UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – landlord operating HMO without required licence – FTT imposing no penalty – whether FTT entitled to treat ignorance of need for licensing as mitigation – appeal allowed – penalty of £4,000 substituted

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

THURROCK COUNCIL

Appellant

and

KHALID DAOUDI

Respondent

Re: 440 London Road,
Grays,
Essex RM20

Martin Rodger QC, Deputy Chamber President

24 June 2020

Remote hearing

Ryan Thompson, instructed by Thurrock Council, for the appellant
The respondent, *Mr Khalid Daoudi*, in person

The following cases are referred to in this decision:

I R Management Services Ltd v Salford City Council [2020] UKUT 81 (LC)

Sutton v Norwich City Council [2020] UKUT 90 (LC)

Introduction

1. On 7 June 2019 the appellant, Thurrock Council, imposed a financial penalty of £10,000 on the respondent, Mr Khalid Daoudi, for an offence under section 72, Housing Act 2004, of failing to licence a house in multiple occupation which was required to be licensed. On 1 November 2019 the First-tier Tribunal (Property Chamber) (FTT) allowed Mr Daoudi's appeal against the financial penalty and decided that, although the elements of the offence were made out, it was not reasonable or appropriate to impose any financial penalty in the circumstances of the case. The Council now appeals against that determination with the permission of this Tribunal.

2. The hearing of the appeal took place using a remote video platform. Mr Thompson represented the Council and Mr Daoudi spoke on his own behalf. I am grateful to them both for their assistance.

The relevant statutory provisions

3. The expression "HMO", meaning a house in multiple occupation, is defined by sections 254-259 of the Housing Act 2004. The standard test in section 254(2) designates a building an HMO if it consists of one or more units of living accommodation not comprising self-contained flats, and which is occupied and used only as living accommodation by persons who pay rent, who share basic amenities with at least one other household but do not form a single household, and for whom the unit they occupy is their only or main residence.

4. By section 55(2)(a) an HMO which falls within any prescribed description is required to be licensed under Part 2 of the Act. By article 3(2), Licensing of House in Multiple Occupation (Prescribed Descriptions) (England) Order 2006, an HMO is of a prescribed description if it comprises three storeys or more and is occupied by five or more persons living in two or more single households.

5. By section 72(1) of the Act a person commits an offence if he has control of or is managing an HMO which is required to be licensed under Part 2 of the Act but is not so licensed. Section 72(5) provides a defence where the person having control of the HMO without a licence had a reasonable excuse for doing so.

6. By section 249A of the Act, as an alternative to prosecution, a local housing authority may impose a civil financial penalty of up to £30,000 if it is satisfied beyond reasonable doubt that a person's conduct amounts to a relevant housing offence in respect of premises in England. The offence under section 72 of failing to licence an HMO is a relevant housing offence for this purpose.

7. A person on whom a financial penalty is imposed has a right of appeal to the FTT by paragraph 10 of Schedule 13A, 2004 Act. By paragraph 10(3) such an appeal is to be a re-hearing of the local housing authority's decision and the FTT may have regard to matters of which the authority was unaware. A "re-hearing" means that the FTT is required to decide for itself whether a financial penalty should be imposed and, if so, to decide the

amount of that penalty, rather than considering only whether the local housing authority was entitled to impose the penalty it did. A further right of appeal lies to this Tribunal.

The facts

8. 440 London Road in Grays, Essex is a six-bedroom semi-detached house on three floors. From 1997 until about 2008 it was the family home of Mr Daoudi, who lived there with his wife and their four children. In about 2008 the family moved to Kent but Mr and Mrs Daoudi retained ownership of the house and Mr Daoudi arranged for it to be let through a letting agency. This arrangement came to an end early in 2018 when the tenant defaulted and Mr Daoudi discovered that the letting agency had failed to insure against non-payment of rent.

9. It had been the practice of the letting agency to let the whole house as a single unit. Having first enquired in February 2018 whether the Council would be interested in hiring the house as a home for looked-after children (they were not) Mr Daoudi made his own letting arrangements. In March 2018 he let the whole house to a family comprising three brothers (or so he understood) and their partners. If that the group formed a single household the property was not an HMO.

