FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FK/HNA/2018/0005**
Property	**:**	**35 Cowley Street, Derby DE1 3SL**
Applicant	**:**	**Mr Manir Khan**
Representative	**:**	**Mr A Porte of counsel, instructed by the Smith Partnership, Solicitors**
Respondent	**:**	**Derby City Council**
Representative	**:**	**Ms F Harper, Solicitor**
Type of application	**:**	**Appeal against a financial penalty under section 249(a) of the Housing Act 2004**
Tribunal member	**:**	**Judge C Goodall** **Mr V Ward** **Mr R Chumley-Roberts MCIEH, JP**
Date and place of hearing	**:**	**24 October 2019 and 8 January 2020 at Derby Magistrates Court**
Date of decision	**:**	**21 January 2020**

DECISION

Background

1. On 13 October 2017, Derby City Council ("the Respondent") served an improvement notice under sections 11 and 12 of the Housing Act 2004 ("the Act") on Mr Manir Khan ("the Applicant") specifying two category 1 hazards and one category 2 hazard at 35 Cowley St, Derby ("the Property"). The date for completion of remedial work in respect of the two category 1 hazards was given as 28 February 2017 (which all parties have accepted is an obvious error and must have been meant to be 28 February 2018). No date for completion of the work to remedy the category 2 hazard was given.

2. It is the Respondent's case that the Applicant failed to comply with the improvement notice, and so committed an offence under section 30 of the Act. Accordingly, having served notice of intention to do so, on 2 October 2018, the Respondent served notice of the imposition of a financial penalty of £20,500.00 upon the Applicant.

3. On 29 October 2018, the Applicant appealed against the financial penalty. The appeal was heard at Derby Magistrates Court on 24 October 2019 and 8 January 2020. Both parties were legally represented, as set out above. Both parties provided a bundle of documents for the first hearing and additional documentation (with the Tribunal's consent) for the second hearing. The Tribunal has considered these documents carefully.

Inspection

4. The inspection took place on the morning of 24 October 2019. The Property is a terraced, two storey property on Cowley St, just north of the centre of Derby. Off a front door on Cowley Street itself is a covered but external passage leading to a front door to the house itself set at ninety degrees to the first door and leading to a hallway. There is a ground floor bedroom on the left and a staircase on the right. Just beyond the staircase is a door leading to a living room with kitchen at the rear.

5. The stairs lead to the first floor with a bedroom and small bathroom at the front, a rear bedroom above the living room and a further bedroom above the kitchen.

6. The Property has FGCH throughout with radiators in each room, each with TRV's. There is a gas fired Potterton boiler with heating and water temperature and timing controls. Windows are uPVC double glazed throughout. There is a hard wired fire protection system with a heat detector in the kitchen and smoke alarms in the cellar, hallway and on the first floor landing.

7. Immediately to the right of the second front door is a door to a cellar. There is now a bulb holder and a light switch at the top of the steps (to

illuminate the steps), though the bulb was missing at our inspection. There is a second bulb holder, with operating bulb, set slightly further into the cellar than the bottom of the stairs, though the bottom of the stairs are lit by that bulb. At the far end of the cellar is the electricity meter, which is required to be topped up using a "key meter" system, and the gas meter and electrical distribution board. The tenants therefore require regular access into the cellar. At the time of our inspection, the cellar steps were supplied with a handrail and the nosings were in good condition.

8. Above the stairs on the first floor there is a roof access hatch. We were not able to access the roof space during our inspection.

Law

9. Under the Act, local authorities are given statutory responsibility for assessing and regulating the condition of properties in their areas. In this case, there was no appeal against the Improvement Notice served on the Applicant, so only limited details of the statutory scheme are necessary.

10. The statutory scheme authorises local authorities to carry out an assessment of a property using an analysis tool called the Housing Health and Safety Rating System ("HHSRS"). Under this analytical tool, hazards are rated into categories. A category 1 hazard results in a local authority being required to take action; a category 2 hazard permits action to be taken. One of the actions that may be taken is the issuing of an Improvement Notice under one of sections 11 and 12 of the Act.

11. Section 13 of the Act provides:

13 Contents of improvement notices

(1) An improvement notice under section 11 or 12 must comply with the following provisions of this section.

(2) The notice must specify, in relation to the hazard (or each of the hazards) to which it relates—

(a) whether the notice is served under section 11 or 12,
(b) the nature of the hazard and the residential premises on which it exists,
(c) the deficiency giving rise to the hazard,
(d) the premises in relation to which remedial action is to be taken in respect of the hazard and the nature of that remedial action,
(e) the date when the remedial action is to be started (see subsection (3)), and
(f) the period within which the remedial action is to be completed or the periods within which each part of it is to be completed.

