



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

Case Reference : **BIR/00FK/HNA/2021/0013**

Property : **304 Normanton Road, Derby. DE23 6WE**
Appellant : **Muhammed Khan**

Representative : **None**

Respondent : **Derby City Council**

Representative : **Ms F. Harper Solicitor Derby City Council**

Type of Application : **Applications under paragraph 10
Schedule 13A Housing Act 2004
relating to a financial Penalty**

Tribunal : **Tribunal Judge P. J. Ellis
Tribunal Member Mr R.Chumley-Roberts.
MCIEH, J.P.**

Date of Hearing : **22 November 2021**

Date of Decision : **10 December 2021**

DECISION

- A. The Tribunal is not satisfied beyond reasonable doubt that the Appellant was either in control of or the manager of 304 Normanton Road Derby DE23 6WE at the time it was used as residential accommodation on 4 November 2020.**
- B. The Final Notice to Impose a Financial Penalty of £16,000.00 dated 8 July 2021 for a failure to take safety measures contrary to Regulation 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006 is cancelled pursuant to s249A(6) and Para 10(4) Schedule 13A Housing Act 2004.**
- C. The Final Notice to Impose a Financial Penalty of £13,500.00 dated 8 July 2021 for a failure to take safety measures contrary to Regulation 7 of the Management of Houses in Multiple Occupation (England) Regulations 2006 is cancelled pursuant to s249A(6) and Para 10(4) Schedule 13A Housing Act 2004.**

Introduction

1. This is an appeal by way of rehearing from the imposition of two financial penalties by the Respondent on the Appellant for allegedly infringing Regulations 4 and 7 of the Management of Houses in Multiple Occupation (England) Regulations 2006 (the Regulations) while managing or controlling a property which is required to be licensed as a house in multiple occupation (HMO) but is not so licensed.
2. The Appellant Muhammed Khan admits that he was the leaseholder of the relevant property from which he operated a food takeaway business on the ground floor but denies he was responsible for the letting of rooms on the first and second floors to residential occupiers.
3. The Respondent, Derby City Council, is the local housing authority. On 8 July 2021 the Respondent served two Final Notices to Impose a Financial Penalty on the Appellant for alleged breaches of Regulations 4 and 7 of the Regulations.

4. On 4 August 2021 the Appellant lodged his appeal against both the imposition of and the amount of the penalties. Comprehensive Directions including an explanation of how the Tribunal will deal with the appeal were issued by the Tribunal on 11 August 2021. The Tribunal conducted the hearing by video conference facility without an inspection. The Appellant was unable to connect to the video platform. He conducted his case by telephone, consequently the Tribunal was unable to see him.
5. The primary issue between the parties was whether or not the Appellant was the person in control of or was the manager of the residential part of the Property. The second issue is that if the Tribunal finds the Appellant was the person in control of the Property, were the penalties appropriate both in connection with each alleged offence and as a total when the two penalties are added together.
6. The Appellant's Statement of Case was the submission he made in response to the Notice of Intention to impose a financial penalty. The Respondent prepared and served a substantial bundle including all relevant Notices, the matrix used for calculating the penalties, witness statements and a submission. The factual matters recorded in this Decision are taken from evidence given at the hearing or from the papers presented by both parties.

The Property and its ownership

7. As the Tribunal did not inspect the relevant property its description is taken from the non-contentious particulars given in the Respondent's submission and Google Street View. There is no substantial dispute relating to the condition of the residential parts of the building.
8. 304 Normanton Road (the Property) is a three-storey building constructed in late 19th century. The ground floor is a food takeaway business known as Rajas Piri Piri. The first and second floors are used for residential/domestic accommodation consisting of five or possibly six bed-sit rooms and shared living room, bathroom and kitchen facilities. There are three bedrooms on the second floor, two at the front and one at the rear of the building. On the first floor are a shared communal living area, a shared kitchen, shared bathroom and two further bedrooms at the front of the building. Access is by an external steel staircase from a yard at the

rear of the food business. Uncertainty over the number of bedsits arose because the Respondent referred to the potential income from six paying units in its calculation of the assumed income of the Appellant from letting the Property.

