



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/OOBB/HNA/2018/0006 & 0014**

Property : **20 Dickens Road, London E6 3BY**

Appellants : **(1) Gangadharan Dilip
(2) Swayam Property Services Ltd & Swayam Lets Ltd**

Respondent : **The London Borough of Newham
("Newham")**

Type of application : **Appeal against a financial penalty under section 249A of and Schedule 13A to the Housing Act 2004**

Tribunal members : **Angus Andrew
Neil Martindale FRICS**

Date and Venue of hearing : **6 July 2018
10 Alfred Place, London WC1E 7LR**

Date of decision : **25 July 2018**

DECISION

In this decision section, schedule and part numbers refer to sections, schedules and parts in the Housing Act 2004 and numbers in square brackets refer to the pages in the hearing bundles, so that [A1] is page 1 of the applicant's bundle and [R1] is page 1 of the respondent's bundle.

Decisions

1. We dismiss the appeals against the three financial penalty notices given to Mr Dilip, Swayam Property Services Ltd and Swayam Lets Ltd.
2. We confirm the financial penalty of £750 imposed on Mr Dilip
3. We vary the two financial penalties notices given to Swayam Property Services Ltd and Swayam Lets Ltd by reducing both financial penalties from £2,500 to £750.

Financial penalty notices and appeal

4. On 30 January 2018 Newham issued the following four financial penalty notices relating to the property: -
 - (i) Against Marian Podianu a financial penalty of £750 in respect of his asserted failure to comply with the Management of Houses in Multiple Occupation (England) Regulations 2006 (“The 2006 Regulations”). [A297]
 - (ii) Against Mr Dilip a financial penalty of £750 in respect of his asserted failure to comply with the 2006 Regulations [A307]
 - (iii) Against Swayam Property Services Ltd and Swayam Lets Ltd a financial penalty of £2,500 in respect of their asserted failure to licence a house in multiple occupation [A313 and A319].
 - (iv) Against Swayam Property Services Ltd and Swayam Lets Ltd a financial penalty of £2,500 in respect of their asserted failure to comply with the 2006 regulations [A325 and A331].
5. On 7 February 2018 the tribunal received Mr Dilip’s appeal against the single financial penalty imposed on him. A completed application form was subsequently received on 20 March 2018. On 26 February 2018 the tribunal received appeals from Swayam Property Services Ltd and Swayam Lets Ltd against the two financial penalties imposed on them. No appeal has been received from Mr Podianu.

Hearing

6. We heard the appeals on 6 July 2018. Mrs Sheeba Kumar represented both Mr Dilip, Swayam Property Services Ltd and Swayam Lets Ltd. Mrs Kumar is a director of both companies. Newham was represented by Clara Zang, a barrister.

7. Mr Dilip relied largely on his original appeal letter together with a number of exhibits but he did not attend the hearing for cross examination. Swayam Property Services Ltd and Swayam Lets Ltd relied on a witness statement from Mrs Kumar who attended for cross-examination. Newham relied on a witness statement from Amanda Amafor who is a Principal Environmental Health Officer and has worked for Newham for 18 years. She also attended the hearing for cross examination.

Background

8. Part 2 makes provision for the licencing of Houses in Multiple Occupation (“HMOs”). Not all HMOs are subject to the licencing regime introduced by part 2. The Licencing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 (“the prescribed descriptions order”) describes those HMOs that are subject to the licencing regime. For the purpose of this decision it is sufficient to note that those regulations exclude two-storey houses from the licencing regime. The property is a two-storey house.
9. Section 56 in part 2 permits the Local Housing Authority to designate an area as being subject to additional licencing. The effect of such designation is to require HMOs not caught by the prescribed description order to be licenced. Newham made such a designation on 21 June 2012 and at our request Ms Amafor sent a copy to us after the hearing.
10. Generally speaking the Housing Act 2004 does not require the licencing of houses in single occupation. However, section 80 in part 3 permits a Local Housing Authority to designate an area as being subject to selective licencing. The selective licencing regime enables a local housing authority to require the licencing of residential accommodation let under a single tenancy or licence. It was common ground that Newham had made such a designation although in writing this decision we note that a copy was not included in their bundle.
11. The net effect of these designations is that before residential accommodation within the designated area can be let Newham must have granted either an HMO licence under section 64 or a property licence under section 88.
12. If the residential accommodation is an HMO the 2006 regulations impose certain duties on the person managing the residential accommodation.
13. Section 72 creates a number of offences in relation to HMOs. In particular it provides that a person having control of or managing an HMO commits an offence if it is not licenced. The section provides a defence if that person had a reasonable excuse for not having a licence.