(3) The notice may not require any remedial action to be started earlier than the 28th day after that on which the notice is served.

(4) The notice must contain information about—

(a) the right of appeal against the decision under Part 3 of Schedule 1, and
(b) the period within which an appeal may be made.

12. Failure to comply with an Improvement Notice is a criminal offence under section 30 of the Act, which provides:

30 Offence of failing to comply with improvement notice

(1) Where an improvement notice has become operative, the person on whom the notice was served commits an offence if he fails to comply with it.

(2) For the purposes of this Chapter compliance with an improvement notice means, in relation to each hazard, beginning and completing any remedial action specified in the notice—

(a) (if no appeal is brought against the notice) not later than the date specified under section 13(2)(e) and within the period specified under section 13(2)(f);

(b) (if an appeal is brought against the notice and is not withdrawn) not later than such date and within such period as may be fixed by the tribunal determining the appeal; and

(c) (if an appeal brought against the notice is withdrawn) not later than the 21st day after the date on which the notice becomes operative and within the period (beginning on that 21st day) specified in the notice under section 13(2)(f).

(3) A person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice.

(5) The obligation to take any remedial action specified in the notice in relation to a hazard continues despite the fact that the period for completion of the action has expired.

(6) In this section any reference to any remedial action specified in a notice includes a reference to any part of any remedial action which is required to be completed within a particular period specified in the notice.

(7) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(8) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

13. As an alternative to prosecution, a local authority may impose a financial penalty under section 249A of the Act, which provides:

249A Financial penalties for certain housing offences in England

(1) The local housing authority may 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.

(2) In this section "relevant housing offence" means an offence under—

(a) section 30 (failure to comply with improvement notice),
…

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a) the person has been convicted of the offence in respect of that conduct, or
(b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6) Schedule 13A deals with—

(a) the procedure for imposing financial penalties,
(b) appeals against financial penalties,
(c) enforcement of financial penalties, and
(d) guidance in respect of financial penalties.

(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9) For the purposes of this section a person's conduct includes a failure to act.

14. The procedure that must be followed to impose a financial penalty is contained in Schedule 13 of the Act. There has not been any suggestion in this case that there has been a failure of process on the part of the Respondent in complying with Schedule 13A. We therefore set out paragraph 10 in that schedule which covers the role of the Tribunal in appeals against financial penalties:

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

(a) the decision to impose the penalty, or
(b) the amount of the penalty.

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

(3) An appeal under this paragraph—

(a) is to be a re-hearing of the local housing authority's decision, but
(b) may be determined having regard to matters of which the authority was unaware.

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

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

15. Statutory Guidance has been issued by the Department for Communities and Local Government dated April 2017 which was included in the Respondents bundle. Also included was a policy adopted by the Respondent for determining financial penalties in their area.

The Improvement Notice

16. The Notice is dated 13 October 2017. The front page recites that the Respondent is satisfied that two category 1 hazards and one category 2 hazard exist, and it states that remedial action is required as set out in the schedules attached to the Notice. At the bottom of the front page is a statement that "A person, on whom an improvement notice is served, commits an offence if they fail to comply with it and are liable on summary conviction to a fine not exceeding level 5 on the standard scale." Appeal

rights are notified with the time scale of 21 days beginning with the date the improvement notice was served.

17. There are two further pages of text setting out in more detail the legal and procedural consequences of an improvement notice, including advice to obtain independent advice, and details of the penalties that can be imposed if a person fails to comply with the notice.

18. The Notice then contains three schedules, a little confusingly numbered schedules 1.1, 1.2 and 2.

Schedule 1.1

19. Schedule 1.1 deals with the hazard of falls on stairs. Three deficiencies are given being:

    a. There is no handrail to the cellar steps
    b. Some of the nosings to the cellar steps are missing
    c. There is no lighting to the cellar steps

20. Remedial action required is:

    a. Provide and fix a handrail to the cellar steps
    b. Provide and secure nosings to the cellar steps of suitable material
    c. Engage the services of a competent person to provide and fix a suitable light to the cellar steps with controls at the top and bottom of the stairs

21. Remedial action is required to be started on 20 November 2017 and completed by 28 February 2017. As already identified, this second date is clearly an error. It must mean 2018, and the Applicant did not seek to take this point.