9. The Property is owned by PAK Foods of Sneinton Dale Nottingham. It owns other properties in the area.
10. The Appellant approached PAK foods in December 2019 seeking an assignment of the existing lease in order to operate the food business with two others, Mr Raja Kahn and Mr Muhammad Asif. His request to take over the Property was agreed but the new lease was drafted with the Appellant as sole lessee. The term of the new lease was six years. The Appellant surrendered it in December 2020 because he and Mr Raja Khan did not consider the business was viable.
11. The Appellant was registered with the Respondent both for council tax and the supplier of food.

Chronology

12. This matter started with an investigation into the condition of the residential accommodation at the Property following an anonymous complaint received by the Respondent on or about 28 October 2020.
13. After conducting preliminary desktop enquiries to establish ownership, Mr Stephen Brodrick Senior Environmental Health Officer with the Respondent, visited the Property with a representatives of the Derbyshire Fire and Rescue Services on 4 November 2020.
14. The inspection revealed a number of serious and less serious hazards in the residential parts of the Property rendering it unsuitable for habitation.
15. On 5 November 2020 the representatives of the Respondent and the Fire and Rescue Service returned to the Property to serve a Prohibition Notice under the Regulatory Reform (Fire Safety) Order 2005 and advised the residents to find alternative accommodation. A male person who identified himself as “Asif”

attended this visit. Asif stated he was not the landlord or the owner of the food business but that he knew the Appellant. He gave Mr Brodrick the Appellant's telephone number.

16. On 9 November 2020 the Respondent served a Notice Requesting Information under s16 Local Government (Miscellaneous Provisions) Act 1976 on the Appellant who had been identified as the probable owner from council records. On 17 November 2020 the Respondent invited the Appellant to attend an interview under caution. The Appellant declined to attend an interview until 29 January 2021 notwithstanding several attempts to arrange an interview. At the interview the Appellant substantially declined to answer questions by giving "No Comment" answers.
17. On 14 December 2020 the Appellant surrendered the lease. On 30 December 2020 the Appellant notified the Respondent council tax office that he was not responsible for the Property and that with effect from 1 September 2020 the person responsible was Mr Mohammad Asif. The Respondent effected the change to its records on 20 January 2021.
18. On 20 April 2021 the Respondent served on the Appellant two Notices of Intention to Impose a Financial Penalty. Attached to the Notices were the matrices, prepared on 19 April 2021, used by the Respondent to calculate the penalty.
19. One Notice specified the proposed penalty for an alleged breach of Regulation 4 (Duty of a manager to take safety measures) in the sum of £16000.00. The second Notice proposed a penalty for an alleged breach of Regulation 7 (Duty of manager to maintain common parts, fixtures, fittings and appliances) in the sum of £13500.00.
20. The Notices reported the Appellants right to make representations within 28 days. After an agreed extension of time the Appellant submitted representations through his solicitor on 28 May 2021.

21. The Appellant denied that he was the person in control or management of the Property and in any event his financial circumstances were such that he was not in a position to pay the penalty.
22. On 8 July 2021 the Respondent served Final Notices in respect of both alleged offences without deduction of the amount proposed in the Notices of Intention to Impose a Penalty. These proceedings were initiated by the Appellant on 4 August 2021.

The Parties Submissions

The Appellant

23. Mr Khan was not represented. Previously he had instructed solicitors who had prepared his response to the Notices of Intention to impose a Financial Penalty. He relied on that response as his Statement of Case. At the hearing, he was unable to join the video connection consequently he attended by telephone. He stated that he had little to add to his written statement.
24. The Appellant was one of three partners who wanted to run the food business on the ground floor of the Property. The other two were Mr Raja Khan and Mr Mohammed Asif. The Appellant admitted he was the sole leaseholder having negotiated the lease with the owners PAK Food.
25. The business was not successful. Mr Raja Khan, who attended the hearing, pulled out shortly after it was established. Mr Asif wanted to run the business. The Appellant had visited the Property only once or twice. On his first visit before taking the lease, he looked at the business premises. He did not go upstairs. The partnership was established for the purpose of running the food business. Letting the residential parts was not their intention.
26. The Appellant's second visit was sometime in January 2020 when he looked upstairs. He saw some bedrooms which were not occupied.

