FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AC/HNA/2020/0112**
Property	**:**	**979 Finchley Road, London NW11 7HA**
Applicant	**:**	**Mrs G Silber**
Representative	**:**	**Stokoe Partnership Solicitors**
Respondent	**:**	**London Borough of Barnet**
Representative	**:**	**In House Legal Services**
Type of application	**:**	**Appeal against financial penalty under section 249A and schedule 13A of the Housing Act 2004**
Date and venue of hearing	**:**	**10 January 2022 (Remote: CVP)**
Date of decision	**:**	**17 February 2022**

DECISION

Decision

1. The decision of the London Borough of Barnet ('the Council') to impose a financial penalty in the sum of £7,000 against the Appellant is varied to **£5,000**. Mrs Silber must pay this sum to the Council within 28 days of the date of issue of this decision.

Background

2. References in square brackets below are to the page numbers of the hearing bundle supplied by the Council.

3. This is Mrs Silber's appeal against the decision of the Respondent local authority ('the Council') dated 3 September 2020, to impose upon her a civil penalty, under s.249A Housing Act 2004 ("the Act"), in the sum of £7,000. The penalty was imposed on grounds that Mrs Silber had, on 19 December 2019, committed the offence under s.72(1) of the Act, of being a person in control or management of an unlicensed House in Multiple Occupation ("HMO") at 979 Finchley Road, London NW11 7HA ('the Property').

4. The appeal has been remitted to this tribunal for determination following the decision of Upper Tribunal Judge Elizabeth Cooke, dated 13 August 2021 **[C20]**, in which Mrs Silber successfully appealed a decision of Judge Carr, made on 16 February 2021, refusing to reinstate her appeal after it had been deemed withdrawn for non-payment of the hearing fee.

5. The freehold owners of 979 Finchley Road, London NW11 7HA ("the Property") are Mayer Hayim Silber and Chaya Scheindel. They were registered as such at HM Land Registry in 2006 **[A17]**. The Property is a two-storey semi-detached house. It was not in dispute that Mrs Silber, who is 90 years old, manages and/or is in control of the Property, and that she also manages and/or controls two other HMOs: (a) 16 Helenslea Avenue, London NW11 8ND; and (b) 191 Golders Green Road, London NW11.

6. In his witness statement dated 29 August 2021 **[A1]**, Mr Kevin Gray, a Principal Environmental Health Officer employed by the Council, states that the property at 191 Golders Green Road has been licensed by Mrs Silber as a HMO since December 2014. He also says that he has checked the Council's computer records which show that a hand-written licence renewal application form for that property was completed and signed by Mrs Silber on 6th February 2020. His evidence on this point is not in dispute.

7. As to 16 Helenslea Avenue, Mr Gray's evidence is that a licence application was made for the property on the 30th March 2017, following the issue of warning letters on 2nd February and 22nd March 2017, with the licence being issued on 21st June 2017. The Council's case is that Mrs Silber failed to comply with the licence conditions for 16 Helenslea Avenue, by allowing the property to become overcrowded, which led to the Council serving Final Notices upon her imposing fines of £16,000 and £21,000 respectively under section 249A and schedule 13A of the Act. Mrs Silber's subsequent appeal against those notices to the tribunal (LON/00AC/HNA/2020/0044/45) were compromised as between the parties.

8. Mr Gray states that he became aware of Mrs Silber's involvement in the Property during enquiries he made regarding 16 Helenslea Avenue. He says that in a letter dated 14 March 2019 **[A15]**, Mrs Silber's solicitor,

Mr Goldkorn, acknowledged that Mrs Silber owned, managed, let or had control of another HMO, which he specified as being the Property. Mr Gray says that he subsequently checked the Council's database and discovered that the Property was unlicensed.