Schedule 1.2

22. This schedule deals with the hazard of excess cold. Deficiencies are identified as:

    a. The heating system is difficult to control as there are no thermostatic radiator valves (TRVs) to the radiators
    b. The EPC certificate indicates there is only 50mm or insulation to the loft

23. Remedial action required is:

    a. Provide and fix thermostatic radiator valves (TRVs) to the radiators to the living and bedroom.

b. Examine the roof space to determine whether there is sufficient insulation in place to comply with current Building Regulations. If not, carry out the following works.

24. There follows a fairly detailed specification of the works required to insulate the loft, which it is not necessary to set out in full.

25. The same start and completion dates as are set out in schedule 1.1 are given; start by 20 November 2017 and complete by 28 February 2018.

Schedule 2

26. This schedule describes a category 2 fire hazard. The deficiencies are:

a. No automatic fire detection in the house and cellar
b. The door between the kitchen and living room is single glazed and does not provide 20 minutes protection from fire

27. Remedial action is:

a. Provide and install a fire alarm and detection system in accordance with the latest edition of BS 5839-6: Grade Category LD2. Five aspects of the specification are given, which again it is not necessary to list.
b. Either replace the door between the living room/dining room and the hallway with a solid door capable of providing minimum 20 mins protection from fire, or provide and fit a fire door to meet test requirements of BS 476 (FD30S type).

28. This schedule does not state any requirements for a start date or completion date of the required works.

Facts

29. In June 2017, the Respondent was notified that the Property might be being occupied as a house in multiple occupation ("HMO"). Accordingly, after establishing that the Applicant was the owner, a statutory inspection under section 239 of the Act was arranged for 2 August 2017.

30. The Applicant and the Respondent's Housing Standards Officer, Patricia Hodgkinson, met at the Property on that date. The recollections of that meeting differ. Mrs Hodgkinson says that she carried out an inspection under the HHSRS rating system and that her findings were that the cellar was poorly lit, there was no handrail for the cellar steps, the nosings of the steps were in poor condition, there were no TRV's fitted to the radiators, there was no evidence of loft insultation, there was no automatic fire protection system, there were insufficient electrical sockets in some rooms, and the door between the hallway and the living room did not provide adequate fire protection. She did establish, at that visit, that the

Property was not being used as an HMO, as it was being occupied by two sisters and the son of one of them as a family unit.

31. The Applicant's recollection is that he was told by Mrs Hodgkinson that he needed to arrange for three issues to be sorted out, being the fire door, an extra socket in one bedroom, and the fire alarm system. In his evidence to the Tribunal, the Applicant used the phrase "three or four jobs" in relation to the works he understood he had to carry out. It is therefore not clear whether there was a fourth job mentioned on that day, but it is clear that the Applicant became aware fairly soon after the inspection that Mrs Hodgkinson also expected the TRV radiator valves to be replaced. We find that the Applicant was aware of at least these four requirements following the 2 August inspection.

32. Regarding the requirement for a fire door, the Applicant's recollection of the conversation with Mrs Hodgkinson also differs from hers. The Applicant is adamant that Mrs Hodgkinson asked for, or at least did not object to, a fire door "with toughened glass". Mrs Hodgkinson says she required a solid door. The difference was possibly significant for the Applicant because the existing lounge door as on 2 August had glazing, so he possibly thought he should replace like with like. The Applicant says he intended to put that door between the kitchen and the living room, and he says he asked if that would be acceptable and was told it would be. It does seem to be the case that the Applicant was intent on installing a new door with glazing, following the meeting on 2 August.

33. Although the Respondent's case was that an HHSRS calculation was carried out following the 2 August inspection, no copy was provided to the Tribunal. There must be some doubt as to whether a formal score was calculated following that inspection.

34. On 16 August 2017, Mrs Hodgkinson wrote to the Applicant to record the results of her inspection on 2 August 2017. In that letter, she said the Property had two hazards, being Excess Cold (requiring TRV's to be fitted on radiators and loft insulation), and Fire Safety (requiring installation of an automatic fire detection system, more electrical sockets, and a new fire door between the hall and living room).

35. There was no mention in that letter of the Falling on Stairs Hazard. We were also supplied with Mrs Hodgkinson's written notes of the 2 August 2017 inspection. Those notes contain no reference to the cellar. The Applicant said he did not recall Mrs Hodgkinson inspecting the cellar on 2 August 2017. This evidence leads us to find that Mrs Hodgkinson did not inspect the cellar (or presumably even discover it) on 2 August 2017, and her concerns about it were not communicated to the Applicant on that date.

36. The Applicant's evidence concerning the 16 August letter is that he did not read it. He does not deny receiving it; his explanation is that he knew what jobs were required from his meeting so did not need to read the letter.