27. The business ran for about a year. Asif wanted to continue running the shop and agreed to take it on with effect from 1 September 2020. The Appellant returned the keys to the landlord on 15 December 2020.
28. He is a single man working as a self-employed delivery driver. His earnings are his sole source of income. He has no savings. He is not a property owner. He has debts of £17,000.00 to HMRC and a further £2000.00 to PAK Food for rent of the Property.
29. The Appellant denied he had ever put residential tenants in the Property. He told Mr Brodrick when he first spoke to him that he had not allowed any one to use the residential part of the Property. He was not responsible for the tenants. He was not aware that there were tenants in the Property until the Prohibition Notice was served on him.
30. The Tribunal asked Mr Khan to describe himself. He asserted he is 5' 8" tall of medium build in his 60s. He then complained that the Respondent had not arranged for the attendance of one of its witnesses, Mr Ataula Rohani, who had described the person to whom he paid rent. The Appellant asserted he and Mr Asif differ substantially in appearance. Had Mr Rohani attended he would have verified that he, the Appellant, was not the person to whom rent was paid.
31. Cross examined by Ms Harper on behalf of the Respondent he stated Mr Asif is a member of his family but he would not give any further information about him. He has told Asif about these proceedings. He admitted he was in debt to PAK Food for unpaid rent but the debt accrued before Asif took over the business in September 2020. He had used money from a government self employed support scheme to pay some rent.
32. He admitted that his intention to add Asif to the lease as appeared from documents attached to his Statement of Case, had never happened. His explanation was that the pandemic had made it difficult to instruct a solicitor, but the intention was for Asif to take over the Property. He surrendered the lease because Asif was not paying the rent after he took over.

33. After service of the Prohibition Notice it was Asif who removed the tenants. He repeated his assertion that he was not aware of any tenants. When asked about his agreement to transfer responsibility to Asif, the Appellant admitted there was no written agreement. The arrangement was verbal.
34. Ms Harper put to Mr Khan, the evidence of Sarah O'Reilly, an Environmental Health Officer employed by the Respondent. Her evidence was that he had spoken on the telephone to her on 5 November 2020 and told her he was closing the business and was working with Mr Brodrick to sort out issues in the accommodation and that all tenants had been rehoused. The Appellant denied that conversation had taken place.
35. He was then referred to the evidence of Mr Rohani who asserted he had paid £270 per month in cash for his rent. The Appellant denied he was the person who received the rent and demanded to know why the witness was not present to verify the identity of the person who received the rent.
36. In answer to the suggestion, he was receiving rent he said it was not true as Mr Rohani would have confirmed. He repeated the assertion that he was not involved in response to every question or proposition put to him in connection with management or control of the Property including the poor condition of the residential accommodation and also in connection with running the business after 1 September 2020.
37. The Appellant called Mr Raja Khan to give evidence. He confirmed that he had been one of the three partners who set up the business but withdrew as he considered the business unviable. He went to the Property in January or February 2020. He looked upstairs at the residential accommodation. It was in a state of disrepair and in his opinion not fit for occupation. No one was living there at the time of his visit. He confirmed that the Appellant withdrew from the business in September 2020. He had had several conversations with the Appellant before then about the business. He left it to Asif after September 2020.
38. He described the Appellant as being of athletic build in his late 50s or 60s. Asif is very much the opposite. He has a heavy build although of similar height to Mr

Khan. Asif is in his 40s. Mr Asif is clean shaven whereas Khan always has stubble. Mr Khan speaks good English. Asif's English is poor.

The Respondent

39. Ms Harper, solicitor employed by the Respondent, submitted that the Respondent's case was based on Mr Rohani's evidence of payment of rent and the records showing the Appellant was the lessee of the Property. The Appellant was registered with the Derby City Council for supply of food. He was registered as the person responsible for paying council tax.

40. A statement from Mr Rohani was served with the Respondent's Statement of Case. The statement comprised three pages. It was witnessed by Mr Dave Evans a Housing Intelligence Officer with the Respondent. It was written on Derby City Council pro forma witness statement paper headed with a reference to s9 Criminal Justice Act 1967 and a statement of truth.

41. Mr Rohani's statement is that he is a 59 year old packer with Boots. He had lived at the Property since 20 September 2020. He paid his rent to 'Muhammed' who owned the business Raja's downstairs. He went there if any repairs required attention. He was shown round by Muhammed. His statement describes many problems with his flat. He then describes 'Muhammed' as a fat man, dark in colour. He isn't very tall. His English is not good. His attendance is only when the shop is open. He had a telephone number for him but no address.

42. Mr Evans evidence was submitted in the form of a written statement. He was not called to give evidence. Mr. Brodrick told the Tribunal he understood Mr Evans had visited Mr Rohani at his new address to clarify some of his evidence but that he was reluctant to give more evidence. There had been no further follow up with Mr Rohani.

