FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/HNA/2022/0043**
HMCTS code (paper, video, audio)		**In person**
Property	**:**	**First Floor Flat, 234-238 Edgware Road, London W2 1DW.**
Applicant	**:**	**Sentry Guardians Limited.**
Representative	**:**	**Freemans Solicitors (Michael Field Ref: 9931.)**
Respondent	**:**	**City of Westminster Council (Ref: 22/00120/HPCPN2)**
Representative	**:**	**Ms Osler of counsel**
Type of application	**:**	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004
Tribunal members	**:**	**Judge H Carr** **Mr A Parkinson MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**10th January 2023**

DECISION

Covid-19 pandemic: description of hearing

This has been an in-person hearing. The documents that the Tribunal were referred to are in two bundles, the appellant's bundle comprising 126 pages, and the respondent's bundle comprising 157 together with a reply , the contents of which have been noted.

Decision of the tribunal

(1) The tribunal determines to extend the time for appeal and not strike out the application.

(2) The tribunal determines to confirm the financial penalty of £8000 imposed upon the appellant by the respondent

(3) The tribunal makes the determinations as set out under the various headings in this decision.

The application

1. The appellant is appealing against the imposition of a financial penalty by the respondent, the City of Westminster Council.

2. The financial penalty was imposed for an offence under section 95(1) of the Housing Act 2004 i.e. failure of a person having control of or managing a house which is required to be licenced but is not so licensed.

3. The appellant is appealing against the imposition of the financial penalty on the basis that

    (i) the applicant is neither a person in control, nor a person managing, the property as set out in section 263 of the Act

    (ii) the property was not a property that was required to be licenced under Section 61(1) of the Act

4. The alleged offence was committed on 19th October 2021. A notice of intent to issue a financial penalty in respect of the failure to obtain an HMO licence. was dated 4th February 2022. The Final Notice of the Financial Penalty was served by the respondent on the appellant on 15th March 2022.

5. The notice of application to appeal is dated 20th June 2022,

6. The financial penalty imposed is £8000.

7. The property comprises the first floor of a four-storey building. The second to fourth floor of the building are also occupied. That part of the building is licensed.

8. The first floor is a former office set out as 8 habitable rooms with 6 used as bedrooms, one used as a common living room and one used for storage including refrigerators. There is a kitchen, two WC's a shower and a washing machine.

9. The occupiers are granted licences to occupy the premises and pay a licence fee of around £650 per month which is collected monthly.

The hearing

10. The hearing took place on 6th December 2022 as an in person hearing at Alfred Place.

11. The appellant was represented by Mr Michael Field Counsel with Freemans Solicitors. Mr Leopold Rothbart, director of Sentry Guardians Ltd was in attendance and gave evidence.

12. The respondent was represented by Ms Victoria Osler of counsel and Femi Olamidé of the respondent's legal team was also present. Mr Matthew Clough and Mr Trevor Withams environmental health officers with the respondent were also in attendance and Mr Clough gave evidence.

The background

13. The respondent designated the whole of the City of Westminster as an area for additional licensing of HMOs. The additional licensing scheme came into force on 30th August 2021.

14. The additional licensing scheme requires that a licence for an HMO must be obtained if the subject property is occupied by three or more persons comprising two or more households. There is no dispute that the occupants of the property comprised two or more households or that there were three or more people in occupation at the relevant date.

15. The appellant is a property guardianship company. It enters into licence agreements with the owners of empty properties, often commercial premises, under which the owner grants to the appellant possession and quiet enjoyment of the property for the purposes of the appellant securing the property against trespassers, damage and other forms of property damage.

16. Ivy Bank Limited hold the freehold title to the first floor of 234-238 Edgware Road, W2 ('the property'). The directors of Ivy Bank Ltd are Mr Uri Ellinson and Ms Rebecca Ellinson. By an agreement dated and commencing on 15th April 2021, Ellinson Estates Ltd granted the appellant a licence of the property for a minimum period of 3 months.

17. It is a term of the agreement between the owner and the appellant that the latter may permit another company - VPM - to grant licences to 'guardians' to occupy the property and protect it against trespass and various forms of damage.

