FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/43UF/HNA/2019/0011
Property	:	100 Victoria Road, Horley, Surrey RH6 7AB
Applicant	:	Mountgreen Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondent	:	Reigate and Banstead Borough Council
Representative	:	
Type of Application	:	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004 (2004 Act)
Tribunal Member(s)	:	Judge Tildesley OBE Mr P Turner-Powell FRICS Ms T Wong
Date and Place of Hearing	:	Crawley Magistrates Court, The Law Courts, Woodfield Road, Crawley, West Sussex RH10 8BF on 30 May 2019 Havant Justice Centre Elmleigh Road Havant PO9 2AL on 8 July 2019
Date of Decision	:	27 August 2019

DECISION

SUMMARY OF DECISION

I. The Tribunal is satisfied that the Applicant has failed to establish on the balance of probabilities that it had a reasonable excuse for not complying with the improvement notice dated 11 April 2018.

II. The Tribunal finds that the Applicant did not comply with the requirements under the improvement notice to start and complete the specified works by the due dates, and its failure continued beyond the issue of the final notice of a financial penalty on 2 January 2019. The Tribunal is satisfied beyond reasonable doubt that the Applicant had committed the offence of failing to comply with the improvement notice dated 11 April 2018.

III. The Tribunal decides that an amount of £12,000 is an appropriate financial penalty for the offence to be paid within 28 days.

IV. The Tribunal, therefore, varies the final notice by reducing the penalty to £12,000.

BACKGROUND

1. The Applicant appeals against financial penalty notice dated 2 January 2019 made under section 249A of the Housing Act 2004 imposing a civil penalty of £30,000 for an offence of failing to comply with an improvement notice dated 11 April 2018 which the Council says was committed on 22 August 2018 and ongoing contrary to section 30 of the Housing Act 2004.

2. The Appeal is to be by way of a re-hearing of the Council's decision and was heard on 30 May 2019 at Crawley Magistrates' Court.

3. The Applicant was represented by Miss Marie-Claire Bleasdale of Counsel. The Applicant called Mr Simon Stern, sole Director of Fountayne Managing Limited, and Mr Mark Stuart Fouweather, director of Amro Consulting Limited, as witnesses.

4. The Applicant appointed Mr Stern of Fountayne Managing Limited (FML) as the managing agent for the property which included both the commercial and residential units. Mr Stern commissioned Mr Fouweather to investigate and make recommendations on the structural collapse at the property.

5. The Council was represented by Miss Poonam Pattni of Counsel. The Council called Mrs Nicole Clare Longley, Senior Environmental Health Officer, as a witness.

6. Mrs Longley was the Officer who carried out the HHSRS assessment on the residential unit, and who issued the improvement notice and the financial penalty notice.

7. Miss Bleasdale confirmed the Applicant's pleading that it had a reasonable excuse for failing to comply with the improvement notice.

8. After hearing representations, the Tribunal decided to hear the Appeal in two stages, dealing first with the evidence on whether an offence had been committed, followed by the evidence on the financial penalty. The Tribunal took this course to ensure that it applied the correct burden of proof to the evidence relied on by the parties.

9. Unfortunately, the hearing of the 30 May 2019 went on longer than anticipated with the result that the Tribunal only reached the end of the first stage.

10. The Tribunal indicated that it would make a preliminary determination on whether it was satisfied beyond reasonable doubt that the Applicant had committed the offence of failing to comply with the improvement notice dated 11 April 2018.

11. The Tribunal reconvened on 10 June 2019 in the absence of the parties to make a determination on the preliminary matter. The Tribunal decided after considering the evidence and representations that it was satisfied beyond reasonable doubt the Applicant did not have the defence of reasonable excuse and that the Applicant has committed the offence of failing to comply with the improvement notice dated 11 April 2018.

12. The Tribunal directed a resumption of the hearing on 8 July 2019 at 10.00am at Havant Justice Centre, Elmleigh Road, Havant PO9 2AL to determine the Appeal.

13. The parties attended the hearing on 8 July 2019. At the request of Counsel no further evidence was called, and they each made their submissions on the penalty.

THE LAW

14. The matter under Appeal is a financial penalty imposed on a person under section 249A of the 2004 Act for failing to comply with an improvement notice.

15. Prior to imposing a financial penalty the Council must give an Initial Notice of intent and a Final Notice. Schedule 13A to the 2004 Act contains the requirements for these notices.

16. The Council can only impose a financial penalty on a person if satisfied beyond reasonable doubt that the person's conduct amounts to a relevant housing offence in respect of premises in England.

17. Section 249A(2) defines relevant housing offence which includes a failure to comply with an improvement notice.

18. Only one financial penalty may be imposed on a person in respect of the same conduct. The maximum penalty is £30,000. The imposition of the penalty is an alternative to the prosecution for a "relevant housing offence".

19. Where an improvement notice becomes operative, the person on whom the notice was served commits an offence if s/he fails to comply with it.

20. If no appeal is brought against an improvement notice section 30(2)(a) of the 2004 Act provides that compliance with an improvement notice means that the person must begin and complete the remedial action in relation to each hazard by the dates specified in the notice.

21. Section 15(6) of the 2004 Act provides that if no appeal is made within the relevant period, the notice is final and conclusive as to matters which could have been raised on appeal.

22. Under section 30(4) of the 2004 Act it is a defence that the person had a reasonable excuse for failing to comply with the improvement notice.

23. Paragraph 10(12) of schedule 13A of the 2004 Act provides that a Council must have regard to any guidance given by the Secretary of State about the exercise of its functions with regard to financial penalties. In this regard the Secretary of State has issued *"Guidance for Local Authorities: Civil Penalties under the Housing and Planning Act 2016 (April 2018) ("*The Guidance*").*

24. Paragraphs 3-5 of "The Guidance" sets out a list of factors to be taken into account when assessing the level of the penalty:

- Severity of the Offence
- Culpability and track record of the offender
- The harm caused to the tenant
- Punishment of the offender
- Deter the Offender from committing similar offences
- Remove any financial benefit the offender may have obtained as a result of committing the offence.

25. The person on whom the penalty is imposed may appeal to the Tribunal. An appeal is by way of re-hearing. The Tribunal can confirm, vary or cancel the final notice.

THE PROPERTY

26. The Property known as 100 Victoria Road, Horley comprises a mix of commercial units and residential units above. Mountgreen Limited holds the freehold to the commercial units under Title Number

SY835888 and the leasehold of the residential flats under 999 year lease registered under title number SY814870. Lidl UK GmbH (Lidl) is the occupier of a shop on the ground floor under a long lease of 999 years. No copy of the lease with Lidl was included in the bundle.

27. The first floor comprises 14 residential flats. A Mr Jacob Booth was the sub-lessee of Flat 9 under a lease granted by Mountgreen Limited for a term of 125 years from 25 December 2015, and registered under title number SY836137 A copy of the lease was included in the bundle [714-759].

28. The property was built in 1979 and originally had offices on the first floor. The offices were subsequently converted into flats.

29. The property has a reinforced concrete framed structure with concrete floors and concrete flat roof construction. The walls are masonry infill panels constructed in brickwork for both inner and outer leafs with a cavity circa 100mm and a parapet extending above the flat roof by approximately 500mm.

THE EVIDENCE

30. On 22 July 2017 a residential leaseholder informed FML that part of the West elevation external wall of the Property had collapsed. Mr Stern of FML made arrangements to have the area cordoned off and instructed scaffolders to make the area safe. Mr Stern said that it became apparent that it was necessary to instruct a surveyor to prepare a method statement and provide a design for structural support. Mr Stern instructed Mr Fouweather of Ammro Consulting Limited to carry out this work. The scaffolding was completed in accordance with Mr Fouweather's method statement on 29 July 2017.

31. Mr Fouweather visited the site on 31 July 2017 to inspect the temporary support works and found that the site was appropriately fenced off and the wall was supported with temporary supports. Mr Fouweather concluded that the site was safe.

32. On 10 August 2017 Mr Fouweather carried out a site survey and prepared a report on 24 August 2017 [78-91]. It was Mr Fouweather's opinion that the failure in the external brickwork had been caused by the canopy attached to the West elevation which had created lateral stress.

33. On 16 September 2017 there was a further collapse of the wall which was rendered safe by the erection of additional scaffolding on 9 November 2017. On 28 September 2017 Mr Fouweather met Mr Booth, the sub-leaseholder, on site and formed the opinion that the flat remained safe for occupation because the wall was temporarily supported by scaffolding.

34. On 20 September 2017 Mrs Longley received a complaint from the tenant of Flat 9, of the property. The tenant informed Mrs Longley that

part of the building containing the flat had collapsed. The tenant said that the Building Control Officer had told him to leave the flat but had been assured by the owner that the flat was safe. The tenant expressed concern for his safety and explained that liability for repairs was in dispute.

35. Mrs Longley visited the flat on 13 October 2017 and also obtained from the Building Control Officer a copy of Mr Fouweather's structural survey. On 20 October 2017 Mrs Longley carried out two HHSRS assessments, one for excess cold and the other for structural collapse and falling elements.

