FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/12UD/HNA/2021/0047**
HMCTS Hearing Code		**V: CVP REMOTE (HYBRID)**
Property	**:**	**The Flat, 3 Norfolk Street, Wisbech PE13 2LD**
Applicant	**:**	**Vasil Iliev**
Respondent	**:**	**Fenland District Council**
Type of application	**:**	**Appeal against financial penalties: section 249A Housing Act 2004**
Tribunal member(s)	**:**	**Regional Judge Ruth Wayte** **Marina Krisko FRICS**
Date of hearing	**:**	**23 May 2022**
Date of decision	**:**	**13 June 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which was requested by the parties. The form of remote hearing was V: CVP REMOTE, with the tribunal sitting together in Cambridge County Court. Due to connections issues, several parties joined by telephone only. The tribunal was referred to a hearing bundle prepared by each party and separate emailed documents which are described in the decision as appropriate.

The decision is as follows:

(1) The tribunal varies the Final Penalty Notice dated 21 October 2021 issued in respect of the breach of HMO Management Regulations to £2,500; and

(2) The tribunal varies the Final Penalty Notice dated 21 October 2021 issued in respect of operating an HMO without a licence to £1,000.

The application

1. This application is an appeal in respect of two financial penalties imposed under section 249A of the Housing Act 2004 ("the 2004 Act"). In particular, £28,833 for an alleged failure to comply with a variety of the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the HMO Regulations") and £7,000 for an alleged offence under section 72(1) of the 2004 Act of control or management of an HMO which was required to be licensed but was not.

2. The Final Notices were dated 21 October 2021 but Mr Iliev maintained that he was unaware that the council was considering issuing any penalties against him until the Final Notices were served on him personally on 8 November 2021. The appeal was received by the tribunal on 22 November 2021.

3. Directions were given on 17 January 2022 and the hearing listed for 23 May 2022. The tribunal sat together at Cambridge County Court and the parties attended by video at their request. Due to connections issues during the hearing, some of the witnesses joined by telephone only. The applicant was represented by Mr Kang of Kients Property Services and the respondent was represented by counsel Mr Mason and their witnesses Andy Brown, Jo Evans, Michelle Page and Dan Horn. Both parties had filed bundles in accordance with the directions and the respondent's counsel also provided written submissions dated 20 May 2022. Mr Kang has indicated before the hearing that he only required Andy Brown for cross examination and the tribunal also requested that Michelle Page attend for questions. The rest of the council's evidence was taken from their written statements. Mr Iliev chose not to make a statement or give evidence.

4. Following the hearing, the tribunal became aware of the Upper Tribunal decision in *Muharaj v Liverpool City Council* [2022] UKUT 140, concerning the sufficiency of notices of intention. Given the arguments made on behalf of the applicant in this case, a copy of that decision was sent to the parties with a request for any submissions by 31 May 2022. The respondent provided written submissions dated 27 May 2022 but none were received from the applicant.

Background

5. On 18 May 2021, Samantha Krauss, a Street Scene Officer for the respondent came across a document bearing the address of 3 Norfolk Street, Wisbech while patrolling an area near Castle Mews for litter. She asked a colleague to accompany her to the property and while waiting chatted to a man living locally she knew as Vas, the applicant. She did not discuss the document with him at that time.

6. Ms Krauss and her colleague, Gemma Newell, went to the address which was for a takeaway called Charcoal Grill. The takeaway was closed and they went into a commercial premises next door to ask how they could access the flat above. The manager escorted them through his premises to a shared courtyard at the back and Ms Krauss's statement records that she walked up a staircase and then straight through an open door into the flat above the takeaway. She found a male of between 25-30 of eastern European appearance in the flat, together with several other people of a similar age. The male's English was very limited and when Ms Krauss showed him the document in her hand, he rang a number on his phone and handed it to her. A male answered and as they spoke Ms Krauss recognised that it was the applicant, who confirmed the document was his. He offered to come to the flat but Ms Krauss suggested they meet back at Castle Mews instead. At that meeting she advised the applicant about the document and littering.