43. The Respondent submitted the statement of Mr Brodrick made on 1 March 2021. In it he referred to seeing another occupant, Mr Raj Patle, who was an occupier of a room on the second floor, when he visited the Property on 4 November 2020. Mr Patle told Mr Brodrick he had moved into the Property only recently before the date of the visit. There was no direct evidence from Mr Patle.

44. Mr Brodrick's statement was admitted as his evidence in chief. He was present to answer further questions. He described the state of the premises as seen on the inspection and the fire officer's opinion that there was an imminent danger to life. It was this concern which operated on his mind when he came to calculate the penalty. The Respondent's bundle included a number of photographs of the condition of the Property. He thought the risk of harm was very high having regard to the defects observed. Also, he had identified infringements of other sections of the Management of Houses in Multiple Occupation (England) Regulations 2006 but he disregarded them having regard to the Totality Principle when calculating the penalties for breach of Regulations 4 & 7. The other relevant Regulations were 3, 5 & 6. He believed the infringements of Regulations 4 & 7 were the most serious.
45. In answer to a question from the Tribunal regarding knowledge not known at the time of imposition of the penalty, Mr Brodrick maintained the Respondent's position that the Appellant was in control of the Property. He had failed to return the s16 information. Had he done so the Respondent would have made more effort to find Asif. There had been contact with the son of Asif who claimed his father was not the proprietor. He also referred to the Appellant's refusal to answer questions at the interview under caution or give any information himself about Asif's whereabouts.
46. In further answers to questions from the Tribunal, he said they had seen three occupiers on their visits on 4 & 5 November 2020 and were told of two others but they were not seen. It was understood there were four lettings involving five people in total.
47. The main evidence regarding receipt of rent came from Mr Rohani who paid his rent to someone on the ground floor. There were no rent books or notes of agreement.
48. The residents vacated the Property few days after service of the Prohibition Notice. He had spoken to the Respondent's housing options team after telling the

residents to leave. There were no complaints from residents that by leaving suddenly they were not receiving repayment of rent.

49. He was asked to explain why the Respondent had not given the Appellant an explanation of the infringements being investigated. As far as Mr Brodrick was concerned information regarding the offences alleged was given when the Appellant received the Matrices. He asserted there was no obligation to give further information before that time. Had Mr Khan engaged with the Respondent he would have received more information. At the interview under caution Mr Brodrick went through all the facts and matters relating to each offence but the Appellant merely responded with “No comment”.

50. As far as the financial penalties were concerned, Mr Brodrick asserted he had received little or no information from Mr Khan about his finances. He agreed he was aware the Appellant was in debt to the landlord and that he had seen some evidence of earnings as a delivery driver, but that information was not sufficient.

51. It was not known for how long the Property was occupied. A short period of occupation would not necessarily affect scoring which was based on the fact of occupation at the time of inspection. That Mr Khan has surrendered the lease was not relevant because he had not given any information. Mr Brodrick was concerned that the hazards identified were so serious that the length of occupation by the residents was irrelevant.

The Statutory Framework

52. The regime of financial penalties as an alternative to prosecution for certain housing offences came into force on 6 April 2017.

53. Section 249A of the 2004 Act, inserted by section 126, and paragraphs 1 and 7 of Schedule 9 to, the Housing and Planning Act 2016 (‘the 2016 Act’) provides

(1) The local housing authority may 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.

(2) In this section ‘relevant housing offence’ means an offence under—

(a) section 30 (failure to comply with Improvement notice),

- (b) section 72 (licensing of HMOs),*
- (c) section 95 (licensing of houses under Part 3),*
- (d) section 139(7) (failure to comply with overcrowding notice), or*
- (e) section 234 (management regulations in respect of HMOs).*
- (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.*
- (4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority but must not be more than £30,000.*
- (5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—*
 - (a) the person has been convicted of the offence in respect of that conduct,*
 - or*
 - (b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.*
- (7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.*
- (8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.*
- (9) For the purposes of this section a person's conduct includes a failure to act.*

54. By paragraph 10 of schedule 13A

a person to whom a final notice is given may appeal to the First-tier Tribunal against

- (a) the decision to impose the penalty or*
- (b) the amount of the penalty.*

55. By clause 10(3) *an appeal under this paragraph is to be a rehearing of the local housing authority's decision, but may be determined having regard to matters of which the authority is unaware,*
and by clause 10(4) *on an appeal under this paragraph the First-tier Tribunal may confirm vary or cancel the final notice.*

56. Section 263 Housing Act 2004 defines the meaning of a person having control and a person managing as:

(1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

57. 234 Housing Act 2004 provides:

(1) The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations—

(a) there are in place satisfactory management arrangements; and

(b)satisfactory standards of management are observed.