10. In May 2018 the "brothers" (who had turned out not to be members of the same family at all) moved out. Mr Daoudi then advertised on various websites and in June 2018 he began letting rooms as bed-sitting rooms with shared use of the cooking, washing and sanitary facilities to individuals with no connection to each other. All six bedrooms in the house were let in this way, and as a result the house became an HMO (applying the standard test). Being of three storeys it also satisfied article 3(2) of the 2006 Order and required to be licensed.

11. At about the same time the Council was preparing to designate Grays as a selective licensing area under Part 3 of the 2004 Act. That designation would provide, with some exceptions, that all houses let under one or more tenancies would require to be licensed. The selective licensing regime commenced in October 2018 but in the months which preceded it the Council gave some publicity to its impending introduction.

12. Selective licensing made no difference to the status of Mr Daoudi's house which was already an HMO which required to be licensed.

13. Following a complaint from one of the occupiers of the house, officers of the Council visited on 18 December 2018 and discovered that there were 10 people in occupation.

14. On 3 January 2019 a notice requesting information was served on Mr Daoudi together with a warning that he appeared to have committed a criminal offence by failing to license the property. Notice was also given of apparent contraventions of the Management of Houses in Multiple Occupation (England) Regulations 2006 and the necessary measures to deal with those matters were required to be taken within eight weeks. The most serious breach identified in the notice was of duties imposed on the manager of an HMO by regulations 5(2) to ensure fire alarms are maintained in good working order and 5(4) to take all

measures reasonably required to protect occupiers from injury. In breach of that regulation the property was said to lack adequate fire detection systems, it was not possible to exit through the front door or individual rooms without a key, no fire blanket was provided in the kitchen, and the doors to bedrooms and to the kitchen did not provide the necessary 30-minute fire resistance. The other breaches mentioned were of regulation 3 (failure to display the manager's contact details in a prominent position), and regulation 7 (an infestation of mice and various other minor items of disrepair were also identified).

15. On 18 January 2019 Mr Daoudi applied for an HMO licence for six separate bed-sitting units. He explained that a fire risk assessment would be completed soon and that provision of smoke and heat detectors or alarms was "in progress". He said he had committed no previous offences and had never been found to be in contravention of relevant housing legislation.

16. At an inspection of the property on 6 March 2019 it was found that all of the work required by the notice of 3 January had been completed. Mr Daoudi later explained to the FTT that the work had been undertaken within four weeks of the notice being received.

17. On 22 March 2019 the Council gave notice of its intention to impose a financial penalty of £10,000 and, despite representations made by Mr Daoudi on 8 April 2019, it did not retreat from that intention and imposed the threatened penalty on 7 June.

The FTT's decision

18. In its decision of 1 November 2019, the FTT recorded the relevant facts and noted that the application made by Mr Daoudi for an HMO licence on 18 January had still not been dealt with.

19. Mr Daoudi attended the hearing and repeated the representations he had made in writing in response to the Council's notice of intention. He said he was unaware of the need for a licence and did not know the meaning of the term HMO. If he had known he was required to have a licence he would not have let the house in individual units. He had applied for a licence as soon as he became aware of the need to do so. He said he could not afford to pay a penalty of £10,000 and had already spent £6,500 in carrying out the works required to comply with the Council's notice under the 2006 Regulations. His wife was unwell and suffering from cancer, which was causing considerable stress to him and his family.

20. As this appeal is brought on the basis that the FTT failed to take into account relevant considerations, and had regard to irrelevant considerations, I will set out the determinative part of its decision in full. At paragraph 36 the FTT said this:

> "The Tribunal do not consider that it was reasonable or appropriate for the respondents to impose any financial penalty in the present case. This is for the following reasons:

(a) The applicant took all steps requested of him by the respondents in good time.

(b) In particular the Tribunal notes that according to Mr Haycock at the re-inspection of the premises on 6 March the applicant had carried out all of the works required at the premises.

(c) In addition the applicant made an application for a licence at the first possible opportunity.

(d) The applicant provided all possible assistance and cooperation to the council when they were seeking information prior to the imposition of a financial penalty.

