FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/HNA/2022/0008**
HMCTS code (paper, video, audio)	**:**	**Face to Face**
Property	**:**	**137, Constantine Road, London NW3 2LR.**
Appellant	**:**	**Alterna Ltd. (trading as London Rooms)**
Representative	**:**	**Mr. A. Odeh-Torro (director)**
Respondent	**:**	**The London Borough of Camden**
Representative	**:**	**Ms. R. Roberts of counsel**
Type of Application	**:**	**Appeal against a financial penalty**
Tribunal	**:**	**Tribunal Judge S.J. Walker** **Tribunal Member Mr. S. Mason BSc FRICS**
Date and Venue of Hearing	**:**	**11 August 2022 – Alfred Place**
Date of Decision	**:**	**1 September 2022**

DECISIONS

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(1) The appeal against a financial penalty imposed by the London Borough of Camden on Alterna Ltd. in respect of an offence under section 234(3) of the Housing Act 2004 – failure to comply with the duty imposed by regulation 7(1)(c) of the Management of Houses in Multiple Occupation (England) Regulations 2006 (duty of manager to ensure that common parts are kept reasonably clear of obstruction) in connection with the property at 137

Constantine Road, London NW3 2LR is dismissed. The penalty notice dated 23 December 2021 is confirmed. The penalty of £4,000 is upheld.

(2) The appeal against a financial penalty imposed by the London Borough of Camden on Alterna Ltd. in respect of an offence under section 234(3) of the Housing Act 2004 – failure to comply with the duty imposed by regulation 7(2)(a) of the Management of Houses in Multiple Occupation (England) Regulations 2006 (duty of manager to ensure that handrail and banister kept in good repair) in connection with the property at 137 Constantine Road, London NW3 2LR is dismissed. The penalty notice dated 23 December 2021 is confirmed. The penalty of £2,000 is upheld.

Reasons

Procedural History

1. The Appellant appealed against the imposition of two financial penalties under section 249A of the Housing Act 2004 ("the Act") against them in respect of the property known as 137 Constantine Road, London NW3 2LR on 23 December 2021. The penalties imposed on the Appellant were for two offences under section 234(3) of the Act for failure to comply with management regulations. The first offence was one of failing to ensure that the common parts of the property were kept reasonably clear from obstruction contrary to regulation 7(1)(c) of the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations") and the second was one of failing to ensure that the handrail and banister were kept in good repair contrary to regulation 7(2)(a) of the Regulations.

2. On 29 April 2021 the Respondent served a notice under section 235 of the Act requiring production of documents, to which the Respondent replied on 10 May 2021.

3. A letter of alleged offence was sent to the Appellant on 18 August 2021 (pages 176 to 178) which included a written interview under caution. On the same date a request was made under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 for information from the Appellant and a further request was made under section 235 of the Act for further documents.

4. The Appellant responded to these various requests.

5. A notice of intention to impose financial penalties on the Appellant was sent to them on 28 September 2021 13 April 2021 (pages 234 to 236). The proposed penalties were £4,000 for the first offence and £2,000 for the second, making a total of £6,000.

6. No representations were received by the Respondent from the Appellant and on 23 December 2021 they issued a final notice to the Appellant (pages 237 to 241) in the same sum as originally proposed.

7. The Appellant appealed to this Tribunal against these penalties on 21 January 2022, which was within the time allowed.

8. Directions were issued on 24 March 2022 and amended on 5 April 2022 and again on 20 April 2022. Among other things, these required the production of bundles by the parties. These directions were complied with by the Respondent, and the Tribunal had before it a bundle comprising 254 numbered pages and an index. References to page numbers throughout this decision are to the numbers printed on the documents in the Respondent's bundle unless otherwise stated. The Tribunal also had before it, and took into account, the Appellants' application form, which was available in hard copy, and a three-page statement of case written by Mr. Odeh-Torro. The former is supported by a statement of truth, but no witness statements or other statements supported by such a statement were provided by the Appellant.

The Law

9. Section 249A of the Act permits a local housing authority to impose a financial penalty for a number of housing offences, amongst which is the offence contained in section 234(3) of the Act of failing to comply with management regulations made under section 234 of the Act. Each offence carries a maximum penalty of £30,000.

10. Schedule 13A of the Act provides that the local housing authority must first give a notice of intent before the end of six months beginning on the first day on which the authority had sufficient evidence of the conduct to which the financial penalty relates. This must set out the amount of the proposed penalty, the reasons for proposing to make it, and information about making representations to the authority. The authority must then give a final notice setting out, among other things, the amount of the penalty and the reasons for giving it.