9. Mr Gray inspected the Property on 19 December 2019, accompanied by Mrs Silber, and took photographs of the interior and exterior of the Property **[A21-40]**. He identified that the Property comprised seven separate letting rooms, with shared kitchen and bathroom facilities, and recorded that Mrs Silber informed him that the house was occupied by 10 people. He also records that Mrs Silber informed him that she was unclear if she had licenced the property, but that if she had not, that she would apply for a license. Mr Gray noted some defects at the Property during his inspection including inadequate fire protection measures and the absence of self-closing door mechanisms.

10. Mr Gray wrote to Mrs Silber on 17 January 2020 **[A46-48]**, informing her that he was investigating whether offences had been committed in relation to the licensing and management of the Property as a HMO. In that letter he asked her to produce documents and to answer questions regarding her ownership and management of the Property. Mrs Silber responded on 30 January 2020 **[A51]**, asserting that she is a good landlady and that she had done nothing wrong. Her response did not address the queries made by Mr Gray, but on 30 January 2020, she provided the Council with copy tenancy agreements and details of the occupiers of the Property **[A59-70]**.

11. In his notice to produce documents Mr Gray had asked Mrs Silber to provide him with copies of existing gas and electrical certificates for the Property. She did not do so, but instead provided him with copy certificates that post-dated his letter (electricity dated 23 January **[A56]**, and gas dated 28 January 2020 **[A58]**). Similarly, although he had asked Mrs Silber to provide copies of existing certificates in respect of the fire alarm and emergency lighting, she instead provided new certificates, dated after the date of his notice. The one for emergency lighting is dated 23 January **[A55]**, and the one for the fire alarm system is dated 25 January **[A53]**).

12. On 27 February 2020, Mr Gray sent a further letter to Mrs Silber in which he said that as no HMO licence application had been received he intended to continue with enforcement action for failure to licence the Property as a HMO **[A73]**.

13. Mr Gray's evidence is that he received no response to his letter of 27 February, and that on 21 May 2020, he reviewed his files and found that no licence application had been submitted by Mrs Silber. He therefore completed the Council's internal "Assessment table for civil penalties" form ("the Assessment Form") **[A76-85]**, and recommended

that a notice of intention to impose a financial penalty in the sum of £7,000 be issued to Mrs Silber.

14. Mr Gray's assessment and recommendation was considered, and approved, by Ms Belinda Livesay, a Group Manager employed by the Council in its Private Sector Housing Team **[A83-85]**. A Notice of Intent dated 28 May 2020 was then sent to Mrs Silber **[A86-91]**.

15. Mrs Silber's solicitors sent written representations in response to the Initial Notice in a letter dated 20 June 2020 **[A92-93]** in which they said:

> "1. Our client's date of birth is 23 February 1931. She is 89 years old. Since the government restrictions on Corona virus were imposed she has not been able to apply for a HMO licence under section 72 of the Housing Act 2004. Now we can confirm she has instructed this firm to apply and we are in a position to do so subject to obtaining a plan as required. We anticipate that this will be provided shortly. Therefore she should be held liable for any penalty since 23 March 2020 when these were put in place. Indeed it should be in respect of at least since the end of February 2020 as people were already concerned."
>
> 2. Mrs Silber believes that this property had been licensed in the past and it was only on receipt of the letter of 17 January 2020 can she be held responsible for not taking any steps to apply for a new licence, we submit. This is a period of weeks."

16. The solicitors go on to say in its letter that they disagree with the Council's assessment regarding the severity of the offence, and that the tenants in the Property are content with the accommodation provided by Mrs Silber.

17. Ms Livesay rejected the solicitors' representations by letter dated 16 July 20 **[A94-96]**, and invited final representations. These were received in an email from Mr Goldkorn dated 24 July 2020 **[A98-99],** in which he said the following:

> " I am making final representations. The points you make are noted. However the amount of the penalty is challenged. No basis is set out and we suggest it is an arbitrary amount and therefore not justifiable. Moreover as a separate point no account is taken of the difficulties in remedying the matters of complaint as a result of the restrictions imposed by the corona virus pandemic. I invite you to substitute a nominal financial penalty."

18. The Council issued a Final Notice **[A100-108]** on 3 September 2020, imposing a penalty in the sum of £7,000. Mrs Silber then appealed that decision to the tribunal in an application received on 29 September 2020.