(e) The Tribunal accepts the applicant's evidence that he was unaware of the need for an HMO licence before the council became involved. This appeared to be accepted by the respondents who were proceeding on the basis that he was nonetheless responsible for failing to make enquiries that a prudent landlord would make. Balanced against this is the respondent's own responsibility to ensure that it takes all reasonable steps necessary to secure applications are made for HMO licences (see particularly section 61(4) of the Act). It was not clear whether the press releases relied on by the council had been reproduced in the local paper. Neither was there evidence of the information contained on the website produced for the consideration of the Tribunal. In any event it is clear that the applicant did not know he had to have a licence. As soon as he did know he applied for one and took steps to comply with local authority requests.

(f) Whilst ignorance of the law is not defence it can go to mitigation. The Tribunal considers that the applicant was genuinely unaware of the requirement to license and if he had been aware he would have obtained a licence.

(g) The Tribunal is surprised that the respondents decided to pursue a penalty despite the applicant's compliance. The Tribunal is of the view that the threat of prosecution or penalty served its purpose. The applicant complied. The penalty charge was unnecessary and unreasonable. The applicant has suffered sufficient punishment as a result of the obvious stress he has suffered and was still suffering in consequence of the action brought.

(h) Finally as an aside the Tribunal was unimpressed that the respondents had not yet taken steps to properly progress the applicant's application for a licence."

The appeal

21. This right of appeal to this Tribunal from a decision of the FTT about the quantum of a financial penalty is an appeal on a point of law under section 11, Tribunals, Courts and Enforcement Act 2007. The Tribunal will only interfere with such a decision if it is satisfied that the decision was not one which was lawfully open to the FTT. That conclusion might be reached because the decision was arrived at without taking account of

some relevant consideration, or having regard to some irrelevant consideration, or was for some other reason not lawfully open to the decision-maker.

22. In this case the FTT explained clearly why it considered that no penalty was appropriate. Its reasons can be summarised as comprising four elements: first, that Mr Daoudi had co-operated fully and taken all the steps required of him once he was aware of the need for a licence; secondly, that he had genuinely been unaware of the requirement to obtain a licence; thirdly, that the threat of prosecution or penalty had served its purpose by procuring compliance with the law; and finally, that the stress suffered by Mr Daoudi in the process was sufficient punishment.

23. Although the FTT mentioned "as an aside" that it was unimpressed with the Council's failure to issue a licence ten months after Mr Daoudi first made his application, I assume it did not intend that to be taken as one of its reasons for imposing no penalty. I do not see how the efficiency of a local housing authority in processing, or failing to process, applications for licences can be relevant to the penalty appropriate to the offence of not obtaining a licence. The offence under section 72 of managing an HMO without the necessary licence is subject to the defence under section 72(5) that he has a reasonably excuse. If a person has done all they can to obtain a licence, and the local housing authority has not exercised its powers under Part 1 of the 2004 Act to prohibit the use of the property until it has been licensed, I do not think that the period of time taken to process the licence application has any relevance to the culpability of the landlord or the degree of harm to which tenants have been exposed as a result of the landlord's behaviour.

24. The steps taken by Mr Daoudi after he became aware of the need for a licence, and after he had been served with notice of the works required to bring the property up to a standard consistent with the 2006 Regulations were obviously relevant to the appropriate penalty. They demonstrated his willingness to comply with his obligations, which was a mitigating factor, and no criticism was made of the FTT's taking them into account.

25. The weight which the FTT gave to Mr Daoudi's ignorance of the need for a licence was challenged by Mr Thompson, who submitted that all landlords are under an obligation to inform themselves of their responsibilities when letting their own property for profit. He referred in support of that submission to paragraph 3.5 of the Guidance on Civil Penalties issued to local authorities by the Ministry of Housing, Communities and Local Government under the Housing and Planning Act 2016 which suggests:

> "A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations."