18. Mr Leopold Rothbart is the sole director of the appellant and of VPM.

The local authority's dealing with the property

19. Mr Clough an environmental health office with the respondent spoke to Mr Rothbart on 25th May 2021 in connection with a complaint made by the license holder of the 2nd to 4th floor of the building in connection with the fire alarm system.

20. In the course of conversation Mr Rothbart informed the respondent that he intended to let the property to four people. Mr Clough told he that he may require a licence for an HMO if he let the accommodation to four individuals. The requirement was repeated in an email from Mr Clough to Mr Rothbart on the same day.

21. Mr Clough visited the property together with his colleague, Mr Trevor Withams on 19th October 2021 following a complaint from one of the occupiers about the conditions in the property.

22. The officers found three women present in the property and in occupation of three of the rooms. The women informed Mr Clough that there were three further individuals occupying the remaining three rooms.

23. On 21st October 2021 the respondent wrote to Mr Rothbart and to Ms Wade who is the office manager of Sentry Guardian requesting that Sentry apply for an HMO licences.

24. Ms Wade replied to the letter stating (inter alia) that they would be applying for an HMO.

25. The property was inspected again on 11th November 2021 in connection with allegations of noise. Mr Rothbart was present as was Ms Mara, the property manager. Under caution Mr Rothbart explained that between April – July 2021 five individuals had moved into the property.

26. On 6th December 2021 the applicant applied for an HMO licence. This was issued on 31st January 2022 and the applicant was designated as the licence holder. The licence was valid from 6th December 2021 to 5th December 2022.

27. On 4th February 2022 the respondent served on the applicant a notice of intent to issue a financial penalty in respect of the failure to obtain an HMO licence.

28. On 4th March solicitors for the applicant made written representations as to why the penalty should not be imposed. In particular they argued that the applicant did not have control of or manage an HMO primarily because it did not receive a rent in respect of the property. The rent was said to be paid to VPM,

29. On 15th March 2022 the respondent served on the appellant's registered office in Manchester a final notice. It was sent by first class post and a copy of the notice was posted to the applicant's London office.

The law

Section 263 Housing Act 2004

Meaning of "person having control" and "person managing" etc.

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.

2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

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. 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.

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.

The issues

30. The issues before the tribunal are:

(i) Whether the application should be struck out because it is out of time

(ii) Whether the tribunal is satisfied, beyond reasonable doubt, that the applicant's conduct amounts to a "relevant housing offence" in respect of premises in England (see sections 249A(1) and (2) of the Housing Act 2004); In particular the applicant argues

(a) That the property does not require licensing as it is not an HMO

(b) That the applicant is not a person having control or managing the property

The determination

Should the appeal be struck out?

31. The appellant argues that it lodged its appeal as soon as it became aware of the final notice. The final notice did not come to its attention despite being sent to two different locations, its registered office and its London office. Mr Rothbart explained that this was because the registered office is run by an accountant who did not open or forward the post, and because the London office was chaotic. Mr Rothbart says in his statement that he received no communications from the respondent subsequent to his legal representatives making representation in connection with the notice of intent to impose a civil financial penalty.

32. The appellant notes that the respondent did not raise the issue of the appeal being out of time until 19th October 2022. It says that the respondent served grounds of response and a witness statement of Matthew Clough and in neither of those documents was there any application that the case be struck out. Nor has there been a formal application to the tribunal. Counsel also suggested that it would have been prudent for the respondent to email the final notice to the appellant as it was fully aware of the appellant's email and to the appellant's legal representatives as it was aware that the appellant was legally represented as the respondent had received representations from Freemans.

33. It argues that its application for the time to be extended was implicit in its grounds of appeal and should have been understood as implicit by the respondent and the tribunal. It notes that there is no box on the application form for applying for an extension of time to appeal.

34. It points to its extended statement of reasons which at paragraph 20 stated as follows:

> So far as the timing of this appeal is concerned, it is assumed, by virtue of the directions made and the proposed substantive listing, that it has been accepted by the Tribunal, based upon matters set out in the initial grounds of appeal, and supporting witness statement of Leopold Rothbart dated 20 June 2022.