37. Between 2 August and 13 October 2017, the Applicant arranged for an extra electrical socket to be installed in one of the bedrooms. He also arranged for the door between the hall and living room to be removed and reinstalled between the kitchen and the living room. A new door with glazed panels was fitted between the hall and living room.

38. Mrs Hodgkinson arranged a follow up visit to the Property for 4 October 2017, giving notice of the inspection under section 239 of the Act. The Applicant did not attend this inspection. We find that as a result of this visit, Mrs Hodgkinson carried out an HHSRS calculation and found there to be three hazards at the Property. This calculation was provided to the Tribunal. Although it is not dated, as it contains a reference to the Falling on Stairs Hazard, which was not mentioned in the 16 August letter or referred to in Mrs Hodgkinson's notes of the 2 August inspection, it cannot be the calculation alleged to have been carried out on 2 August. It must be the one carried out following the 4 October inspection.

39. The HHSRS assessment identifies the three hazards referred to in the Improvement Notice. The Falling on Stairs hazard scored 2,801, the Excess Cold hazard scored 1,871, and the Fire Hazard scored 636. The first two are therefore category 1 hazards, and the last is a category 2 hazard. As a result of the visit, Mrs Hodgkinson issued the Improvement Notice on 13 October 2017.

40. The Applicant accepts that he received the Improvement Notice, but says he misplaced it, and he therefore had to request a further copy at about the end of November, which was duly supplied. He says he only then realised that the notice required additional works beyond those he was told he should carry out at the 2 August meeting. He had of course by then installed a new electrical socket in one bedroom, and he had replaced the door between the hallway and the living room.

41. The Applicant did not appeal the Improvement Notice.

42. Between September and the end of November 2017, the relationship between the Applicant and his tenants became turbulent, and they reached an agreement that the tenants would leave. We heard evidence at the hearing from Helen Fisher, one of the two sisters living at the Property in summer 2017. We make no findings regarding the merits or otherwise of the dispute between the Applicant and the Fishers. We do find that the tenants left actual occupation on or about 17 October 2017, but we also find that some belongings were left. The parties to the tenancy were unable to sort out a handover of the keys, which were posted back through the letterbox of the Property. The Applicant said he did not have a spare set. Out of a concern that he might be accused of unlawful eviction, it was

a few weeks before the Applicant arranged for a locksmith to obtain access and the Applicant repossessed the Property. We find that he regained possession by at least 13 December 2017 and that he could have obtained access earlier than that; probably in mid-November.

43. On the Applicants evidence, it was therefore not until some time in December 2017 that he was able to address the Improvement Notice. We find that in December 2017 the Applicant made some efforts to do some of the works required in the Improvement Notice. He asked for advice from his contractor about the fire detection system and was advised that the existing battery operated some alarms were not adequate and a hard-wired system should be installed. He asked for advice about works to the cellar steps from a contractor, who suggested he ask the Respondent for more detail about the specification required. He emailed Mrs Hodgkinson on 13 December 2017 to ask if 10 year battery operated smoke alarms would suffice. At the hearing, the Applicant said that he and Mrs Hodgkinson had discussed the Respondents requirement during a telephone conversation in December 2017 during which he had asked for clarification on the detail of the works required in the Improvement Notice, particularly in relation to the cellar steps. He accepted that during that alleged conversation he had not mentioned TRV's or roof insulation.

44. The Respondent's evidence suggests that the Applicant started to address the Improvement Notice a little earlier than December 2017. The request for a new copy of the Improvement Notice was dated 27 November 2017. An email concerning the location of smoke alarms was received on 24 November 2017. Mrs Hodgkinson replied on 27 November 2017 to specify what she was looking for. The Applicant's email of 13 December regarding the smoke alarms had really already been replied to in the 27 November 2017 email from Mrs Hodgkinson, but nevertheless she replied to the 13 December 2017 email within 3 hours of receiving it, giving the clarification sought. Mrs Hodgkinson denied that the alleged December 2017 telephone conversation took place.

45. Our finding is that the Applicant could be excused delaying turning his attention to compliance with the Improvement Notice until he had resolved the dispute with his tenants, but that he could have, and did start the process of arranging for the works to be carried out at the end of November 2017 and certainly by 13 December 2017. Bearing in mind that Mrs Hodgkinson responded to all emails from the Applicant in a timely manner, and with straightforward answers, we do not accept that the Applicant was unable to obtain clarification about any works he was required to do as he could have asked by email. To the extent that it matters bearing in mind the previous sentence, we prefer Mrs Hodkinson's evidence about the December 2017 telephone call to the effect that we think it probably did not take place.