36. In respect of the HHSRS for excess cold Mrs Longley found that the windows in the kitchen lounge of the Flat did not fit properly because of movement in the structure and were a source of constant draught. Mrs Longley also observed there was constant draught at floor level and water had begun to penetrate. Mrs Longley said these deficiencies increased the level of harm from the average score of 1 in 340 to 1 in 180. This produced a HHSRS score of 1,820 which is a Category 1 hazard.

37. Mrs Longley assessed the likelihood of harm and spread of health outcomes higher than average from the structural collapse of the building. Mrs Longley was of the view that the structure was likely to collapse again because the wall was not properly supported, and the owner was not taking steps to ensure that the scaffold was tight and secure. Mrs Longley stated that if the structure collapsed it would be large heavy elements from a considerable height. Mrs Longley scored the hazard at 259, a Category 2 hazard in band E. The average hazard score for structural collapse is 1 (Category 2 hazard in band J).

38. On 2 November 2017 Mrs Longley sent letters of intended entry to Flat 9 to Mountgreen as freeholder/head leaseholder and its managing agent, Mr Booth the sub-lessee, his letting agent and the tenant.

39. On 8 November 2017 Mrs Longley inspected the building, Mr Booth, his father and the tenant were present. No-one attended for Mountgreen. At the inspection Mr Booth said he was not sure whether he was responsible for fixing the windows.

40. In December 2017 the tenant vacated flat 9 which has remained empty since that date.

41. On 11 April 2018 Mrs Longley served an improvement notice under sections 11(2) and 12(2) of the 2004 Act on The Company Secretary of Mountgreen with a copy to Mr Stern of FML. The Notice required Mountgreen to carry out the works specified in Schedule 2 of the Notice and to begin them no later than 11 June 2018 and to complete them within two months from that date (11 August 2018). Mrs Longley also advised Mountgreen that it had a right of appeal against the Notice to the Tribunal.

42. The works specified in Schedule 2 were:

- Remove the walkway or retain it as a structure separate from the building
- Carry out works to re-build the wall and re-tie it to the inner skin of the cavity ensuring that the building is properly supported throughout the duration of the works.
- Carry out such remedial work to the windows of Flat9 to ensure that they fit properly.

43. No-one from Mountgreen contacted Mrs Longley about the improvement notice. Mountgreen did not appeal the improvement notice.

44. On 22 June 2018 Mrs Longley visited the property and found that the works had not started in accordance with the Notice. Mrs Longley wrote to the Company Secretary of Mountgreen and asked about its intentions in respect of the works. Mountgreen did not respond to the letter.

45. On 22 August 2018 Mrs Longley visited the property again to ascertain whether the works had been completed. Mrs Longley was of the view that no works had been done and the site looked exactly the same as it did in January 2018.

46. On 17 September 2018 Mrs Longley sent by letter an interview under caution to Mountgreen. Mrs Longley received an email from Mr Stern on 26 September 2018. Mrs Longley replied explaining that she could not accept Mr Stern's e-mail because it did not come from Mountgreen and that an interview under caution had to be completed by a person with the appropriate level of authority from the Company.

47. Mrs Longley wrote again to Mountgreen stating that it must respond on its own account if it wished to have its views taken into account. A "S Brim" sent an e-mail on behalf of Mountgreen dated 9 October 2018 saying that Mountgreen was in dispute with Lidl over the liability to carry out the repairs, and that there had been delay with the production of the report of the independent expert. "S Brim" went onto state that the works had been tendered and a start date was imminent. Mrs Longley said that "S Brim" did not appear to be a director of Mountgreen.

48. On 11 October 2018 Mrs Longley sent a supplementary interview under caution by letter to Mountgreen asking when the works would commence and the likely duration of the works. No reply was received by the due date.

49. On 4 December 2018 Mrs Longley sent a notice of intent to issue a financial penalty. Mountgreen made no representations against the notice. Mr Stern, however, sent e-mails dated 21 and 23 December

2018 giving answers to the questions posed by Mrs Longley in the supplementary interview under caution.

50. On 2 January 2019 Mrs Longley issue the Final Notice of Civil Penalty for £30,000.

51. Mrs Longley accepted in cross-examination that she was not a surveyor but she had expertise as an environmental health officer. Mrs Longley agreed that the no-one was living in the flat at the time of the issue of the improvement notice. Mrs Longley understood that Mr Booth had allowed the tenant to leave. Mrs Longley pointed out that the risks identified by the HHSRS assessment were not dependent upon whether the flat was in actual occupation.

52. Mr Fouweather then gave evidence. In his statement he explained that following the site visit on 28 September 2017 he further inspected the property on 10 January 2018, 25 January 2018, 29 January 2018, 11 July 2018, 27 July 2018, 12 September 2018, 11 December 2018, 13 December 2018 and 19 December 2018. The purpose of his visits from 10 January 2018 was to investigate with other surveyors and engineers the cause of the collapse so that appropriate remedial works could be agreed.

53. Mr Fouweather stated that following the erection of the temporary scaffolding he was satisfied that there was no danger of the wall collapsing or of any further movement in the wall. Mr Fouweather challenged the conclusion that there was any serious risk of a class 1 harm because in his view the temporary support was adequate. Mr Fouweather acknowledged that he did not appreciate that the Category 1 hazard referred to "Excess Cold" rather than "Structural Collapse".

54. Mr Fouweather stated in cross examination that the repair to the wall and window was not contingent on carrying out necessary works to the canopy.

55. Mr Fouweather expressed his disagreement with the Third party expert's conclusion that the attachment of the canopy to the outer scree of bricks was not a contributory cause of the structural collapse [253-256].

56. Mr Stern gave evidence and confirmed the arrangements that he put in place immediately after he was informed of the structural collapse.

57. Mr Stern explained that when he received Mr Fouweather's opinion that the canopy was the cause of the failure in the external brickwork he informed Lidl that the freeholder intended to recover the costs arising from the collapse of the wall.

58. Mr Stern also said that on 23 August 2017 he made a claim against the insurance policy for the costs of the repair to the wall [515]. On 19 September 2017 the loss adjusters for the insurers repudiated the claim because there was no evidence that an insured event occurred [579].

59. Mr Stern in his witness statement set out the steps he took to resolve the dispute with Lidl:

60. In September 2017 Lidl indicated they disagreed with Mr Fouweather's report.

61. In October 2017 Lidl instructed Blake Morgan solicitors which indicated that their client agreed to the referral of the dispute to an independent structural engineer to act as an expert to determine the cause of the collapse of the wall provided that each party agreed to accept the expert's findings whose decision w0uld be final [554].

62. On 19 October 2017 Mr Stern emailed Blake Morgan and Mr Fouweather advising that their legal team required three independent surveyors to be recommended [555]. On 24 October 2017 Mr Stern sent another email stating that if Lidl did not propose any engineers by 26 October 2017, Mountview would instruct its solicitors to commence with proceedings to agree liability based on Mr Fouweather's report [556]. On 3 November 2017 Mr Stern indicated that they would agree to Stripe Consulting as third party surveyors [558].

63. On 16 November 2017 Mr Stern sent another email [560] to Blake Morgan stating that

> "Whilst corresponding with you I have also had to deal with the complaints from the Council and the tenants as well as winter being upon us. The suggestion that you make is going to result in further delay. Your suggestion in itself goes beyond expert evidence and allows the expert to be judge without any recourse to the parties. That is not the English legal system.....
>
> There can be no further delays in the works being carried out. Please accept this email as notice that the works will be commenced seven days from the time and date hereof to give you time to obtain your own evidence. After then the works will commence without further notice. My client's solicitors will then be instructed to serve a pre-action protocol letter setting out our claim".

64. On 21 November 2017 Blake Morgan provided a copy of their client's expert report. The parties' experts then met on site on 10 and 25 January 2018.

65. Mr Stern stated that following the site visit on 25 January 2018 he tried to get agreement to the works of repair being carried out but it took time for Blake Morgan to respond. Mr Stern sent an email on 6 February 2018 stating that his clients agreed to a joint instruction of a third party expert [569]. On 6 March 2018 Blake Morgan responded asking for confirmation of agreement to the draft joint instruction of the third party expert.

66. Following Blake Morgan's email of 6 March 2018, Mr Jonathan Kandler, solicitor for Mountgreen, took over the negotiations with Blake Morgan. From 12 March 2018 to 13 April 2018 ten e-mails were

exchanged between the respective solicitors [573-582]. At the end of which Blake Morgan on behalf of their client agreed that Mountgreen could commence works as soon as the expert has inspected so that further damages could be mitigated.

67. On 8 May 2018 Mr Stern emailed Mr Kandler and Blake Morgan asked when the inspection of the third party expert would take place [583]. On 23 May 2018 Mr Stern emailed the same parties stating that *"Can I stress the urgency of the matter as we have been served an improvement notice from the Council which needs to be carried out. This seems to be dragging on for much too long, any reason for this?"* [584].