7. On 19 May 2021 Ms Newell emailed Andy Brown, Fenland's Private Sector Housing Officer, to inform him of her concerns that the flat was a House in Multiple Occupation (HMO) due to the amount of people of a similar age seen on her visit with Ms Krauss. Her email refers to "*the male in charge of the properties at Castle Mews, Wisbech and a property in Norfolk Street*", which is a reference to the applicant who then lived at 29B Castle Mews and was clearly well known to the council, although it is unclear in what capacity.

8. On 17 June 2021 Mr Brown inspected the property with a colleague and Gary Reach of the Cambridgeshire Fire and Rescue Service. He accessed the flat by the same route as Ms Krauss and Ms Newell. On entry, he met a Bulgarian male who said he did not live at the property and then left the building. He then discovered many other Bulgarians within the flat and spoke to three people who told him that there were eight people staying there, living in four bedrooms. Some names and other details were completed on the council's occupation form which was signed by the three people named.

9. Mr Brown established that the Charcoal Grill had not been in use for some time. He inspected the property apart from the two rooms on the

upper floor which were locked with padlocks and took a number of photographs, mainly of the commercial premises and common parts. He considered that the property was in a poor state of repair with four category one hazards (Excess Cold, Fire, Food Safety and Domestic Hygiene, Pest and Refuse) and one category two hazard (Electrical deficiencies). He decided to issue an Emergency Prohibition Notice the following day to remove the occupants from a dangerous situation and find them temporary accommodation.

10. On 18 June 2021 Mr Brown received confirmation from the Anglia Revenues Partnership who provide Council Tax, Housing Benefit and Business Rates services to Fenland, that the applicant was liable for business rates and had completed an occupancy form for the property on 9 April 2021. That form described himself and one Kosta Ruskov Stoyanov, his son, as tenants and gave 14 June 2020 as the date the tenancy commenced. The Owner/Landlord was described as Mr Ning Zhang. His interest was confirmed by Official Copies of the Land Register which showed that Mr Zhang had been granted a 15 year lease of the property on 9 September 2019. The register stated that the lease prohibits or restricts alienation.

11. That same day Mr Brown's colleague, Michelle Page, attended the property to advise the occupants of the Emergency Prohibition Order and add any further details to the occupation form. She also concluded that there were 8 people living there but was only able to obtain one additional name which she added to the form completed by Mr Brown the previous day. The applicant arrived during her visit and spoke to both the occupants and Ms Page. Ms Page's statement records the applicant saying the occupants "*weren't paying any rent but merely paying for the gas and electric that they used and that he was helping them out*". The applicant also made a number of telephone calls to Ms Page later that day, as the two occupants who had accepted the council's offer of temporary accommodation were having difficulties accessing that accommodation.

12. Later that same day the Emergency Prohibition Order was served on the applicant, with copies to the leaseholder and freeholder.

13. On 12 August 2021 Mr Brown was given approval to take enforcement action (i.e. issue financial penalties) for an unlicensed HMO and for breaches of HMO management regulations. Mr Brown's statement confirms that "*I deemed the breaches were beyond reasonable doubt*".

14. On 17 August 2021 Notices of Intent were sent first class to the applicant at the property and 29B Castle Mews. No response was received.

15. On 21 October 2021 Final Notices were sent in the same manner, again no response was received.

16. On 8 November 2021 as Mr Brown was working in the flats attached to the applicant's home he decided to take copies of the Final Notices with him. As anticipated, he saw the applicant at the property and served the notices on him. The applicant told him he had been unaware of any previous notice. Mr Brown advised him of his appeal rights.

17. On 18 November 2021 Mr Brown was contacted by Mr Gurmit Kang, the applicant's representative, to confirm that an appeal had been submitted to the tribunal.