46. The next event of significance is that the Property was re-let through an agent on 26 January 2018. The new tenants provided a statement to the

Respondent but did not attend the hearing. We have not taken into account the content of any of that statement, but we have noted that the Applicant was willing to re-let prior to complying fully with the Improvement Notice. Unfortunately, the Applicant's relationship with those new tenants had broken down by April 2018.

47. On 22 February 2018, Mrs Hodgkinson informed the Applicant of a proposed reinspection of the Property under section 239 of the Act on 1 March 2018. In fact that had to be rearranged due to inclement weather, and it took place on 7 March 2018. There is a dispute about whether the Applicant was notified of that inspection. He was not present at it. At that inspection, Mrs Hodgkinson told us, she found that the following works had not been carried out: provision of a handrail to cellar steps, repair nosings to cellar steps, any work to the lighting over the cellar steps, provision of TRV's to radiators, and inspection and insulation of the roof-space. She also found that required work to install a fire door between the hall and the living room had not been completed to her satisfaction, nor had a fire protection system been provided.

48. At the hearing in October 2019, the Applicant hotly disputed that the fire protection system had not been installed by 28 February 2018. The Tribunal asked for further evidence to try and resolve this disputed factual situation. We were provided with a witness statement from a Mr Musshy Sadiq of M & M Joinery and Property Maintenance stating that a firm called M.A.R. Electrical and Plumbing fitted the smoke alarm on 28 February 2018. A rather unsophisticated receipt dated 28 February was produced from M & M rather than M.A.R. Electrical and Plumbing. A more formal certificate from M.A.R. dated 8 March 2018 was also produced. There is no doubt that at some point between 28 February and 19 April 2018, a new, hard wired fire protection system was installed at the Property complying with that element of the Improvement Notice, as Mrs Hodgkinson re-inspected and confirmed this in an email dated 19 April 2018. For reasons which appear below, it is not relevant whether the Applicant's or the Respondent's version of the date of installation of the fire protection system is correct and we make no finding on that.

49. As the Applicant had not, in the view of the Respondent, complied with the Improvement Notice, a formal interview under caution was conducted with him on 11 May 2018.

50. On 26 June 2018, Mrs Hodgkinson served notice of intention to carry out works in default under Paragraph 4 of Schedule 3 of the Act.

51. On 8 August 2018, the Respondent served a notice of intention to impose a financial penalty under section 249A of the Act. Representations were received from the Applicant's solicitors, the Smith Partnership, by letter dated 6 September 2018. There was then an exchange of information between the Respondent and the Smith Partnership, culminating in the service of a final notice imposing a financial penalty by letter dated 28

September 2018. The Smith Partnership explained in that exchange that the Applicant had not been able to complete works because of access problems and due to inclement weather.

52. On 11 September 2018, works in default, at a cost of £1,903.75 plus VAT were carried out by a contractor engaged by the Respondent, comprising:

    a. New handrail to cellar steps
    b. Cut back worn nosings to cellar steps and provide and fix new nosings
    c. Install a lighting point and fitting with switch over the cellar steps
    d. Provide and fix TRVs to the radiators in the living room and bedrooms
    e. Insulate the loft to BS 5803
    f. Provide and fit fire door with 30 min protection between hallway and living room

53. A recitation of the facts requires mention of the Applicant's personal circumstances, on which we were provided with additional evidence for the second day of the hearing. The Applicant was previously an account manager for Pitney Bowes. He describes this as a "good job at a good salary". However, at some point in the last few years, his mental health deteriorated, and he had to give up this work. He was first diagnosed with clinical depression as far back as 2009, and again in May 2014. He self-referred for help in June 2015 following a relationship breakdown and again in January 2016, and February 2017. Covering the period with which this case is concerned, he again asked for help in February 2018 with low mood and anxiety. In August 2019, he was accepted onto a CBT programme run by Trent Psychological Therapies Service, following diagnosis of a depressive disorder with moderate to severe severity. There was however no suicidal ideation.

54. Financially, the Applicant says he relies upon income from property and support from his two adult daughters. He says he receives no state benefits. He provided a bank statement which he says is his only bank account. The statement does not show a balance on the account. He said he had two investment properties (one being the Property), but we were given no details of their value or whether they are mortgage free.

55. We asked the Applicant to tell us the extent of his professional expertise in property management. He is not a member of any landlord associations, and did not seek professional help when he received the Improvement Notice. He is not familiar with the Housing Act 2004. He talks to agents occasionally and says his daughter is his agent and he cannot afford a professional agent.