68. On 24 May 2018 Blake Morgan advised that they were awaiting the revised fee estimate from the third party expert [585].

69. On 8 June 2018 Mr Stern emailed Mr Kandler and Blake Morgan [586] stating that the amount (fee?) was agreed *subject to this getting moving as of now nothing is happening and the tenants and the council are being frustrated.* Mr Stern added the *"Our tenant is currently becoming increasingly upset and please note the enforcement from the Council currently is in effect".*

70. On 15 June 2018 Mr Stern emailed Blake Morgan with a copy to Mr Kandler [587] requesting an update and stating that *"Please note we currently have a notice from the Council to get this repaired, the landlord will need to comply with the notice in order to avoid the fine, so if the inspection can take place ASAP it would be beneficial for all parties".*

71. On 26 June 2018 the third party expert raised various queries and on 17 July 2018 suggested that the parties' experts meet with him on site to deal with any outstanding matters.

72. On 31 July 2018 Mr Kandler emailed Blake Morgan and the various experts stating that "*For the record my clients have been begging to be allowed to do the works. I wrote to all today asking for confirmation that my client may proceed with the works"* [593].

73. On 15 August 2018 the third party expert concluded that the collapse of the wall was not caused by the canopy. Mr Stern stated as soon as he received the third party's determination he immediately started to make arrangements to carry out the works. Mr Stern sought the agreement of Lidl to remove the glass panels[1] from the canopy, which was given on 5 October 2018.

74. On 16 August 2018 Mr Stern sent out tenders for the work with a return date of 28 August 2018. Mr Stern selected Whitley Builders Limited as the contractor. On 13 November 2018 Mr Stern sent a JCT contract to

[1] The glass panels are also referred to as Perspex in the evidence. The Tribunal has adopted glass panels so that it is consistent throughout the decision.

Whitley Builders Limited with a commencement date of 21 November 2018. Unfortunately for the Applicant, Whitley Builders cancelled the contract at the last minute with the result that an alternative builder had to be found.

75. Mr Stern instructed Aspect Construction to do the works. Contract documentation was prepared on 15 December 2018. The works commenced on 3 January 2019 and completed on 30 April 2019.

76. Mr Stern stated that only Flat 9 was affected. Mr Stern said that he kept Mr Booth, the sub-leaseholder informed of developments. Mr Stern sent an email on 18 September 2017 [520] to Mr Booth stating that the structural engineer had re-confirmed that the building was safe to reside in. This was then followed by an email later the same day stating that Mr Stern had instructed the surveyor to re-assess the safety of the building [521].

77. On 29 September 2017 Mr Stern supplied Mr Booth with an update on the state of the wall stating that the surveyor had inspected the building yesterday and advised that the building was safe for residents to live in, and there was no need to vacate the building. Mr Stern said that he required a decision from Lidl before he could consider the next step [528]. Mr Stern supplied a further update on 19 October 2017 stating that the repairs could not be carried out until the independent engineer had carried out an inspection of the site which should be next week [528].

78. On 19 February 2018 Mr Booth emailed Mr Stern requesting an update with the wall [530] stating that *"as months go by with no progress, it is extremely disappointing that no-one seems to care about what is happening at the building. Is the freeholder aware that my flat is inhabitable. Just to put things in perspective I have not had a tenant in there for two and half months. This is around £2,250 of lost income for me and it is increasing everyday nothing is done. I do hope when this situation is finally rectified I will be compensated financially for this loss as you stated months ago when I was originally in danger of losing my tenant"*.

79. On 15 March 2018 Mr Stern responded to Mr Booth [531] making the following points:

    a) External repairs: unfortunately we are unable to reach agreement with Lidl and have agreed to instruct an independent expert to supply a binding report and the party found to be at fault would be held liable for the costs.

    b) Accommodation: all parties have been made aware of your situation and we will be demanding your loss of rent as part of the Claim.

    c) Temporary repairs: Mr Fouweather has advised not to carry out temporary repairs until the engineer has been on site.

d) Service Charges: as a gesture of goodwill no service charge would be demanded.

80. On 7 September 2018 Mr Stern emailed Mr Booth [537] confirming that he had discussed the matter with the freeholder which had indicated that it would be reimbursing Mr Booth for the loss of rent, and that compensation would be in three stages. On 21 September 2018 Mr Stern confirmed that payment of £6,000 would be made today and the balance would be paid by the 15 November 2018 [539].

81. In January 2019 Mr Stern advised Mr Booth of the start date of the works [546].

82. Mr Stern confirmed in his witness statement that Mr Booth had received £13,400 in compensation and had been excused liability to pay service charges in the sum of £1,844.08.

83. Mr Stern accepted in his witness statement that he should have responded more proactively to Mrs Longley's communications. Mr Stern asserted that the reason for not being proactive was that the Applicant and him had no prior experience of being subject to this procedure. Mr Stern thought that everything would be alright if he tried to make sure the works were carried out as soon as possible.

84. Mr Stern included in his evidence emails in September 2017 with Building Control for the Council [503 & 505] advising of the steps taken to secure the safety of building.

85. On 8 November 2017 Mr Rolph of Building Control emailed Mr Stern asking him when the structural survey was due to take place. Mr Rolph also asked what steps were being taken to ensure that the temporary support was adequate to prevent further collapse and failure of the wall section. Mr Rolph pointed out that there had been a subsequent incident following the original failure [507]. Mr Stern responded the same day stating that he was currently working to instruct jointly a third party surveyor and that scaffolders would be back on site to erect additional scaffolding and support [508]. These two emails had been copied to Mrs Longley.

86. Mr Stern's first direct contact with Mrs Longley was on 23 September 2018 [509], some five months after the improvement notice when he explained that FML had been instructed by Mountgreen to manage the property, and that as part of its management duties FML had been dealing with issues regarding the collapsed wall. Mr Stern explained that a dispute had arisen between the Landlord and the long Leaseholder and that after an intense set of negotiations the parties had agreed to instruct a third party expert whose decision would be binding on all the parties. Mr Stern stated that the third party report had been issued in mid-August and that FML had since tendered for the works. Mr Stern indicated that he should be in a position to advise of a start date in the week commencing 8 October 2018.

87. On 26 September 2018 Mrs Longley said that she could not accept Mr Stern's response on behalf of Mountgreen because the nature of her enquiry, interview under caution, required an answer from someone at the company with the appropriate level of authority to respond to legal questions on the Company's behalf [510].

88. Mr Hersch Schneck director for Mountgreen responded to Mrs Longley on the same day asking her to take instructions/response from Mr Stern as if it would be from Mountgreen Ltd as FML have been instructed to manage the property [511].

89. On 21 December 2018 Mr Stern emailed Mrs Longley stating that he was pleased to inform after much negotiation and litigation between the leaseholders and Lidl that he had secured a contractor to start the works on the first week in January [512].

90. Mr Stern in his evidence made reference to the ruling of the Beth Din on 21 September 2018 which is a Tribunal that determines disputes between members of the orthodox Jewish community. The decision note is headed "In the Matter of an Arbitration Pursuant to the Arbitration Acts".

91. Counsel applied for admission of the decision in evidence. As part of her application Counsel stated that the Applicant was not relying on the decision to establish that FML was acting as the Applicant's agent in relation to the Council's actions on the improvement notice and financial penalty". Given Counsel's concession, there was no objection to its admission [808-809].

92. Mr Stern explained that he updated and informed the Applicant at all stages in respect of the progress in securing the repair of the wall. Mr Stern stated that his client was becoming uneasy with him over the constant delays and the failure to deal with the Council's demands. Eventually the Applicant commenced proceedings against FML before the Beth Din which decided on 20 September 2018 that

> "AND insofar as there is any delay found or wanting on the part of FML, FML shall indemnify the Applicant in relation to all sums due and payable by way of any compensation due to any tenant and or costs fines and any financial penalties".

93. Mr Stern in cross examination stated that his company operated as a managing agent and had roughly 2,000 units (200/220 buildings) in its portfolio. Mr Stern stated that his company focussed on buildings rather than flats. Mr Stern acknowledged that he was aware of the law relating to residential leases but did not have a detailed knowledge of the powers of local authorities. Mr Stern pointed out that his company did not have an inhouse lawyer. Mr Stern, however, accepted that throughout the relevant period he had access to Mr Kandler, the Applicant's solicitor, who was aware of the improvement notice.

94. Mr Stern asserted that he wanted to get the matter resolved quickly. He stated that he was aware that the wall and windows could be remedied without displacing the canopy. Mr Stern indicated that the decision at the time was that there was no point in carrying out the repairs until the cause was established. When asked about the cause, Mr Stern said it was about deciding responsibility.

95. Mr Stern believed that the works under the terms of the lease could not be carried out without the permission of Lidl. He referred to the request to Blake Morgan for consent to remove the canopy. Mr Stern, however, acknowledged, the Applicant had not included a copy of the lease with Lidl which meant that his claims about the terms of the lease were not capable of verification by the Council and the Tribunal.

