FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00GF/HNA/2021/0015**
HMCTS Code	**: V: Remote CVP Platform**
Property	**: Studio 4, 1 Winifred's Drive Donnington, Telford, TF2 8BB**
Applicant	**: Regbinder Singh Thiara**
Representative	**: Andy Craft**
Respondent	**: Telford and Wrekin Council**
Representative	**: Amy Groves Solicitor**
Type of Application	**: Appeal against a Financial Penalty Section 249A and Schedule 13A Housing Act 2004**
Tribunal Members	**: Judge T N Jackson Mr R Chumley- Roberts MCIEH, J.P**
Date of Hearing	**: 27th January 2022**
Date of Decision	**: 21st February 2022**

DECISION

Crown Copyright 2022

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing which had been consented to by the parties. The form of remote hearing was Video (V: CVP REMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing. The documents referred to were contained within the parties' bundles, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal, the Tribunal directed that the hearing be held in private. The Tribunal had directed that the proceedings were to be conducted wholly as video proceedings; it was not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who were not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction was necessary to secure the proper administration of justice.

Decision

We vary the Final Notice given to the Applicant from £10,000 to £6250.

The date in the discount provisions within the Final Notice are varied to the date 28 days after the date of this Decision.

Reasons for decision

Introduction

1. By an application received on 7th October 2021, Regbinder Singh Thiara, ('the Applicant'), applied to the Tribunal to appeal a decision to impose a financial penalty and the amount of that penalty under the provisions of paragraph 10 of Schedule 13A of the Housing Act 2004 ('the Act'). The financial penalty had been imposed on him under section 249A of the Act by the Borough of Telford and Wrekin ('the Respondent') in respect of the Property known as Studio 4, 1 Winifred's Drive, Donnington, Telford TF2 8BB ('the Property').

2. The Tribunal issued Directions on 14th October 2021. The Directions confirmed that due to the Covid-19 Pandemic, an oral hearing would be held via remote video conferencing and that the Tribunal would not inspect the Property. The Tribunal received bundles from the Applicant's representative Mr Craft and the Respondent's representative. Further submissions and statements were received from the Respondent on 17th January and 20th January 2022 and from the Applicant's representative on 21st January 2022. During the hearing, we also received from the Respondent's representative copies of the Hazard scores and HHSRS Scoring Sheet for a section 12 Improvement Notice and an email dated 16th September 2021 from Ms Harley to the Applicant enclosing the Final Notice of Civil Penalty and accompanying Statement of Reasons and invoice.

Background

3. The Property is situated within a building which has been converted into residential units including 2 self -contained flats and 5 studios. A 6th studio was the subject of a Prohibition

Order (see below). The Applicant is the registered proprietor of the freehold title of the building.

4. Following complaints regarding the standards of the residential accommodation in the building, from approximately June 2019 Mr Tallon, a Compliance Officer from the Respondent Council, carried out inspections of the units. In his opinion, as at November 2019, the required remedial works, which had been communicated to the Applicant, had not progressed or progressed to a satisfactory standard.

5. Improvement Notices were served in relation to Flat 1, Studios 2, 3, 4, and 5 and a Prohibition Order was served in relation to Studio 6 as it had been converted from an office to a self- contained let in breach of planning and building control permissions. The Applicant appealed against the Improvement Notices in relation to Flat 1 and Studio 3 and the Improvement Notices were varied following a determination by the Tribunal on 16th October 2020 (BIR/OGF/HNA/2021/0011 and BIR/OGF/HNA/2021/0012). Some of the Improvement Notices had since been revoked as the necessary works had been completed.

6. In relation to this Property, following an inspection of 25th of November 2019, on 26th November 2019, Mr Tallon served two Improvement Notices. An Improvement Notice under section 11 of the Act was served in relation to a Category 1 Hazard, namely Fire Safety, as the fire alarm system was not functioning satisfactorily. It is common ground that this section 11 Improvement Notice was revoked by the Respondent on 11th May 2021 after the works were complied with (see paragraph 8 below) and this Notice was not the focus of the Financial Penalty. A further Improvement Notice under section 12 of the Act was served on the same date in relation to two Category 2 Hazards, namely Damp and Mould Growth, and Electrical Hazards. The Hazards were scored as 873 Band D for Damp and Mould growth and 918 Band D for Electrical Hazards. The section 12 Improvement Notice required the Applicant to provide a whole flat heating system; works to insulate the flat roof of the studio; the installation of suitable and adequate mechanical extraction system to the bathroom; easement of the studio entrance door and the replacement of all perished rubberized trims to the door. The Improvement Notice also required the submission of an Electrical Inspection Condition Report (EICR) with all Code 1 or 2 items rectified. The works on the section 12 Improvement Notice were due to start no later than 2nd January 2020 and were to be completed by the 15th of February 2020.Both Improvement Notices had the same reference number.