35. The appellant refers the tribunal to its procedural rules. In particular the rules emphasise that the procedures are flexible and that cases should be dealt with fairly and justly. It notes that under rule 6 the tribunal has the power to extend the time for appeal. Counsel suggests that the lacuna, from the receipt of the appeal to the time that the respondent raised the issue should lead the tribunal to use its powers flexibly and in the interests of justice to extend the time and accept the appeal.

36. The appellant argues that it has acted in good faith throughout, acted in a timely manner to submit the appeal once aware of the Final Notice, and it would not be fair forhim to lose his right of appeal in the circumstances.

37. The respondent argues that the final notice is dated 15th March 2022. The covering letter under which it was sent is of the same date. Both documents were posted together by first class post to the Appellant's registered address in Manchester. Proof of postage was obtained from the post office. The documents were not returned undelivered. On that basis the respondent argues that the tribunal may be satisfied that the final notice was sent. Further, a copy of the notice was sent on the same date, again by First Class post, to the Appellant's London office address. Again, this was not returned undelivered.

38. Counsel for the respondent submits that the tribunal does not need to be satisfied that the notice came to the applicant's attention in order to be satisfied that it was sent. Nor does it need to consider when the notice came to the applicant's attention for the purpose of compliance with the requirement that an appeal must be filed within 28 days after the date on which the notice was sent by the applicant.

39. The deadline for an appeal was therefore 14th April 2022. The appeal was lodged nearly three months later. Accordingly, the appeal is brought out of time, and the Tribunal has no jurisdiction to consider it.

40. Nor is the appellant's argument that the notice did not come to its attention of any utility to it in circumstances where it has not applied for any extension to file an appeal, nor given any evidence in support of any application it might have made for an extension of time, including the actual date when the Appellant does contend it knew of the notice, and how it came to know. Without that information the respondent argues, the tribunal could not in any event form a view as to why the appeal was not filed in time, but crucially why it was not filed sooner than it was.

41. Finally the respondent argues that it is unbelievable, that the notice did not come to the appellant's attention until an undisclosed date in June. Not only was the final notice posted to the registered office not returned, but neither was the copy of that notice sent to the Appellant's London office. That both the notice and a copy of it were both lost in the post in Manchester and London respectively is an untenable position for the Appellant to adopt.

42. It follows that the appeal being brought significantly out of time, there being no application to extend time, nor evidence in support of any such application, the tribunal has no jurisdiction to consider the appeal and it must be struck out.

43. The respondent also points out that the fact that the respondent did not raise this as an issue until 19th October 2022 is irrelevant. It is the appellant's responsibility to make its appeal on time.

The decision of the tribunal

44. The tribunal determines not to strike out the application for lack of jurisdiction and uses its powers to extend the time limit for entering an appeal to the date of the hearing.

The reasons for the decision of the tribunal

45. The reasons for appealing out of time provided by the appellant are very weak. The tribunal and indeed the respondent expects that property owners have appropriate systems for receipt of post and in general such reasons would not be sufficient for the tribunal to extend the time for appeal.

46. However, in the particular circumstances of this case the tribunal has decided to use its powers to extend the time period for the appeal and accept it out of time.

47. This is because (i) the tribunal itself failed to recognise that the appeal was out of time. It issued directions and set a hearing date which may have suggested to the appellant that the only issues to be determined were the substantive issues (ii) the respondent did not raise the issue until after the hearing date had been set despite having received the directions on the application. In addition it submitted documents which did not raise the issue of the time limit, nor did it make a formal application to have the application struck out.

48. The tribunal determines therefore to extend the time for appeal to the date of the hearing as this enables the tribunal to deal with the case fairly and justly.

Is the tribunal satisfied beyond reasonable doubt that the offence has been committed?

49. The applicant raised two arguments in connection with the commission of the offence. The first question is whether the property is an HMO at all, and the second question is whether the appellant is liable in law for the fine set out in the penalty notice.

Is the property an HMO?

