FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/22UH/HNA/2021/0017-19**
HMCTS Code		**V: CVP (Hybrid)**
Properties	**:**	**7 Hainault Road, Chigwell IG7 6QU** **105 Queens Road, Buckhurst Hill IG9 5BH** **17 Palmerston Road, Buckhurst Hill IG9 5PA**
Applicant	**:**	**Mr Darius Endriukaitis**
Respondent	**:**	**Epping Forest District Council**
Type of application	**:**	**Appeal against financial penalties: section 249A Housing Act 2004**
Tribunal member(s)	**:**	**Judge Wayte** **Tribunal Member Thomas MRICS**
Date of hearing	**:**	**8 and 9 November 2021**
Date of decision	**:**	**25 November 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVP COURT (Hybrid). A face-to-face hearing was not held due to the pandemic. Both parties provided bundles.

The order made is:

The tribunal varies the financial penalties to £31,500.

The applications

1. These applications are for appeals against financial penalties imposed under section 249A of the Housing Act 2004 ("the 2004 Act"). They were received by the tribunal on 20 April 2021. The relevant final notices dated 12 March 2021 made the following allegations and imposed the following penalties:

Property	**Alleged offence(s) under the Act**	**Penalty**
7 Hainault Road (0017)	Section 72(1)	£30,000
	Section 234(3), Regulations 3 and 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006 (the "**Regulations**")	£13,209.30
105 Queens Road (0018)	Section 72(1)	£30,000
	Section 234(3), Regulations 3 and 4	£15,410.85
17 Palmerston Road (0019)	Section 72(1)	£30,000
	Section 234(3), Regulations 3 and 4	£17,612.32
Total		£136, 232.47

2. Directions were given on 13 May 2021. Although the appeal was just over a week after the time limit provided by rule 27 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, Judge Wyatt used the tribunal's case management powers in rule 6 to extend the time limit due to the amount of the penalties. Both parties filed hearing bundles but the first hearing scheduled to commence on 20 September 2021 was adjourned as the applicant had been admitted to hospital.

3. The appeal was eventually heard on 8 and 9 November 2021 by video conference, with the panel sitting at Cambridge County Court. The applicant represented himself. The respondents were represented by counsel Mr Feldman and their witnesses Paula Black, an Environmental Health Officer for the Council, Nicholas Whiddon and David Bales, respectively the managing agent and owner (as a director of Bellstar Properties Ltd) of 105 Queens Road.

Background

4. In or about June 2019 the applicant started working with Mr Ceslovas Sasnauskas, someone he had known for many years. Mr Sasnauskas is the sole director of New Property Move Limited, which was incorporated on 23 September 2014. The nature of the business is described in the information held by Companies House as "other building completion and finishing" but it is uncontested that in fact the company operated as a property management company, letting rooms in shared houses. The applicant's role is disputed but he stated that he was more involved on the management side, as a handyman carrying out gardening and maintenance at a salary of £2,500 pcm.

5. On 20 September 2019, the applicant signed an assured shorthold tenancy agreement for 7 Hainault Road for a fixed term of 1 year at a rent of £2,500 pcm. That agreement contained a term against underletting without the consent of the landlord. The property is a large semi-detached house with 3 bedrooms on the first floor and 3 reception rooms, a study and kitchen on the ground floor. On 2 October 2019 the applicant showed the property to Mr Scott Sweeney who moved into a room on 1 November 2019. His first month's rent of £900 was paid into the applicant's bank account and a holding deposit was paid to a Ms Nichola Burrows. Rent after that date appeared to be paid to New Property Move Limited. The respondent relied on a statement from Mr Sweeney [R/207-9], which confirmed that the property was occupied by up to 9 people during the time he was resident. He left the property in November 2020 after contact from Three Oaks Estates, representing the owner of the property, told the occupants they had to find somewhere else to live.

6. On 20 May 2020, the applicant entered into an assured shorthold tenancy for 105 Queens Road, together with Mr Ceslovas Sasnauskas and Miss Zivile Miklyte. Again, the initial term was one year and the rent was £2,100 pcm. The agreement stated that the property was to be used as a private residence only in the occupation of the tenant and not for business purposes. The property is a double fronted large 4 bedroom house over 3 storeys. Shortly after the tenancy had been signed, works were carried out to divide the sitting room into two bedrooms and locks were placed on the doors. Again, the property was sublet to around 9 persons.

7. On 19 June 2020, the applicant entered into an assured shorthold tenancy agreement for 17 Palmerston Road, again with Mr Sasnauskas and Miss Mikylte. The agreement was not in the respondents' bundle. This was the largest property, a semi-detached house with 6 bedrooms over 3 storeys. Again, the property was sublet to multiple people shortly after the tenancy was signed.