18. On 22 November 2021 the appeal was sent to the tribunal by Mr Kang. The grounds stated that the applicant was not a person with management or control of the flat but accepted that he did run a business from the commercial premises but it ceased trading more than one year ago. The applicant denied any connection with the flat and stated that any occupants were there without his knowledge or permission. He was not the freehold or leasehold owner of the building.

19. On 13 January 2022 Mr Brown held a meeting at the property with the leaseholder Mr Zhang and the applicant to discuss works required for the prohibition order to be revoked. Mr Brown's statement says that during that meeting it was confirmed that the applicant still leased the property. On 19 January 2022 Mr Zhang returned the form in respect of the property confirming that the applicant had an interest, although with no details of the nature of such interest.

The Law

20. Financial penalties as an alternative to prosecution were introduced by the Housing and Planning Act 2016 which amended the Housing Act 2004 by inserting a new section 249A and schedule 13A. It is for the local authority to decide whether to prosecute or impose a fine and guidance has been given by the Ministry of Housing, Communities and Local Government (now renamed as the Department for Levelling Up, Housing and Communities). In order to impose a financial penalty the local authority must be satisfied beyond reasonable doubt that the conduct amounts to a relevant housing offence.

21. Section 249A lists the relevant housing offences which include offences under section 72 (licensing of HMOs) and section 234 (management regulations in respect of HMOs) of the 2004 Act.

22. Schedule 13A sets out the requirement for a notice of intent to be given before the end of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates. It also contains provisions in respect of the right to

make representations within 28 days after that initial notice and the requirements for the final notice.

23. Appeals are dealt with in paragraph 10 of Schedule 13A. The appeal is a re-hearing and may be determined having regards to matters of which the authority was unaware. On an appeal the First-tier Tribunal may confirm, vary or cancel the final notice.

24. The maximum civil penalty for each offence is £30,000. The relevant factors as set out in the MHCLG guidance are:

(a) Severity of the offence;

(b) Culpability and track record of the offender;

(c) The harm caused to the tenant

(d) Punishment of the offence

(e) Deter the offender from repeating the offence

(f) Deter others from committing similar offences.

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

25. It is now usual for each local authority to have developed their own enforcement policy. The Upper Tribunal has confirmed that while the tribunal should consider for itself what penalty is merited by the offence under the terms of any such policy, weight should be given to the assessment made by the authority of the seriousness of the offence and the culpability of the appellant.

The issues

26. The applicant admitted that 8 people were living in the property but challenged the finding that the property was an HMO. However, the key area of challenge was in respect of the suggestion that the applicant was a person in control or managing the property. The written submissions for the applicant stated that there was insufficient evidence to justify the Notices of Intent and therefore the notices and penalties were invalid. If the notices were upheld the amount of the penalties should be reconsidered, particularly given the applicant's means.

Was the property an HMO?

27. Given the concession that it was occupied by 8 people sharing a kitchen and bathroom, at first sight this seemed a strange challenge by the applicant. The written submissions prepared by Mr Kang pointed to the lack of security at the property, suggesting that it may have been squatted. They also pointed out that there were no photographs of beds or furniture to show that the property had been designed or equipped for letting purposes.

28. Section 254 of the Housing Act 2004 sets out the meaning of house in multiple occupation. There are three tests, with the standard test being the relevant one here. That test requires one or more units of living accommodation i.e. rooms not consisting of a self-contained flat or flats, occupied by persons who do not form a single household. The living accommodation must be occupied by those persons as their only or main residence or they are to be treated as so occupying it, rents or other consideration must be provided in respect of at least one of those persons and two or more households must share one or more basic amenities i.e. a bathroom or kitchen.

29. Mr Brown's statement described the flat consisting of a kitchen and bathroom on the first floor, with two rooms being used as bedrooms. The second floor had two further rooms which he believed were being used as bedrooms but he was unable to access them on his visit on 17 June 2021. During that visit he spoke to Malin Sergeev and Matyo Miyaylov, both Bulgarian males who stated they occupied the rooms on the first floor. They confirmed they paid £30 a week and had been living at the property for 3 and 2 months respectively. Both men shared their room, Malin with a friend identified by Ms Page the following day as Radislav and Matyo with his partner Nedka, who was there on 17 June but did not speak to Mr Brown. No other names were discovered by Fenland but as stated above the applicant accepted that 8 people were in occupation.