The Financial Penalty Notice

56. The Notice itself imposed a penalty of £20,500. No issue has been raised regarding its content or the process of it being issued.

57. The Respondent provided two documents to explain the penalty imposed. The first is a general policy on civil penalties as an alternative to prosecution, which was adopted at an Urban Renewal Cabinet meeting held on 11 October 2017 ("the Policy"). The second is an implementation document dated 27 July 2018 which applies the Policy to this case ("the Implementation Document").

58. The Policy states that the amount of a financial penalty should take into account the following factors:

- Punishment of the offender
- Deterrence of the offender from repeating the offence
- Deterrence of others from committing offences
- Removal of any financial benefit to the offender
- Severity of the offence
- Culpability and track record of the offender
- Harm caused to the tenant

59. The first step in the Policy is to select a level of harm. The Respondent has selected four levels, being very high (extreme harm outcomes), high (severe harm outcomes), medium (serious harm outcomes) and low (moderate harm outcomes).

60. The second step is to determine the culpability of the offender, by allocating the culpability into one of four levels, being deliberate, reckless, negligent and low or no culpability.

61. Having completed steps one and two, a starting point financial penalty is determined from a pre-fixed matrix. This fixes a penalty of £27,500 (maximum is £30,000) for a deliberate offence with a very high level of harm, down to £2,500 for an offence with a low level of harm for which there was low or no culpability.

62. The Policy then suggests adjustment for aggravating and mitigating circumstances. There is a non-exhaustive list of seven aggravating factors and eight mitigating factors. "Normally", the Policy states, the penalty would be adjusted by £500 upwards or downwards for each factor.

63. The Implementation Document repeats the approach taken in the Policy (though the minimum sum on the pre-fixed matrix has been increased to £3,000). For this case, the officers determined that this offence warranted classification as a high level of harm, with culpability at the level of "reckless", which produced a tariff of £20,000 on the Respondent's matrix.

64. The calculation in the Implementation Document then adjusts for mitigating and aggravating factors. Two mitigating factors were identified, being no previous convictions and no history of financial penalties being

imposed. Three aggravating factors were identified being that work in default was required, that the mental and/or physical health of the tenants was affected as perceived by the tenants, and a history of ignoring requests for repairs from tenants. That therefore resulted in an additional £500 to the penalty.

The Applicant's submissions

65. Mr Porte's first submission is contained in the response to the Respondent's case document. The submission is that the Respondent has failed to establish compliance with the public interest test for consideration of prosecution bearing in mind the strength of the defence of reasonable excuse that the Respondent should have appreciated, and bearing in mind the Applicant's mental health. The argument is that a prosecution should never have been brought, and as a financial penalty is akin to a prosecution, the financial penalty should not have been imposed.

66. The second submission is that the Applicant has a reasonable excuse for not complying with the Notice. The submission is that (a) he had difficulties understanding what he had to do, (b) he had difficulties obtaining clarification from the Respondent, and (c) he had difficulties gaining access to the Property.

67. Thirdly, Mr Porte adopted a point initially raised by the Tribunal concerning the lack of compliance with the requirements of sections 13(2)(e) and (f) of the Act in Schedule 2 of the Improvement Notice, which omitted a start and end date for the remedial works. It would not be possible, he suggested, for a conviction for failure to comply with that part of the Improvement Notice to be obtained because no date for compliance with that Schedule had been given.

68. The fourth limb of the Applicant's submissions, which only comes into play in the event that the Tribunal does not accept the previous submissions, is that the penalty imposed should be reconsidered. Mr Porte criticised the high starting level of £20,000, pointing out that the maximum for the most serious offence imaginable would only be £30,000, so a starting point of two thirds of that for this offence was excessive. He also referred to the Respondents Policy document on fixing financial penalties (identified above), pointing out that there were eight mitigating factors listed in that policy, six or seven of which applied to the Applicant, whereas the Respondent had only identified two mitigating factors in its Implementation Document. His general submission was that the level of harm in this case was low to medium, and the culpability factor should not fall above negligence. The right starting point was therefore in the range £5-10,000, which should then be mitigated down. He asked us to take particular note of the Applicants mental health difficulties, genuine confusion over works required, access problems, and the clear attempts the Applicant was making to comply with the Notice.

The Respondent's submissions

69. On the specific point regarding missing dates on Schedule 2 of the Improvement Notice, Miss Harper asked the Tribunal to take the view that the date for completion of the Schedule 2 works had been omitted, it was clear that the intended completion date was 28 February 2018, and the Applicant had not been prejudiced by the omission. No authority establishing that the Tribunal should ignore the omission was provided.