50. The appellant argues that the respondent must prove beyond reasonable doubt that the property was occupied by at least three people as their sole

or main residence in order for it to meet the standard test as to whether a property is an HMO. The appellant considers that there is an absence of proof in this case and considerable doubt

51. Although the respondent provided statements from three of the occupiers which state that they occupied the property as their sole or main residence the occupiers were not present at the hearing to be cross examined. The appellant argues that the documents are pro-forma documents which have been completed without thought. Counsel pointed to the recent decision of the Upper Tribunal *Camfield & Ors v Uyiekpen & Anor* [2022] UKUT 234 (LC) where it was suggested that using pro-forma documents such as the ones used by the respondent is dangerous because pro-formas adopt a formulaic tick box approach to the evidence necessary to prove the elements of a criminal offence to the required criminal standard.

52. Counsel for the appellants asked Mr Clough in cross examination whether he had raised particular questions with the occupiers such as whether each one had confirmed the terms of the tenancy, where the occupier was registered to vote, whether they have a property elsewhere, a partner or children. Mr Clough agreed that he did not ask those questions; he said that he would not normally enquire about those matters. He completed one form and then emailed the other forms for them to complete.

53. The appellant argues that the approach of the respondent is inadequate. It refers to extensive case law on only or main residence and argues that it is important to look at a whole range of issues when determining whether the property is someone's sole or main residence, for instance whether the person is an owner, a tenant, a lodger or in accommodation provided with employment. The respondent should also have considered personal ties such as registration with doctors/dentist/ registration to vote etc. All the occupiers in this instance have signed agreements, which are licenses to occupy. The appellant argues that these documents are short term, and lack many of the features that would appear in a standard assured shorthold tenancy. This, suggests the appellant, veers more towards each licensee having a main residence elsewhere. Without evidence to the contrary the tribunal cannot be sure beyond reasonable doubt that the occupiers occupied as their only or main residence.

54. Mr Rothbart gave evidence of conversations he had with the licencees and his knowledge of their personal circumstances in his statement. So for instance of Ella Shearman he says that she came to London to work as a young professional but he says she had a main residence elsewhere, which he believed to be in Devon. This is based on the application form she completed. He also referred to Annabel Goddart who was a staff nurse working in London but she had what he believed to be a main residence in Bristol.

55. The appellant reminds the tribunal that the burden is on the respondent, to prove that each licensee occupied the premises as their sole or main residence. The appellant argues that there is an absence of such evidence. The only evidence advanced speaks to physical presence on a particular day

56. The respondent argues that the property is not required to be the occupants "only" residence, but that "main" residence suffices i.e. the occupant may have 'two homes', but that the question is which is the main home.

57. The respondent rejects the appellant's argument that the guardians were not occupying the property as their main residence because the licence agreement, and in particular its temporary nature, "veers more towards each licensee having a main residence elsewhere".

58. The respondent points out that this suggestion goes completely against the very purpose of the licence, to ensure a continual presence at the property to guard against trespass and damage to the property. That cannot be achieved if the guardian is living elsewhere.

59. The respondent points to the terms of the licence itself. The licence agreement requires that the guardian will:"4.2 Sleep at the property for at least five nights out of any seven, unless written consent to be away has been granted by VPM having been given reasonable advance notice… and "4.3….the Guardian will ensure that at least one Guardian is in the Property at any time;

60. The respondent argues that it is an established principle that where a person sleeps is of utmost importance in determining where a persons' main residence is and refers the tribunal to *Sumeghova v McMahon* [2002] EWCA Civ 1581; [2003] H.L.R. 26. In this case, the guardians were obliged to sleep at the property.

61. Further, and the respondent says, crucially, it is entirely against the empirical evidence recorded in the witness statement of Mr Withams, and the photographs attached to his witness statement. Mr Withams states, "*I met three occupants who were home at the time of the visit. Ella Shearman who occupies room 5, Annabelle Goddard who occupies room 1 and Lilyana Shtereva who occupies room 2. I took photographs of Bedroom 2, (Exhibits TW1, TW2, TW3 and TW4), Bedroom 5 (Exhibits TW5 and TW6) Bedroom 6 (Exhibit TW7) and the un-numbered rear room which was being used as a bedroom (Exhibit TW8) All of these rooms contained personal possessions and clothes and were clearly being occupied."* [WS Withers, para.4].