30. Mr Brown's photographs were mainly of the common parts, commercial premises or specific defects. There was a picture of an official looking letter to the applicant at 3 Norfolk Street, a photograph of a collection of trainers in the hallway, a picture of a door with a sweater and a towel hanging over it and an empty looking kitchen. The photographs generally depicted an abandoned property, with little evidence of any furniture. Mr Brown stated that there were two beds in each of the rooms on the first floor but was less sure about other furniture. He said that he did not take pictures of the bedrooms as he wanted to gain the occupants' trust and, in his experience, Eastern European people were wary of the council.

31. The suggestion that the occupants could have been squatters is not supported by the behaviour of the applicant who clearly knew at least some of them and was supportive of Matyo and his partner when they sought temporary accommodation following the service of the

Prohibition Notice. There was also evidence of him stating that the occupants paid him for use of the gas and electric, which was not contested during the hearing.

32. In all the circumstances, the tribunal considered that there was evidence to support the council's case that the flat met the standard definition of an HMO beyond all reasonable doubt. The tribunal considers that the property was occupied by 8 people as their only or main residence, albeit as a short-term prospect, with payment of £60 per week towards the bills. There was no evidence to support the applicant's suggestion that the occupants were squatters.

Was the applicant in control of or managing the property?

33. This was the main ground for the appeal, with the applicant arguing that the respondent had not discharged their burden of proof to show that he was either in control of or managing the property. At the hearing, the respondent submitted that the applicant was a manager as defined in section 263 of the 2004 Act. This required them to show that the applicant was either an owner or lessee of the property and in receipt of rent or other payments from persons who are in occupation as tenants or licensees of parts of the premises. Section 262 states that "lease" and "tenancy" have the same meaning and include a sub-lease or sub-tenancy.

34. As pointed out by the applicant, the respondent's evidence was a little thin on this point. The occupancy questionnaire does not contain a section for the landlord's details and the occupants do not appear to have named the applicant as their landlord. His interest in the property, described on the Anglia Revenue form by the applicant as a tenant, was discovered by Mr Brown from Fenland's partners dealing with council tax and business rates as detailed in paragraph 10 above. The applicant also spoke to Michelle Page on 18 June 2021 when he confirmed that the occupants were not paying rent but merely paying for gas and electricity and that he was helping them out. This evidence was not challenged by the applicant during the hearing, although the tribunal requested that Ms Page be made available for cross examination given the importance of her evidence on this issue.

35. Mr Kang focussed his argument on the Notices of Intention, one of which had referred to the applicant as "*a person in control of*" the property and the other had simply referred to "*your conduct*". He submitted that Fenland were unable to establish that the applicant was a person in control of the property as set out in section 263 of the 2004 Act as there was only evidence of £30 per week paid by two occupants which was unlikely to be two thirds of the rack rent required to meet that definition. He also argued that given the prohibition on alienation of Mr Zhang's lease, there was no evidence that Mr Iliev was an owner or lessee as required to meet the definition of a manager.

36. As stated above, the tribunal asked both parties to address the validity of the Notices of Intention in the light of the recent decision in *Muharaj v Liverpool*. The facts in that case were more extreme as the notices did not actually set out an offence at all. Here, Fenland admitted there was some ambiguity in respect of the notice dealing with the HMO offences as reference was made to the applicant "having control of" the property, as opposed to being the manager of it. That said, the summary of the offence included the management regulations in full which refer to the manager. Fenland also accepted that the notice in respect of the failure to licence only referred to "your conduct" but again the summary of the offence contained ample information to enable the applicant to make representations or mount an appeal. No further submissions were received on behalf of the applicant (who stated that he had not seen either notice until after 8 November 2021).