96. Mr Stern said that there was ongoing litigation with Lidl in connection with the recovery of its contribution to the costs of these works through the service charge. Mr Stern stated that the Applicant was not asking the residential leaseholders to contribute to the costs.

97. Mr Stern gave no explanation for not mentioning the liability dispute with Lidl when he responded to Mr Rolph of Building Control on 7 November 2017. Mr Stern stated that he knew of Mrs Longley's visit to the property on 8 November 2018, and that he had instructed Mr Fouweather to inspect the flats.

CONSIDERATION

98. The Tribunal considers first whether the procedural requirements of section 30 and schedule 13A of the 2004 Act have been met.

99. The improvement notice was sent on 11 April 2018 to The Company Secretary of Mountgreen Limited with a copy to Mr Stern of FML. The notice informed the recipient of its right of appeal to the First-tier Tribunal. No appeal was made within the period of 21 days which meant that the improvement notice became operative at the end of the 21 days. By virtue of section 30(2) the dates of compliance with the improvement notice were no later than the 11 June 2018 for starting the works specified in the Notice and the 11 August 2018 for completing the works.

100. Turning now to the requirements under schedule 13A. On 4 December 2018 the Council sent Mountgreen Ltd the notice of intent to issue a financial penalty. No representations were received. On 2 January 2019 the Council sent Mountgreen Ltd a final notice to issue a financial penalty. The Applicant did not challenge the validity of the notices.

101. The Tribunal is satisfied that the procedural requirements of section 30 and schedule 13A have been met.

HAS THE APPLICANT COMMITTED AN OFFENCE?

102. The Tribunal next considers whether the Applicant has committed the offence of failing to comply with the improvement notice dated 11 April 2018. The Tribunal reminds itself that it must be satisfied beyond reasonable doubt.

103. The Applicant accepted that it had not started the works specified in the Notice by the due date of no later than the 11 June 2018, and had not completed them by the due date of 11 August 2018. The Applicant did not commence the works until 3 January 2019, one day after the issue of final notice of a financial penalty, and the works were not finished until 30 April 2019.

104. The Tribunal is satisfied that the Applicant did not comply with the improvement notice within the meaning of section 30(2) of the 2004 Act and that its failure to comply continued beyond the date of the Final Notice of the financial penalty.

105. The Applicant contended that it had a reasonable excuse for its failure to comply with the improvement notice. The Applicant submitted that Mr Stern of FML was acting throughout as its agent, and that the Tribunal should consider the actions of Mr Stern when assessing its claim of reasonable excuse.

106. The Applicant stated that as at the 11 June 2018 and 11 August 2018 it could not effect the repairs to the property because of its agreement with Lidl to await the outcome of the report of the third party expert. The Applicant maintained that it was "handcuffed" by the agreement. The Applicant did not receive the report of the third party expert until 15 August 2018. The Applicant submitted that it was reasonable to await the report in order to ascertain the cause of the collapse of the wall.

107. The Applicant asserted that once it received the report it took steps to expedite the works by going out to tender on 16 August 2018. The Applicant, however, stated that it was unable to progress matters as quickly as it wanted after 16 August 2018 because it required the permission of Lidl to remove the glass panels of the canopy to commence the works, and it was let down by its preferred contractor which cancelled the contract at the last moment. The Applicant asserted that the delay in carrying out the repairs posed no tangible risk to the tenant of Flat 9 because he had left in December 2017 and Flat 9 had remained vacant since that date.

108. Miss Bleasdale submitted that the Tribunal had to consider reasonable excuse in the light of the circumstances prevailing at 11 June and 11 August 2018 when the offence of failure to comply with the improvement notice was triggered. The Tribunal accepts the validity of Miss Bleasdale's proposition with the caveat that it is entitled to examine the evidence of the events prior to the salient dates when making findings on the characterisation of the reasonable excuse put forward.

109. Before turning to the facts, the Tribunal considers it necessary to unpack the elements of the offence under section 30 of the 2004 Act. The offence is committed when the person on whom the improvement notice is served fails to start the remedial action in relation to each hazard by the date specified in the notice, and fails to complete the remedial action for each hazard by the date specified. The offence continues until the remedial action has been completed for each hazard despite the fact the period for completion of the actions has expired.

110. It follows from the above analysis that the reasonable excuse must relate to the failure to address the remedial action specified for each hazard throughout the period of non-compliance.

111. In this case the Applicant's failure to comply with the improvement notice started on 11 June 2018 and continued beyond the date of the final notice to issue a financial penalty. The Applicant's excuse of not being able to carry out the repairs because of the agreement with Lidl only applied for part of the period of non-compliance and effectively expired soon after receipt of the report of the third party expert on 15 August 2018. The Applicant appeared to be putting forward other reasons for not complying with the improvement notice after that date, namely, Lidl's consent for removal of the glass panels and the withdrawal of the contractor. The Applicant did not articulate that it was relying on a second set of circumstances as a reasonable excuse for the period of non-compliance after 15 August 2018.

112. The Tribunal decides to evaluate both sets of circumstances on whether they constitute a reasonable excuse for the non-compliance with the improvement notice during the respective periods.

113. The Tribunal starts with the Applicant's assertion that it was handcuffed by the agreement with Lidl which the Applicant said prevented it from carrying out the repairs to the property. The Tribunal observes that the Applicant did not adduce a copy of the agreement in evidence, so there was no direct evidence of its terms, and whether those terms prevented the Applicant from complying with the improvement notice.

114. The Applicant instead relied upon a series of e-mails between Mr Stern, Mr Kandler, and Blake Morgan the solicitors for Lidl. The e-mails revealed there were two stages to the agreement.

115. The first stage was that the Applicant eventually agreed to Blake Morgan's suggestion that they were bound by the decision of the third party expert which occurred probably around January 2018. In December 2017 Mr Stern was still emailing Blake Morgan about taking the dispute to the courts [564].

116. The second stage was to agree the instructions to the third party expert [570]. According to the e-mails, Mr Kandler took over the negotiations from Mr Stern and the instructions to the expert were not finally agreed

with Blake Morgan until 13 April 2018 [581] which was two days after the date of the improvement notice. On 18 April 2018 Blake Morgan sent the joint instructions to Mr Whapples of Stripe consulting [231].

117. The joint instructions were forwarded to Mr Pyle (the third party expert) who wrote to the parties' solicitors on 9 May 2018. Mr Pyle explained that he was a building surveyor who could give an opinion on the cause of the collapse of the west facing wall, and invited the parties' solicitors to indicate whether they wished him to proceed [233]. Mr Pyle provided both parties' solicitors with an update on 25 June 2018 stating that the timing of the publication of his opinion report would depend upon how quickly the responses were received from the parties' experts and how comprehensive they were [239]. Mr Pyle added that his instructions did not include an opinion on the continuing structural stability for the building. The update was sent some 14 days after the date for starting the remedial actions as specified in the improvement notice.

118. The Tribunal finds that the agreement was about deciding fault and liability between the Applicant and Lidl for the cause of the collapse of the wall and that the report of the Third Party expert was confined to his opinion on the cause of the collapse. The Tribunal is satisfied that the agreement did not touch upon the works required to render the property safe, and that the Council's HHSRS assessment did not feature at all in the Applicant's handling of its dispute with Lidl. The Tribunal notes that the Applicant was fully aware of the time scales for the improvement notice by the time they finally agreed with Mr Pyle the joint instructions following his letter of 9 May 2019.

119. The Tribunal considers it significant that the Applicant chose not to engage with the Council over its concerns with the hazards posed by the building. The Applicant's first contact with Mrs Longley was through Mr Stern on 23 September 2018 which was a response to the interview under caution by letter, and almost six weeks after the notified completion date for the remedial works.

120. Mr Stern's explanation for not entering into dialogue with Mrs Longley was that he was not familiar with the Council's powers under the 2004 Act. Mr Stern pointed to the fact that FML did not engage the services of a lawyer.

121. The Tribunal does not accept Mr Stern's explanation. Mr Stern is a professional managing agent with an extensive property portfolio. The Tribunal would expect a managing agent of Mr Stern's calibre to have knowledge of the Council's legal responsibilities for housing standards. The Tribunal's expectation is supported by Mr Stern's emails of 23 May 2018 and 15 June 2018 in which he emphasised the requirement to carry out the improvement notice and identified the possibility of a fine [584 & 587]. Finally Mr Stern acknowledged that throughout his dealings in this matter he had the support of the Applicant's solicitor,

Mr Kandler, who in fact took an active part in the negotiations with Blake Morgan for Lidl.

122. The Tribunal finds that Mrs Longley served the improvement notices on the Applicant and Mr Stern. The notices included the Council's reasons for taking enforcement action and the rights of appeal. The Applicant did not appeal the improvement notices.