8. On 6 August 2020 Ms Black received a telephone call from Nicholas Whiddon, the agent for 105 Queens Road, stating that the property had been unlawfully sublet as an HMO. A joint inspection of the property was carried out on 11 August 2020 and 9 people were found to be living in 7 rooms, including the now subdivided sitting room. Ms Black interviewed Lisa Anderson who confirmed she had moved into her room on 1 July 2020 and shared the agreement on her mobile telephone which was by "Dave Darius Endrius" [R/53]. Her rent of £650 pcm was paid to New Property Move Ltd. Ms Black also spoke to Steven Merry who again had dealt with "Dave" and paid his rent to New Property Move Ltd [R/81-2]. Ms Black returned to the property on 17 September 2020 to take further statements, which were also included in the respondent's bundle.

9. On 22 September 2021 Ms Black received a copy of a letter to the applicant and others from the solicitors for Bellstar Properties Ltd, the owner of 105 Queens Road, enclosing a notice seeking forfeiture for the unlawful letting of the property. Shortly afterwards Ms Black got in contact with the applicant due to a complaint from Steven Merry that the electricity had been disconnected. The applicant responded to an email within 45 minutes to confirm that the supply would be reconnected that day.

10. Ms Black subsequently discovered that the applicant was registered for council tax at 17 Palmerston Road, claiming a single person discount and under a slightly different name with "Dr Ceslovas Endrius" for 7 Hainault Road. She carried out an unannounced visit at 17 Palmerston Road on 22 October 2020 and took a witness statement from Nora Sif Dine [R/125-6]. Nora advised her that there were 13 tenants occupying 8 rooms, including two in the summer house to the rear of the property. She also advised that she had become aware that the owner of the house, Mr Singh, lived next door. Nora said that when she first moved in, she thought the house was owned by Darius. Ms Black spoke to other tenants who advised that Darius was their contact in relation to any property issues.

11. Ms Black continued to 7 Hainault Road and entered the property that afternoon with an agent from Three Oaks Estates, the managing agent for the owner. She was unable to take any statements during that visit but was subsequently contacted by Scott Sweeney as set out above.

12. On 30 October 2020 Ms Black wrote to both the applicant and Ceslovas Sasnauskas, inviting them to attend the Civic Offices for a formal interview [R/236-7]. After a reminder on 5 November 2020 which stated that the current penalty for operating an unlicensed HMO was £30,000, the applicant responded to say he would attend for an interview. No response was received from Mr Sasnauskas.

13. The interview took place on 1 December 2020. The applicant was represented by Lynn Gothard, a solicitor. During the interview he admitted being involved with subletting the properties. He was not aware that HMO licences were required at the time but was keen to work with the council moving forward as he still wanted to be involved in property management. His solicitor confirmed that he was making a full admission. The transcript of the interview was in the respondent's bundle [R/253-307].

14. After the interview Ms Black made contact with the London Borough of Redbridge who confirmed that they had previously served penalty notices on New Property Move Limited in respect of a property in Ilford.

15. On 15 January 2021 the respondent sent out Notices of Intention to Issue a Financial Penalty in relation to 6 matters. The relevant Final Notices were served on the applicant on 12 March 2021. Notices were also served on New Property Move Limited but no copies were in the respondent's bundle. Ms Black stated that moves had been made to wind the company up by Mr Sasnauskas but she had received no direct contact from him.

The Law

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

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

18. Schedule 13A sets out the requirement for a notice of intent to be given before the end of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates. It also contains provisions in respect of the right to make representations within 28 days after that initial notice and the requirements for the final notice.

19. Appeals are dealt with in paragraph 10 of Schedule 13A. The appeal is a re-hearing and may be determined having regards to matters of which

the authority was unaware. On an appeal the First-tier Tribunal may confirm, vary or cancel the final notice.

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

(a) Severity of the offence;

(b) Culpability and track record of the offender;

(c) The harm caused to the tenant

(d) Punishment of the offence

(e) Deter the offender from repeating the offence

(f) Deter others from committing similar offences.

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

The issues

21. Although the applicant admitted that he rented all three properties and that the intention was to use them as HMOs, the submissions made with the application denied that he received any rent either on his own account or as agent or trustee. He was an employee of New Property Move Limited and it was that company that received the rents. In the circumstances he did not commit any of the offences and could not be liable for the penalties. In the event that the tribunal took a different view, he argued that the penalties were entirely inappropriate and bore little relationship to his low culpability and the absence of harm to the tenants.

22. In expanded reasons for the appeal he also raised the defence of reasonable excuse, stating that he was pressured by his employer who took advantage of his ignorance of HMO regulation. He also attacked the respondent's policy in terms of the calculation of the penalties as defective due to its failure to consider totality, leading to penalties out of all proportion to his salary.