7. The Applicant sought to appeal the Improvement Notices but did so out of time and therefore the appeals did not proceed. No further contact was received from the Applicant during the compliance period.

8. Following an inspection of the Property on 26th February 2020, Mr Tallon noted that the smoke detection works required by the section 11 Improvement Notice and the heating works required by the section 12 Improvement Notice had been complied with. He did not revoke the section 11 Improvement Notice in case the works required for the section 12 Improvement Notice were complied with in the next few weeks which would have allowed him to revoke both Improvement Notices at the same time. Mr Tallon did not contact the Applicant with the outcome of his inspection.
9. Council tax records suggest that the Property was vacant between 20th January 2020 and 4th September 2020 although the Applicant did not advise the Environmental Health Officers either that it was vacant or when a tenant subsequently moved in. The Property was redecorated before the new tenant moved in.

10. Due to the Covid pandemic and changes in personnel, the Property was not reinspected until 22nd October 2020.Following an email dated 20th October 2020 to the Applicant and his representative Mr Craft and written notice delivered on 21st October 2020 to the occupant of the Property, an inspection was arranged for 22nd October 2020.

11. Ms M Harley, Environmental Health Officer, who carried out the inspection, was only aware at that time of the Category 1 Improvement Notice under section 11 of the Act. On inspection, she noted that the works required by the section 11 Improvement Notice had been carried out. She emailed the Applicant on 22nd October 2020 confirming that the Improvement Notice would be revoked. She also raised concerns about the substantial amount of mould growth and stated that 'in order to overcome this, better ventilation should be provided with consideration given to insulating the cavity if this has not been done. Constant redecoration will not help in solving the core of the problem'.

12. The following day Ms Harley became aware of the existence of the section 12 Improvement Notice. Its content was largely in line with the concerns she had raised the previous day regarding the presence of mould. She emailed the Applicant and Mr Craft on 23rd October 2020 to apologise for her error, and confirmed the existence of the section 12 Improvement Notice and that the works required to resolve the Category 2 Hazards were still outstanding. The email advised that there was currently an offence under section 30 of the Housing Act 2004 which could lead to a prosecution or the issue of a Civil Penalty Notice. At the inspection, Mr Craft had alluded to the fact that the Tribunal had revoked the Improvement Notice but the Council records did not show this to be the case. Therefore, Ms Harley asked that she receive confirmation within the next 7 days with confirmation of the revocation by the Tribunal or dates for when the outstanding works would be carried out. As there was no response, Ms Harley sent a reminder email on 12th November 2020 chasing a response and stating that the tenant had advised that, despite the redecoration, the mould was getting worse.

13. Mr Craft emailed the same day to say that he thought the Legal Department had revoked the Improvement Notice as opposed to the Tribunal. He stated that electrical Hazards had been addressed by a competent contractor and further works were ongoing to address the mould growth. He suggested that at the inspection the following week it would be observed that there were no Category 1 or 2 Hazards in the Property.

14. On 17th November 2020, Ms Harley emailed Mr Craft and the Applicant to say she would look at compliance at the forthcoming inspection. She asked for a copy of the EICR. They were also reminded of the outstanding works to ensure compliance with Improvement Notices served in relation to Studios 2 and 5.

15. On 20th November 2020, Mr Craft emailed M Harley giving an update position regarding each Improvement Notice served in relation to the building. In relation to this Property, he advised that the EICR would be forwarded in due course and that works to insulate the roof and provide further ventilation had been planned for a considerable amount of time although cooperation from the tenant had been lacking. He commented that the hazards were low level Category 2 Hazards and to continue with enforcement action would not be in the public interest and would be seen as an attempt to provide the Respondent with a financial benefit rather than to achieve compliance. He said that there were more dangerous properties with serious Category 1 Hazards that would benefit from intervention. He stated that he believed the Applicant to be unfairly targeted to increase statistics on the service of Notices and to try to raise money via the Civil Penalty route. Mr Craft stated that he was

supervising all aspects of any work required under all the Notices that had been served in relation to the building.