123. The Tribunal places weight on Mr Fouweather's evidence that the repair to the wall and the window was not contingent on carrying out necessary works to the canopy. Mr Stern acknowledged that he knew this but he said he was advised not to do emergency works by Mr Fouweather until the third party expert had published his report. In the Tribunal's view this evidence demonstrates that the Applicant was not interested in remedying the hazards identified by Mrs Longley in case such actions prejudiced its liability dispute with Lidl.

124. The Tribunal placed no weight on the Applicant's assertion that it was necessary to await the report of the third party expert to establish the cause of the structural collapse before embarking upon the remedial works. The Tribunal has already found that the primary purpose of the report was to establish liability rather than identifying the nature of the required repairs. Next the Applicant adduced no evidence that the remedial actions specified in the improvement notices were inappropriate and dependent upon identifying the cause of the collapse. In any event the Applicant is not entitled to challenge the appropriateness of the remedial actions because this was a matter that it could have raised on an appeal against the improvement notice. The Applicant chose not to appeal which meant that the improvement notice was final and conclusive on matters which could have been raised on appeal by virtue of section 15(6) of the 2004 Act.

125. The final part of the Applicant's reasonable excuse was that at the time it did not meet the requirements of the improvement notice no-one was in occupation of Flat 9 and there was no intention to put anyone in residential occupation until completion of the repairs.

126. The Tribunal is not persuaded of the relevance of the flat being vacant to the issue of reasonable excuse.

127. The Tribunal starts with the circumstances of why the flat was unoccupied. The evidence indicated that the tenant left the flat because he did not feel safe after receiving advice from Mr Rolph of Building Control. Mr Booth, the sub-leaseholder, asserted that the flat was uninhabitable. The Tribunal observes that the Applicant placed great store on the fact that Mr Booth, the sub-leaseholder, was eventually compensated for the financial losses he suffered. The Applicant, however, makes no mention of the plight of the person who lived at the property, and who effectively lost his home. The Tribunal is not convinced that the Applicant is entitled to rely on the flat being vacant which was principally a result of its inaction in putting matters right.

128. The Tribunal, however, considers there is a more compelling reason why the Applicant's reliance on the unoccupied nature of the flat is misguided, which is to do with the nature of the hazards addressed by the improvement notice. The HHSRS assessment conducted by Mrs Longley was not dependent upon persons being in actual occupation of the property. The category one hazard of excess cold is calculated by reference to a potential occupier of a vulnerable group. The category 2 hazard of structure collapse considers risks not only to the health and safety of potential occupiers but also to members of the public.

129. The Tribunal turns its attention to the Applicant's reasons for not addressing the requirements of the improvement notice after publication of the third party expert's report. Mr Stern said he immediately went out to tender for the work with a return date of 14 days, but was let down by the preferred contractor. The Applicant also asserted that it was required to consult with the residential leaseholders and obtain the consent of Lidl before commencing the works.

130. The Applicant did not include a copy of the lease with Lidl in the hearing bundle which meant that the Tribunal was unable to verify the Applicant's claim about requiring Lidl's consent. Even if the Tribunal assumes that consent was necessary, the Applicant's evidence on obtaining consent was contradictory. Mr Kandler obtained the agreement of Blake Morgan to commence the works as soon as the third party expert released his report [582]. Despite this agreement, Mr Kandler required the consent of Lidl to remove the glass panels from the canopy [594] which was not given until 5 October 2018. Similarly the Applicant said that it had to consult with leaseholders over the works which did not tally with Mr Stern's statement that no contribution through the service charge was being sought from the residential leaseholders towards the costs of the works. Given the Applicant's insistence that it was doing everything possible to expedite the works, the Tribunal questions why Mr Stern had to wait for the third party expert's report before going out tender. Presumably it would have been possible for Mr Stern to have completed this step whilst waiting for the report so the Applicant would have been ready to start the works.

131. The Tribunal was not impressed with the Applicant's co-operation with Mrs Longley after 15 August 2018 when she was investigating whether the Applicant had committed an offence. Mrs Longley followed procedure by sending the Applicant an interview under caution which was responded to by Mr Stern on 17 September 2018. Mr Schneck who is a director sent an email informing Mrs Longley to take instructions from Mr Stern because he had been instructed to manage the building. Mrs Longley advised the Applicant that she could not accept the response of Mr Stern because it had to come from a person with the appropriate level of authority in the Company. A "S Brim" replied by email on behalf of the Applicant on 9 October 2018 to the interview under caution. Mrs Longley did not believe that "S Brim" was a director of the Applicant.. The Applicant did not respond to Mrs Longley's

supplementary interview under caution sent 11 October 2018, and to the notice of intent to issue a financial penalty dispatched on 4 December 2018. Mr Stern sent emails on 21 and 23 December 2018 which related to the questions posed in the supplementary interview under caution.

132. Miss Bleasdale contended that Mrs Longley was wrong to reject Mr Stern's response to the interview under caution. Miss Bleasdale referred to the email of Mr Schneck authorising Mr Stern to respond on behalf of the Applicant because FML have been instructed by the Applicant to manage the property. Miss Bleasdale supported her submission with an extract on "*Actual and Apparent Authority"* from Bowstead & Reynolds on Agency 21st edition, and a reference to the case of *R v Turner* (BJ) 61 Cr.App.R.67, CA in Archbold[2].

133. Miss Pattni contended that Mrs Longley had acted reasonably in requiring a person in authority in the Company to answer her questions set out in the interview under caution. Miss Pattni considered that where a criminal offence was alleged only the Directors and or a legal representative instructed on behalf of the Company had the authority to respond to an allegation that an offence had been committed, and to accept a caution if one was offered.

134. The Tribunal accepts that Mr Stern was acting as agent for the Applicant in respect of the management of the property, and that the Applicant was liable for the actions of Mr Stern done within that authority.

135. The Tribunal, however, was unable to ascertain the limit of Mr Stern's authority, and whether it extended to acting for the Company in a "criminal" investigation. Mr Stern's emails with Mr Booth where Mr Stern made reference to the agreement of the Applicant to the amount of compensation due to Mr Booth [537] and the involvement of Mr Kandler, the Applicant's solicitor, in the negotiations with Blake Morgan suggested there were limits to Mr Stern's authority. Also Mr Stern stated that FML had a written contract with the Applicant to manage the property which would have been helpful for the Tribunal to have seen in order to ascertain the extent of his authority.

136. The Tribunal would expect a Director of the Company or a legal representative to answer questions set out in an interview under caution. The Applicant cannot delegate its liability for alleged offences to Mr Stern. In this regard the Tribunal did not consider the case of *R v Turner*, helpful.

137. The Tribunal finds the unwillingness of the Applicant's directors to engage directly with the Council particularly once an investigation into an alleged offence had commenced indicative of the Applicant's disregard of its responsibilities under the improvement notice.

[2] Miss Bleasdale supplied this authority at the reconvened hearing on 8 July 2019.

138. The Tribunal decides that the Applicant's evidence on expediting the works after publication of the third party expert's report contradictory. The Tribunal is not convinced that after 15 August 2018 the Applicant gave urgent attention to the requirements of the improvement notice which again was characterised by its lack of constructive engagement with the Council.

139. The Tribunal summarises its findings on the defence of reasonable excuse:

(i) The Applicant did not comply with the requirements under the improvement notice to start and complete the specified works by the due dates, and its failure continued beyond the issue of the Final Notice of a Financial Penalty on 2 January 2019.

(ii) The Applicant's reasons for not complying with the improvement notice were that "it was handcuffed by the agreement with Lidl" which applied until shortly after 15 August 2018, and thereafter, the Applicant said that it took steps to expedite the works but was thwarted by events outside its control.

(iii) The Applicant did not include in the hearing bundle copies of the various documents relevant to its defence of reasonable excuse. The documents included the lease with Lidl, the agreement with Lidl for a binding adjudication by a third party expert, the letter of instruction to the third party expert, and the contract with FML.

(iv) The Applicant's agreement with Lidl was about deciding fault and liability and that the agreement did not touch upon the works required to render the property safe.

(v) The Council's HHSRS assessment did not feature at all in the dispute between the Applicant and Lidl.

(vi) The Applicant chose not to engage with the Council over its concerns with the hazards posed by the building. The Applicant's first contact with Mrs Longley was some six weeks after the completion date for the remedial works.

(vii) The Applicant's expert accepted that the repair to the wall and the window was not contingent on the canopy.

(viii) The Applicant was not interested in remedying the hazards identified by Mrs Longley in case it prejudiced its liability dispute with Lidl.

(ix) The Tribunal placed no weight on the Applicant's assertion that it was necessary to await the report of the third party expert to establish the cause of the structural collapse before embarking upon the remedial actions.

(x) The Tribunal is not persuaded of the relevance of the flat being vacant. The Applicant's inaction was the principal cause of the flat becoming vacant. Further the HHSRS assessment is not dependent upon persons in actual occupation of the property.

(xi) The Tribunal finds that the Applicant's evidence on expediting the works after publication of the third party expert's report contradictory. The Tribunal is not convinced that after 15 August 2018 the Applicant gave urgent attention to the requirements of the improvement notice which again was characterised by its lack of constructive engagement with the Council.