11. The alleged offences relate to the management of a House in Multiple Occupation ("HMO"). The definition of an HMO is found in section 254 of the Act. To be an HMO it must meet one of the tests set out in that section. These include the standard test under section 254(2).

12. A building meets the standard test if it;

> "*(a) consists of one or more units of living accommodation not consisting of a self-contained flat or flats;*
> *(b) the living accommodation is occupied by persons who do not form a single household …;*
> *(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;*
> *(d) their occupation of the living accommodation constitutes the only use of that accommodation;*

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

13. By virtue of section 258 of the Act persons are to be regarded as not forming a single household unless they are all members of the same family. To be members of the same family they must be related, a couple, or related to the other member of a couple.

14. By section 234(3) of the Act it is an offence to fail to comply with regulations made under that section, which includes the Regulations identified above. These Regulations impose a number of duties on the person managing the HMO. Regulation 7 imposes, among others, the following duties;

"(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

15. The above offences can only be committed by a manager of the HMO. Regulation 2(c) of the Regulations defines the manager as "*the person managing the HMO*".

16. Further definition is provided by section 263 of the Act as follows;

(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) ..... ; 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."

17. It is a defence to a charge of an offence under section 234(3) of the Act that a person had a reasonable excuse for committing it (section 234(4)).

18. An appeal to the Tribunal by the person subject to the penalty is to be by way of a rehearing and may be determined with regard to matters of which the authority was unaware.

19. It is for the local housing authority to prove beyond reasonable doubt that the offences relied on have been committed. Any defence of reasonable excuse must be established by the appellant on the balance of probabilities. This is made clear in the case of IR Management Service Ltd. -v- Salford City Council [2020] UKUT 81 (LC), which also provides that Tribunals should consider explanations given by persons managing an HMO in order to ascertain whether or not a reasonable excuse has been established even if such a defence is not expressly raised by them.

20. As is made clear by the decisions of the Upper Tribunal in the cases of London Borough of Waltham Forest -v- Marshall and Ustek [2020] UKUT 35 (LC) and Sutton -v- Norwich City Council [2020] UKUT 90 the Tribunal's starting point when considering an appeal of this kind is the local housing authority's policy. Proper consideration must be given to arguments that there should be a departure from the policy, but the burden is on the appellant to show that such a departure should be made. The Tribunal must look at the objectives of the policy and consider whether those objectives would be met if the policy were not followed. The Tribunal must also give considerable weight to the local housing authority's decision but may vary it if it disagrees with it. In addition, regard must be given to the guidance issued by the Secretary of State in 2016 and re-issued in 2018 entitled "Civil Penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities" ("the Guidance").

21. As is made clear in the Guidance, when determining the level of a financial penalty regard must be had to the following;
    (a) the offender's means
    (b) the severity of the offence;
    (c) the culpability and track record of the offender;
    (d) the harm or potential harm (if any) caused to a tenant;
    (e) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or
    (f) the need to remove any financial benefit the offender may have obtained as a result of committing the offence

The Hearing

22. The Appellant is a body corporate and was represented at the hearing by Mr. Odeh-Torro, a director. They had no legal representation. The Respondent was represented by Ms. Roberts, in-house counsel.

23. The Tribunal had before it the documents referred to in paragraph 8 above.

24. Ms. Suarez-Robles, one of the Respondent's officers, also attended. She adopted her witness statement (pages 1 to 17) as her evidence in chief. She was asked a number of questions for clarification by Ms. Roberts and by the Tribunal. Mr. Odeh-Torro had no questions for her.

Findings of Fact

25. As explained above, no questions were put to Ms. Suarez-Robles. Her evidence was, therefore, unchallenged. Indeed, much of the Respondent's case was accepted in the Appellant's statement of case.

26. Based on this largely unchallenged evidence and the exhibits provided by Ms. Suarez-Robles, the Tribunal found the following facts.

27. The property comprises four floors and contains, among other rooms, six bedrooms, a ground floor reception, a kitchen/diner on the ground floor and a small kitchen on the second floor (see page 18).