62. Finally the respondent says that it is against the word of the occupants themselves that they occupied the property as their only or main home.

63. The appellant in closing submissions reminded the tribunal that the respondent had to prove its case to the criminal standard of proof for each and every element, otherwise the notice would have been issued in error.

Was the applicant a person having control or managing the property?

64. The appellant explained that the reason that no licence was applied for at the beginning of the arrangement with the owner was because the arrangement was short term – initially for three months. There was no indication that the agreement was to continue. He said that different local authorities had different policies with regard to property guardianship and that many did not require the properties to be licenced. There were also planning issues to be considered and for those reasons the appellant, although Mr Rothbart is an experienced property manager, did not

65. The appellant says that the proper recipient of the penalty notice is Vacant Property Management and not Sentry Guardians. It first raised this argument in its representations made to the respondent

66. Its argument is that no rent was paid to Sentry Guardians. The rent was paid to Vacant Property Management. The guardians' agreements were with Vacant Property Management. In the circumstances, the Appellant company are not liable in law for the fine set out in the Final Notice.

67. Mr Rothbart asked the tribunal to consider the Go Cardless arrangements which he explained in his statement. What he says at paragraph 8 is that rental payments from guardians were collected via Go Cardless which is an online platform that enables businesses to accept direct debit payments. Once the money is collected Go Cardless automatically transfers that money to VPM. Mr Rothbart says that none of the money goes to Sentry Guardians. The money from Go Cardless is paid as a bulk payment to VPM normally three days after the money is collected. The sums set out include monies received from guardians of other properties.

68. He also pointed out that the key fee for lost keys is paid to VPM .

69. The respondent drew the attention of the tribunal to the legal framework. In relation to "person having control", there are two limbs to the definition: where the premises are let at a rack rent and where they are not. "Rack-rent" means the "full amount which a landlord can reasonably be expected to get from a tenant" having regard to any rent restrictions.

70. Where there is a letting at a rack-rent, the first limb of the definition is satisfied and it is unnecessary to consider whether there is anyone else who could also let the premises at a rack-rent.

71. Where there is no-one in receipt of a rack-rent, it is necessary to consider who is the person entitled to receive the rack-rent under the second limb of the definition.

72. The respondent argues that the rent is payable to Sentry Guardians. Counsel drew the attention of the appellant to the arrangements with the guardians and particular clauses of the agreement that the guardian enters into with Vacant Property Management.

73. Prior to entry into any agreement to occupy the property, the potential guardian completes a 'Sentry Guardians Application Form'. The form requires certain documents to be provided to satisfy eligibility to be "a Guardian for Sentry Guardians". The form requires the applicant to answer the question, "why do you think you are suitable to become a Sentry Guardian?"

74. Once an application to become a 'Sentry Guardian' is accepted Vacant Property Management enters into a licence agreement with that applicant to "share living space" in the property. The licence agreements – each headed 'Sentry Guardians', with a reference to the appellant's email address and website in the footer – and comprising identical terms, provide – inter alia – that:

> 1.2. VPM places Guardians in properties for SGL in order that those Guardians may perform their Guardian Functions. Guardians pay a weekly licence fee to VPM to act as Guardians and are allocated properties from which they perform those Guardian Functions which necessarily require them to occupy the Shared Space with others for the period of this Licence.
>
> 1.3 The Licence Fee is payable weekly but will be collected Monthly in advance by standing order, the first payment to be made when the Guardian receives the keys to the Shared Space.
>
> 2. Payments
>
> 2.1 Upon signing this Licence, the Guardian will immediately pay VPM the fee for the Key.

> 2.2. Unless otherwise agreed, SGL will collect the licence fee monthly in advance on the first day of each calendar month….
>
> 2.3 The Licence Fee may be increased under SGL's fair usage policy by a maximum amount of up to £200 per calendar month…
>
> 2.4 If the Guardian fails to cancel the Standing Order or Direct Debit for the payment of the Licence Free after the Termination of this Licence, then SGL will repay to the Guardian any amounts paid in respect of a period after Termination, but will be entitled to deduct an administration fee of

75. The respondent's case is that these licence documents under which those living in the property were in occupation made clear that the rental obligation was to the appellant, and that rent was to be paid to it directly. Even if – notwithstanding the plain wording of the licence documents on which the appellant itself relies – VPM collected the rent, it did so as agent only.