14. Section 234 provides that a person managing an HMO commits an offence if he fails to comply with the 2006 regulations. Again, the section provides a defence if that person had a reasonable excuse for not complying.
15. Section 95 creates a number of offences in relation to houses that are subject to selective licensing. In particular it provides that a person having control of or managing a house that requires a selective licence commits an offence if it is not licenced. The section provides a defence if that person had a reasonable excuse for not having a licence.
16. Section 263 defines the terms “person having control” and “person managing”.
17. Section 126(2) and Schedule 9 of the Housing and Planning 2016 amended the Housing Act by inserting a new section 249A and schedule 13A.
18. Section 249A gives a local housing authority discretion to impose a financial penalty if it is satisfied beyond reasonable doubt that a person’s conduct amounts to a housing offence, which term includes the offences created by sections 72, 95 and 234. The local housing authority has a discretion as to the amount of the financial penalty save that it may not exceed £30,000 and only one financial penalty may be imposed in respect of the same conduct.
19. Schedule 13A deals with appeals, which lie to this tribunal. An appeal is to be a rehearing of the local housing authority’s decision but may be determined having regard to matters of which the authority was unaware. On an appeal this tribunal may confirm, vary or cancel a notice imposing a financial penalty.
20. In April 2017 the former Department of Communities and Local Government issued guidance for local authorities under paragraph 12 of schedule 13A. The guidance relates to “civil penalties” under the 2016 Act and a copy is at pages A33 to A52. We take the terms “financial penalty” and “civil penalty” to be interchangeable.
21. Paragraph 3.5 of the guidance provides that local authorities “*should develop and document their own policy on determining the appropriate level of civil penalty in a particular case*”. The paragraph suggests seven factors that should be taken into account when setting civil penalties.
22. Newham did indeed develop and document its own policy on determining the appropriate level of financial penalties. It is to be found in Appendix 1 to Newham’s Private Housing Enforcement Policy and is at pages A31 and A32. It takes the form of a matrix. Four factors are to be considered that largely replicate the seven factors in the DCLG guidance: Deterrence & Prevention, Removal of Financial Incentive, Offence History and Harm to

Tenants. There are five categories for each factor. The categories for the first three factors carry scores of 1, 5, 10, 15 and 20 whilst the categories for the final factor (Harm to Tenants) carry scores of 2, 10, 20, 30 and 40. Thus the minimum score is 5 and the maximum score is 100. A table then converts the score to a “Fee” that seems to be euphemism for financial penalty. The minimum penalty is £250 for a score of 1 to 5 (in reality 5 would appear to be the minimum score) and £30,000 for a score of 91 to 100.

