence of any entry on the charges register of the Land Registry title of the Property, as evidenced by the search undertaken on 4 March 2021 by the Respondent.

Reasons

20. "Relevant housing offence"

20.1 The Tribunal was satisfied, beyond reasonable doubt, that the evidence of breaches of the Regulations as identified at the 1st inspection on 7 August 2020, was conduct amounting to an offence under s234 of the Act, a "relevant housing offence" for the purposes of s249A of the Act, permitting the imposition of a financial penalty.

21. Procedural requirements

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

(1) the offence under s234 of the Act was continuing as at the date of the Notice of Intent;

(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,

(3) the Notice of Intent contained information about the right to make representations.

22. Application of the Policy

22.1 Culpability and harm and severity of offence: having regard to the Policy:

(1) the Tribunal agreed with the Respondent's determinations in respect of harm (medium) and culpability (high) for the reasons stated in the Final Notice; and

(2) the Tribunal noted that the Applicant had not availed himself of the opportunity to make any representations in response to the Notice of Intent.

22.2 Financial benefit:

(1) The Tribunal noted that it had been open to the Applicant to provide such information to the Tribunal as he considered relevant regarding his financial circumstances but that he had not done so;

(2) there was no evidence before the Tribunal of any financial hardship/inability to pay the financial penalty on the part of the Applicant, nor of a mortgage on the Property;

(3) in the circumstances, the Tribunal was satisfied that there was insufficient evidence regarding the Applicant's financial circumstances to justify any reduction in the amount of the financial penalty.

22.3 Aggravating factors:

(1) In accordance with paragraph 10(3)(b) of Schedule 13A of the 2004 Act, the Tribunal determined that it was appropriate to have regard to the Applicant's previous conviction as an aggravating factor which increased the amount of the financial penalty by £1000.

22.4 Mitigating factors:

(1) The Tribunal considered whether it was appropriate to exercise the discretion in paragraph 5.5 of the Policy to effect a reduction in the financial penalty. In view of the delay of 7 days by the Applicant in ensuring that there was a fully-operational fire alarm system at the Property and the further delay of more than 4 months in completing all necessary remedial works, the Tribunal did not consider that it could be said that the Applicant had undertaken those works in "a timely and appropriate manner". In the circumstances, any exercise of this discretion was considered inappropriate.

(2) For the same reasons, the Tribunal concluded that it was not appropriate to take into account the completion of the remedial works as a mitigating factor.

C Wood
Tribunal Judge
28 October 2021