28. The property is owned by Mrs. J. Becci and was let by her on 24 February 2020 to the Appellant for a term of 5 years commencing on 2 July 2020 (see pages 126 to 146). The Appellant in turn let individual rooms at the property to a total of 9 different people between August 2020 and September 2021. A chart showing occupancy is at page 40. At the date of the Respondent's inspection there were 7 people in occupation. The various tenancy agreements are at pages 41 to 100. In each the landlord is referred to as "London Rooms", and instructions are given for the payment of rent to an account in that name. However, in the information provided by the Appellant to the Respondent, they stated that the rent from the occupiers of the property is received by the Appellant (page 170). They confirmed that the person named on the tenancies is London Rooms (page 171).

29. On 15 April 2019 a licence was issued to Mrs. Josephine Becci under section 64 of the Act, a mandatory HMO licence (page 20). This stated that the permitted maximum number of persons allowed to occupy the property is 10. Ms. Suarez-Robles' evidence was that when she attended the property on 6 April 2021 there were 7 people in occupation. She explained that with that many people in occupation the HMO licence required there to be two sets of kitchen facilities at the property. If there were not 2 sets, then the maximum permitted number would be 5. Although the ground floor kitchen/diner at the property was 25 square metres, and so large enough to meet the standard for 6 to 10 people, it only had one set of kitchen facilities. The kitchen on the second floor was, therefore, required to be in use in

order to meet the requirements for having 7 people in occupation (see pages 32 to 33).

30. The HMO licence was varied on 14 September 2020 to show that LRSL Ltd (trading as London Residential) – Mrs. Becci's managing agents - now had responsibility for management of the property (see para 2.2.2 at page 3).

31. On 6 April 2021 Ms. Suarez-Robles inspected the property and took a number of photographs (pages 37 to 39). She found that the second-floor kitchen was locked and inaccessible to tenants. The managing agent who was with her unlocked the door and she saw that there was no fridge or freezer in the room and no plates or pots. The second-floor rear corridor was obstructed by 2 large clothes-drying racks. The banisters to the communal staircase were in disrepair, with several balusters missing.

32. The Tribunal accepted these findings, which were not challenged, and noted that the missing balusters created a gap which would give rise to a risk of falling between levels for a child, the test being whether a 10cm sphere would pass between the gap.

33. Ms. Suarez-Robles's evidence was that one of the tenants, Mr. A. Ibrahim, complained to her that the second-floor kitchen was kept permanently locked. The evidence included e-mail correspondence between him and the Appellant in which he complained about the kitchen being closed. In particular, he wrote on 24 and 26 November 2020 stating that the kitchen was closed and enquiring why, stating that two kitchens were required, to which the Appellant replied on 26 November 2020 that the kitchen will remain closed (pages 104 to 105).

34. On the basis of this evidence the Tribunal was satisfied that on the date of the inspection the common parts of the property – which include the second-floor kitchen and corridor – were not kept reasonably free from obstruction and that the banisters were not in good repair.

35. On 28 September 2021 a notice was sent to the Appellant informing them of the Respondent's intention to issue civil penalties. The notice alleged an offence under regulation 7(1)(c) in respect of the locking of the second-floor kitchen and the obstruction of the second-floor rear corridor, and an offence under regulation 7(2)(a) in respect of the missing balusters (pages 234 to 235).

36. No representations were received and a final notice was issued on 23 December 2021. The penalties were £4,000 for the first offence and £2,000 for the second.

Have the Alleged Offences Been Committed

37. There was no doubt that the property was an HMO. This was not disputed by the Appellant and the evidence clearly shows that it is. There was also no doubt that, on the date of the alleged offence – the

date of the inspection – the common parts were not kept reasonably free from obstruction – the door to the kitchen was locked and the corridor was clearly obstructed by drying clothes - and the banisters were in disrepair. Although the Appellant contended that the kitchen was not normally locked, it was clearly found to be so on the day in question. The Appellant's statement of case suggests that a key is provided for the cleaners to access the kitchen, but it is not suggested that this is available to the tenants and any such suggestion is also inconsistent with the complaints made by Mr. Ibrahim and the Appellant's reply to them. In any event, no evidence was presented to support such a contention.

38. It is clear from the Appellant's statement of case, and also from the submissions made by Mr. Odeh-Torro at the hearing, that the Appellant's main argument was that they could not be guilty of the offence because they were not the manager for the purposes of the Regulations. This is made clear in paragraphs 1 to 7 of their statement of case.