23. Mr Dilip and his wife are the joint owners of the property that is a two-storey house. It used to be their family home but they moved to a larger house some 10 years ago. Since then they have let the property and we were told that it is the only investment property that they own.
24. Mrs Kumar used to be a civil servant. Some years ago, she and her husband incorporated both Swayam Property Services Ltd and Swayam Lets Ltd and commenced trading as Letting and Managing Agents. Mrs Kumar told us that they generally let and manage properties owned by people from within their “own community”. She said that it is a very competitive market with well in excess of 20 similar businesses operating from the high street in Newham. Mrs Kumar told us that properties owned by offshore residents were generally let and managed through Swayam Property Services Ltd while properties owned by UK residents were generally let and managed by Swayam Lets Ltd. However, the distinction between the two companies appears to have become increasingly blurred. Ms Zang made no point about their separate roles. Both Newham and Mrs Kumar appear to have regarded the two companies as being interchangeable and from now on we refer to them simply as Swayam.
25. Traditionally agents would let properties and then manage them taking a commission for performing both tasks. However, in recent years the competition for such work has become so intense that agents have had to adopt a different business model. They will now routinely take a tenancy of the unit from the freehold or leasehold owner and then sublet the unit to the intended occupier or end tenant. These agreements have become known as “*let to let agreements*” and the intention is to transfer the risk, including the risk of void periods, from the true owner of the unit to the agent.
26. Mrs Kumar told us that she and her husband disliked such agreements but the commercial reality of the market was such that they had little alternative but to accept them. She said that they manage approximately 240 properties of which about half are managed through “let to let agreements” with the other half being managed in the transitional way.
27. On 3 October 2013 Newham licensed the property under section 88 for “a maximum of 12 people living as one household regardless of age” [A73]. The property licence records that the license holder is Mr Dilip and that Swayam Property Services Ltd are the managing agent. The license was

originally for a term of 1 year but this seems to have been a mistake and it was subsequently extended to 31 December 2017. Thus, the property was licenced under the selective licencing regime and not as an HMO.

28. Swayam were letting and managing the property on behalf of Mr Dilip and his wife. Mrs Kumar negotiated the letting of the property to Mr Podianu and Corina Dragoi on the understanding that they would occupy it with their extended family. It is apparent that Mr Dilip and his wife required the property to be let and managed through a “let to let agreement”. Accordingly, on 10 July 2017 Swayam took a tenancy of the property for a period of 6 months from 10 July 2017 at a rent £1,540 per calendar month [A107]. On the same day Swayam granted a tenancy of the property to Mr Podianu and to Miss Dragoi for the same 6 months at a rate of £1,750 per calendar month [A89]. The difference of £210 per calendar month represents Swayam’s commission.
29. On the basis of the identity documents copied by Mrs Kumar, when the letting was arranged, Mr Podianu and Ms Dragoi and the other members of their extended family are all from Romania.
30. Although the chronology in Ms Amafor’s statement is confused nevertheless it seems that the police were called to the property on about 3 September 2017. The reason for their visit is not entirely clear but they were investigating a crime. An e-mail of 3 September 2017 from PC Martin [A82] suggests “*24 Romanian males*” were living at the property and that they “*may be forced to work etc*”. As far as we can tell this information was finally communicated to Newham’s HMO licensing team on 8 September 2017. It will be appreciated that at that time Newham had no knowledge of either the let to let agreement or the tenancy granted to Mr Podianu and Miss Dragoi.
31. Newham not unreasonably took the view that the property was being occupied as an HMO rather than by a single household and on 14 September 2017 they gave Mr Dilip “*notification of incorrect licence type*” [A83]. The notice did two things. Firstly, it informed Mr Dilip that he must either submit a new application for an HMO licence or he must take immediate steps to return the property back to a single-family dwelling. The notice states in terms that if Mr Dilip is unaware that the property is being used as a HMO he must by 12 October 2017 provide documentary evidence that he is “*actively taking steps to return the property back into use as a single family dwelling*”. The notice makes it clear that failure to respond might result in Newham taking “*steps to vary or revoke your licence*”.
32. Secondly the notice required Mr Dilip to send ten documents to Newham. A copy of this notice was sent to Swayam as the managing agent named in the property licence.