26. Ignorance of the need to obtain an HMO licence may be relevant in a financial penalty case in at least two different ways. There may be cases in which an ignorance of the facts which give rise to the duty to obtain a licence may provide a defence of reasonable excuse under section 72(5). In *I R Management Services Ltd v Salford City Council* [2020]

UKUT 81(LC) an experienced letting agent responsible for the management of a property comprising only two bedrooms mounted a reasonable excuse defence on grounds that he had been unaware that the property had come to be occupied by more than one household, making it an HMO. The FTT in that case was not persuaded of the letting agents' lack of knowledge but, if it had been, his ignorance of the need to obtain a licence in those circumstances would have been capable of supporting the statutory defence. It is also possible to imagine circumstances in which a landlord had a reasonable excuse for not appreciating that a property had come within a selective licensing regime (although it would be necessary for the landlord to have taken reasonable steps to keep informed). Short of providing a defence, ignorance of the need to obtain a licence may be relevant to the issue of culpability. Although, as the Government's Guidance points out, a landlord is running a business and ought to be expected to understand the regulatory environment in which that business operates, not all businesses are the same. A decision maker might reasonably take the view that a landlord with only one property was less culpable than a landlord with a large portfolio.

27. In this case the FTT did not suggest that Mr Daoudi had a reasonable excuse for failing to obtain a licence. In *I R Management* I suggested at paragraph 31 that the issue of reasonable excuse might arise on the facts of a particular case without an appellant articulating it as a defence and that tribunals should consider whether any explanation given by a landlord of an HMO amounts to a reasonable excuse for the relevant offence. My decision was published after the decision of the FTT in this case and it does not appear from the material before the Tribunal that Mr Daoudi referred to the statutory defence. Nevertheless, I do not think the FTT could properly have found the defence to be made out. No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence. That is the view which the FTT took in paragraph 36(f) of its decision. Yet by making Mr Daoudi's ignorance of his responsibilities the foundation of its conclusion that it was not reasonable or appropriate for any financial penalty to be imposed the FTT effectively allowed him the benefit of the defence without explicitly addressing it.

28. The FTT also considered that Mr Daoudi's responsibility to make enquiries and inform himself of his own obligations was "balanced against" the Council's responsibility to take reasonable steps to secure that applications were made for HMO licences. It referred in that regard to section 61(4) of the 2004 Act which does indeed require a local housing authority to take all reasonable steps to that end. I take that to mean that the FTT considered Mr Daoudi was less culpable because of suggested failings on the part of the Council. But the steps which the FTT had in mind and mentioned in paragraph 36(e) were wholly irrelevant to the licensing requirement in this case. The newspaper advertisements and website entries were concerned with the new selective licensing regime. Mr Daoudi's property was required to be licensed by section 55(1), 2004 Act because it fell within a description prescribed by the 2006 Order: it was an HMO comprising three-storeys or more occupied by more than two households. The extent to which the new selective licensing regime was publicised in advance was irrelevant to Mr Daoudi's responsibilities because his property should already have been licensed. The FTT was wrong, therefore, to regard Mr Daoudi's failure to comply with those responsibilities as being "balanced against" any suggested default on the part of the Council. In any event, the inference that the Council had not taken reasonable steps to publicise the selective licensing regime was

apparently based on its inability to produce documents at the hearing, which had not previously been requested. There was no reason why the Council should have been in a position to provide evidence of advertisements or posts on websites and the FTT ought not to have treated its inability to do so as a matter weighing against the imposition of an appropriate penalty for the offence.

29. The FTT also took the view that the financial penalty imposed by the Council was unnecessary and unreasonable because the threat of prosecution or penalty had "served its purpose" in that Mr Daoudi had applied for the necessary licence. But securing compliance with the law in an individual case is only part of the purpose of the civil penalty regime. The Government's Guidance identifies a number of factors relevant to the scale of civil penalties including punishment of the offender and deterrence of others from committing similar offences. As the guidance observes:

> "An important part of deterrence is the realisation that (a) the local housing authority is pro-active in levying civil penalties where the need to do so exists and (b) that the civil penalty will be set at a high enough level to both punish the offender and deter repeat offending."

The deterrent effect of the civil penalty regime, at least as far as it applies to first offences committed by landlords with only one or two properties, would be seriously diminished if securing compliance with the law in relation to one property was regarded as a sufficient achievement of the statutory objective to justify waiving any penalty.