39. It was clear to the Tribunal from his submissions that Mr. Odeh-Torro had misunderstood the terms of the legislation. His submissions were that it had not been shown that the Appellant received the rack-rent for the property. This is relevant for determining whether or not a person is a "person having control" of a property as provided for in section 263(1) of the Act. However, the offences in question are committed by the manager as defined in section 263(3) of the Act. In order to prove that the Appellant is a person managing the property it is only necessary to show that they are an owner or lessee of the premises – which is done by means of the lease between Mrs. Becci and the Appellant – and that they receive rent from the occupiers of the property – which is admitted in the information provided by the Appellant to the Respondent.

40. The Tribunal had no doubt that the Appellant was a person managing the property as defined in section 263(3) of the Act and, therefore, the manager for the purposes of the Regulations.

41. The only remaining question, therefore, was whether or not the Appellant had a reasonable excuse for committing the offence. The law requires such a defence to be established by the Appellant on the balance of probabilities. This requires the provision of evidence to make out the defence. Although it was asserted that the kitchen was not always locked, and that the tenants were instructed not to cause an obstruction, no evidence has been put forward to support those assertions. In particular there was no witness statement from M. Odeh-Toro. The Appellant's application form is supported by a statement of truth but contains nothing more than a statement that the notice was based on an issue that was hard to control and which cannot be proved to be the Appellant's fault.

42. The issue for the Tribunal is whether or not on 6 April 2021 the state of the property was such that there was a breach of the Regulations. The Tribunal was satisfied beyond reasonable doubt that it was, and insufficient evidence has been provided to show that the Appellant had a reasonable excuse.

43. For those reasons the Tribunal was satisfied beyond reasonable doubt that the offences had been committed.

The Appropriate Penalty

44. It follows from the Tribunal's conclusion above that the alleged offences had been committed by the Appellant, that the Respondent had power to issue financial penalties to them under section 249A of the Act.

45. The Tribunal was satisfied that the necessary procedural requirements prior to the imposition of a financial penalty had been complied with as set out in the findings above.

46. Therefore, the only remaining issue for the Tribunal was to consider what the appropriate financial penalties are.

47. The evidence in Ms. Suarez-Robles' statement explains how the Respondent applied its policy to his case (paras 10.3 at page 12). The Respondent treated the Appellant as a portfolio landlord – which was not denied – and considered that the offences only had a lesser impact on the safety of residents. This led to a conclusion that the offences were moderate band 2 offences falling within the range from £5,001 to £10,000.

48. The Respondent considered that there was an aggravating feature in respect of the Appellant's previous conduct. In particular, reliance was placed on a previous conviction for an HMO related offence. No evidence of this was in the Respondent's bundle, which was not helpful. However, Mr. Odeh-Toro confirmed to the Tribunal that the Appellant had been convicted at Highbury Corner magistrates' court on 5 December 2017 of an offence of managing an unlicensed HMO on 9 February 2017, for which a fine of £1,125 was imposed.

49. The relevant policy is at pages 210 to 232 – see in particular pages 227 to 228.

50. The Respondent also considered that the financial impact of the pandemic amounted to a mitigating factor. They decided to impose a penalty of £4,000 for the first offence and £2,000 for the second. Ms. Roberts explained that the difference between the two was to reflect the overall totality of the penalties imposed.

51. From this it is clear that the Respondent took the view that the aggravating features were less weighty than the mitigating ones, as the penalties imposed were below the lowest point of the band 2 scale.

52. There was nothing in the Appellant's submissions as to the amount of the penalties. Mr. Odeh-Toro was given the opportunity to make submissions about the amount of the penalty at the hearing, but he had nothing further to add.

53. The Appellant put forward no arguments why the Tribunal should depart from the Respondent's policy. The Tribunal considered that there was no doubt that the correct starting point under the policy had been used and that the conviction was an aggravating feature. It also saw no reason to depart from the Respondent's decision to treat the financial impact of the pandemic as a mitigating factor for both penalties and to reduce the second penalty to reflect totality.

54. In the Tribunal's view, the Appellant did not establish any basis for reducing the penalties imposed upon him. In addition, the Tribunal concluded that it was not satisfied that there were any reasons for departing from the Respondent's policy in respect of the setting of financial penalties and it was not satisfied that the purposes of that policy would be met if there were a departure from that policy.

Conclusions

55. It follows from what is set out above that the Tribunal concluded that the appeal should be dismissed and the penalties of £4,000 and £2,000 upheld.

Name: Tribunal Judge S.J. Walker **Date:** 1 September 2022

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.