140. The Applicant's submitted that it had a reasonable excuse because it was doing everything possible to expedite the works but was prevented from doing so because of its agreement with Lidl to await the outcome of the third party report and that when the report was published the works were delayed due to factors beyond its control.

141. Miss Bleasdale argued that the Tribunal should concentrate on why the two timelines specified for the works in the improvement notice were not adhered to. In Miss Bleasdale's view, the Applicant's lack of engagement with the Council about the Notice, although regrettable was not relevant to the reasons for not carrying out the necessary repairs.

142. The Tribunal's findings demonstrate the Applicant's preoccupation with fault and liability took precedence over its obligations under the improvement notice. The Tribunal decided that the Applicant had opportunities to address its obligations under the notice but chose not to do so in case it prejudiced its dispute with Lidl. In this regard, the Applicant's lack of engagement with the Council was telling because it showed its disinterest in rendering the property safe and carrying out the remedial works.

143. **The Tribunal's findings do not support the Applicant's proposition that it was doing everything possible to expedite the works but was prevented from doing so because of matters beyond its control. The Tribunal is satisfied that the Applicant has failed to establish on the balance of probabilities that it had a reasonable excuse for not complying with the improvement notice dated 11 April 2019.**

144. **The Tribunal finds that the Applicant did not comply with the requirements under the improvement notice to start and complete the specified works by the due dates, and its failure continued beyond the issue of the Final Notice of a Financial Penalty on 2 January 2019. The Tribunal is satisfied beyond reasonable doubt that the Applicant had committed the offence of failing to comply with the improvement notice dated 11 April 2019.**

ASSESSMENT OF PENALTY

145. Mrs Longley at [321] explained the steps that she followed in arriving at her decision to impose a financial penalty on the Applicant. Mrs Longley had regard to the Council's Housing Enforcement Policy [393] which required her to complete first a "Decision Matrix" when consideration was being given to prosecution, caution or financial penalty.

146. Mrs Longley supplied a copy of her decision matrix at [32] & [33]. Mrs Longley scored 38 at stage 1 which brought the offence within the category of "proceed to prosecution, simple caution/ civil penalty" rather than take action within the enforcement policy. At stage 2 Mrs Longley weighed up whether the Applicant should be prosecuted which included a civil penalty or offered a caution. Mrs Longley decided that circumstances of the case did not merit the offer of simple caution and recommended a civil penalty.

147. Mrs Longley then considered the factors identified the Guidance at [3.5] and repeated in the Council's Housing Enforcement Policy at [406] for determining the level of the penalty.

148. Mrs Longley decided in respect of the severity of the offence that the most likely consequence from the Applicant's offending was that the harms suffered would be within Class 111 and 1V harm bands such as coughs and colds, pneumonia for excess cold and fractures and loss of a finger for collapse, which merited an assessment of medium harm. Mrs Longley considered the culpability very high relying on the Applicant's total lack of co-operation and communication with the Council. Mrs Longley commented that *"although the Landlord does not have any previous conduct to take into account and was carrying out certain assessments to get work done to the property this was more with a mind to passing the blame than getting the property into a safe condition"*. Mrs Longley then referred to the "Table of Punitive Charges" in the Council's Housing Enforcement Policy [417] and determined the level of penalty at £10,000.

149. Mrs Longley next considered whether the proposed penalty was high enough to punish the Applicant and deter the Applicant and others from committing further offences. In this regard Mrs Longley conducted a financial investigation of the Applicant. Mrs Longley discovered that the Applicant had 22 properties which were valued in 2016 at £38,385,965, and its net worth was £3,651,852 [392].

150. Mrs Longley did not have detailed income information for the Applicant but had details of the service charges and ground rent for Flat 9. Mrs Longley calculated the Applicant's annual income from Flat 9 at £1,492.21 which was multiplied by 14 to produce an annual income for the 14 Flats in the block. The annual income for the block came in at £20,890.94 or £401.75 per week.

151. Mrs Longley formed the view that the penalty should be based on Applicant's income from its property portfolio as a whole because of her finding of the Applicant's high culpability for the offence. Mrs Longley took the weekly figure of £401.75 and multiplied it by the number of properties (22) which resulted in an estimated weekly income of £8,838.47 for the Applicant.

152. Mrs Longley did not consider that a straight addition of the weekly income was sufficiently punitive to have the desired effect on the Applicant. Mrs Longley, therefore, multiplied the figure by 4 producing a sum of £35,358.88 which when added to the £10,000 for culpability and severity supplied a penalty of £45,358.88.

153. Mrs Longley then estimated the alleged pecuniary advantage gained by the Applicant from the offence. Mrs Longley believed that the Applicant had secured an advantage by not carrying out the necessary works when it was required to do so. In this regard Mrs Longley took the estimate of £46,274.00 (VAT inclusive) supplied by Whitley Builders for carrying out the works as the proxy value for pecuniary advantage, which was then added to the £45,358.88 producing a sum of £91,632.88.

154. Mrs Longley added the costs of her investigation of £1,800 to £91,632.88 to arrive at a penalty of £93,432.88. As this proposed figure was above the maximum of £30,000 for a financial penalty, Mrs Longley decided on an amount of £30,000 for the penalty in this case.

155. Miss Bleasdale argued that the approach taken by the Council to the imposition of a financial penalty by inflating it so that it comprised the maximum penalty that could be imposed was entirely wrong in principle. Miss Bleasdale contended that since the imposition of a civil penalty was an alternative to prosecution the Council should have mirrored the manner in which the magistrates' court would have approached a sentencing exercise by applying the principles set down in the Sentencing Guidelines.

156. Miss Bleasdale acknowledged that there was no sentencing guideline for the offence of failing to comply with an improvement notice. In those circumstances Miss Bleasdale suggested the appropriate approach was to have regard to guidelines applied in similar offences. Miss Bleasdale considered that the guideline for offences under the Health and Safety Work 1974 committed by companies supplied a helpful illustration of the approach that should have been followed by the Council when considering the penalty.

157. Miss Bleasdale pointed out that the key difference in the approach adopted in the Sentencing Guidelines from that followed by Mrs Longley was that the fine was set by the assessment of the level of harm and culpability and not by the companies' turnover. Thus in this case Mrs Longley increased the provisional penalty of £10,000 assessed on culpability and severity by a figure which represented the Applicant's

income. The Sentencing Guidelines, although they commence at the same starting point as Mrs Longley with an assessment of the offence in terms of harm and culpability, the Guidelines do not suggest provisional figures for the assessment but instead refer to a grid of guideline penalties which are set for four categories of companies defined by the level of turnover. The four categories are: Large: turnover or equivalent: £50 million and over; Medium: turnover or equivalent between £10 million and £50 million; Small: turnover or equivalent between £2 million and £10 million: Micro turnover or equivalent not more than £2 million. Miss Bleasdale accepted the suggested fines for the offence categories defined by harm and severity increased with the size of the Company's turnover[3].

158. Miss Bleasdale argued that although the Tribunal had rejected the Applicant's defence of reasonable excuse, the Tribunal was entitled to regard the facts relied on by the Applicant as mitigation of the penalty. Miss Bleasdale reminded the Tribunal of the Applicant's case that it was doing its best to progress the works but was prevented from doing so because of its dispute with Lidl. Miss Bleasdale relied on the fact that the property had been made safe from September 2017, and so the delay in carrying out the works did not have serious consequences. In Miss Bleasdale's view, the facts did not show high culpability on the Applicant's part and the risk of harm was low because Mr Booth had been fully compensated for his losses and the tenant had moved out in December 2017.

159. Miss Bleasdale challenged Mrs Longley's method for calculating the Applicant's income. Miss Bleasdale pointed out that Mrs Longley had treated monies collected as service charges as income, which was incorrect because those monies are held on trust for the leaseholders. Miss Bleasdale produced the Applicant's unaudited financial statements which for year ended 30 November 2015, 2016, and 2017 which showed turnovers of £637,582, £11,528,600, and £3,562,965 respectively. Miss Bleasdale contended that the Applicant should be classified as a small company[4] albeit at the high end.

160. Miss Bleasdale also supplied the unaudited financial statements for Fountayne Managing Limited for the years ended 31 March 2016, 2017 and 2018 which showed turnovers of £27,170, £53,175 and £189,385. Miss Bleasdale argued that the financial circumstances of the managing agent was relevant because of The Beth Din decision which determined that FML must indemnify the Applicant for all losses including financial penalties insofar as there is any delay found or wanting on the Applicant's part. Miss Bleasdale referred to the fact that The Beth Din decision was made pursuant to the Arbitration Acts which meant that the decision was final and binding on the parties to the arbitration.

[3] For example: Breach of Duty (Health and Safety) The starting point for Harm Category 1 Offence Very High Culpability was £250K (Micro); £450K (Small), and £1.6m (Medium).
[4] As defined by the Sentencing guidelines.