37. In future, Fenland should ensure that they properly consider the nature of the "landlord's" interest in a property as part of the process of enforcement. The evidence is that both Mr Brown and his colleagues assumed the applicant was the "landlord" but they never tried to establish the extent of his interest in the property, for example by asking questions of the occupants or inviting the applicant to attend an interview under caution. It is also important that their Notices of Intention spell out whether they are relying on a person being in control of or managing the property. This is part of each offence (with the offence in respect of HMO regulations only being capable of being committed by the manager) and is also relevant to the assessment of the penalty in terms of the culpability of the offender.

38. That said, the applicant did not challenge Fenland's evidence that he had described himself as the tenant of the property and confirmed that he received payment from the occupants for the use of gas and electricity. That is enough to meet the statutory test of a manager in section 263 beyond reasonable doubt. The tribunal acknowledges that his application for the appeal denied any interest in the flat but Mr Iliev did not give evidence or make himself available for cross examination and in the circumstances the tribunal is entitled to prefer the evidence of the council on that point.

39. It follows that the tribunal is satisfied that the applicant has committed the two offences. However, all that Fenland have established is that the applicant allowed the occupants to live at the property for a few months in exchange for a modest weekly payment, which will affect the amount of any penalty which may be justified.

The Civil Penalties

40. Fenland's Housing Enforcement Policy was included in their bundle. There are two stages when considering civil penalties: firstly whether to impose one at all and then to determine the amount. The focus in

terms of the amount is said to be the severity of the offence, the culpability and track record of the offender and the harm caused to the tenant. There are three steps: the first is to consider culpability factors, ranging from a serious breach of legislation (very high) to minor failings due to an isolated incident (low) and the harm factors which range from category 1 (serious adverse effect) to category 3 (low); the second step is to combine these scores with the Standard Scale (Criminal Justice Act 1982) to create a point scale ranging from 1 to 6, with ranges for the penalty from £1 to £30,000. Step 3 is not stated as such but appears to be an ability to adjust the penalty either up or down to taken into account factors increasing or reducing seriousness or reflecting personal mitigation. Ability to pay appears to be a separate consideration following receipt of financial information.

41. Fenland had also provided a copy of their enforcement matrix for each offence. This states that a positive score will favour enforcement, balancing a range of factors set out in the matrix. Both offences had received a score of 4 (out of 10) on the basis that they were serious, deliberate acts, the authorised officer had followed procedures, there were reliable witnesses, enforcement would help raise awarenesss of responsibilities or improve standards and the offence was detrimental to the welfare of the occupants. The applicant made no challenge in respect of this matrix.

42. Andy Brown then set out full details of each offence. In respect of the HMO Management Regulations, he listed five breaches – with the most serious being the lack of effective fire detection and emergency escape routes and the lack of heating. As stated above, he was so concerned about the property that an Emergency Prohibition Order was served, which remains in force. He considered that the culpability was very high as there was a serious breach of legislation and the harm should be category 1, with a high risk of an adverse effect. Applying these scores to the matrix resulted in a range for the penalty of £17,001 to £30,000. He proposed a penalty of £27,833. When questioned by the tribunal he said that the property was the worst condition he'd ever seen and was unsuitable for housing. That put the penalty towards the top of the range, which he set by breaking the range into three sections and picking the halfway point in the highest third. He then used step 3 to add an additional £1,000 on the basis that "the landlord" was taking advantage of vulnerable Roma Bulgarians who may not have known that the standard of housing was far below what was required. The penalty in the Notice of Intent was therefore set at £28,833. In the absence of any representations by the applicant, that amount was confirmed in the Final Notice by Dan Horn, the Head of Housing and Community Support.

43. The second notice was issued in respect of the failure to licence the HMO, an offence under section 72 of the 2004 Act. Culpability was again set as very high – a serious breach of legislation but harm as category 3, a low risk of an adverse effect. On the matrix this fine came

out at level 4, with a range of £2,501 to £7,000. Andy Brown chose the maximum to deter repeat offending, serve as an adequate punishment and on the basis that the landlord was taking advantage of the occupants as set out above. In the absence of any representations that amount was also confirmed in the Final Notice by Dan Horn.

