



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

Case Reference : CHI/00HG/HNA/2020/0014

Property : 30 Derry Avenue, Plymouth, Devon PL4
6BH

Applicant : William Sheppard

Representative :

Respondent : Plymouth City Council

Representative : Ms Helen Morris, solicitor

Type of Application : **Appeal against a financial penalty -**
Section 249A & Schedule 13A to the
Housing Act 2004

Tribunal Member(s) : Judge D. R. Whitney
Mr T. Sennett FCIEH
Mr M. Ayres FRICS

**Date of Hearing
Held remotely by CVP** : 10th November 2020

Date of Determination : 24th November 2020

DECISION

Background

1. The Applicant is the owner of 30 Derry Avenue, Plymouth, Devon PL4 6BH (“the Property”). The Respondent is Plymouth City Council (“the Council”).
2. The Council issued a Final Notice to Issue a Financial Penalty (“the Penalty”) dated 31st July 2020 imposing a penalty of £5,000 on the basis that the Applicant had committed an offence pursuant to section 72 of the Housing Act 2004 in failing to have a licence for the Property for the period 1st September 2019 to 5th May 2020.
3. The Applicant sought to appeal the Penalty and the Tribunal issued directions for the matter to come to hearing. Those directions were substantially complied with by the parties and the Tribunal had before it a bundle prepared by the Respondent and references [] are to pages within that bundle.

The Law

4. The Tribunal must be satisfied that the offence alleged has been committed to a criminal standard of proof. The alleged offence is:

Section 72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person’s occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1), or
(b) an application for a licence had been duly made in respect of the house under section 63, and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition, as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (4) a notification or application is “effective” at a particular time if at that time it has not been withdrawn, and either—

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are—

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority’s decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) “relevant decision” means a decision which is given on an appeal to the tribunal and confirms the authority’s decision (with or without variation).

5. If so satisfied the Council may impose a Civil Financial Penalty pursuant to Section 249A of the Housing Act 2004.

The Hearing

6. The hearing was attended by the Applicant and his partner Ms McKenzie and for the Respondent Ms Morris, solicitor and Mr Colrein, Senior Community Connections Officer.
7. The hearing took place by video and all parties were content to proceed. On certain occasions the Council representatives did lose connection but they were able to re-connect on each and every occasion. At the conclusion of the hearing all parties confirmed to the Tribunal that had been afforded opportunity to make any and all submissions they wished to make.
8. What is set out in this decision is a summary of the evidence given at the hearing.
9. The Tribunal at the start of the hearing explained to all parties that the purpose of the hearing was for the Tribunal to hear evidence to determine whether or not a civil financial penalty should be imposed and if so the level of the same. It was explained that in so doing the Tribunal would have to be satisfied to the criminal standard that Mr Sheppard was operating the Property as an unlicensed house in multiple occupation. Only then if so satisfied would the Tribunal consider what, if any, penalty should be imposed.
10. The Tribunal explained to Mr Sheppard given he was unrepresented, having considered his documents within the bundle, it treated his case as being that he had a reasonable excuse for committing the offence.
11. The Tribunal confirmed to all parties it had read the bundle and took account of all documents within the same.
12. Mr Sheppard explained that he had over the past 12 months or so had been struggling financially. He explained that he had arrears of rent of about £6000 plus he had voids. At the start of the year he had broken his wrist and had only received statutory sick pay. He wanted to pay the fee, but had no funds to do so. He had asked the Council if he could pay the licence fee in instalments but they had refused and suggested he took out a loan.
13. Mrs Morris cross examined Mr Sheppard.
14. Mr Sheppard confirmed his income from his property investments was £24,000 as per his financial statement [B20-B21]. His take home income from Princess Yachts of about £17,700 was in addition to this sum.