33. On 29 September 2017 Mrs Kumar provided all the requested documents. In her evidence Ms Amafor told us that she had “*no problem*” with the documents provided.
34. However, neither Mr Dilip nor Mrs Kumar either applied for an HMO licence or provided documentary evidence that they were taking steps to return the property back into use as a single-family dwelling.
35. Having received no response to the first section of the notification Ms Amafor inspected the property on 17 October 2017. She was accompanied by a colleague and a policy officer. Her findings on that inspection are set out in her witness statement and we see no need to repeat them in full. With the exception of her finding that the smoke alarm was not working they were not seriously challenged by Mrs Kumar.
36. The property was occupied, at the time of the inspection, by a number of men seemingly from Eastern Europe. There were 14 beds in the property and statements taken from two occupiers who were present during the inspection indicate that each of them was paying rent of at least £200 per month to Mr Podianu. Ms Amafor took a number of photographs during the inspection and these are at A133-A169. On the basis of those photographs the property was squalid. With the possible exception of the smoke alarm the photographs substantiate the breaches of the 2006 regulations that were to form the basis of the final notice to which we shall shortly refer. The photograph of the smoke alarm [A157] simply shows a pole pressed against the alarm button: Ms Amafor’s evidence was that the alarm was not working.
37. On 20 October 2017 Ms Amafor gave notice to Mr Podianu requiring him to state his interest in the property and also to identify the freeholder. Although Mr Podianu did not respond to that notice further enquiries made by Ms Amafor revealed that he lived at 4A Thackeray Road E6 3BW and that he had given that address on 27 July 2017 when he registered for a citizenship ceremony.
38. It seems that either Ms Amafor or one of her colleagues alerted Newham’s Planning and Enforcement Department to the apparent use of the property as an HMO. They visited the property on 22 November 2017. An e-mail report of that visit is at R11. The report records: “*The property has three bedrooms and five occupants. The occupants are all related, the property layout did not suggest that the use was that of a HMO. There are no locks on the bedroom doors, the bathroom and kitchen facilities appear to be all shared*”.
39. It is apparent from Mrs Kumar’s statement that she attended the inspection by the Planning and Enforcement Department and that Mr Podianu and Ms Dragoi were also present during the inspection.

40. On 29 November 2017 Ms Amafor served notice of Newham's intention to serve a financial penalty notice on Mr Podianu, Mr Dilip and Swayam. All the recipients were given until 3 January 2018 to make written representations.
41. Mr Podianu's response was brief. He wrote that he did not live at the property and had only helped a friend to get the tenancy. Responses were also received from Mr Dilip and Mrs Kumar and we refer to those in more detail in the next section of this decision.
42. On the basis of Mrs Kumar's evidence, which in this respect was not challenged, Mr Podianu attended Swayam's office on 13 December 2018 and returned the keys, saying that the property was "*being vacated with immediate effect*".
43. Having considered the responses Ms Amafor, on 30 January 2018, issued the financial penalty notices referred to in paragraph 4 above.

Reasons for our decision

44. Essentially and on the basis of the case put to us, we must consider the following five questions: -
- a. Was the property being used as an HMO such that it required an HMO license?
 - b. If so, what was the duration of that use?
 - c. Did Mr Dilip and Swayam fail to comply with the 2006 regulations?
 - d. Did Mr Dilip and/or Swayam have a reasonable excuse for failing to license the property as an HMO and/or failing to comply with the 2006 regulations?
 - e. In the event of our dismissing the appeals should we confirm or vary the financial penalties.

In answering these questions, we remind ourselves that we must be satisfied beyond reasonable doubt that Mr Dilip's and/or Swayam's conduct amounts to a housing offence.

Was the property being used as an HMO such that it required an additional HMO license?

45. Mrs Kumar did not seriously challenge Ms Amafor's findings that at the date of inspection on 17 October 2017 the property was being used as an HMO and she was right not to do so. Ms Amafor's evidence was supported

by her photographs, the witness statements taken under the Criminal Justice Act 1967 from two of the occupiers [A363 to A373] and Mr Podianu's statement that he had never lived at the property. Consequently, we are satisfied beyond reasonable doubt that the property was being used as an HMO such that it required an additional HMO licence.

If so, what was the duration of that use?