(2)The regulations may, in particular—

(a)impose duties on the person managing a house in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it;

(b)impose duties on persons occupying a house for the purpose of ensuring that the person managing the house can effectively carry out any duty imposed on him by the regulations.

(3)A person commits an offence if he fails to comply with a regulation under this section.

(4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation.

(5)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.

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

(7)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.

58. The Management of Houses in Multiple Occupation (England) Regulations 2006 provide at Regulation 4

(1) The manager must ensure that all means of escape from fire in the HMO are—

(a)kept free from obstruction; and

(b)maintained in good order and repair.

(2) The manager must ensure that any fire fighting equipment and fire alarms are maintained in good working order.

(3) Subject to paragraph (6), the manager must ensure that all notices indicating the location of means of escape from fire are displayed in positions within the HMO that enable them to be clearly visible to the occupiers.

(4) The manager must take all such measures as are reasonably required to protect the occupiers of the HMO from injury, having regard to—

(a) the design of the HMO;

(b) the structural conditions in the HMO; and

(c) the number of occupiers in the HMO.

(5) In performing the duty imposed by paragraph (4) the manager must in particular—

(a) in relation to any roof or balcony that is unsafe, either ensure that it is made safe or take all reasonable measures to prevent access to it for so long as it remains unsafe; and

(b) in relation to any window the sill of which is at or near floor level, ensure that bars or other such safeguards as may be necessary are provided to protect the occupiers against the danger of accidents which may be caused in connection with such windows.

(6) The duty imposed by paragraph (3) does not apply where the HMO has four or fewer occupiers.

And at Regulation 7

(1) The manager must ensure that all common parts of the HMO are—

(a) maintained in good and clean decorative repair;

(b) maintained in a safe and working condition; and

(c) kept reasonably clear from obstruction.

(2) In performing the duty imposed by paragraph (1), the manager must in particular ensure that—

(a) all handrails and banisters are at all times kept in good repair;

(b) such additional handrails or banisters as are necessary for the safety of the occupiers of the HMO are provided;

(c) any stair coverings are safely fixed and kept in good repair;

(d) all windows and other means of ventilation within the common parts are kept in good repair;

(e) the common parts are fitted with adequate light fittings that are available for use at all times by every occupier of the HMO; and

(f) subject to paragraph (3), fixtures, fittings or appliances used in common by two or more households within the HMO are maintained in good and safe repair and in clean working order.

(3) The duty imposed by paragraph (2)(f) does not apply in relation to fixtures, fittings or appliances that the occupier is entitled to remove from the HMO or which are otherwise outside the control of the manager.

(4) The manager must ensure that—

(a) outbuildings, yards and forecourts which are used in common by two or more households living within the HMO are maintained in repair, clean condition and good order;

(b) any garden belonging to the HMO is kept in a safe and tidy condition; and

(c) boundary walls, fences and railings (including any basement area railings), in so far as they belong to the HMO, are kept and maintained in good and safe repair so as not to constitute a danger to occupiers.

(5) If any part of the HMO is not in use the manager shall ensure that such part, including any passage and staircase directly giving access to it, is kept reasonably clean and free from refuse and litter.

(6) In this regulation—

(a) “common parts” means—

(i) the entrance door to the HMO and the entrance doors leading to each unit of living accommodation within the HMO;

(ii) all such parts of the HMO as comprise staircases, passageways, corridors, halls, lobbies, entrances, balconies, porches and steps that are used by the occupiers of the units of living accommodation within the HMO to gain access to the entrance doors of their respective unit of living accommodation; and

(iii) any other part of an HMO the use of which is shared by two or more households living in the HMO, with the knowledge of the landlord.