19. By letter dated 12 October 2020, Mr Goldkorn applied for a HMO licence for the Property, which Mr Gray states was issued by the Council on 27 November 2020 **[A11/53]**.

The Legal Framework

20. Section 249A of the Act permits a local housing authority to impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

21. One such offence concerns the licensing of HMO's under s.72 of the Act, which provides that:

> "A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed."

22. However, in any proceedings against a person for the offences of managing or controlling an unlicensed HMO, it is a defence if they had a reasonable excuse for committing the offence: ss.72(5)(a).

23. What constitutes a "HMO" is defined by sections 254 to 259 of the Act. 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 by persons who do not form a single household, as their only or main residence, only used as living accommodation, by persons who pay rent, and who share basic amenities with at least one other household.

24. Section 61 of the 2004 Act requires HMO's to which Part 2 of the Act applies to be licensed. Part 2 provides for licensing in two main situations. Firstly, 'mandatory HMO licensing' applies to HMO's described in sections 254-259 of the Act. This includes HMO's that meet the standard test, which are required to be licensed under Part 2, and which fall within any description of HMO prescribed by regulations. Since October 2018, the Licensing of HMOs (Prescribed Descriptions) (England) Order 2018/221 has required that an HMO will fall within the prescribed description if it is occupied by five or more persons, living in two or more households.

25. The second situation is "additional HMO licensing", which applies where a local housing authority has designated an area as subject to additional criteria to those applying to mandatory HMO's, using powers conferred by section 56 of the Act. A HMO falling within a description specified in such a designation is required to be licensed, irrespective of whether it is required to be licensed under the mandatory licencing regime.

26. On 4 April 2016, the Council designated the whole of its area as subject to additional licencing, with effect from 5 July 2016 **[A74-75]**. As a result, a HMO, as defined by s.254, that comprises two or more storeys, and which is occupied by four or more persons in two or more households, where some or all facilities are shared or missing, is required to be licenced under additional licencing.

27. In this case, the Council's position is that on the date of the alleged offence on 19 December 2019, the Property was a HMO as defined by s.254(1), and that it fell within both the mandatory and additional licensing regimes, and was required to be licensed. This is not disputed by Mrs Silber.

28. The expression "person having control" is defined in section 263, as follows:

> "263(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack rent."

29. By s.263(2) "rack-rent" means "a rent which is not less than two-thirds of the full net annual value of the premises."

30. The expression "person managing" premises is defined in s.263(3) *inter alia* as:

> "…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 …

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

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

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

31. In this case, the Council's position is that Mrs Silber, on the date of the alleged offence on 19 December 2019, was a person who 'had control' of the Premises as she was the person who was in receipt of the rack rent. Again, this is not disputed by Mrs Silber.

32. Under section 249A, only one financial penalty may be imposed on a person in respect of the same conduct. That penalty is to be determined by the housing authority but must not exceed £30,000 (section 249A(3) – (4)).

33. Schedule 13A of the Act deals with the procedure for imposing financial penalties and appeals against financial penalties Paragraph 10 of that Schedule states:

"(1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—

(a) the decision to impose the penalty, or

(b) the amount of the penalty.

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph—

(a) is to be a re-hearing of the local housing authority's decision, but

(b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed."

34. A local authority is required by paragraph 12 of Schedule 13A to have regard to any guidance given by the Secretary of State about the exercise of its functions in relation to financial penalties. Such guidance was issued by the Secretary of State in April 2018, entitled *Civil Penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities* **[B1]** (the Guidance").

35. Paragraph 3.5 of the Guidance identifies specific factors that local housing authorities should consider to help it ensure that a civil penalty is set at an appropriate level, namely:

(a) the severity of the offence

(b) the culpability and track record of the offender

(c) the harm caused to the tenant (elsewhere it is explained that harm includes the potential for harm)

(d) punishment of the offender

(e) deterrence of the offender from repeating the offence

(f) deterrence of others from committing similar offences

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

36. In accordance with paragraph 3.3 of the Guidance, the Council formulated its "Enforcement Policy" **[B21-103]** ('the Council's Policy') which, at Appendix A [**B42-65],** set out its own policy on financial penalties.