Did the applicant commit the relevant offences?

23. Given the admission in respect of the use of the properties as HMOs, the respondents need to establish beyond reasonable doubt that the applicant was a person managing the premises as set out in section 263 of the 2004 Act. The respondents' case relied on section 263(3)(b)

which states: "*In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises would so receive those rents or other payments but for having entered into an arrangement 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…*".

24. There was no dispute that the applicant was a lessee of all three properties. The respondents' case was that the applicant had entered into an arrangement with New Property Move Limited, a legal person under the 2004 Act, whereby the properties were sublet as HMOs and the company received the rent. The arrangement was a joint business venture between the applicant and his friend Ceslovas Sasnauskas. The respondents also relied on his PACE interview during which his solicitor confirmed the applicant was making a full admission.

25. The applicant's case, as set out in his witness statement dated 30 July 2021 and confirmed in evidence, was that he had lied at the PACE interview as he was pressurised by his employer to do so or lose his job. Ceslovas had told him that if he pleaded guilty the penalties would be waived. He had no idea of the severity of the situation or the magnitude of the penalties which could be issued against him personally. He felt that the solicitor had failed to advise him properly and should have stopped him making admissions. He was just an employee of New Property Move Limited which was the actual party liable. If the tribunal did not accept that defence, he relied on the same facts to establish the defence of reasonable excuse.

The Tribunal's Decision

26. While the tribunal accepts that the applicant may have had no idea of the potential seriousness of his position during the PACE interview, it does not accept that he is an innocent party. The applicant is clearly a man of some business acumen, having run his own cleaning company in the past and although he may not have known about HMO regulation, he could easily have done some research. At very least he must have appreciated that entering into tenancy agreements on the basis that he would live in three properties at the same time and then subletting those properties without notifying the agent or owner was dubious conduct. Registration for council tax at one of the properties on the basis he was the sole occupant (and claiming a single person discount) and the other under a false name, further damages his credibility. The applicant was the main contact for the subtenants, many of whom thought he owned the properties and the tribunal is satisfied beyond reasonable doubt that his involvement with them was on the basis of a joint business enterprise with his former friend Mr Sasnauskas. Apart from one payment by Mr Sweeney in relation to 7 Hainault Road, the rent was paid to New Property Move Limited and the applicant's share was paid as his salary. In the circumstances the

applicant was a person managing all three properties as set out in section 263(3)(b) of the 2004 Act.

27. The tribunal does not consider that the applicant can demonstrate a reasonable excuse defence. Again, we do not believe that he was pressurised by Mr Sasnauskas, other than perhaps in relation to the PACE interview. In any event, any reasonable person would have been honest with the owners of the property at the outset and taken steps to reassure themselves that their conduct was lawful.

28. There was no dispute in relation to the use of the properties as HMOs or the breach of HMO Regulations. In the circumstances, the tribunal is satisfied that the applicant's conduct amounts to offences under section 72 (licensing) and 234 (HMO regulations) of the 2004 Act in respect of all three properties.

The Civil Penalties

29. The respondent's enforcement policy refers to "fixed" penalty notices which are calculated in accordance with a matrix [R/443]. Unusually, the respondent uses the Local Housing Allowance (LHA) to calculate each penalty. The penalty for failure to licence is equivalent to twice the LHA rate for the entire property for the period it was not licenced (minimum 6 months and up to 12 months). The penalty for failure to comply with HMO Management Regulations is equivalent to twice the LHA rate for the entire property x 0.5 in respect of providing information to occupiers (regulation 3) and x 2 in respect of fire safety measures (regulation 4). The LHA for all three properties was £440.31.

30. Applying the matrix to 7 Hainault Road, the Financial Penalties Decision Record [R/323-5] sets out the calculation for the failure to licence as twice £440.31 (the relevant LHA) x 6 (the number of bedrooms) x 12 (length of the offence), amounting to £63,404.84. As this was in excess of the statutory maximum for a single offence, the penalty is capped at £30,000.

31. The Financial Penalties Decision Record for the HMO Regulations sets out the calculation for regulation 3 (duty to provide information) at £2,641.86 and regulation 4 (fire safety) at £10,567.44.

32. 17 Palmerston Road had 8 bedrooms. Although the applicant's involvement with the property ended by November 2020, the matrix provides for a minimum of 6 months for the licensing offence. This produced a total of £42, 269.76, which again was capped at £30,000. The penalty for the regulation 3 breach came to £3,522.48 and regulation 4, £14,089.92.

33. Finally, 105 Queens Road had 7 bedrooms and again the minimum of 6 months was applied for the licensing offence even though this property operated as an HMO for the shortest period. The penalty came to £36,986.04 which was again capped at £30,000. The penalty for the regulation 3 breach was £3,082.17 and regulation 4, £12,328.68.

34. The penalties therefore amounted to a grand total of £136,232.47.

35. The tribunal queried how the council's "fixed" penalty regime could properly reflect the factors contained in the MHGLG Guidance, which the respondent claimed to apply. In particular, no account was taken at all of any personal factors. The tribunal was also troubled by the fact that the calculation for each section 72 offence amounted to a penalty in excess of the statutory maximum. Ms Black relied on the 50% discount for proportionality but also stated that the council had discretion to reduce the amount of any penalty. She gave an example of a case where a section 72 penalty was reduced to £2,500 in recognition of the fact that the failure to (re)licence had been technical. She considered that the penalties were reasonable in this case, given the total profit from all three houses would have been £112,200 had the arrangement continued for a year but stated that the council would accept £68,116.23 as identified in her letter to the applicant dated 12 March 2021 (i.e. applying the 50% discount).

36. Mr Feldman submitted that this was a serious case which justified a significant penalty in respect of each property. No attempt had been made by the applicant to make the properties safe for multiple occupation and Mr Bales had given evidence that his company had suffered a loss of some £30,000 due to the unlawful subletting.

37. The applicant stated that the penalties were excessive and took no account of his salary, which amounted to £30,000 for a full year gross of tax and national insurance. He considered it was unfair that Ceslovas Sasnauskas had escaped liability. He was currently out of work but hoped to secure employment as an executive chef in the near future.

The tribunal's decision

38. Before considering the amount of the penalties, the tribunal needs to decide whether it was proportionate for the council to issue civil penalties for all three offences for each property. In particular, the regulation 3 offence for failure to place written details of the manager in the common parts and provide an applicant's address. As stated above, the applicant was clearly in contact with both the occupants and the council throughout and the council relied on the fact that the occupants identified the applicant as the manager to prove their case. In the circumstances, the tribunal considers that no financial penalty

should be imposed on the applicant for this technical breach of a rather outdated regulation in respect of any of the properties.

39. The tribunal does consider that a penalty should be imposed in relation to the licensing and fire safety offences. As the council pointed out, no licences would have been provided for large HMOs of more than 6 people and the properties were therefore all over-occupied with scant regard for fire safety. Taking into account the concession made by Ms Black, the respondent now seeks £15,000 in respect of each licensing offence. The tribunal considers that this sum should be reduced by a further 50% to reflect the fact that this was a joint enterprise with Ceslovas Sasnauskas and by Ms Black's own admission, she should have served notices on him personally rather than just the company, which is in the process of being dissolved.

40. As a check, the tribunal considered the factors set out in the MHCLG Guidance. The tribunal considers that the offence is serious, mainly due to the number of people occupying each property. It accepts that the applicant was unaware of HMO regulation and that no harm was caused to any of the tenants, although the applicant's culpability is increased by his duplicity in respect of the personal tenancy agreements and the loss suffered by at least one of the property owners. The applicant provided wage slips to support his claim that he earned £30,000 a year, gross of tax and national insurance. Taking all the circumstances into account, the tribunal is satisfied that £15,000 is an appropriate penalty in relation to each property. Although the offence lasted for a full year for 7 Hainault Road and only months in relation to the other properties, the seriousness of the conduct increased as each tenancy agreement was entered into and the number of occupants also increased, up to 13 for 17 Palmerston Road. The tribunal is also satisfied that it is appropriate to reduce that amount by a further 50% to reflect the part played by Mr Sasnauskas, without whom the applicant was unlikely to have engaged in the enterprise at all. For the avoidance of doubt, this makes the penalties £7,500 for each property, or a total of £22,500.

41. The tribunal carried out the same process in respect of the regulation 4 offences. Unusually, the respondent's matrix creates a lower penalty for this offence compared to a failure to licence but the photographs in the bundle contained some evidence of fire safety measures in the kitchen and standard domestic smoke alarms. Ms Black also conceded that all the properties were in a very good condition. Again, starting from the penalties originally sought by the respondent reduced by 50% as a result of Ms Black's agreement to apply the early payment deduction, the tribunal considered that the penalties should be reduced by a further 50% to reflect the part played by Mr Sasnauskas. For simplicity, the tribunal has rounded its calculation of the penalties payable by the applicant to £2,500 in respect of 7 Hainault, £3,500 in respect of 17 Palmerston and £3,000 in respect of 105 Queens Road, making a total of £9,000.

42. This amounts to a grand total of £31,500, which removes any financial benefit to the applicant by reference to his salary. The tribunal considers that this is an appropriate amount to reflect the seriousness of the breaches and the applicant's role in respect of these three properties, while acting as a substantial deterrent.

Name: Judge Ruth Wayte **Date:** 25 November 2021

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).