Decision

59. This is an appeal by way of a rehearing. The matters recorded in this Decision are taken from the evidence given at the hearing and the evidence submitted by the parties.
60. The Tribunal must be satisfied beyond reasonable doubt that the Appellant's conduct amounts to a relevant housing offence. The Respondent's allegations are that the Property, 304 Normanton Road, was a House in Multiple Occupation subject to the HMO regulations. The Appellant was a person having control or management of the Property and that he had committed two offences under the Regulations without reasonable excuse.
61. The Tribunal is satisfied the relevant part of 304 Normanton Road, namely the upper two floors was capable of being an HMO. Further, it is satisfied that at the time of the Respondent's inspection on 4 November 2020 there were at least three occupants residing at the Property.
62. The Respondent alleged the Property presented an imminent risk of serious harm to any occupier by reason of numerous serious hazards principally related to the lack of fire safety measures and this justified civil penalty's which reflected the high degree of risk of harm. The Appellant did not seriously challenge the allegations of defects during the hearing. The Respondent's representative put some of the alleged defects to the Appellant in the course of the hearing. In each case the Appellant gave the same answer namely that he was not responsible for occupiers being present, he was not the manager, had no involvement with the business after 1 September 2020 and he had not received any rent. It was apparent to the Tribunal that he would continue with the same response had the Respondent continued with the recital of defects and potential harm

arising from them. For that reason the Tribunal indicated to the Respondent it was not necessary to go over the remaining allegations.

63. It was the Appellant's case that he was not responsible for there being residents in occupation. His case is that he was the leaseholder and the person named on the council tax register and the food premises licence solely for the purpose of running a business of food preparation and takeaway service until 1 September 2020 when Mr Asif took over. The enterprise upon which his partnership with two others was launched in or about December 2019 did not include residential letting of the upper part of the building. He contended throughout that he had not let the property to any person and had not given any permission to his remaining partner for the Property to be let.
64. The Respondent relied heavily on the evidence of Mr Rohani in support of its contention that the Appellant was the person to whom rent was paid. Unfortunately, Mr Rohani was not called to give evidence. The short statement he prepared with the assistance of Mr Evans of the Respondent, described the person who showed him round and who received the rent as fat with poor English. When asked by the Tribunal to describe the person he met at the Property on 5 November Mr Brodick described Asif as being 'thick set'. Mr Raja Khan, who gave evidence on behalf the Appellant agreed with the description of Asif as being heavily built with poor English. He also described the Appellant as being of medium build with good English.
65. Mr Rohani's statement gave a telephone number for the person to whom he paid rent as ***** **859. It was not the same number as that used by the Appellant which is given in the statement of Mr Evans as ***** **701 being the same number given by the Appellant in his application form.
66. The Respondent's evidence included a report of a conversation with another occupier, Mr Raja Pratile, who did not give his own statement. Both Mr Rohani and Mr Pratile told the Respondent that they had only

recently taken up occupation. In both cases their evidence indicated they moved in after 1 September 2020.

67. Section 234(4) Housing Act provides a defence to an allegation of infringing subsection 3 of failing to comply with a regulation if there has a reasonable excuse.
68. In this case the Tribunal is concerned with whether or not it is satisfied the Appellant committed the offences and if so, does he have a reasonable excuse.
69. There is a clear conflict of fact between the parties. Unfortunately, Mr Asif was not present. The reason for his absence was not satisfactory. The Appellant did not want to give any information about him. The Respondent's witnesses had been to his house but had not seen him. Mr Brodrick's evidence was that Asif's son had said his father was looking after the business.
70. The Appellant contends he was rarely present at the Property, he left Asif to run the business, he handed over the business to him with effect from 1 September 2020, he arranged for the council tax records to be amended with effect from that date and he surrendered his lease in December 2020. The Appellant explained the reason he remained on the title was because he expected Asif to deal with such matters.
71. Throughout, he maintained he had not received rent and that he did not know the Property was occupied until he heard from Mr Brodrick.
72. The Tribunal found The Appellant's evidence vague in places. He had not cooperated with the Respondent by giving information and answering questions. His reason for so doing was confusion about his position and as far as the interview was concerned, he was advised by his then solicitors to adopt a 'no comment' response. However, when first approached by Mr Brodrick and consistently since then he asserted that he had not let and

had not given permission to Asif to let the Property to any person for residential use.

73. The Respondent's evidence did not establish the date when the occupants took up residence but from the evidence available the Tribunal is satisfied they did not move in until shortly before the complaint about the state of the Property in October 2020. By that date the Appellant had ceased his connection with the business although he had not removed himself from the various registers indicating ownership.