30. The FTT's decision to impose no penalty in this case, despite being satisfied beyond reasonable doubt that the elements of the relevant offence were made out, was described by Mr Thompson on behalf of the Council as an exceptional course in an unexceptional case. I agree.

31. I am satisfied that at least two of the factors which the FTT took into consideration were irrelevant and did not weigh in favour of absolving Mr Daoudi of any financial penalty. If Mr Daoudi's ignorance of his responsibilities, and the achievement of compliance as a sufficient outcome in itself, are left out of account the only factors tending towards leniency were the speed with which Mr Daoudi complied with his responsibilities when they were pointed out to him and his personal circumstances. There must be a limit, however, on the extent to which belated compliance with an obligation can mitigate the punishment appropriate to the original non-compliance, especially when the offence exposes tenants to a high degree of risk. I do not see how eventually doing what the law requires can justify a decision to impose no penalty at all, although it has a bearing on the level of punishment. There is no reason in principle why a decision-maker should not decide that no penalty ought to be imposed despite a breach of the criminal law, but where Parliament has provided for penalties of up to £30,000 for offences which it clearly intends to be treated as serious, a substantial justification would be required based on more than sympathy for the personal circumstances of the offender and his family.

32. For these reasons I consider that the FTT took into account considerations which were legally irrelevant in reaching its decision. It is not possible to be confident that it would

have reached the same conclusion if it had not treated Mr Daoudi's culpability as being balanced by the suggested failings on the part of the Council, or his belated compliance as a sufficient achievement of the objects of the legislation. Its decision must therefore be set aside and the Council's appeal allowed.

33. It falls to this Tribunal to consider whether a penalty ought to be imposed for the breach of the duty to obtain an HMO licence, and if so, what that penalty should be. It is appropriate, when undertaking that exercise, to have regard to the objects of the civil penalty legislation and the policy applied by the Council in its area.

Reconsideration of the penalty

34. On behalf of the Council Mr Thompson invited me to impose the same penalty as it had done.

35. I was referred to the Guidance on Civil Penalties issued to local authorities by the Ministry of Housing, Communities and Local Government under the Housing and Planning Act 2016. It contains a list of factors that may be relevant to the quantum of a civil penalty, including: the severity of the offence; the culpability and track record of the offender; harm caused to the tenant; the punishment of the offender; deterring the offender from repeating the offence; deterring others; and removing any financial benefit obtained from committing the offence.

36. The Guidance requires local housing authorities to draw up their own policy on civil penalties. In *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC) and in *Sutton v Norwich City Council* [2020] UKUT 90 (LC) the Tribunal has considered the weight that should be given to a local housing authority's civil penalty policy in determining the appropriate level of penalty to be imposed by a tribunal. In *Sutton*, at [245], the approach was summarised as follows:

> "If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision".

37. The Council's policy on civil penalties identifies as the guiding principle in considering whether a civil penalty should be imposed the question whether it is just and proportionate to do so. If it is considered just and proportionate the policy then provides a four-stage process to determine the amount of the penalty. I have not found the various stages easy to understand, nor do I think they were properly applied by the Council in this case.

38. For offences involving failure to licence an HMO the range of potential penalties identified in the policy is very wide, from £2,500 to the maximum penalty of £30,000. The policies of other local housing authorities which the Tribunal has had to consider usually classify offences in much narrower penalty bands (*LB Waltham Forest v Marshall* [2020] UKUT 35 (LC) includes a typical example). It is questionable whether the very wide range

adopted by the Council in its policy serves any useful purpose (other than to suggest that a penalty of less than £2,500 will never be appropriate for a licensing offence, which is doubtful). Having identified so wide a range, stage 1 of the assessment therefore involves consideration of the seriousness of the offence and the degree of culpability of the landlord to determine where within that range the appropriate penalty lies.

39. A high likelihood of harm will be taken to exist where there has been a high risk of an adverse effect on an individual. I agree with the Council's assessment that the failure to licence the property exposed those living there to a high risk of harm because of the inadequacy of the fire precautions. I do not agree with the Council's decision-maker who recorded that the building had no fire detection (the photographic evidence showed numerous smoke detectors), but the steps which were taken before the Council's inspection were inadequate. Mr Daoudi explained that he could not be held responsible when the batteries installed in smoke detectors were removed by his tenants. I agree, but the risk that batteries will be removed or expire is one reason why the Council insists on an integrated alarm and detection system linked to mains electricity. Had Mr Daoudi applied for a licence at the appropriate time he would have been required to upgrade the fire detection provision and the risk to his tenants from fire would have been reduced substantially.

40. An offence committed through an act or omission which a person exercising reasonable care would not commit is regarded by the policy as being of medium culpability. A low level of culpability will attach to an offence committed with "little fault" for example because "there was no warning/circumstance indicating a risk" or because the "failings were minor and occurred as an isolated incident." In agreement with the FTT I accept the Council's assessment that this offence was at a medium level of culpability. The failings were not minor and the risk of inadequate fire precautions was obvious.

41. The policy attributes numerical values to culpability and harm which are added together to produce a score which is then adjusted to take into account any aggravating factors by adding to the score. The resulting total translates on a grid to a financial starting point for the penalty assessment. One such aggravating factor mentioned in the document is that the offence was motivated by financial gain; in this case the Council regarded the high level of rent charged for rooms in the HMO to indicate such motivation and treated it as aggravating factor. I do not agree. There is no evidence that the rent charged was above the market level for such accommodation in the locality and a policy which penalised a landlord for charging a market rent would not be rational.

42. An offence of medium culpability and high risk, aggravated by a motive of financial gain, merits a starting point of £8,000 under the Council's policy. Despite the Council's decision-maker having arrived at that figure as a notional starting point, no use was then made of it in setting the appropriate penalty.

43. Had the suggested aggravation been omitted from consideration, the relevant starting point would have been £6,000. I take that as my starting point.

44. Personal mitigation factors are also mentioned at this stage of the policy document, although it is not explained how these are intended to be taken into account. As the policy identifies only one figures as the penalty appropriate to a range of scores, rather than providing a range into which the offence can be placed at an appropriate point depending on its seriousness, it gives no assistance on how mitigation is intended to be reflected at stage 1. Presumably for this reason, when the Council applied its policy it appears to have taken account of mitigation at stage 2.

45. At stage 2 the policy requires the Council to "consider all of the landlord's income". Despite that statement it is apparent that the only income to be taken into account is "the weekly income, as declared on the tenancy agreement for the property where the offence occurred". The income figure is then used "to increase or reduce the penalty calculation", although on what basis this is to be done is another matter which is not explained. As the policy does not identify a band within which the appropriate penalty for such an offence will lie no guidance is provided on the intended limits, if any, of this increase or the circumstances in which the landlord's income would merit a reduction in the penalty.

46. In this case the decision-maker estimated that the income achieved by Mr Daoudi from letting the property over the six months for which the offence was committed was in the order of £20,000. That was the only figure which the decision maker then used in the assessment, but to take into account the fact that Mr Daoudi had cooperated fully with the Council in its investigation that figure was reduced by 50% to give the final financial penalty of £10,000. That does not appear to me to be a rational approach, because it ignores the seriousness of the offence, the culpability of the offender and the aggravating factors which had been taken into account at stage 1.

47. At stage 3 the decision-maker is directed to check that the proposed level of penalty is proportionate. The guiding principle is said to be that the offender should be deterred from committing further offences and there should be no financial gain. This reflects the Government's Guidance, at paragraph 3.5(g), which suggests that "it should not be cheaper to offend than to ensure a property is well-maintained and properly managed."

48. Examples of the potential financial benefits which are to be discouraged at stage 3 are given in the Council's policy, including, for offences in relation to licensing: "rental income whilst the HMO was operating unlicensed or where it was occupied more than the number of persons authorised; the cost of complying with any works conditions on the licence; the cost of the licence application fee." I find this list puzzling. If the object is to ensure that the penalty is proportionate, the use of the cost of complying with works, or applying for a licence, might be thought only to have a bearing on the appropriate penalty if the property is no longer to be used as an HMO so that these costs have been avoided altogether. If a licence has been applied for and the necessary works carried out, the cost of doing so is not a measure of the offender's financial gain. Nor is the total income received while the property was operating unlicensed a measure of that gain. Logically, the relevant amount should be the additional rent which the landlord was able to secure by operating without a licence.

49. Stage 4 of the policy requires the decision-maker to consider reducing the penalty having regard to its "impact on the offender's ability to comply with the law or make restitution to the victims." No explanation is offered to decision-makers as to how a penalty might adversely affect compliance in the case of a licensing offence, although I can see that in an improvement notice case a substantial penalty might divert funds which might otherwise be used to carry out the required works. But what form of restitution the policy has in mind is unexplained (is it perhaps intended that the offender should receive credit for rent repaid to tenants?) nor is it apparent how any reduction is to be calculated.

50. I am satisfied that in this case, by ignoring the figure produced having regard to harm and culpability, the Council did not apply its own policy. The formulation of policy is a matter for the Council, but where the result is a policy as impenetrable as in this case it would be fruitless for the Tribunal to attempt to construe and apply it to the letter. The better approach is to apply such parts of the policy as make sense and to ignore the rest. It is possible in this case to respect the Council's assessment of the appropriate starting point for an offence of this seriousness and culpability by taking the figure set by the policy (which I am satisfied is £6,000), and then to make any adjustments which appear to the Tribunal to be required having regard to the general objects identified in the Guidance (see [35] above). I therefore decline Mr Thompson's invitation to adopt the Council's assessment as a guide to the appropriate penalty in this case.

51. Mr Daoudi disputed the Council's assessment that his income from the house had been £20,000 in the period of the offence. He agreed that when the house was full the rents received should have been more than £3,000 a month. The Council's figure assumed that the rooms were all occupied by tenants paying rent from June until December, which Mr Daoudi said had not been the case. The agreements in evidence suggest that only two rooms were occupied in June, and that two others were occupied in August. The Council's standard form of questionnaire did not ask tenants when their occupation commenced and only one of those interviewed volunteered a date, 6 July. There is no information about the sixth room. Mr Daoudi also said that some tenants did not pay.

52. One way of assessing the gain made by Mr Daoudi by not licensing the property is to compare the rent he received when he let the house as a whole, which was £1750 a month, with the figure of approximately £3,000 he could obtain when it operated at full capacity as an HMO. Had it been full for the period of approximately six months during which it was not licensed but ought to have been, a benefit of around £8,500 would have been achieved, comparing the HMO income with the income letting the house as a whole. As the dates of the tenancy agreements suggest the house was not fully occupied throughout that period (but disregarding any shortfall in receipts caused by non-payment, which is a management issue) a figure of £6,000 would seem fairly to represent the financial gain secured by not licensing the property. On that basis I do not think it is necessary to increase the penalty from the £6,000 starting point to achieve the necessary deterrence. (I should not be taken to imply that the appropriate penalty will always be a sum which deprives the offender of the rent received during the period of offending; the additional income which a landlord receives as a result of committing the offence is a relevant consideration in fixing the penalty, but it is only one factor, and not necessarily the most significant one.)

53. Mr Daoudi provided limited evidence of his liabilities, in the form of copies of bank and mortgage statements, but I have no comprehensive picture of his resources and I do not think any further adjustment is required to take them into account.

54. Having identified that stage 1 of the policy suggests a starting point of £6,000 based on culpability and harm, and that consideration of the financial gain secured by non-compliance does not require a greater penalty, I can see no reason in this case to take the exceptional course of imposing no penalty at all. The Council considered that Mr Daoudi's swift compliance with the notice requiring works and his cooperation with its investigation were significant mitigating features. I agree, but they do not justify imposing no penalty at all. I will take them into account by reducing the penalty to £4,000.

Disposal

55. For the reasons I have given I set aside the decision of the FTT and impose a penalty of £4,000 under section 249A, Housing Act 2004. I conclude by suggesting that the Council may wish to give further consideration to its policy to explain more clearly how it is intended to operate and to eliminate some of the confusion and uncertainty which I have referred to above.

Martin Rodger QC,

Deputy Chamber President

3 July 2020