16. On 24th November 2020, Ms Harley responded in relation to the subject Property. As it appeared from Mr Craft's earlier email that works were still outstanding and the section 12 Improvement Notice had not been complied with, Ms Harley advised that if Mr Craft believed that there was a defence of reasonable excuse, he needed to provide such information including details of not gaining access to the Property with dates and whether this was reported to the Respondent. She inspected the Property on the following day with heating specialists. The Applicant and Mr Craft had been advised of the inspection but did not attend. Works to the entrance door, mechanical extraction and ceiling insulation had not been carried out. A new heater had been placed within the kitchen area and it appeared that an existing heater had been moved closer to the door and had what appeared to be scorch marks on its front. The heating specialists advised that the panel heaters installed were inefficient as although the right kilowattage in size, due to poor insulation, they could not provide the heat required, as the heat loss superseded the heat gain from the heaters. A satisfactory EICR had still to be submitted.

17. In mid -January 2021, the Respondent was contacted by the tenant's support worker as the damp and mould was affecting the tenant's health and she was seeking medical advice.

18. Ms Harley inspected again on 22nd January 2021 in the presence of Mr Craft. There had been no change in the heating provision and the mould growth had got significantly worse. No works had been carried out either to the mechanical extraction in the bathroom, the front door or the flat roof. A double socket under the sink had a dislodged face plate. Mr Craft was advised of the continuing failure to comply with the section 12 Improvement Notice.

19. On 25th January 2021, Ms Hartley emailed the Applicant and Mr Craft advising that the mould growth had got significantly worse and whilst heating had been provided there was inadequate insulation in the Property. It advised that the Improvement Notice had still not been complied with as no works had been carried out to upgrade the thermal qualities of the flat roof or improve the ventilation within the bathroom. It reiterated that undertaking the works required by the Improvement Notice would have helped reduce the amount of mould in the flat. The Applicant and Mr Craft were asked to advise what action they intended to take regarding the mould. There had still not been the submission of the EICR despite the Property being let from 5th September 2020.

20. On 6th February 2021, an EICR was received which showed that whilst the installation was poor it was satisfactory. Code 2 items were identified indicating potential danger and a Code F1 was also identified requiring further investigation.

21. On 8th February 2021, Mr Craft emailed to advise that the roof had been replaced and an EICR had been sent for the Respondent's attention and asked to be notified of any outstanding works.

22. On 9th February 2021, by email to the Applicant and Mr Craft, Ms Harley noted that a new flat roof had been provided but requested confirmation on what work had been undertaken on the bathroom extraction unit and whether works had been carried out to remove the Code 2 and F1 items on the EICR. It further stated that the front door was still letting water into the studio.

23. The tenant contacted Ms Harley and advised that nothing had been done regarding the mould. Following an inspection by Ms Harley on 17th February 2021, where it was apparent that the mould growth had not been treated, the Respondent served an Abatement Notice under section 80 Environmental Protection Act 1990 dated 18th February 2021 requiring the Applicant to wipe down and treat all areas affected by mould growth within 7 days of the service of the Abatement Notice.

24. On the same day, Ms Harley hand delivered an 'interview under caution' letter to the Applicant and emailed a further copy on 18th February 2021.

25. On 22nd February 2021, Mr Craft told Ms Harley that an electrician had advised that the Code 2 items could only be rectified by a complete rewire, and that in Mr Craft's opinion, it would require a Prohibition Order to be served on the Property. Ms Harley emailed Mr Craft to query the apparent conflict with the EICR previously submitted that the electrical installation was satisfactory. She declined to serve a Prohibition Order and advised that the tenant may be requested to relocate for a few days to allow the works to be undertaken.

26. On 26th February 2021, at an inspection Ms Harley observed that attempts had been made to wipe down the mould growth in accordance with the Abatement Notice. although mould was still present. It appeared that works had been done to the roof as a contractor had fallen through the ceiling resulting in a piece of plasterboard stuck over a section of the ceiling. Works to the bathroom extraction fan and the front door remained outstanding.

27. By 22nd April 2021, the Applicant had not responded to the 'interview under caution' letter.

28. On 10th May 2021 Mr Craft sent to Ms Hartley a copy of a satisfactory EICR dated 1st April 2021.

29. On 11th May 2021, Ms Harley served a section 16 Revocation of Improvement Notice upon the Applicant in relation to the section 11 Improvement Notice only. The Revocation Notice contained a typographical error as the date of the decision is stated to be 20th October 2020 when it should have been 22nd October 2020, the date of the inspection.