46. This is a more difficult question. Ms Kumar said that any use as an HMO must have started after 30 August 2018. She relied on a property inspection log [A103]. The log records inspections going back to January 2017 that are, perhaps surprisingly, not in chronological order. The log records three inspections in August 2017, two by "Anil" and one by "Islam". Neither Anil nor Islam are identified and neither either gave a written statement or attended for cross examination. Furthermore, these inspections seem to have been for specific purposes unrelated to any use as an HMO. Under the column headed "action" the following notes are provided for each inspection: "*All lights and alarms working fine*", "*boiler repairs*" and "*new furniture provided*". In summary the property inspection log carries very little evidential weight.
47. Four factors indicate that the use of the property as an HMO must have commenced shortly after the grant of the tenancy to Mr Podianu and Ms Dragoi. The first is the witness statement of Mr Ion-Madalin Cortia [A369] who shared a room with two others. His statement of 17 October 2017 records that he moved into the property "*three months ago*". The second is the condition of the property as evidenced by Ms Amafor's photographs. On the assumptions that the property was in reasonable condition when let it would have taken some time for that condition to deteriorate to the extent shown in the photographs. The third is Mr Podianu's statement that he had never lived in the property. The fourth is the police report indicating that on 8 September 2017 the property was occupied by 24 Romanian males.
48. Ms Amafor sought to persuade us that for the duration of the tenancy granted to Mr Podianu and Ms Dragoi the property was used as an HMO. However, that is not consistent with the evidence referred to above. Newham's Planning and Enforcement Department were satisfied that by the 22 November 2017 the property was no longer being used as an HMO and having regard to the applicable burden of proof there are no grounds for going behind their report. Indeed, we are troubled that it had been left to Mrs Kumar to disclose that report given that the imposition of a financial penalty presupposes the commission of a criminal offence.
49. Having regard to the evidence as a whole we are satisfied beyond reasonable doubt that shortly after the property was let to Mr Podianu and Ms Dragoi it was used as an HMO and that that use continued until at least 17 October 2017 when it was inspected by Ms Amafor. We cannot with any

precession say when that use ceased save that it was between 17 October 2017 and 22 November 2017.

Did Mr Dilip and Swayam fail to comply with the 2006 regulations?

50. The breaches were confirmed by Amafor's evidence and supported by the photographs in Newham's document bundle. We do not consider it necessary to deal with each and every asserted breach but by way of example the photographs confirmed a mattress blocking the landing, a missing staircase spindle, a missing light bulb, the squalid condition of the WC compartment and numerous household items in the front garden.
51. Mrs Kumar's only serious challenge to the asserted breaches was her comment that the smoke alarm may not have worked because a switch on its side had not been turned on. Even if correct that would not have amounted to a defence. At the time of the inspection the smoke alarm was clearly not operational and it did not sound as it should have done, when Ms Amafor pressed the test buzzer in the middle of the alarm.
52. Consequently, and for each of the above reasons we are satisfied that both Mr Dilip and Mr Swayam failed to comply with the 2006 regulations.

Did Mr Dilip and/or Swayam have a reasonable excuse for failing to license the property as an HMO and/or failing to comply with the 2006 regulations?

53. This was the nub of the hearing and the case as presented by Mrs Kumar. In summary Mr Dilip's case was that he had handed over responsibility for the property to Swayam. Swayam's case was that having let the property to apparently respectable tenants it could not be held responsible if those tenants, without Swayam's knowledge, unlawfully used the property as an HMO.
54. Both Mr Dilip and Swayam were put on notice of the unlawful use of the property as an HMO when they received Newham's "notification of incorrect licence type" sent on 14 September 2017. If they had acted promptly to investigate the position and if, as suggested by the notification, they had actively take steps to return the property back into use as single family dwelling then their lack of knowledge may well have amounted to a reasonable excuse. Indeed, it is apparent from the notification that if Mr Dilip and/or Swayam had taken such action Newham would not have imposed a financial penalty.
55. However, over a period of more than one month neither Mr Dilip nor Swayam took any action either to inspect the property or to return it into use as a single family dwelling resulting in Ms Amafor's inspection on 17 October 2017.