37. At Appendix A, the Council's Policy repeats the seven factors from paragraph 3.5 of the Guidance **[B49-52]**. It then sets out a Civil Penalty Matrix to be used as a guide when assessing the amount of a civil penalty. The Matrix sets out nine penalty bands as follows:

Harm	**Culpability**	**Starting assessment**

		baseline
Moderate	Moderate	£750
Moderate	Substantial	£5,000
Moderate	Extreme	£10,000
Substantial	Moderate	£10,000
Substantial	Substantial	£15,000
Substantial	Extreme	£20,000
Extreme	Moderate	£15,000
Extreme	Substantial	£20,000
Extreme	Extreme	£25,000

38. The Council's Policy then sets out a seven-step prescribed process to be followed by its officers when deciding on the amount of a civil penalty:

(a) **Step 1: Severity of the offence** – the objective is specified as being to determine the level of harm that was or could have been caused by the offence. The policy states that when assessing the severity, the offence is to be assessed against the degree of potential or actual harm caused, both to individual tenant and more widely, for example:

- Nature/extent of hazards present.
- Vulnerability of tenants e.g. age, illness, disability, someone with language issues etc
- Evidence of discrimination/action against the tenants
- Effect on neighbouring premises
- Number of persons and/or households affected e.g. single family or HMO

- Level of risk to occupiers or third parties

(b) **Step 2: Culpability** – the objective is specified as being to determine the offender's culpability as deliberate, reckless or negligent. The policy states that when assessing culpability, the offender is to be assessed against three levels of culpability:

- Deliberate: offender intended to cause harm or ignored legal responsibilities.

- Reckless: offender was reckless as to whether harm was caused or duties were not complied with.

- Negligent: failure to ensure awareness of legal responsibilities.

(c) **Step 3: Initial assessment of civil penalty** - the objective is specified as being to reach an initial assessment of the civil penalty based on severity of the offence and culpability;

(d) **Step 4: Track record of landlord** - the objective is specified as being to consider the offenders track record and issues that may influence the civil penalty. The following are matters are identified:

- Has committed similar offences before

- Offence was planned

- Experienced landlord who should know responsibilities

- Owns a number of properties so should be aware of the legislation (i.e. not a single property landlord)

- Period of time over which offence(s) committed

- High level of profit from the offence/sought profit in committing

- Offender is a letting agent

- Attempt to cover up evidence of offence

- Landlord with a generally well managed portfolio

(e) **Step 5: Any mitigating factors** - the objective specified as being to consider any mitigating factors and whether they are relevant to the offence e.g. ill health of landlord, obstructive behaviour of third parties etc.

(f) **Step 6: Revised assessment** - the objective is specified as being to reach a provisional overall assessment of a civil penalty appropriate to the offence based on following the above steps.

(g) **Step 7: Check –** described as being a final check to ensure that the provisional civil penalty assessment meets the aims of the sentencing principles and that it is proportionate and will have an appropriate impact. The sentencing principles are identified as:

- Punishment of offender
- Reduction of/stopping crime
- Deterrent for other potential offenders
- Reform of offender
- Protection of public
- Reparation by offender to victim(s)
- Reparation by offender to community

39. At page 42 of the Council's Policy is a template of the Assessment Form, as used by Mr Gray when calculating the amount of the penalty to impose on Mrs Silber**[B62-66]**. When completing that form, the officer is asked to provide details of the offence, and then to follow the seven-step process described above. At step 4: Track record of landlord, the same bullet points set out above are repeated , and the form then specifies the following: "Penalty to be **increased** by a minimum of £1k for each aggravating factor)". At step 5: Any mitigating factors, the same bullet points set out above are repeated, and the form then specifies the following: "Penalty to be **decreased** by a minimum of £1k for each mitigating factor)".

The Hearing

40. The hearing of the application took place by video conferencing (CVP) on Monday 10 January 2022. Present for the Council were Ms

O'Leary, counsel, Mr Gray and Ms Livesay. On Friday 7 January, Mr Goldkorn emailed the tribunal to say that Mrs Silber did not have internet access, that she would be attending the hearing by telephone, and that she would be representing herself. No explanation was given as to why Mr Goldkorn would not be present at the hearing.

41. Mrs Silber did indeed dial into the hearing by telephone, and stayed on the call for the duration of the hearing. She informed us that Mr Goldkorn had visited her on Sunday 9 January, and that he had given her a hardcopy of the Council's hearing bundle as well as a witness statement to be read to the tribunal at the hearing.

42. Although the representations made by Mrs Silber were repetitious and very limited, it was clear to us that she understood the purpose of the hearing. She did not seek a postponement of the hearing, and nor had Mr Goldkorn. Whilst it would obviously had been preferable for Mr Goldkorn to have represented Mrs Silber at the hearing, especially given her age, we are satisfied that no unfairness arises from the fact that the hearing proceeded with Mrs Silber attending as an unrepresented person.

43. Ms O'Leary objected to Mrs Silber being allowed to rely on oral evidence at the hearing arguing, quite correctly, that any witness statement should have been filed and served in accordance with the tribunal's directions. We nevertheless gave permission to Mrs Silber to read out her statement and to rely upon it in evidence. In our view, despite the failure to comply with directions, it would not be proportionate to prevent Mrs Silber, an elderly lady who was unrepresented at the hearing, from reading out that statement. However, we informed the parties that we would accord it appropriate evidential weight given the fact that the Council had not had sight of a witness statement in advance of the hearing, and had not therefore had the opportunity to respond to it. In the event, Mrs Silber's statement was very short, and did advance her case over what had already been said in the grounds of appeal provided by Mr Goldkorn, which were themselves extremely short.

Mrs Silber's Case

44. Mrs Silber identified five grounds of appeal in her application form: (a) that she thought the Property was licensed, and that she was only put on notice that it was not when she received the Council's letter of 17 January 2020; (b) that the complaints made regarding the state of the property were minor;(c) that the tenants present had been there for many years, and have no complaints; and (d) that no explanation had been given as to the basis on which the financial penalty had been determined.

45. After this appeal was remitted to the FTT the tribunal issued further directions dated 17 August 2021, requiring the parties to provide bundles for consideration at the final hearing of the application. Mrs Silber was directed to include in her bundle an expanded statement of the reasons for her appeal, including any additional grounds upon which she wished to rely, and any response to the Council's case. She was also directed to include any witness statements of fact relied upon.

46. On 1 December 2021, in response to those directions, Mrs Silber's solicitors provided a six-page PDF bundle. The first five pages are a reproduction of her application form. The sixth and final page is entitled "Expanded grounds of Appeal and Submissions". It consists of four short paragraphs which largely repeat the grounds of appeal stated in her application form. Firstly, it is said that Mrs Silber's assertion that she thought the Property was licensed is evidenced by the letter of 14 March 2019 from Goldkorns, solicitors to Mr Gray **[A:15]** in which they gave the address of the Property in answer to a question about any other properties for which she held a HMO license. Secondly, it is said that reference will be made to photographs to show that the complaints about the state of the property were minor. Thirdly, that the tenants all like Mrs Silber and have no complaints. Finally, it was accepted that information regarding how the penalty had been assessed had now been provided, but it was contended that the amount of the penalty should be at the very lowest level, having regard to the other grounds of appeal, and Mrs Silber's age.

47. In the statement that Mrs Silber read out at the hearing she again said that she thought the Property had been licenced. She referred to the fact that her two other HMOS had licenses, and said that the Property had also been licensed, but the she had not realised that the license had expired a long time ago. She apologised for that mistake but said that the Property had now been licensed. She also said that there are only a few tenants there, that they had been there for a long time, and that they had no complaints. She repeated her grounds of appeal, and said that she believed the appropriate penalty should be £1,500. She was not happy with how Mr Gray had dealt with this matter and emphasised that she tried to do nothing but good for her tenants.

The Council's Case

48. In Ms O'Leary's submission there was ample evidence on which the tribunal could be satisfied that the Property was a HMO that was required to be licensed, and that on 19 December 2019, the date of Mr Gray's visit to the Property, Mrs Silber had committed the offence under 72(1).

49. She pointed out that Mrs Silber's grounds of appeal did not expressly raise a ss.72(5)(a) defence that she had a reasonable excuse

for committing that offence. To the extent that her assertion that she "thought the property was licensed" was capable of giving rise to the defence, it was not, said Ms O'Leary, evidenced by the facts. Nor, in her submission, could it be said that Mrs Silber had, on the balance of probabilities, discharged the burden of proof on her to establish that the defence was made out.

50. The Council had, she submitted, properly calculated the penalty by following the seven-step process in its Civil Penalty Matrix, including adjusting its penalty 'bands' to reflect any aggravating and mitigating factors. The two aggravating factors identified, namely that Mrs Silber was an experienced landlord who should know her responsibilities, and the period of time over which offence had been committed were, said Ms O'Leary clearly correct. She submitted that the penalty of £7,000 was appropriate.

Decision and Reasons

51. As stated above, Mrs Silber did not dispute that at the date of the alleged offence, on 19 December 2019, the Property was a HMO that required licencing. Nor did she dispute that she was a person who managed and/or was in control of the Property for the purposes of s.72(1). We are, in any event, satisfied, for the following reasons, that all of these elements of the offence have been proved beyond reasonable doubt.

52. We accept as true Mr Gray's evidence, at paragraphs 12-19 of his witness statement **[A4-5]** that when he visited the Property on 19 December 2019, he identified that there were 11 persons in occupation, occupying between them, a total of six letting rooms. We find his evidence to be credible, verified as it is by his contemporaneous handwritten note of his visit **[A41-45]**. Although he records that Mrs Silber informed him during his visit that there were ten individuals in six households, we see no reason to doubt the contents of his carefully documented note. In any event, whether there were 10 individuals in occupation, or 11, makes no material difference as to the whether or not the Property was required to be licensed.

53. We also accept as true, Mr Gray's uncontested evidence that some of the bedrooms had their own cooking facilities, with the other occupants sharing a galley kitchen on the ground floor. We accept his evidence that the bathrooms were shared amongst the occupants, and that there were no self-contained flats present. This accords with the plan of the Property at **[A123]**.

54. We find that all the requirements of the standard test in section 254(2) are made out, and that the Property was a HMO on 19 December 2019. It clearly consisted of one or more units of living accommodation, not comprising self-contained flats, that was occupied by five or more

persons. Mr Gray's evidence of occupation, as recorded in his notebook and the occupancy table he prepared after collating the evidence provided by Mrs Silber **[A72]**, as well as the multiple individual tenancy agreements produced by Mrs Silber, lead us to conclude that the Property was, on the relevant date, occupied by persons who did not form a single household. There is nothing to suggest that those persons did not occupy the Property as their only or main residence, and we infer that they did. They clearly paid rent to Mrs Silber, and they also shared basic amenities with at least one other household, namely the shared bathroom facilities, and in some cases, kitchen facilities.

55. We are also satisfied that Mrs Silber had control of the Property as she received the rack rent, and that she also had management of the Property as she is the owner of the Property who received rent from the tenants in occupation of the HMO.

56. As such, the Property was required to be licensed. Mr Gray's evidence that it was not so licenced is uncontested, and we are therefore satisfied beyond reasonable doubt that the s.72(1) offence was committed on 19 December 2019.

57. We do not consider that Mrs Silber had, on that date, a reasonable excuse for committing this offence. She has not produced any documentary evidence to explain or corroborate her assertion that she "thought the property was licensed" until she received the Council's letter of 17 January 2020. We accept, as correct, Mr Gray's evidence that his search of the Council's records showed that the Property had not previously been licensed as a HMO. Mrs Silber managed two other HMO's at 191 Golders Green Road and 16 Helenslea Avenue, so she was obviously aware of the HMO licencing regime. She was also aware of the numbers of people in occupation of the Property and she should, in our view, have known that the Property needed to be licensed.

58. Mrs Silber contends that several of her tenants have been there for many years, and that her tenants have not complained about the conditions in the Property. This may well be correct. However, it cannot constitute a defence to the offence. In our determination, no reasonable excuse has, on the balance of probabilities, been provided by Mrs Silber that explains her failure to do so.

59. In *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), Judge Cooke held that when considering an appeal against the amount of a financial penalty imposed by a local authority under the Housing Act 2004, this tribunal should pay great attention to the authority's policy and should be slow to depart from it. The burden is on an appellant to persuade the tribunal to do so.

60. We are satisfied that in all the circumstances of this case, the Council's decision to impose a financial penalty was correct. When Mr

Gray completed the Assessment Form, he concluded that the paperwork provided by Mrs Silber showed that the Property has been an HMO for over twenty years, and that it was licensable since the introduction of the Council's additional licensing scheme in July 2016. That conclusion has not been challenged by Mrs Silber, and it is substantiated by the occupancy table prepared by Mr Gray. We find that Mr Gray's conclusion is correct. As such, given Mrs Silber's status as a professional landlord, with two other licenced HMO's, we are entirely satisfied that her failure to licence the Property justifies the imposition of a financial penalty.

61. We turn to the amount of penalty, and the Council's seven-step process. Step 1 is to consider the severity of the offence, the objective being to determine the level of harm that was or could have been caused by the offence. Mr Gray assessed this as being 'moderate', the lowest of the Council's three bands, the others being 'moderate' and 'extreme'. We agree with his assessment. When he inspected the Property, Mr Gray identified that there was a fire alarm and an emergency lighting system in place, and that fire doors were present. However, he also identified that: there was a fire extinguisher in the hallway that had no details of its service history displayed; there was damage to the ceiling plaster in the kitchen; a smoke detector in one of the letting rooms (Room 3) was missing with only the base plate in place; there was no operational self-closing mechanisms to the doors to Room 4 and Room 7; and the smoke detector to Room 6 was covered in plastic.

62. We accept that overall, the evidence indicates that the Property was in good condition. However, we do not accept Mrs Silber's characterisation of these defects as minor. There have, at all material times, been a large number of tenants in occupation of the Property. Ensuring that all required fire safety precautions are in place, and that risk to occupiers is minimised, is a serious obligation on a person in control or management of a HMO. We agree with Mr Gray's assessment that if a licence had been applied for that these defects would have been identified, and remedial action required before a license would have been granted. We accept that Mr Gray correctly characterised the offence is one of moderate severity.

63. Step 2 requires a consideration of culpability, and whether the offender's conduct was deliberate, reckless or negligent. At the hearing we asked Mr Gray whether these three categories are exclusive, and if the Council's Policy requires him to ascribe Mrs Silber's conduct to one of the three. His reply was that they are not exclusive, and that more than one could apply. He suggested that Mrs Silber's conduct had been both reckless and negligent. Ms Livesay agreed.

64. We doubt that it is useful for the Council to require officers to identify whether conduct is deliberate, reckless or negligent. These

terms have specific legal meanings, particularly in criminal law, that are not always easy to distinguish between, even for lawyers. The three terms are not referred to in the MHCLG Guidance, and we suggest that the broader approach suggested in the Guidance, is to be preferred, namely that 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. In addition, the Guidance states that landlords are running a business and should be expected to be aware of their legal obligations.

65. In this case, when assessing Mrs Silber's culpability for the purposes of the Assessment Form, Mr Gray identified the following considerations as relevant:

(a) she had been advised about the need to licence the Property;

(b) she was an experienced landlady with two licensed HMO's in the borough; and

(c) from the paperwork she had provided, the Property had been a HMO for over twenty years, licensable since the introduction of the Additional Licensing Scheme in July 2016.

66. The fact that Mr Gray did not seek to classify Mrs Silber's conduct as deliberate, reckless or negligent, supports our view that these categorisations are not helpful to Council's officers when deciding on the level of a financial penalty.

67. Looking at the facts of this case, we agree that they support the Council's assessment of Mrs Silber's culpability as being 'substantial'. We recognise that Mrs Silber has no previous history of offending. We also accept that her failure to licence was not deliberate. However, we agree with Mr Gray's assessment of her as an experienced landlady, with two other HMO's that were licensed at the time of her offence. We also agree that the substantial period of time for which the Property had remained unlicensed, since the introduction of the Council's additional licensing scheme in July 2016, is a pertinent factor when assessing culpability. In addition, we consider that in letting out the Property Mrs Silber was running a business, and should be expected to be aware of her legal obligations. These factors, in our determination are sufficient to warrant an assessment of culpability as substantial.

68. We therefore agree with the Council's assessment of moderate severity and substantial culpability which, under its Matrix results in an initial penalty assessment of £5,000. Steps 4 and 5 in the Council's Policy requires the decision maker to have regard to aggravating and

mitigating factors, before arriving at a revised assessment for the amount of the penalty. This, we consider to be an entirely rational and legitimate approach to assessing the amount of a financial penalty and one that is not inconsistent with the Guidance.

69. However, the problem in this case is that when considering aggravating factors at Stage 4, Mr Gray has, in our view, paid inappropriate regard to the same factors that he had regard to when assessing culpability. He has recorded the following two factors as aggravating features in the Assessment Form:

(a) Mrs Silber was responsible for another two licensed HMO's and so should be more conversant with the need to comply with the requirement to licence such properties;

(b) from the paperwork provided by Mrs Silber the Property has been an HMO for over 20 years, and licensable since the introduction of the Council's additional licensing scheme in July 2016

70. These constitute a duplication of factors that Mr Gray had regard to at Stage 2 when assessing culpability. As such we consider they amount to irrational 'double-counting'. We do not accept Ms O'Leary's submission that it was legitimate to have regard to the same factors at both Stage 2 and 4. The factors cannot constitute aggravating factors when the same factors have already been specified as reasons justifying an initial financial penalty assessment.

71. What appears to have led Mr Gray astray are the factors that the Policy required him to have regard to at Stage 4. We note that the section 7.3 of the Guidance is entitled "Culpability and track record of the offender". What the Council 's Policy does is to treat culpability (Step2) as a separate consideration from an offender's track record (Step 4). That, we suggest is not a helpful approach and it is one that led Mr Gray to fall into error in this case. It would more properly accord with the Guidance if culpability, and a landlord's track record, were considered together at Step 2, and then any further aggravating factors (over and above those considered at Steps 1 and 2) taken into account at Step 4. The Council may wish to give consideration to revising its Policy accordingly.

72. We therefore determine that the increase of the initial penalty by £2,000 to have regard to the two aggravating factors identified by Mr Gray was inappropriate and unjustified. We do not consider there to be any aggravating circumstances justifying an increase in the initial penalty. Nor do we consider any reduction is merited because of mitigating factors. With regard to the latter, we have paid particular regard to Mrs Silber's age, but do not consider that to be a mitigating factor justifying a reduction in the penalty. She is a person who has, for

many years, been in control or management of three HMO's. She is also a person who has had recourse to professional help from a solicitor when required, both in these proceedings and in the previous matter before the tribunal regarding 16 Helenslea Avenue.

73. For the above reasons, we vary the amount of the financial penalty in this case to £5,000. Stepping back, we consider a penalty in that sum to be appropriate for the offence committed by Mrs Silber, when viewed against a maximum possible penalty of £30,000. If we had determined her culpability as 'moderate', then under the Council's banding that would have resulted in a penalty of £750 which we are satisfied would be too low for the licensing offence committed.

Name: Amran Vance **Date**: 17 February 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).