30. On 12th May 2021, Ms Harley served a s249A Notice of Intent to issue a Civil Penalty on the Applicant. The front page of the Notice of Intent contained a typographical error in that it referred to both the section 11 and section 12 Improvement Notices when it should only have referred to the section 12 Improvement Notice, as the section 11 Improvement Notice had been revoked the previous day. The statement of reasons attached to the Notice of Intent referred only to the section 12 Improvement Notice.

31. On 27th May 2021, Ms Harley inspected the Property and noted new heaters had been installed but that the mechanical extraction unit in the bathroom was still only operable from the isolation switch and the down blow heater in the bathroom was not working. On 2nd June 2021, Ms Harley emailed the Applicant and Mr Craft to advise them of the two outstanding issues and that once they had been resolved the Improvement Notice could be revoked. No response was received and to date the section 12 Improvement Notice had not been revoked.

32. The Applicant submitted representations on 9th June 2021 in relation to the Notice of Intent, following which, on 16th September 2021, the Respondent served on the Applicant a Final Notice of Civil Penalty in the sum of £10,000.

Calculation of Penalties

33. The Respondent adopted a Scoring Matrix to indicate the level of Civil Penalty which considered the following factors:

    a. severity and number of offences
    b. culpability and serial offending
    c. harm, or potential harm caused,
    d. deter offender and landlord community from future offending
    e. portfolio size/assets
    f. potential gross rental income per month

34. Each factor was scored either 1,5,10,15 or 20 depending on criteria noted in the matrix. The total score could be reduced if the offender admitted guilt before the Notice of Intent was issued and/or if they rectified the identified offences within timescales given. The overall total score then fell within a band which determined the range of Civil Penalty considered to be appropriate.

35. In relation to 'severity and number of offences', a score of 10 was given as there was a failure to comply with the Improvement Notice. Ms Harley did not reassess the Hazards under the HHSRS and based her decision on the severity of the mould growth. A score of 10 was given regarding 'culpability and track record' as the Applicant had been served with several Improvement Notices and a Prohibition Order in relation to the same building and there were multiple complaints from tenants in the building regarding their living accommodation. He had been convicted of offences under section 235 (requirement to produce documents) and also section 238 (the provision of false or misleading information to the local housing authority) of the Housing Act 2004. in relation to other properties. He had a history of failing to comply.

36. 'Harm to the tenant' was scored 10 as the remedial works included works to alleviate damp and mould being experienced in the Property. The works were not done and on re-occupation of the Property in September 2020, conditions had deteriorated quickly which impacted on the tenant's health and wellbeing. This resulted in an Abatement Notice being served to ease the conditions. Further, the tenant was vulnerable and had a support worker.

37. A score of 15 was given regarding 'deterring the landlord and wider landlord community from offending' as the Applicant had previously appealed to the Tribunal regarding two other Improvement Notices served in relation to 1 Winifred's Drive. It was said that the tribunal attendance had not deterred him from failing to comply with this Improvement Notice. The Applicant had continued to fail to comply with the Improvement Notice despite being told repeatedly that he had not complied. A score of 15 was deemed appropriate as there was little confidence that a financial penalty would deter him from future offending. Also, the Applicant is an established landlord and is linked to portfolio landlords and managing agents in the area. It was considered important that a Civil Penalty should be at a sufficient level to deter other landlords in the community from failing to comply with their legal obligations.

38. A score of 15 was given regarding 'portfolio size and assets' as in 2019 the Applicant had confirmed that he owned 9 properties within the Respondent's area including 1 Winifred's Drive (comprising 7 lets) and one other which was divided into lets, thus totalling 11-20 lets.

39. 'Potential gross rental income per month' was scored 15 as based on the properties declared by the Applicant. As there was no evidence as to actual rent, the Respondent used the local housing allowance as a guide resulting in an estimated average rental income, over the whole of the Applicant's rented properties, of £5656.50 per month.

40. As there was no admission of guilt and the offences had not been rectified within the timescales given, no deductions were made.

41. The total overall score was calculated as 75, placing the Civil Penalty in the band width £14,000 to £18,000. Ms Harley's evidence was that she placed the fine at the top of the range to allow flexibility should representations be made.

42. The Applicant's representations referred to the enforcement action being taken out of time as it should have been taken within 6 months of the date the Improvement Notice expired in February 2020 i.e. on or before 14th August 2020; there had been no communication from the officer who issued the Improvement Notice that there was non- compliance; that the Property became empty prior to the first Covid lockdown; that the lead officer carried out an inspection without serving a relevant power of entry notice; that the Applicant had been misled by the lead officer saying that the Improvement Notice would be revoked and then subsequently issuing a Civil Penalty Notice.