56. Ms Kumar gave two explanations for this inactivity. The first was that she thought it sufficient to send the documents required by the notification. That assertion completely overlooks the explicit warnings contained in the notification and referred to in paragraph 31 above.
57. The second was that she could only inspect the property by appointment, the implication being that she had been unable to secure an appointment. That explanation is not consistent with Ms Kumar's general observation that Swayam inspected the property every ten weeks and her inspection of the property on 15 November 2017. Not only is there no evidence, by way of a letter or e-mail, of any attempt to inspect the property between 14 September 2017 and 15 November 2017 but the two explanations provided by Mrs Kumar are inconsistent. If she considered that it was sufficient to provide the documents requested by Newham there is no obvious reason why she should have attempted to inspect the property. With respect to Ms Kumar her explanations were not credible.
58. We agree with Ms Zang that in deciding whether or not Mr Dilip and Swayam have a reasonable excuse we should have regard to the intention behind the licensing regime which is, as Ms Zang observed, to ensure that landlords are responsible for the welfare and safety of the occupiers and that they are not exploited.
59. In conclusion we are satisfied and find that both Mr Dilip's and Swayam's failure to take any action to return the property into use as a single-family dwelling for a period of more than one month deprived them of the statutory defence.

In the event of our dismissing the appeals should we confirm or vary the financial penalties.?

60. The matrix developed by Newham is a good starting point in determining the amount of any financial penalty. As has been observed by another tribunal Newham's matrix works "*effectively to distribute the weight of the allocated criteria across the range of possible fines up to £30,000*".
61. As far as Mr Dilip's fine of £750 is concerned it is at the bottom end of the range indicated by Newham's matrix. For three of the four factors Ms Amafor allocated the minimum score of 1 whilst for the fourth factor (harm to tenants) she allocated a score of 10 on the basis that whilst there were no vulnerable occupants there was likely to be some low level health/harm risks to the occupiers. That may be regarded as a slightly generous assessment but we do not disagree with it and we confirm the financial penalty.
62. We have more difficulty with the financial penalties imposed on Swayam. A local housing authority exercises a discretion when imposing a financial penalty. In selecting the financial penalty, the official must exercise his or

her own judgement having regard to all the relevant facts. In answer to our questions Ms Amafor said that after completing the matrix she imputed the information into a computer, which produced the financial penalty. That process does not appear to us to be entirely consistent with the exercise of a discretion.

63. From the documents produced by Ms Kumar it is apparent that Swayam acted properly in checking the bona fides of Mr Podianu and Ms Dragoi before letting the property to them. As Ms Amafor observed she had “*no problem*” with the documents provided. It was not suggested that Swayam colluded with Mr Podianu in his use of the property as an HMO and having heard Ms Kumar we are satisfied that there was no collusion.
64. On the basis of the evidence before us the real culprit was Mr Podianu. Having taken the tenancy with Ms Dragoi he then sub-let the rooms to at least 14 East European males, taking a separate rent from each of them. In doing so it is apparent that he made a substantial profit. He had been given a financial penalty of £750. In such circumstances the imposition of a substantially higher penalty on Swayam was perverse.
65. Even if we are wrong in that approach we do not consider that Ms Amafor correctly applied Newham’s own matrix. The substantially higher penalties imposed on Swayam rest on her allocating a maximum score of 20 for the factor “*Removal of Financial Incentive*”. The criteria for a score of 20 is said to be “*A medium to large Managing Agent. Large Asset value. Large profit made by offender*”. The justification given in this case is “*Managing agent has a large portfolio of properties they manage*”.
66. Ms Kumar gave her evidence in a very straightforward manner and we had no reason to doubt it. Swayam is a small family business run by Mrs Kumar and her husband that operates in a very competitive market. In terms of other letting agents, a portfolio of some 240 properties could not be described as large.
67. The profit rent of £210 per month is in reality Swayam’s commission. It is a modest enough sum for the transfer of the risk that was implicit in the “let to let agreement”. It contrasts sharply with the profit that would have been made by Mr Podianu who, on the basis of Mr Cotea’s statement, appears to have been charging the individual occupiers in the region of £200 per month.
68. Having heard Mrs Kumar’s evidence we consider that a more appropriate score under this factor would have been 5 reflecting the criteria: “*Little profit made by offender*”. That would indicate a total score of 12 and a financial penalty of £750, that is consistent with the financial penalty imposed on Mr Podianu.

69. Consequently, and for each of these above reasons we reduce the financial penalties imposed on Swayam from £2,500 to £750.

Name: Angus Andrew

Date: 25 July 2018

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).