15. Mr Sheppard explained that at the time he was trying to let the Property through an agency and made the application as he knew the Property had 5 letting rooms and so may require a licence. He was using an agency as the accommodation for students in Plymouth had grown and there was a shortage of suitable tenants. He decided it was better to pay the agency fee and secure tenants. The rents he had been receiving had fallen.
16. He had ceased using the agency as he was unhappy with the service he received. He had started letting the rooms in the Property (and the other two properties he owned) on the general market and not simply to students. He found he had more problems with arrears with non-student tenants.
17. He confirmed that for the year 2019 to 2020 he had let the Property to 5 students by agreement dated 22nd February 2019 [C76] commencing on 1st September 2019 although initially only 4 tenants moved in. The fifth tenant did not move in until November 2019.
18. Mr Sheppard confirmed he had not paid the licence fee to the Council until 5th May 2020. He accepted he had been told the application for a licence would not be treated as completed until the fee was paid in full. He accepted emails had been received but these were dealt with by Ms McKenzie as the Applicant stated he was dyslexic. He admitted he had attended an interview with the Council where he was advised to pay and stated he was told to take out a loan.
19. He explained that he had been struggling financially. He stated that at no time had he refused to pay and attempted to agree some form of instalment arrangement with the Council which they refused.
20. Mr Sheppard explained his portfolio consisted of 3 properties. All were subject to what he described as large mortgages. He explained he had to re-mortgage a few years ago following a divorce to pay monies to his ex wife. The mortgage payment on the statement of financial means related to his home address only and not to those within the portfolio.
21. Upon questioning by the Tribunal the Applicant stated he was divorced in or about 2008/2009. He believed the monthly mortgage payment on the Property was about £1050 and the other two properties had mortgage payments totalling about £990. The mortgage on the Property was for about £150,000 and he had interest only mortgages on the other two properties for about £195,000 each.
22. Mr Sheppard was not sure what the three properties were worth but suggested he thought perhaps about £800,000 in total.
23. He explained he previously had a garage business but in or about January 2019 he took a job with Princess Yachts. He explained he did not feel able to just rely on the income from his rental properties. He explained the changes

to the student rental market had adversely affected his earnings from the portfolio. Upon questioning on his total earnings from the portfolio he stated in 2016/2017 he earned £26,000, 2017/2018 £35,000 and 2018/2019 £24,000.

24. He confirmed that at the date of the hearing he had three rooms empty across the portfolio.
25. Mr Sheppard explained the amount he was paying his accountant each month was high (£280) because this included instalments towards a debt owed to them.
26. Mr Sheppard apologised that he did not have the funds. He stated he had always wished to pay and believed going forward now he is back working again this problem will not arise again and was caused by a difficult financial period.
27. The Tribunal adjourned at this time to allow all parties a 15 minute break prior to the Council presenting its case.
28. The solicitor for the Council submitted that Mr Sheppard admitted the offence of failing to have a licence for an HMO. She suggested that his case did not amount to a reasonable excuse but was effectively mitigation. The Council state that the Applicant did not have a licence for 8 months despite this being drawn to his attention and his being provided with opportunities to remedy the situation prior to action being taken.
29. Mr Colrein gave evidence and confirmed his statement was true [C24-C34]. Ms Morris asked a number of supplemental questions.
30. Mr Colrein accepted the properties owned by the Applicant were well run. However the Council will not accept an application until the fee is paid. Part of the criteria for granting an HMO licence for the council to consider is whether or not the person seeking the licence is a fit and proper person and also consideration is given to their financial ability to comply with all requirements, including payment of the fee.
31. It was the Council's case that whilst one of the 5 tenants may not have moved in until November, the offence was committed in September as there was a tenancy agreement for 5 persons. In Mr Colrein's opinion the Applicant could have kept his letting of the Property to 4 or fewer occupants and then he would not have required a licence.
32. Mr Colrein confirmed that even now having seen the financial information disclosed this would not have changed his view as to the penalty given as the applicant disclosed a net income of about £50,000.
33. Mr Sheppard was invited to cross examine but had no questions.