74. The Respondent relied on the evidence of Mr Rohani. The Appellant was unable to cross examine him. Although this was an oral hearing the Tribunal is aware of the decision in *Raza v Bradford Metropolitan Borough Council [2021]UKUT 39 (LC)* at paras 42 & 43. in which HHJ Cooke said “ *in these three cases was that these landlords were at risk of being found to have committed a criminal offence, there were factual issues in dispute, and the FTT made findings of fact on the basis of evidence that had not been tested in cross-examination. That made the procedure unreliable. It was also unfair because it resulted in a finding that a criminal offence had been committed without giving the landlord the opportunity to cross-examine the witnesses who gave evidence against him or to respond, under cross-examination, to the case against him.*

43. There might perhaps be cases where written evidence about disputed facts was sufficiently clear and consistent for a tribunal to make findings of fact on the balance of probabilities. But it is difficult to imagine cases where the FTT could be so sure of contested facts, on the basis of written evidence only, that it could find them proved to the criminal standard, beyond reasonable doubt. And even if the FTT could be sure, it would nevertheless be unfair, for the reasons explained, in a case where the party concerned was at risk of being found to have committed a criminal offence

75. The Appellant protested the absence of Mr Rohani because had he been there the Appellant would have been able to cross examine particularly with regard to the identity of the person who the witness identified as responsible for the letting.

76. The Respondent also relied upon the Appellant being the lessee of the Property. Its case was that Asif paid the rent he received to the Appellant who derived a gain from letting the Property. It asserted there were up to six occupiers of the Property who all paid £270pcm generating a substantial sum during the period of involvement in the Property for the Appellant. The allegation of gain made by the Respondent was supposition. Both Mr Rohani and Mr Prattle told the Respondent's witnesses that they had only recently taken up occupation. The earliest date of occupation known to the Respondent was 28 October 2020 when it received a complaint about the state of the premises. Having regard to the obvious poor condition of the Property it is unlikely occupiers would have accepted the condition for several months. The Tribunal found the Respondent's assertion that the Appellant had received rent unconvincing.

77. The Appellant denied he received the rent which according to Mr Rohani, was paid in cash. He asserted to the Tribunal he was a delivery driver with no assets and limited means. At the interview under caution he did not give any information about his financial circumstances. It was not until May 2021 when, with the assistance of his solicitor, he made representations to the Respondent about his financial circumstances and produced some evidence that he had asked Mr Asif to become lessee of the Property. The Respondent agreed that the evidence showed some attempt at amending the lease by the addition of a party but it refuted the implication that the Appellant had surrendered his interest in the business.

78. His evidence of means was limited but indicated he was in debt to HMRC and was working as a delivery driver. Also, he was living in temporary accommodation. One page of his bank account indicated very low level of activity with no substantial sums of the sort suggested by the Respondent being paid in.

79. The Respondent's case is based on the untested evidence of one person, the fact of the Appellants status as property lessee and council taxpayer and then supposition that he must have been the person responsible for the control and management of the Property.

80. The Tribunal is not satisfied beyond reasonable doubt that these suppositions and the untested evidence of Mr Rohani are sufficient to prove to the necessary standard that the Appellant was in control of or the manager of the Property.
81. Further and in any event, the relevant statutory provisions provide that it is a defence if there is a reasonable excuse for the commission of the offences. The same facts satisfy the Tribunal that if it is wrong in its view that the Appellant was not in control of or management of the Property, he had a reasonable excuse for not complying with the regulations because he relied on Mr Asif to manage the Property in accordance with the partnership's agreed enterprise of running a food outlet, not a residential property.
82. In *R v Waltham Forest & ors* [2020] EWHC 1083 (Admin) Lord Justice Dingemans considered the need for *mens rea* in deciding financial penalty cases in the criminal courts. At paragraph 40 he said "*In our judgment it is plain that there is no requirement to prove that the defendant knew that the property he had control of or managed was a HMO, and therefore was required to be licensed, for a number of reasons which are set out below*". He then gave a number of reasons including at paragraph 44 "*Fourthly there is a defence in section 72(5) of the 2004 Act for the defendant to prove that he had a reasonable excuse for having control of or managing a HMO which was required to be licensed. In those circumstances if a defendant did not know that there was a HMO which was required to be licensed, for example because it was let through a respectable letting agency to a respectable tenant with proper references who had then created the HMO behind the defendant's back, that would be relevant to the defence, see generally Thanet District Council v Grant [2015] EWHC 4290 (Admin) at paragraph 17. The existence of the statutory defence and the fact that a reasonable excuse for not having a licence can be made out, lessens the need to have the mental element as part of the offence. The dicta in Thanet District Council v Grant recognising that such an absence of knowledge might be relevant*

to the defence of reasonable excuse is incompatible with a requirement to prove knowledge that there was a HMO requiring to be licensed.”