43. In response to the representations, the Respondent noted that it was a continuing offence under section 30 (5) of the 2004 Act; the Applicant did not advise the Respondent that the section 12 Improvement Notice had been complied with; having the Property vacant should have aided getting the works done in accordance with the section 12 Improvement Notice; s239 of the 2004 Act requires a 'proper officer' to give at least 24 hours' notice of inspection to inspect but the notice is not required to be given in a prescribed format. On 20th October 2020 an email was sent to the Applicant and Mr Craft advising of the inspection on 22nd October 2020 at 2pm which Mr Craft attended. The lead officer had not misled the Applicant as she had corrected the error regarding her statement regarding revocation the day after she had made the statement, had apologized and explained that there was also a section 12 Improvement Notice that had not been complied with and provided a further copy.

44. Following receipt of the Applicant's representations, Ms Harley reviewed the scores. She reduced the score for 'portfolio size and assets' from 15 to 10 to reflect ownership of 7 properties as revealed by a recent check of council tax records. She had also previously counted the individual lets within 1 Winifred's Drive as separate properties.

45. The total score was therefore reduced to 70 which placed it within the Civil Penalty band of £10,000 to £14,000. Aggravating factors were identified as the failure to comply with the Improvement Notice over an extended period, the failure to carry out works when the Property was vacant between 20th January 2020 and 4th September 2020; works should have been completed before the start of the pandemic and access to carry out the required works should not have been an issue during that time; post date for compliance several visits were undertaken and there had been considerable email exchanges; the Applicant had not responded to the letter inviting him to interview under caution; there had been the need to serve Improvement Notices on other lets within 1 Winifred's Drive and also a Prohibition Order regarding use of what had been an office as a self -contained let in breach of planning and building control permissions.

46. Mitigating factors were that another heater had been provided within the kitchen area and that works had been carried out to improve the thermal insulation quality of the flat roof albeit nearly a year after the compliance date for the Improvement Notice. An EICR with no code 1 or 2 items had recently been provided (dated 1st April 2021) over a year after being initially requested. A new heater had been installed within the combined living room/bedroom. There were no known previous convictions for failure to comply with an Improvement Notice. The lower portion of the band was chosen to reflect that additional works had been carried out to the Property.

Inspection and Hearing

47. No physical inspection was carried out by the Tribunal although we had the benefit of photos from both parties. From the documentary evidence we understand that the Property is a ground floor studio of approximately 35 square metres with a front door leading to a combined living room/bedroom which leads to an open plan kitchen and door to a bathroom to the rear. There was 1 wall mounted on demand convector heater in the living room/bedroom area and 1 floor standing convector heater. There was a fixed electrical downflow heater in the bathroom.

48. We understand that the living /bedroom area has a felt flat roof protrusion extending beyond the main part of the building.

49. We also understand that the Property has one openable window with the entrance door being the only other means of providing natural ventilation. We understand that extractor fans are located in the internal kitchen cooker hood and in the bathroom. The bathroom is without a window and as the bathroom extractor fan was not connected to the light switch, the occupants had to operate it via an isolation switch, so it was either on or off and had no overrun. We understand that the switch was located very close to the wet area of the shower.

50. In addition, it is the Respondent's case that:

   a. there was an electric cable with exposed wires in the kitchen;
   b. there were several spurred off sockets where trunking covers had been removed exposing cables that appeared to have multiple spurs;
   c. the entrance door was ill fitting on its latch allowing uncontrolled draughts and rainwater to enter the Property between the base of the door and the threshold; and
   d. the Property had an Energy Performance Certificate dated 22nd January 2020 in which it was given an energy rating E with the potential to be a C.

51. An oral hearing was held by video platform on 27th January 2022. The Applicant was not present. He was represented by Mr Craft. The Respondent Council was represented by Ms A Groves and she was accompanied by Mr J Tallon Compliance Officer, Ms M Harley, Environmental Health Officer and Ms L Williams, Team Manager-Private Sector Housing. Ms E Warmsby attended as an observer.