44. Mr Kang asked Mr Brown about his knowledge of the applicant and involvement with his residence in Castle Mews. The tribunal was unclear where the conversation was going but it is clear there is no aura of wealth. The applicant's claim that he was reliant on benefits and had no fixed employment was not challenged by Fenland. There was some discussion about a property in Bulgaria but no evidence about its ownership, value or occupation.

The tribunal's decision

45. Although the tribunal may have reached a lower score on the enforcement matrix, we agree that a penalty was bound to follow given the condition of the property and the number of occupants.

46. As stated above, it is important to bear in mind the evidence as to the applicant's interest in the property as context for the penalties, as well as his means. Fenland's policy states at paragraph 20.19 that the penalty should be proportionate and reflect both the severity and whether there is a pattern of previous offending. The level of the penalty should be high enough to deter the offender from repeating the offence.

47. The evidence in this case is that the applicant entered into an arrangement with the leaseholder to rent the property, presumably for use as the Charcoal Grill. The flat above the property does not look as if it has been used as residential accommodation in any commercial way for some time. The applicant took responsibility for the business rates and council tax as part of that agreement. That business failed and the applicant, who is also Bulgarian, subsequently allowed members of the community to occupy the flat for a short period in exchange for payment towards the utility bills. Fenland established payment of £60 per week for two of the four bedrooms, well below the market rate of at least £100 per room or £400 a week. When Fenland inspected the property their best evidence is that one occupant said he'd been there for 3 months and the other for 2 months. That indicates a total of some £600 income, without taking into account any of the applicant's expenses in terms of the bills. There is no evidence that the applicant exploited the occupants. That said, the tribunal accepts that the property did not meet the standards required for private sector accommodation and the Emergency Prohibition Order was not appealed by the applicant or the leaseholder Mr Zhang.

48. Fenland accepted that there was no previous knowledge of the applicant's experience as a landlord and in fact did not challenge the applicant's claim that he was reliant on benefits with no fixed employment. With this in mind, the tribunal queries the assessment of culpability as "*very high*". Although the policy rather elides culpability with the seriousness of the offence, the tribunal considers that a more appropriate assessment of the applicant's conduct on the evidence is "*medium*", defined in the policy as *"an act or omission that a reasonable person would not commit*". The applicant is clearly not a professional landlord and the arrangement was not at a commercial rent. There was also no evidence that he had any knowledge of the requirements for private sector lettings or licensing. That said, the property was clearly not in a fit state to be occupied at all and certainly not by 8 people.

49. In terms of harm, given the relative youth of the adult occupants, their brief period of occupation, the time of year and the fact that the commercial premises was not in use, the tribunal considers that there was in truth a low risk of serious harm in respect of the management regulations offences, making that category 2 rather than 1. Using the matrix in the policy, the range for the penalty is therefore level 3 or £1001 to £2,500. The tribunal considers that the top of the range is appropriate given the state of the property and the number of occupants. The tribunal does not accept that there are grounds to increase the fine as there was simply no evidence that the applicant was exploiting the occupants. In fact, Ms Page gave evidence that he helped them by calling her when there were problems accessing the temporary accommodation offered by the council.

50. The penalty for the failure to licence using medium for severity and low risk or category 3 as assessed by Fenland, with which we agree, therefore falls within level 2 on the matrix, a range of £501 to £1,000. Again, the tribunal felt that the maximum was merited in this case.

51. The tribunal therefore varies the penalties to £2,500 for the breach of HMO Regulations and £1,000 for failure to licence an HMO. Since the applicant is in receipt of benefits it is likely to take a very long time for him to pay this amount and it is clearly sufficient to deter him from reoffending, assuming he ever gets that opportunity again. The tribunal also considers it to be a proportionate amount given the evidence as to his limited interest in the property and the short period of offending.

Name: Judge Ruth Wayte

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).