83. In this case the Appellant relied on his partner to take responsibility for the Property as agreed. He did not know there were tenants in it. The Tribunal is satisfied he had a reasonable excuse under s263(4).
84. That being so, it follows that the Tribunal sets aside both penalties imposed on the Appellant as he was not the person in control or management of the Property.
85. Had the Tribunal decided differently it would have reduced the penalty imposed.
86. Using the statutory criteria recited in the Tribunal's Directions and the Respondent's matrix as the starting point the Tribunal considers the penalties imposed are excessive.
87. When determining the penalty for the infringement of Regulation 4 the Respondent described a failure to keep means of escape free from obstruction contrary to para (1)(a) but photographs presented to the Tribunal showed an accumulation of items of bedding and furniture on landings stacked in a way which would not impede anyone escaping down the stairway in case of emergency. The Tribunal recognises this material should not be present in the exit stairway as it was combustible but it was not true to say it was impeding access.
88. The matrix also refers to an infringement of para 3 (failing to affix notices indicating location of means of escape) but on the Respondent's evidence there were fewer than four residents in occupation (para6).
89. The Tribunal varies the assessment of risk of harm from Very High to High. It also varies culpability from High Level Negligence to Medium Level.

90. As far as the penalty for breach of Regulation 7 is concerned on the evidence presented, which was not substantially challenged by the Appellant the Tribunal varies the risk of harm to Medium. The residents had not been in occupation for more than a few weeks and were told to vacate on 5 November 2020 when the Prohibition Notice was served. The Property was then unoccupied. The level of negligence is varied to a low level of risk of harm.
91. In relation to aggravating factors for both Regulations, the Respondent reduced the penalty by £1500.00. The Tribunal varies that reduction to the maximum. The Respondent relied too much on a supposition of an intention to let the Property and the unsatisfactory evidence of Mr Rohani.
92. Moreover, the Tribunal is not satisfied the Respondent has had sufficient regard to the Appellant's financial circumstances, the lack of any gain accrued to the Appellant, the decision by the Appellant to surrender the lease, and the prompt rehousing of the tenants, albeit by Mr Asif.
93. In *Sutton v Norwich* Lord Justice Newey said "*A Tribunal's decision as to what civil penalty it should impose for either a breach of the 2007 Regulations or failure to comply with an improvement notice involves, as I see it, both evaluation and discretion.*"
94. The Tribunal recognises that to some extent, the Appellant is responsible for his situation. He should have cooperated with the Respondent when first approached. Instead, he behaved in struthious manner ignoring calls and giving little information. However, the facts of the Appellant's circumstances are that he is unable to pay his debts which were known by the Respondent when the penalty was imposed. The fine is greater than the sum the Respondent alleges he received by way of rent. The Appellant has no track record of abusive landlord behaviour. The occupiers suffered no harm from their brief occupation of the Property.
95. Any fine is a punishment. The Tribunal has had regard to the evidence of the Appellant's financial circumstances including the lack of any evidence

that the payments made for the short time the Property was occupied found their way to his bank account when varying the penalty it would have imposed. However, the Tribunal also recognises that the Appellant did not challenge the evidence of the state of the Property or that it was unsuitable for residential occupation. It would replace the penalty for each offence to the sum of £3000.00.

96. In the paper submissions from the parties there was a further challenge to the penalties imposed. The Appellant contended the Respondent had not had regard to the totality principle when determining the total sum payable.
97. The Appellant contended the total sum of £29500.00 was disproportionate having regard to his financial circumstances and his mitigating factors.
98. The Respondent relied on *Sutton v Norwich CC* [UKUT]90 (LC) in its contention that there are circumstances where it is permissible to exceed the maximum fine of £30,000.00. There were other breaches of the Regulations which it did not pursue. Had it done so, it calculated that the maximum fine would have been £49,500.00. The total fine of £29500.00 was proportionate. As the Tribunal would have reduced the penalties it will not make a determination of whether or not the Totality Principle was properly applied.

Appeal

99. If either of the parties is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal on a matter of law to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to them rule 52 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

Tribunal Judge Peter Ellis