70. Miss Harper's case on the substance was that if the Applicant really disputed the contents of the Improvement Notice, his remedy was to appeal it and ask the Tribunal to vary it or revoke it. As he did not appeal, he must be taken as accepting that the works set out needed to be done. She said that on the evidence, there was virtually no contact from the Applicant until after the date for compliance with the Notice had expired. The truth was that the Applicant had simply decided he did not want to do the work required. On the evidence, the Applicant had access between at least December 2017 and 26 January 2018. When he decided to put in new tenants on 26 January 2018, he was preferring to expose that new tenant to identified hazards to make money rather than providing a property that was compliant with health and safety requirements.

Discussion and determination

71. The first issue for the Tribunal to decide is whether there is any merit in Mr Porte's first submission to the effect that the public interest test should have been applied to produce a decision that no prosecution (and so no financial penalty) should have been brought, bearing in mind the defence, and the Applicant's mental health.

72. We are unable to see any basis for it to be in the public interest for the Penalty Notice not to be issued. On the contrary, it seems to us to be in the public interest for landlords who fail to comply with Improvement Notices to be held accountable for their failures. We appreciate that the Applicant does have mental health issues, and in the event of this causing a severe disability, we also agree that this can and should be considered when considering enforcement action. Looking at all the circumstances of this case though, we think that the Respondent was justified in proceeding to issue a financial penalty notice.

73. The next question is whether the Applicant committed an offence under section 30 of the Act in failing to comply with the Improvement Notice. We must be satisfied beyond reasonable doubt that he did. On his own admission, this question goes to the issue of reasonable excuse, for the Applicant admitted that he had not complied with the requirements of Schedules 1.1 and 1.2 of the Improvement Notice by 28 February 2018.

74. Before answering this question, we are of the view that an allegation of failure to comply with Schedule 2 of the Improvement Notice cannot be

sustained. That schedule was, in our view, defective, as it did not contain a date for work to be started and completed as is required by section 13(2)(e) and (f) of the Act. Section 30(2) of the Act makes it very clear that a critical element of the offence is that the work is not completed within the dates set out in compliance with section 13(2)(e) and (f). If those dates are not present, section 30(2) is not fulfilled. In fact, the work to install an automatic fire detection system was completed by the Applicant by the latest of 13 April 2018. The Applicant had replaced the door in around October 2017 (though with a door that was not regarded as satisfactory to the Respondent). We cannot determine beyond reasonable doubt that the Applicant had committed a section 30 offence in relation to Schedule 2 of the Improvement Notice.

75. So we turn to Schedules 1.1 and 1.2. There are three remedial actions required under Schedule 1.1. There is possibly a scintilla of doubt about what the Respondent was looking for in relation to the light over the stairs, for it is difficult to see what purpose is served by the installation of a light switch at the bottom of the steps. But we consider that after a moments thought, it becomes easy enough to work out that a light was required at the top of the steps. The existing cellar light did provide some light as one reached the bottom of the steps, but it was somewhat gloomy when the steps were viewed from the top. And there can have been no doubt about the requirement for a handrail. The Applicant said he did not know which side to install it, but the Respondent did not specify, so the Applicant would have complied with the Notice whichever side he installed it. If there was really any doubt, why not install a rail on both sides? The nosings should have been very straightforward for any competent builder to repair.

76. On Schedule 1.2, the requirement to install TRVs to the living room and the bedroom radiators is extremely simple and speedy to interpret and implement. We think the specification of what was required regarding loft insulation is perfectly straightforward to a competent generalist builder or specialist insulation firm. It would have been straightforward for the Applicant to comply without the need for any further clarifications.

77. So why did the Applicant not comply? The three reasons given were the need to understand the requirements, the need to clarify the requirements, and the inability to gain access. The first two reasons are really the same point. We reject these reasons. We consider that the wording of the Improvement Notice was clear enough for a competent landlord or his contractor to be able to both understand and implement the requirements without the need for any further clarification from the Respondent. Further we consider that if clarification had been needed, it would have been provided by Mrs Hodgkinson via email.

78. We also reject the argument about access. We have found that the Applicant had unfettered access to the Property from 13 December 2017 at the latest. At that point he had two and a half months to do the work –

plenty of time. He cannot use the argument that there were new tenants from 26 January 2018 for it was his decision to put them in rather than keeping the Property vacant until the Improvement Notice work had been complied with.