76. The respondent says that it is clear (a) there is a rack rent – the rooms in the property are let at a sum of at least £650 each – and (b) who is in receipt of that rent; it is the appellant. This is clear from the terms of the licence agreement entered into with each occupant (or 'guardian') of the property. Clause 2.2. provides that "Unless otherwise agreed, SGL will collect the licence fee monthly in advance on the first day of each calendar month….".

77. The respondent also submits that there is nothing to suggest, but instead evidence to the contrary, that no alternative form of payment was agreed. Three of the occupants informed the respondents orally and in witness statements that the licence fee was paid to the appellant, a contention borne out by the bank account details into which the licence fee was paid, being those of the appellant itself.

78. In addition the respondent points out that term 2.3 of the licence agreement with the individual occupants provides: "The Licence Fee may be increased under SGL's fair usage policy by a maximum amount of up to £200 per calendar month…", which clearly indicates that the level of fees are in the control of the appellant.

79. Moreover, the respondent points to term 2.4 of the licence which provides; "If the Guardian fails to cancel the Standing Order or Direct Debit for the payment of the Licence Free after the Termination of this

Licence, then SGL will repay to the Guardian any amounts paid in respect of a period after Termination, but will be entitled to deduct an administration fee of £95." The respondent says that the inference to draw from this term is that it is the appellant which receives the fee, if it is to be the appellant which facilities any refund of it.

80. The respondent says that the fact that it is the appellant which receives the fee ties in with its control over the property. It is the appellant which receives from the owner possession of the property and the quiet enjoyment of it. The occupants apply to be, and are known as "Sentry Guardians". It is the appellant company registration number which is on the header to the individual occupant's licence agreement. It is the appellant's contact details on the footer of each and every licence agreement. And it is the appellant which is entitled to receipt of the licence fee.

81. The respondent suggests that the evidence is overwhelming that it is the appellant who is in control of the property. But it submits that even if that evidence was discounted, the appellant must be 'a person managing' the property.

82. The respondent points to the definition derives from s.398 of the Housing Act 1985, as amended by the Housing Act 1996, and is also the definition for "a person involved in the management" of an HMO. A person managing premises must receive rents or other payments from the tenants or licensees of the premises.

83. By s.263(3)(b), even where the rents are being paid directly to a third party, e.g. to a local authority to satisfy arrears of rates, the owner or lessee remains the manager.

84. The respondent points out that in this case, in the individual licence agreements, under the heading 'AGREED PURPOSE OF LICENCE', it is provided "VPM are entitled to collect sums and undertake all management of the Property on behalf of SGL".

85. The respondent argues that even if VPM exercised this entitlement (which it says is again contrary to all evidence that the appellant collected the licence fee directly), it did so as a third party only, and the appellant notwithstanding this curious arrangement, remains the manager of the property for the purposes of s.263, 2004 Act.

86. Mr Rothbart says that the clauses referred to by the respondent were the result of mistakes and that the tribunal must have regard to the substance of the agreement rather than formalities. He explained that the original agreement was with Sentry Guardians but following legal advice this was changed to Vacant Property Management because Vacant

Property Management received the monies. The changes were done by Mr Rothbart's office but not all of the changes were made as they should have been. These mistakes have now been put right. He assured the tribunal that the agreements were with, and rents were paid to Vacant Property Management.

87. He told the tribunal that the current agreements have Vacant Property Management logos and contact details.

88. Mr Rothbart said that Sentry Guardians do not currently make profit although it may begin to return a profit at the beginning of 2023. It does invoice Vacant Property Management in respect of property management costs. He says that the money that is received via rental payments from licenses is essentially split. Some pays for utilities, some goes to the landlord and some is paid to Sentry Guardians in respect of maintenance costs.

89. The respondent pointed out that if this were the case it is surprising that no copies of the current agreement was provided to the tribunal. The respondent also noted that a licence was applied for the property and it was in the name of Sentry Guardian,

90. The appellant explained that this was because this was done by his office

91. The respondent also challenged the appellant on the basis of the licence obtained, which was in the name of Sentry Guardians. The respondent suggests that in the light of the argument put forward by the appellant that this is surprising. The appellant explained that although he was an experienced property manager, the office was newly set up and incorrectly obtained an HMO licence in the name of Sentry Guardians.

92. The respondent was sceptical about the evidence provided in connection with Go Cardless. A single page PDF was provided at page 26 of the applicants bundle. This document provides a list of transactions. Each transaction is dated and covers a period of 07/06/21 to 06/10/21. There is a reference in each transaction to 'Guardian Rent Income' It was highlighted by the respondent that each transaction contains references to 'Sentry' as well as Vacant Property Management. The respondent was also sceptical that the Go Cardless statement did not clearly identify any rent received from the occupants of the First Floor Flat at 234-238 Edgware Road.

The decision of the tribunal

93. The tribunal determines that it is satisfied beyond reasonable doubt that the offence has been committed by the appellant and therefore confirms the penalty notice.

The reasons for the decision of the tribunal

94. The tribunal is satisfied beyond reasonable doubt that the property was the only or main residence of the occupiers. This is based primarily on the signed statement of those occupiers who were each paying considerable sums to live in the property.

95. The tribunal does not accept the argument that the precarious status of the occupation agreement means that the property is unlikely to be their only or main residence *per se*. Increasing numbers of people live in shared accommodation on licences as their only or main residence. There needs to be more to suggest that the statements the occupiers have signed are incorrect.

96. The tribunal does not accept that the conversations that Mr Rothbart says he had with the occupiers indicate that their main residence is elsewhere. These conversations related second-hand are not reliable evidence and even if taken at face value can be interpreted as referring to their parents' home or the place where they were brought up. The forms produced which are applications to be property guardians were completed before being accepted as property guardians and therefore the addresses on these are not indicative of the only or main residence of the occupiers during the course of their occupation of the property.

97. The tribunal notes the requirements that the occupiers spend a significant proportion of their time at the property, and in particular sleep there.

98. It has considered the legal cases provided by the parties and accepts the respondent's submissions on these. It agrees with the appellant that the question is one of fact and degree but in reaching its determination that the property is the only or main residence of the occupiers it has taken into account the level of rent paid, the terms of the agreement and the presence required of the occupiers along with their witness statements.

99. It notes the appellant submissions on *Camfield & Ors v Uyiekpen & Anor* [2022] UKUT 234 (LC) and agrees with the appellant that pro-formas are a highly risky method of gathering evidence. However in the particular facts of this case the tribunal has concluded for the reasons set out above that the occupiers occupied the property as their only or main residence.

100. The tribunal is also satisfied beyond reasonable doubt that the appellant is the correct recipient of the penalty notice as it determines that the appellant is in control of or managing the property.

101. Counsel for the appellant suggests that the written agreements represent only the form of the agreement with the occupiers and not the substance.

The tribunal does not accept this. Its starting point is the agreements which were signed by the occupiers. These agreements indicate that rent was paid to Sentry Guardians and this is confirmed by the witness statements of the occupiers. Each of the three statements stated that the rent was paid to Sentry Guardians.

102. Faced with the written agreement and the signed statements it is not sufficient for the appellant to claim that the form of the agreement is less significant than the substance. In the opinion of the tribunal the form and substance are as one. The tribunal is not persuaded that the clauses in the agreement which point to Sentry Guardian being the person in control are mistakes. There are too many of these claims to be plausible. It is not convincing that when amending the agreement Mr Rothbart would have relied on an inexperienced person in his office. Nor is it convincing that Mr Rothbart would not have checked the application for the licence and ensured that the licence was applied for by Vacant Property Management if that was the correct reflection of the business arrangement entered into.

103. Nor is the tribunal persuaded by the appellant's evidence on Go Cardless. It does not consider that the documentation provided is useful evidence of payment of the rents of the occupiers of this particular property direct to Vacant Property Management.

104. Overall the tribunal accepts the submission of the respondent and determines to confirm the penalty notice.

Name: Judge H Carr Date: 10 January 2023

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).