34. Upon questioning by the Tribunal Mr Colrein confirmed that save for the fee as far as he recalls the application had everything else attached as may be required. The licence had not as yet been issued as the Council were awaiting the outcome of these proceedings.
35. Mr Colrein confirmed that in calculating the penalty he followed the Councils policy [C81-C95]. He had added nothing for any financial benefit the Applicant may have received by letting the Property as an HMO.
36. He explained he investigated and made his recommendation which was endorsed by his Technical Lead. He determined that a civil financial penalty was most appropriate given no prior convictions but satisfied that an offence had been committed.
37. He did not believe he had inspected this Property and had received no complaints about the same. The culpability was based on the length of time the Property was without a licence despite contact being made. In his opinion this was reckless. He assessed the Property as having a low risk of harm since although he had not visited he believed there is a risk of harm in all properties.
38. He accepted that Plymouth had a lot of student accommodation and landlords were finding it harder to find student tenants. However at the point of the application it would seem that all three of the Applicants properties were full or nearly full.
39. Mr Sheppard asked Mr Colrein if he was aware that a colleague had inspected and only found an issue with a fire door? Mr Colrein stated he was not aware. On the issue of instalments, Mr Colrein said that the Council do not accept instalments as there is an ongoing offence until the fee has been fully paid.
40. Ms Morris in closing stated the council had a duty to licence and the offence was committed for a long period of time until payment was made in May 2020. In her submission the issuing of the Penalty was a reasonable and proportionate response by the Council. It was in line with the Government Guidance to local authorities and the Councils own policy.
41. Ms Morris suggested the Tribunal should respect and give weight to the Councils policy.
42. Finally Mr Sheppard once again apologised explained this situation has not happened in the past prior to this occasion and won't happen in the future.

Decision

43. The Tribunal thanks all parties for their measured and considered submission at the hearing. All have been taken into account together with the bundle filed.
44. The Tribunal reminds all that its role in determining this Appeal is to look at matters completely afresh and make up its own mind.
45. The first question for the Tribunal is was it satisfied that the offence as alleged had been committed?
46. To be fair to the Applicant he did not try and suggest otherwise but the Tribunal was conscious he was acting as a Litigant in Person. Mr Sheppard accepted that from September 2019 there was a tenancy agreement for 5 persons to occupy the Property. He accepted that from November 2019 5 people who formed separate households were occupying the Property.
47. We considered whether or not his inability to afford the licence fee amounted to a reasonable excuse. We take account of the fact that no suggestion is made by Mr Sheppard that he was not receiving rents during this period. Further he was reminded by the Council on numerous occasions including at a face to face interview with officers of the Council.
48. We are not satisfied that this amounts to a reasonable excuse and we find beyond reasonable doubt that the offence was committed from September 2019 until 5th May 2020.
49. We turn now to the question of the penalty. We have had regard to the Councils policy and accept that we should follow the same unless there is good reason.
50. The Property was being let as an Unlicensed HMO for 5 persons with no direct contact and so this attracts a total of 10 points. It is accepted that this is a first offence and so a further 5 points are added to the score. The Applicant did not challenge these parts of the score.
51. The Applicant suggests he was not reckless. Considering the Councils policy we are satisfied that a finding that he was reckless is appropriate. The Applicant chose to let the Property with five persons. As Mr Colrein suggested he could have simply ensured not more than 4 persons occupied the Property until he could afford to pay. It was clear from the evidence he was aware of the need to obtain a licence but did not do so. We accept the evidence of Mr Colrein that the Council could not accept instalments as in so doing it would effectively have condoned the running of an HMO without a licence. We are satisfied that a score of 15 points should be applied.
52. Finally we considered what if any score should be applied for the “potential harm”. We note Mr Colrein had not inspected. Mr Sheppard in questioning

Mr Colrein explained that when a colleague had inspected they had been satisfied save for some modest issue with a fire door. This Tribunal is satisfied that demonstrates there was some potential for harm and a score of 2 points is appropriate.

53. This provides a total score of 32 points which gives an indicative penalty of £5,000 [C87].
54. We have considered if there is any financial benefit for which any addition should be made. We adopt the Councils calculation [C118 and C119] and find there is not.
55. We have then considered whether there should be any reduction due to financial hardship. We accept the Applicants evidence as to his finances but these do appear to indicate that his household net income is in excess of £50,000 per annum and he has not inconsiderable capital assets. The purpose of a civil financial penalty is to act as a punishment and a deterrent.
56. We are not satisfied that the Applicant will suffer financial hardship such that the penalty should be reduced. We find that the Applicant is liable to pay a civil financial penalty of £5,000 and affirm the Penalty given by the Council.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at rpsouthern@justice.gov.uk being the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking