First-tier Tribunal
Property Chamber

(Residential Property)

Case Reference	**:**	**MAN/00BN/HNB/2021/0002**
Property	**:**	**64 Egerton Road, Manchester, M14 6RA**
Appellant	**:**	**Jordan Fishwick West Limited**
Representative	**:**	**Mr Robert Darbyshire**
Respondent	**:**	**Manchester City Council**
Representative		**Mr Paul Whatley**
Type of Application	**:**	**Under paragraph 10 of Schedule 13A to the Housing Act 2004 – an appeal against a financial penalty under s.249(a)**
Tribunal Members	**:**	**Judge P Forster** **Mr I D Jefferson FRICS**
Date of Decision		**1 November 2021**
Date of Determination		**5 November 2021**

DECISION

Decision

The Tribunal is satisfied beyond reasonable doubt that the Appellant committed offences under s.234 of the Housing Act 2004 and finds that it is liable to pay a financial penalty of £5,525, payable within 28 days of receipt of the decision.

Introduction

1. Jordan Fishwick West Ltd., the Appellant, appeals against the Final Notice dated 29 July 2020 issued by Manchester City Council, the Respondent, imposing a financial penalty on it under s.249A of the Housing Act 2004 ("the 2004 Act") in respect of 64 Egerton Road, Manchester M14 6RA ("the Premises"). The appeal is made under paragraph 10 of Schedule 13A to the 2004 Act.

2. The Respondent served the Appellant with a Notice of Intent dated 19 June 2020 to impose a financial penalty of £19,500 in respect of the Premises. After written submissions were made by the Appellant, this was followed on 29 July 2020 by a Final Notice imposing a penalty of £15,725.

3. The Tribunal issued Directions on 15 February 2021 that provided for the Respondent to address the issues raised by the appeal and to provide a bundle of relevant documents for use at the hearing. The Appellant was also directed to provide a bundle of relevant documents, to include an expanded statement of the reasons for the appeal.

4. The hearing was held by video on 22 September 2021 without an inspection of the Premises. The Appellant was represented by Mr Robert Darbyshire and the Respondent by Mr Paul Whatley. The Tribunal heard oral evidence from Ms Katie Tamblyn, a director of the Appellant Company and from Mr Christopher Hixon, the Respondent's Housing and Compliance Officer.

The Appellant's case

5. The grounds of appeal are concisely stated in the notice of appeal: "The Respondent failed to assess the appropriate level of fine in this case in accordance with its own policy in that (i) it treat (sic) the level of risk as 'serious' when the risk was in fact remote and (ii) it treated the Appellant as 'reckless' when it was 'negligent' within the meaning of the policy".

6. The Appellant believes that Mr Hixon, the Respondent's Housing and Compliance Officer, misunderstood the facts of the case and the Respondent's Policy on Civil Penalties. The result was the imposition of a penalty which was considerably higher than the case merited according to the terms of the Policy.

The Respondent's case

7. The Respondent is satisfied that the Appellant failed to comply with regulations 4, 7 and 8 of The Management of Houses in Multiple Occupation (England) Regulations 2006 ("the 2006 Regulations") and by so doing committed an offence under s.234 of the 2004 Act. In accordance with the Council's Policy on Civil Penalties the Respondent has imposed a financial penalty as an alternative to prosecution.

The Law

Commission of Relevant Offences

8. All references are to the Housing Act 2004.

9. A 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 (s.249A(1)). The penalty cannot exceed £30,000 (s.249A(4)).

10. An appeal against the imposition of a financial penalty is to be a re-hearing of the local authority's decision (para 10(3) to Schedule 13A). The Tribunal must therefore similarly be satisfied, beyond reasonable doubt, that such an offence has been committed.

11. A "relevant housing offence" includes an offence under s.234 of the Act. A person commits an offence under s.234(3) if he fails to comply with the 2006 Regulations that impose obligations on the person managing the HMO, in this case, the Appellant.

12. There is a statutory defence under s.234(4) where the person who commits an offence had a reasonable excuse for not complying with the regulation.

Guidance

13. The Secretary of State published guidance in 2016 (Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities), which was re-issued in 2018 and is relevant to offences under section 234 of the 2004 Act. Pursuant to Schedule 13A, a local housing authority is to have regard to any guidance given by the Secretary of State about financial penalties.

Reasons for the Decision

14. The Appellant is a well-established lettings and estate agency with a network of offices across central and south Manchester. On 5 March 2018, the Appellant agreed with Parveen Ahmed who owns 64 Egerton Road, to manage the Premises on her behalf. The Premises is a house in multiple occupation within the meaning of s.254 of the Housing Act 2004 and is subject to the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations").

15. The Premises are described by the Respondent and this is not disputed by the Appellant, as a three-storey mid terrace, comprised of 8 separate bedrooms with 2 communal areas and a kitchen. Each bedroom was occupied by a single tenant. There were 8 unrelated occupants forming 8 separate households. The tenants shared the living room, kitchen and bathrooms.

16. The Respondent's inquiries into the Premises were prompted by the revocation of the HMO licence on 12 October 2019 by Syed Rizwan Ahmad. He was the person named on the lisence but the Premises are owned by his wife Perveen Ahmed. On 21 November 2019, Ms Ahmed informed the Respondent that the Premises was being managed by the Appellant and that was confirmed in an email on 11 December 2019 from the Appellant to the Respondent. Mr Hixon checked the Council's register of HMOs on 12 December 2019 and finding that there had not been an application to reinstate the licence, he went to the Premises that day.

17. Mr Hixon met some of the tenants and was told that they had reported disrepair issues to the Appellant as managing agent. Witness statements from each of the tenants were produced to the Tribunal. Mr Hixon's evidence is that he found that the fire doors in the Premises were not being maintained with missing seals and gaps around the doors. Items were also being stored in the escape route. Mr Hixon served a notice requesting entry and returned to the Premises on 22 January 2020 to conduct a formal inspection. Mr Hixon identified offences under the regulations 4; 7 and 8.

18. In respect of regulation 4 – duty to take safety measures, it is stated that:

    - the smoke detector in the cellar was hanging from the wall.
    - the fire door from the cellar to the ground floor landing was poorly secured to the door frame and did not close flush to the rebate. The door's self-closing device was also broken.
    - the 1st floor rear bedroom door handle was loose.
    - the smoke seals were missing from a number of bedroom doors increasing the likelihood of smoke entering the escape route.
    - there were excessive gaps around bedrooms doors increasing the likelihood of fire spread.

19. In respect of regulation 7 – duty to maintain the common parts, it is stated that:

    - the stepped access at the rear of the property was fitted with a dilapidated and unsecure handrail.

20. In respect of regulation 8 – duty to maintain the living area, it is stated that:

- the glazing in the rear kitchen door was cracked and in a dangerous condition.
- the shower screen was missing in the cellar bathroom.

21. Mr Hixon's evidence is that he was advised by the tenants that they had previously reported a damaged fire door and fire alarm to the Appellant in December 2019. The doors to each bedroom were found to be poorly fitted leaving excessive gaps. Smoke seals fitted to bedroom doors were poorly maintained and missing sections therefore not adequate to prevent the spread of smoke. The fire door at the head of the cellar staircase was not secured to the frame, with one hinge hanging from the door frame. The fire door failed to close flush with the frame, leaving large gaps and would not have been adequate to prevent the spread of fire and smoke into the escape route. Within the cellar he found items stored in the escape route and a fire alarm hanging from the wall. The shower within the cellar was missing a screen making it unusable. The ground floor rear access door comprised a cracked widow panel. The external steps leading to the rear door were unstable and fitted with a loose handrail. The door handle in connection with the 1st floor rear bedroom was not secure and, in Mr Hixon's opinion, increased the likelihood of the occupier becoming trapped in the room in the event of a fire. Mr Hixon took photographs of the items which were produced to the Tribunal.

22. On 20 February 2020 a list of required works was sent to the Appellant. On 5 March 2020, the Appellant informed the Respondent that Ms Ahmad had appointed her own contractor to carry out the necessary works.

The Offences

23. Appellant accepts that it was the person managing the Premises at the relevant time and that it committed offences under s.234 of the Act. The Appellant does not seek to raise a statutory defence. On this basis, and on the evidence, the Tribunal is satisfied beyond reasonable doubt that the Appellant committed offences under s.234 and that it is liable to pay a financial penalty.

24. The Tribunal is left to consider the amount of the penalty to be imposed on the Appellant.

The amount of the penalty

25. The Tribunal is required to pay great attention to the Respondent's policy on financial penalties and should be slow to depart from it. The burden is on the Appellant to persuade the Tribunal to do so - Waltham Forest LBC v Marshall [2020] UKUT 35 (LC) endorsed by the Court of Appeal in Sutton v Norwich [2021] EWCA Civ 20.

26. The Respondent has applied the Association of Greater Manchester Authorities Policy on Civil Financial Penalties ("the Policy"). This sets out a structure to be followed and the factors to be considered when issuing a financial penalty. There is a two stage process in which the level of harm is viewed together with the level of culpability. These two factors are placed in a matrix from which a "band" of appropriate penalties is calculated. The Policy sets out a description of each factor and provides examples. The harm factor is set at a risk of "a low harm" (low); "a serious risk of harm" (medium) or "a serious and substantial risk of harm" (high). The culpability factor is set at, in order of seriousness: "negligent"; "knowledge of risk"; "reckless" and "intentional".

Harm

27. The Policy provides that where no actual harm has resulted from the offence, as in the present case, the Local housing Authority will consider the relative danger that persons have been exposed to as a result of the offender's conduct, the likelihood of harm occurring and the gravity of harm that could have resulted.

28. The Tribunal has a copy of the Final Notice dated 29 July 2020 (page 280 of the Respondent's bundle of documents) which incorporates the Council's response to the Appellant's representations made in response to the Notice of Intent dated 19 June 2020 (page 182). Although the Tribunal does not have a copy of the Notice of Intent it is possible to identify the specific allegations that are made and there was no dispute between the parties about the issues that need to be considered.

29. It is submitted on behalf of the Appellant that Mr Hixon failed to make the distinction between the likelihood of the risk arising and the damage that would follow when he calculated the amount of the penalty. That is not for the Tribunal to consider directly. The appeal is by way of being a rehearing and therefore it is for the Tribunal to reach its own decision based on the facts. The Tribunal is not undertaking a review of the Respondent's decision although appropriate weight is given to its views.

30. The breaches of the Regulations relate substantially to fire safety failures which engage regulation 4. The Respondent's Policy makes it clear that risks arising from fire are generally to be regarded as being in the "high" category of harm. In the present case the Respondent assessed the harm as "medium" because of the existence of the fire alarm system.

31. There is very little dispute between the parties about the facts of the case. Mr Hixon's findings are by and large accepted by the Appellant. Mr Hixon on 22 January 2020 found the fire door from the cellar to the rest of the Premises was poorly secured and was not flush with the door frame and the self-closing device was broken. The fire detector was hanging from the wall, as can be seen in the photographs, but it is not alleged that it was not working. A number of the bedroom doors were inadequately maintained, smoke seals were missing and there were excessive gaps around the doors. All of these items are intended to prevent the spread of smoke and fire and their effectiveness was compromised.

32. The fire alarm system was tested in October 2019 by DBA who certified it as being satisfactory. The Respondent does not allege that the system was faulty. The fire alarm test certificate certified the functionality of the system but did not take account of the safety of the means of escape and any general maintenance issues relevant to fire safety in the Premises.

33. Mr Hixon found that a door handle to one of the first-floor bedrooms was broken. Although the Appellant states that it had been reported by a tenant and promptly repaired, Mr Hixon's finding on 22 January 2020 is not contested. It is an issue of general maintenance more than strictly an issue of fire safety. The handrail to the steps at the rear of the Premises was dilapidated and unsecure. It was clearly in a state of disrepair and posed a potential risk of falling. The damaged glazing in the rear kitchen door and the missing shower screen were likewise issues of general maintenance.

34. The Policy defines the harm categories by way of examples of the housing defects giving rise to the offences:

"High" "…poses a serious and substantial risk of harm to the occupants and/or visitors; for example, danger of electrocution, carbon monoxide poisoning or serious fire safety risk".

"Medium" "…poses a serious risk of harm to the occupants and/or visitors; for example, falls between levels, excess cold, asbestos exposure".

"Low" "…poses a risk of harm to the occupants and/or visitors; for example, localised damp and mould, entry by intruders".

35. A "serious fire safety risk" falls within the "high" category but the Policy does not define this term. The Tribunal must consider the relative danger that the tenants were exposed to by the defects in the Premises: the cellar door, the hanging smoke detector, the missing smoke seals and the gaps around the doors. These in themselves do not pose a risk of fire compared to say an electrical fault or a risk to health caused by a defective gas boiler. The defects included in the Final Notice risk compromise or reduce the effectiveness of other fire safety measures in the Premises, but the primary protection for tenants is provided by the working fire safety system. If the Premises did not have a working fire safety system, reliance on other measures might be more significant.

36. The Respondent lowered the risk category from "high" to "medium" because of the fire alarm system which mitigates the risk. The examples given in the Policy for the risk categories appear to distinguish between defects that could cause an immediate danger – the "high" risk category, and defects that could affect the health of occupiers over a long term of exposure - the "medium" and "low" categories. Overall, the examples provided are not helpful when deciding which of the categories a particular defect falls into. The difference between the "medium" and "low" risk categories seems to turn on the gravity of the potential outcome rather than focusing on the likelihood of harm occurring. The examples are confused because there maybe little or no difference

between them, say between excess cold and localised damp.

37. The Tribunal must interpret the Respondent's Policy and reach its own conclusions based on the evidence. An HMO is a high risk environment, and fire or smoke inhalation poses a risk of serious physical injury or loss of life to the tenants but the likelihood of a fire occurring is, to use Mr Whatley's phrase, a once in a blue moon event but with severe outcomes. The Tribunal concludes, taking account of the existence of a working fire safety system, that the defects themselves in this case are low risk, acknowledging their potential to reduce the effectiveness of the fire safety system. no

Culpability

38. Culpability denotes the offender's blameworthiness or responsibility for their actions. The more culpable the behaviour is, the more serious is the breach of the relevant regulations and the more severe the outcome.

39. The Policy provides that when determining culpability, the Local Housing Authority will have regard to four levels where the offender:

    (1) "has the intention to cause harm, the highest culpability, where an offence is planned.

    (2) is reckless as to whether harm is caused, i.e., the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences, even though the extent of the risk would be obvious to most people.

    (3) has knowledge of the specific risks entailed by his actions even though he does not intend to cause the harm that results.

    (4) is negligent in their actions".

40. The Policy provides examples of culpability:

"very high – deliberate act"	Intentional breach by landlord or property agent or flagrant disregard for the law e.g., where an unregistered gas fitter is allowed to carry out gas work and the landlord/property agent knows that he is not registered.
"high – reckless act"	Serious or systemic failings, actual foresight of or wilful blindness to risk of offending but risks nevertheless taken by the landlord or property agent, e.g., failure to comply with HMO Management Regulations.

"medium – negligent act"	Failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence, e.g., part compliance with a schedule of works, but failure to fully complete all schedule items within notice timescale.
"low – low or no culpability"	Offence committed with little or no fault on the part of the landlord or property agent, e.g., obstruction by tenant to allow contractor access, damage caused by tenants.

41. The Tribunal heard oral evidence from Katie Tamblyn, a director of the Appellant Company. She was not involved in the day to day management of the Premises and was not the author of the letter dated 1 July 2020 written in response to the Notice of Intent. That was written by her fellow director, Martina Harrison.

42. The Appellant relies on an inspection carried out by a member of staff in November 2019 to provide a benchmark for the condition of the Premises and submits that any deterioration between then and Mr Hixon's inspection on 22 January 2020 may have been caused by tenants. They were required by the terms of the tenancy agreement to report any problems to the agent. Ms Tamblyn's evidence is that no complaints were received during that period.

43. The Appellant's case is that as managing agents it was responsible for maintenance issues. It has regular contractors which it employs to carry out any necessary works. The relationship between the Appellant and the owner, Mrs Ahmed, was very poor. Ms Tamblyn described how Ms Ahmed would go into their office and argue with the staff. Mrs Ahmed insisted on using her own workers to carry out repairs. The Appellant has provided copies of numerous text messages and emails between it and Ms Ahmed that demonstrate the problems it had getting issues resolved. The relationship deteriorated to the point when in December 2020, the Appellant terminated the agency agreement with Mrs Ahmed with effect from June 2021 at the end of the tenancy. Ms Tamblyn states, this is very unusual and shows how bad things were with the landlord. This evidence was not challenged by the Respondent and is accepted by the Tribunal.

44. Based on the Appellant's inspection in November 2019, it was not aware of any problem with the smoke detector in the cellar until the tenants reported the issue in about December 2019. No problem was noted by DBA when it tested the fire alarm system in October 2019. Likewise, the Appellant says that it did not know about the issues with the cellar door until they were reported by the tenants on 18 December 2019. At that point, the evidence is that the Appellant told Mrs Ahmed about the defects and she instructed her own contractor to repair the door and the smoke detector. The work had not been done by the date of Mr Hixon's inspection on 22 January 2020.

45. Mr Hixon found that a number of the bedroom doors were inadequately maintained, smoke seals were missing and there were excessive gaps around the doors. All of these items are intended to prevent the spread of smoke and fire and their effectiveness was compromised. DBA did not recommend any remedial works when it inspected the Premises in October 2019. The Appellant sought to rely on DBA's inspection and its expertise but it is apparent that its brief was to test the fire alarm and not to carry out a detailed inspection of the general fire security of the Premises.

46. The Appellant has no record of anyone reporting the broken door handle on one of the first-floor bedrooms. It was not noted when the Appellant inspected in November 2019. The Respondent seems to accept that no complaint was made by a tenant, certainly there is no evidence that it was brought to the Appellant's attention.

47. When the Appellant inspected the Premises in November 2019, access to the rear yard was not possible because of an accumulation of rubbish. Ms Tamblyn's evidence was that the person who conducted the inspection had words with the tenants about this at the time but there is no documentary evidence to confirm the existence of the problem or that it was brought to the attention of the tenants. The inability to access the rear yard is put forward by way of explaining the state of the handrail. This is not accepted by the Tribunal because from the photograph of the handrail it had clearly been in a dilapidated condition for some considerable time.

48. The Appellant says that the glazing in the rear kitchen window was not cracked at the start of the tenancy in August 2019 nor at the time of the inspection in November 2019. The Appellant falls back on the terms of the tenancy agreement which requires the tenants to notify the agent about any damage to the Premises. Broken glass is expressly the responsibility of the tenants who would be required to pay for repairs which might explain any reluctance to report the matter to the agent. This account is not challenged by the Respondent which points out that nevertheless it was the Appellant's responsibility to maintain the common parts under the Management Regulations.

49. The Appellant accepts that the shower screen was missing at the start of the tenancy but says that tenants were told not to use the basement bathroom. There are other bathrooms on other floors. Mrs Ahmed's contractor was supposed to be dealing with the matter but did not do so. The Appellant provided Ms Ahmed with four alternative quotes for the work but she did not give instructions for the work to go ahead. None of this is contested by the Respondent which points out that it should have been addressed as a breach of contract between the Appellant and Ms Ahmed. That is essentially what happened but not until the agency agreement was terminated with effect from June 2021.

50. Again, there is very little dispute between the parties about the facts of the case as they relate to the question of culpability. It is for the Tribunal to interpret the Policy and reach its own conclusions.

51. The Respondent classifies the level of culpability as "reckless". Mr Whatley submits that there was a systematic failure on the part of the Appellant to identify the existence of defects and then to take remedial action that would comply with the Management Regulations.

52. It is said that the Appellant's inspection carried out in November 2019 failed to identify any of the defects found by Mr Hixon in January 2020. The Tribunal has some concerns about the thoroughness of the November inspection as demonstrated by the failure to note the rubbish in the rear yard. The missing door seals, the gaps around the doors. the rear handrail and missing shower screen are not thought to be of recent in origin. However, on the evidence, it is not possible to establish with any certainty when the smoke detector became loose, the cellar door was damaged, the doorhandle was broken or the glass in the kitchen window was cracked.

53. Mr Hixon in his oral evidence sought to attribute a higher degree of blame to the Appellant because it is a firm with more than one office which he felt meant that it ahd a higher degree of responsibility. The Tribunal disagrees fundamentally with this approach because the Management Regulations apply equally to who so ever is managing an HMO. The same rules and standards must be applied across the board. Mr Darbyshire submits that it was only the rear handrail and the cellar door which "were remotely serious". That is an exaggeration but it reflects that the Tribunal's overall view that individually and together the defects were not of the most serious type.

54. The Policy defines "a reckless act" in terms of "actual foresight of or wilful blindness to the risk of offending but risks nevertheless taken". In other words, a deliberate act done with full knowledge of the consequences. This was described as inaccurate in the case of ICI Ltd. v Shatwell [1965] AC 656. In contrast, a "negligent" act arises where someone either fails to consider the consequences of a particular action or having considered them, fails to give them the appropriate weight. There are inevitably shades of meaning, but "reckless" connotes intent whereas "negligent" implies an omission to do something.

55. The Tribunal finds that the Appellant's behaviour cannot properly be described as reckless and so it does not come within the "high" level of culpability. The Appellant did not wilfully disregard its legal obligations. The Appellant knew what was required of it but did not deliberately set out to ignore matters.

56. On the evidence, the Tribunal finds that the Appellant's behaviour was negligent and so falls within the "medium" level of culpability. It did not act intentionally, but it was negligent in its failure to deal with it legal responsibilities. The Appellant knew what was required of it but it did not deliberately set out to ignore matters. The Appellant gave insufficient attention to its obligations under the Management Regulations.

The Matrix

57. Applying the Respondent's Policy, an offence of low harm and medium culpability puts it in Band 2 with a penalty range of between £5,000 and £9,999. The start point according to the Policy is in the middle of this range, £7,500.

58. The next step is to review the amount of the penalty to determine if it meets the stated objectives as set out in the statutory guidance published by the Ministry of Housing, Communities and Local Government. The penalty should reflect the extent to which the offender fell below the required standard. The civil penalty should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through commission of the offence.

59. The Policy provides for the amount of the penalty to be reviewed and, if appropriate, adjusted to ensure that it fulfils the general principles. This requires any aggravating or mitigating factors to be considered and for the penalty to be increased or decreased by £1,000 for any relevant factor. The Policy does not define these terms.

60. The Respondent has not identified any aggravating factors and in the absence of any submissions on the point, the Tribunal finds that there are no such factors.

61. In terms of any mitigating factors, the Respondent deducted £1,000 to reflect the difficulties faced by the Appellant in having to deal with Ms Ahmed. This is evidenced in the various texts and emails between the two of them and by Ms Tamblyn's oral testimony. Whilst the Appellant did terminate its contractual ties with its client, it would have been better not to carry on for a further six months. The Tribunal reduces the penalty by £1,000 to reflect the mitigating circumstances.

62. The Respondent made a further reduction of 15% because the necessary works have been completed. This is in accordance with the Policy. The Tribunal also makes a 15% reduction.

63. Accordingly, the Tribunal imposes a penalty on the Appellant of £5,525 (£7,500 - £1,000 - £975).

Dated 1 November 2021

Judge P Forster

RIGHT OF APPEAL

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 the Regional Office, which has been dealing with the case.

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.

If the person wishing to appeal does not comply with the 28-day time limit, that 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.

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.