161. Miss Bleasdale said it was wrong for Mrs Longley to conclude that the Applicant had gained a pecuniary advantage from delaying the works. Mr Stern stated that there had been no saving in delaying the works. According to Mr Stern, the works were as extensive as they would have been if carried out immediately. Mr Stern in his witness statement gave a figure of £89,249.18 which had risen to £145,000 by the time of the hearing.

162. Miss Bleasdale stated that the facts supported a finding of minimal harm to persons affected, and low culpability on the Applicant's part. Miss Bleasdale said that there were no aggravating features in this case. The Applicant had no previous convictions, had taken steps to carry out the works by obtaining three tenders and had accepted responsibility for its failure to comply with the improvement notices.

163. Given the above circumstances, Miss Bleasdale's primary submission was that Mrs Longley's initial assessment using the Decision Matrix exaggerated the Applicant's culpability, and that her decision should have been not to proceed to prosecution or civil penalty and take action within the enforcement policy. Miss Bleasdale further submitted that if it had been right to proceed to prosecution, the correct analysis at stage 2 of the Decision Matrix would have been to offer a simple caution rather than impose a financial penalty.

164. Miss Bleasdale's alternative submission that if a financial penalty was appropriate, the level of penalty imposed by the Council was far too high. Miss Bleasdale pointed out that the Council had imposed the maximum penalty which should be reserved for the most serious cases. Miss Bleasdale invited the Tribunal to cancel the civil penalty, failing that to reduce the civil penalty to a figure appropriate to reflect that the culpability and harm in this case were low.

165. Miss Pattni submitted that the Sentencing Guidelines did not apply to financial penalties. Miss Pattni referred to paragraph 12, schedule 14 of the Housing Act 2004 which required a local housing authority to have regard to the Guidance issued by the Secretary of State.

166. The Guidance required Local Housing Authorities to develop and document their own policy on when to prosecute and when to issue a civil penalty and should decide which option it wishes to pursue on a case by case basis in line with that policy[5]. The Guidance sets out the factors that a local authority should take into account when deciding on the level of civil penalty[6].

167. Miss Pattni asserted that the Council's Housing Enforcement Policy [393] was the relevant document for assessing the appropriateness of a financial penalty and its quantum, not the Sentencing Guidelines. Miss Pattni argued that local authorities were best placed to understand the

[5] Para 3.3
[6] Para 3.5

housing issues in their area which would be reflected in their enforcement policies.

168. Miss Pattni stated that Mrs Longley had identified a category 1 hazard which represented a serious risk to the health and safety of potential occupiers. Further Mrs Longley had concluded that the Applicant was dragging its feet and shirking its responsibilities. Miss Pattni pointed to the evidence of Mr Fouweather who indicated that preventive works were possible and not dependent on the resolution of the dispute with Lidl. Miss Pattni referred to the fact that the tenant lost his home and had to move out because of the condition of the property.

169. Miss Pattni contended that Mrs Longley was correct in her assessment of the offence as medium harm and very high culpability, which, in accordance with the Council's Enforcement Policy, provided a starting point of £10,000. Miss Pattni drew the Tribunal's attention to the Guidance at 3.5(d) which required the penalty to be set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with responsibilities. Miss Pattni pointed out that in the absence of financial information from the Applicant, Mrs Longley had to make assumptions on the financial information obtained from other sources.

170. Miss Pattni argued that the Applicant could not rely on The Beth Din decision to suggest that regard should be had to the financial circumstances of FML rather than those of the Applicant in fixing the amount of the penalty. Miss Pattni said that such a proposition was incorrect as a matter of law. Miss Pattni relied on the decision of *R v NPS London Ltd* [2019] EWCA Crim 228, in which the Court of Appeal (Criminal Division) decided it is the offending organisation's turnover, not that of any linked organisation which should be used when setting a financial penalty for the purpose of the health and safety guidelines.

171. Miss Pattni invited the Tribunal to uphold the decision to impose a financial penalty with a starting point of £10,000 and consider any further adjustments as appropriate.

172. Under paragraph 10 of schedule 14, the Appeal to the Tribunal is by way of a rehearing of the Council's decision and the Tribunal may have regard to matters of which the Council was unaware. On Appeal the Tribunal may confirm, vary or cancel the final notice.

173. The Upper Tribunal in *Dhugal Clark v Manchester City Council* [2015] UKUT 0129(LC) considered the Tribunal's powers on appeal in respect of a Local Authority's decision to refuse to vary an HMO Licence under part 3 of schedule 5 of the 2004 Act. Paragraph 34(2) which deals with the Tribunal's power on HMO appeals adopts the same wording as paragraph 10 of schedule 14 for appeals against financial penalties. In the Tribunal's view, the decision in *Clark* has equal application to appeals against financial penalties.

174. In *Clark* the Upper Tribunal decided that on a rehearing the First-tier Tribunal hears the evidence and makes up its own mind on the facts; and its task is to make its own decision on the application. The Upper Tribunal, however, emphasised that the First-tier Tribunal in making up its own mind is not required to start with a blank sheet of paper and is entitled to have regard to the views of the local housing authority whose decision is under appeal. The Upper Tribunal said how influential those views would be, depended on the subject matter. Later in the decision when considering the weight the First-tier Tribunal should give to Council guidance, the Upper Tribunal determined that Council's guidance was relevant material from which the First-tier Tribunal should be slow to depart.

175. In the light of *Clark* the Tribunal adopts the stance that it should make its own mind on the facts, on whether a penalty should be imposed and if so on the appropriate amount but its decision should be in the context of the Secretary of State's guidance on financial penalties and the Council's Housing Enforcement Policy.

176. The Tribunal is not persuaded of the merits of applying the Sentencing Guidelines to the facts of this case. In the Tribunal's view such an approach is akin to starting with a blank sheet of paper.

177. The Tribunal, however, considers Miss Bleasdale's objection on how the Council dealt with the Applicant's financial circumstances in respect of the penalty when compared with the approach of the Sentencing Guidelines has substance. The Sentencing Guidelines and the Council's Policy and Guidance agree on the principle that the penalty should take into account the financial circumstances of the offender. The difference between them is the means by which this is achieved. The Sentencing Guidelines have separate starting points for the fines for four categories of companies defined by turnover with an escalation of the starting points through the four categories beginning with the company with the lowest turnover. In contrast the starting points in the Council's Enforcement Policy are restricted to the culpability and seriousness of the offence which are then adjusted to reflect the financial circumstances of the offender. According to Miss Bleasdale the approach taken by the Council as in this case had the potential to inflate the penalty without due regard to the seriousness of the offence. Before considering Miss Bleasdale's criticism in detail the Tribunal makes its findings of fact on the factors identified at 3.5 of the Guidance.

178. The Tribunal finds as follows:

Severity of the Offence

179. The Applicant did not appeal the improvement notice which means that the Tribunal is entitled to treat Mrs Longley's HHSRS' assessment as final and conclusive. The Tribunal finds that there was a category 1 hazard of excess cold and a category 2 hazard of structural collapse at the property. In so doing the Tribunal accepts Mrs Longley's

evaluation that the deficiencies in the property increased the level of harm in respect of excess cold from the average of 1 in 340 to 1 in 180 which produced a HHSRS score of 1,820. Likewise the Tribunal accepts Mrs Longley's view that the likelihood of harm and spread of health outcomes from structural collapse at the property was higher than the average which resulted in a HHSRS score of 259 from the structural collapse of the building.

180. The Tribunal when considering the severity of the offence in the context of an improvement notice is examining the likelihood of harm to potential occupiers of the property. In this regard the Tribunal attaches no weight to the Applicant's submission that the risk of harm was negligible because the tenant had vacated Flat 9. The Tribunal is satisfied that the reason the tenant left the Flat was because he was told by the Building Control Officer that it was not safe for him to live there. Further the owner of the Flat confirmed that the property was not capable of being let as it was "uninhabitable".

181. The Tribunal considers relevant that the property remained in a hazardous condition for a significant period of time. The works were not completed until 12 months after the issue of the improvement notice, and until 21 months after the first collapse of the Western elevation.

Culpability and Track Record

182. The Tribunal's findings in respect of the Applicant's defence of reasonable excuse are relevant to the question of culpability. The Tribunal found that the Applicant's preoccupation with its fault and liability dispute with Lidl took precedence over its obligations under the improvement notice. Next the Tribunal decided that the Applicant had opportunities to address its obligations under the improvement notice but chose not to do so in case it prejudiced its dispute with Lidl. Finally the Applicant's lack of engagement with the Council was telling because it showed its disinterest in rendering the property safe and carrying out the remedial works.

183. The Tribunal is also concerned that the Directors, the controlling mind of the Applicant, appeared to accept no responsibility for the actions of its Agent and their unwillingness to co-operate with Mrs Longley's investigation. It is the Applicant which is liable for the offence and its liability cannot be transferred to its managing agent.

184. The Tribunal is satisfied that the Applicant had no previous convictions, and that this was the first time that the Council had dealt with the Applicant under the 2004 Act.