79. The truth, so far as the Tribunal is concerned, is that the Applicant significantly failed to understand his obligation as a landlord to comply with his legal obligations. He seemed to bury his head in the sand. He did not even read the letter of 16 August 2017, which set out at least some of the requirements of the Improvement Notice. He didn't read the Improvement Notice until the end of November 2017. When he did, he appears not to have noticed that non-compliance is a criminal offence. We think he made very poor judgements in his lack of activity to comply with the Notice. Rather than getting on with the works, he obfuscated and delayed. It is entirely his fault that he did not comply with the Notice. It is not edifying that even now he seeks to attach blame to the Respondent for his own non-compliance. We find that there is no reasonable excuse for not complying with Schedules 1.1 and 1.2 of the Improvement Notice and we find that the offence under section 30 in relation to those two schedules is made out beyond any reasonable doubt.

80. We now consider whether the correct penalty was imposed. Looking at the factors that should determine the penalty, we take account of the following factors:

    a. This is the Applicant's first offence;

    b. This offence is not severe. In relation to falling on stairs, there was always some light to the cellar steps, albeit that we agree it required some improvement. The most serious deficiency is the risk of falling on the stairs due to the absence of a handrail and defective nosings. The excess cold hazard is substantially less severe than the worst type of this hazard, as there is full gas fired central heating with radiators in every room and with controls on the boiler, double glazing throughout, and at least some loft insulation according to the EPC. Account needs also to be taken of the fact that the Schedule 2 deficiencies can no longer be taken into account.

    c. We do regard the applicant as carrying a significant degree of culpability. We refer back to our comments in paragraph 79.

    d. So far as deterrence is concerned, and looking at the general significance of the legislation on housing, we are of the view that financial penalties can be properly used to reinforce a message that property management needs to be ever more professional. The Applicant demonstrated in this case that he is significantly short at the moment of the standard of professionalism that is required of a property manager. The imposition of a financial penalty will bring to his attention the need for him to develop his expertise, or engage

professional support, such that he (and others) will be deterred from committing relevant housing offences by the size of the penalty he will have to pay.

e. We do take note of the fact that the Property continued to have identified hazards which the Applicant had a legal obligation to resolve from 28 February 2018 until September 2018, when they were resolved through works in default, and yet the Applicant was in receipt of rent throughout that period knowing of the deficiencies and deliberately not resolving those deficiencies. To some extent, the penalty will need to deprive the Applicant of an element of this profit earned during that period.

81. So far as the Respondent's policy is concerned, we have a concern about the harm factor that is used. We don't disagree that potential harm is a factor that can be considered, but when assessing potential for harm, it is surely necessary to also assess the likelihood of that harm arising. A hazard may carry a risk of very serious injury, or harm, but there surely has to be a recognition that the penalty arising should be greater if the harm was very likely to arise as against extremely unlikely to arise. That factor is not reflected in the Respondent's policy.

82. We also consider that the tariff for mitigation and aggravating circumstances is not proportionate. We think it is rather too simplistic to allocate each an identical value and then to apply that value in a formulaic way. There are degrees of good character and conduct, health conditions, lack of maturity, compliance with requests from tenants, and non-compliance with warnings, which should be reflected in the extent to which mitigating and aggravating factors are taken into account. It is also the case that £500 as a proportion of £20,000 is much less significant than as a proportion of £5,000. It may be that the tariff for a mitigating or aggravating factor should be a proportion of the penalty rather than a fixed sum.

Decision

83. Taking all the above discussion into consideration, our decision is that we prefer to take the starting point for the penalty as £10,000. It is at least arguable that this offence is at a medium level of harm and the Applicants behaviour is at the level of negligent. We reduce that to reflect the Applicant's mental health, his previous good character, no history of penalty charges, and his endeavours to do some works. Against that we think that the re-letting of the Property prior to completion of the Improvement Notice works, and the fact that the works were not undertaken even after expiry of the Notice count against him. Weighing these factors up together, we think a further discount of £4,000 is warranted, leaving a financial penalty of £6,000. We do not make any adjustment in relation to the Applicant's financial circumstances, as we

were unconvinced that we had received full disclosure about those circumstances.

84. At the October 2019 hearing day, we were told that the Respondent would recover its costs of the works in default from the financial penalty. So far as this Tribunal is concerned, our decision does not restrict the Respondent's right to recover its works in default costs via Schedule 3 of the Act, should it wish, and obviously provided it complies with the procedural requirements in that Schedule.

85. We therefore order that the Respondent's Notice Imposing a Financial Penalty dated 2 October 2018 be varied. The penalty imposed is reduced from £20,500 to £6,000. The date for payment is within the period of 28 days beginning with the day after this decision is sent to the parties.

Appeal

86. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)