The Harm Caused to the Tenant

185. The Tribunal finds that the Applicant compensated Mr Booth, the leaseholder, for his losses of rental income and excused him from payment of service charges for the period the property was in disrepair

and uninhabitable. The Tribunal, however, is required to weigh its findings in respect of Mr Booth against the circumstances of the tenant who actually lived in Flat 9. In the Tribunal's view, it is significant that the tenant's situation did not appear to feature in the Applicant's radar of persons affected by the hazards in the property. On the evidence presented the Tribunal is satisfied that the tenant had to leave the flat because it was unsafe.

Punishment of the Offender

186. This factor is directed at ensuring the penalty is set at a high enough level to ensure that it has real economic impact upon the Applicant and demonstrate the consequences of not complying with its responsibilities. The Tribunal considers that this factor brings into play the Applicant's financial circumstances. The Tribunal accepts Miss Pattni's submission that the penalty should be based on the Applicant's financial circumstances and not those of FML.

187. Mrs Longley assessed the Applicant's financial circumstances by calculating the weekly income received by the Applicant for the property and by carrying out an investigation of the Applicant's financial assets which revealed that the Applicant had a portfolio of 22 properties valued at £38million in 2016 with a net worth of £3.6 million to the Company. Miss Bleasdale relied on the Applicant's unaudited financial accounts which showed overall that it was a "small company" albeit at the high end with an annual turnover of approaching £10 million.

188. The Tribunal acknowledges there is no prescribed method for calculating the financial circumstances of offenders in relation to financial penalties for housing offences. The Tribunal considers that rental income may be appropriate in certain situations. In this case, however, Mrs Longley treated service charge receipts as income which it is not, being monies held on trust for the leaseholders. The Tribunal has taken a view on the Applicant's financial circumstances in the round and concluded that the Applicant is a company of substance with substantial assets. The Tribunal is satisfied that the penalty should be increased to reflect the Applicant's healthy financial position.

Deter the Offender and others

189. The Tribunal considers the question of deterrence overlaps with the factor of punishment, in that it is designed to ensure that the level of the penalty is at a high enough level such that it is likely to deter the offender from repeating the offence and deter others from committing the offence. The Tribunal considers that the factor of deterrence did not require specific attention in this case provided the Applicant received a financial penalty for its offence which should in itself act as a deterrent.

Remove any Financial benefit the Applicant may receive

190. Mrs Longley assessed the financial benefit to the Applicant from delaying the works at £46,274. Mr Stern said there had been no financial benefit to the Applicant. According to Mr Stern, the works were as extensive as they would have been if carried out immediately. Mr Stern in his witness statement gave a figure of £89,249.18 which had risen to £145,000 by the time of the hearing for the costs to the Applicant in carrying out the works. The Council did not challenge Mr Stern's evidence on financial benefit. The Tribunal finds that the Applicant received no pecuniary advantage from its offending.

EVALUATION OF FINANCIAL PENALTY

191. Mrs Longley assessed the severity of the offence as medium because she considered the harms most likely to occur were within class 111 and 1V harm bands. The Tribunal considers that Mrs Longley's approach was too narrow and did not examine the whole circumstances relating to severity of the offence. The Tribunal found that Mrs Longley's HHSRS assessment showed that the deficiencies in the property increased the likelihood of harm for both hazards above the average likelihood. The hazards which included a category 1 hazard prevailed at the property for a significant period of time which meant that Flat 9 was uninhabitable and forced the sitting tenant to vacate the property. The Tribunal's assesses the severity of the offence as high rather than medium.

192. Mrs Longley assessed the culpability of the Applicant as very high. The Tribunal found that the Applicant put its dispute with Lidl first with the result that it disregarded its responsibilities under the improvement notice. The Tribunal also considered the directors' unwillingness to engage with Mrs Longley on the interview under caution added to the Applicant's culpability. The Tribunal is of the view that an assessment of high culpability should be reserved for serial offenders who are in flagrant breach of the law and are obstructive or try to conceal their offending.

193. The Tribunal is satisfied that the Applicant's conduct did not reach the threshold of a flagrant breach but was sufficiently blameworthy to justify a classification of high culpability. The Tribunal's initial assessment of high culpability has to be assessed against the Applicant's good record of no previous convictions or adverse dealings with the Council over housing matters. The Tribunal, therefore, adjusts its assessment of culpability to medium.

194. As explained earlier the Tribunal should have regard to the Applicant's enforcement policy. The Tribunal's findings on the Applicant's culpability and severity of the offence justify the imposition of a financial penalty.

195. The Enforcement Policy provides a table of punitive charges (based on culpability and harm) which suggests that a penalty of £8,000 should be imposed for an offence of high severity and medium culpability. By

way of comparison, the Applicant adduced the Civil Penalties Enforcement Policy & Guidance Housing and Planning Act 2016 for Nottingham City Council [446] which proposed a range of £6,000 - £15,000 for Offences of High Severity and Medium Culpability. The top of the range determined the upper limit for the penalty including the financial circumstances of the offender. The Tribunal is satisfied that £8,000 is the correct starting point for the financial penalty in respect of the Applicant's offence.

196. The Tribunal now considers the appropriate increase in the penalty to reflect the financial circumstances of the Applicant and to ensure that it has real economic impact and is at a sufficiently high level to deter the Applicant from offending again. Miss Bleasdale was highly critical of the manner in which the Council approached the impact of financial circumstances on the penalty for the Applicant. Miss Bleasdale stated that the approach taken by the Council to the imposition of a financial penalty by inflating so that it comprised the maximum penalty that could be imposed was entirely wrong in principle.

197. The Tribunal acknowledges the force of Miss Bleasdale's argument. The maximum penalty of £30,000 should be reserved for the most serious offences. An offence of high severity and medium culpability does not transform into the most serious category because of the Applicant's financial circumstances. The Tribunal notes that Miss Pattni did not seek to defend the Council's approach. Miss Pattni invited the Tribunal to confirm the financial penalty with a starting point of £10,000 and consider any further adjustments as appropriate.

198. The Tribunal considers that Mrs Longley was at some disadvantage because the Council's enforcement policy did not directly deal with the impact of the financial circumstances on the calculation of the penalty. Mrs Longley resorted to the enforcement policy of Nottingham City Council for guidance in this respect. Mrs Longley overlooked an important feature of the Nottingham policy in that it provided a range of penalty bands for the determined level of culpability and seriousness of harm risk presented by the offence. The upper limit of the band represented the maximum that could be imposed for the penalty including any adjustment for financial circumstances. The logic behind the banding system was to preserve the principle that the maximum penalty should be reserved for the most serious offences. In the Nottingham policy the upper limit was only breached if it was necessary to add to the penalty the value of any pecuniary advantage gained by the offender from the offence. Taking Nottingham's guidance the penalty for an offence of high severity and medium culpability including an adjustment for the financial circumstances of the offender could not exceed £15,000. This meant that the range of £15,000 to £30,000 was preserved for more serious offences,

199. The Tribunal found that the Applicant was a company of substance with substantial and that the penalty should be increased to reflect the

Applicant's healthy financial position. The Tribunal considers that an uplift of £4,000 is about right to give a penalty of £12,000.

200. The Tribunal found that the Applicant gained no pecuniary advantage from the offence.

201. Mrs Longley included the Applicant's investigation costs in the financial penalty. The Tribunal notes that the Council's enforcement Policy states that in keeping with the key principle of ensuring that the costs of enforcement are borne by the offender rather than by good responsible landlords the costs associated with investigating, determining and applying a civil penalty will be reflected in the level of the civil penalty that is imposed. The policy then goes onto to state that the final civil penalty amount is made up of two financial elements: the investigative charge and the punitive charge. Finally, according to the policy there would be a third financial element if the Council successfully defended an appeal at the First-tier Tribunal, the Council would seek to recover its costs before the Tribunal by increasing the civil penalty.

202. Mrs Longley added £1,805.48 to the penalty for the investigative costs incurred by the Council. This amount did not include the Council's costs of defending the Appeal. The Tribunal did not hear submissions on the costs element of the penalty.

203. The Tribunal has examined the investigative costs claimed at [380]. It appears to the Tribunal that the costs are evenly split between the Council's expenses incurred on the investigation and service of the improvement notice and the investigation connected with the financial penalty. The Tribunal suggests to the Council that the costs in connection with the improvement notice should be dealt with separately by means of a demand under section 49 of the Housing Act 2004. This would leave about £900 for the investigation associated with the financial penalty. If this is added to the preliminary figure of £12,000 it would give a penalty of £12,900.

204. The Council supplied no figure for its costs in connection with the hearing. The Tribunal is circumspect about whether there is legal authority for the Council to recover those costs by adding to the financial penalty notice.

205. The final act of the Tribunal is to stand back and decide whether an amount of £12,900 is just and proportionate to the offence. **The Tribunal decides that an amount of £12,000 is an appropriate financial penalty for the Offence to be paid within 28 days.**

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.