Submissions

52. Mr Craft submitted that there had been both procedural irregularities and issues regarding the validity of the Enforcement Policy as follows:

   a. Failure to serve section 239 Notice prior to inspections

b. The alleged criminal offence was out of time for prosecution;
c. Covid 19 Government Restrictions and the Respondent's Enforcement Policy;
d. The application of the Civil Penalty Matrix and
e. Case mismanagement

Failure to serve section 239 Notice

53. Mr Craft claims that the Respondent failed to exercise their duty '*as required under s249 [sic] Power of Entry'* in relation to inspection after February 2020.

54. Ms Groves says she is unclear as to what Mr Craft refers. She assumes that Mr Craft is referring to the power of entry set out in section 239 of the 2004 Act and submits that the Respondent has used the powers under section 239 to inspect the Property on several occasions, with the prior consent of the Applicant, Mr Craft and the occupants (when occupied) of the Property. This is evidenced in the documentary evidence of the email exchanges and by the evidence of Ms Harley that she would contact the tenant directly by text. She submits that section 239 does not require the notice to be in any particular format.

Out of time

55. Mr Craft submits that as Mr Tallon had sufficient evidence at his inspection of 26th February 2020 and was happy with the Applicant's progress, that the 6 month prosecution 'clock' commenced from that date, or in the alternative, following the inspection carried out on 22nd October 2020.

56. Mr Craft argues that works were ongoing after the required date and therefore an offence was not committed. Mr Craft submits that he believed that all the works were completed by February/March 2021, although he did not provide any evidence to support that belief.

57. Ms Groves submits that as the required works had not been completed by the compliance date and had still not been completed by May 2021, that the offence was a continuing one and the 6- month time limit had not yet started.

Covid 19 and the Enforcement Policy

58. Mr Craft submits that the Respondent has not updated their Enforcement Policy with regard to their practices during Covid 19 despite guidance from the Ministry of Housing, Communities and Local Government ('MHCLG' Guidance') and yet looks to exploit the Applicant's 'alleged' failures during the pandemic. He refers to the suspension of possession proceedings and the enforcement of evictions during lockdowns. He suggests that at no time did the Respondent assist private sector landlords during the pandemic and chose an unnecessary path of enforcement. He submits that the Respondent did not consider the option of completing the Works in Default, which he asserts is evidence that they did not consider the Category 2 Hazards as being significantly hazardous to the occupying tenant. Neither did they seek to suspend the Improvement Notice. He asserts that as they are low Category 2 Hazards and work was being done that formal enforcement action should not have been taken. He submits that the Applicant was being treated unfairly and was being 'picked on'.

59. Ms Groves submits that at no time did Mr Craft or the Applicant request that the Improvement Notice be suspended. The delay caused by the pandemic afforded the

Applicant further time in which to undertake the works required and potentially avoid enforcement action. Ms William's evidence demonstrated that a briefing note had been circulated to staff following the announcement of the pandemic to inform officers how to carry out their responsibilities through lockdown, including the need to carry out risk assessments and wearing PPE to carry out inspections. The Respondent denies that the Applicant was unfairly treated. Ms Groves also submits that works in default were not considered to be appropriate as such works placed an initial financial burden on council tax payers.

Civil Penalty Matrix

60. Mr Craft submits that the Respondent has deviated from the Enforcement Policy and CPN scoring matrix but has not provided the basis or any evidence to support this claim.

61. Mr Craft says that the Respondent has taken into account as an aggravating factor the continuing failure to have completed the works after the inspections of 15th February 2020 and 22nd October 2020. He submits that as the Respondent should have commenced a prosecution following either of those inspections, the continuing failure should not be considered as a factor.

62. Ms Groves submits that there has not been any deviation from the Enforcement Policy and CPN Matrix. She says that Ms Harley sets out in her witness statement at paragraphs 65-74 (pages A59-A60) how the decision to issue a Notice of Intent was reached and how the fine was calculated. She says that it is unclear on what basis Mr Craft claims that the Respondent has not adhered to the policy nor on what evidence he bases this assertion.

63. At the hearing, Mr Craft initially did not have any questions regarding the scoring matrix. After we prompted him that this was an important area, in each category he then asked why the scores had not been placed in the band lower than the score given without articulating his suggestion as to why that should be the case.

Case mismanagement

64. Mr Craft submits that the Respondent does not understand the Scoring Matrix and refers to Tribunal cases BIR/OGF/HNA/2021/0011 and BIR/OGF/HNA/2021/0012 in which comment was made by the Tribunal. He submits that this is evidenced by the fact that in the Notice of Intent, the Respondent had used the highest fee in each band whereas in the Final Notice, the Respondent altered their calculation by using the lowest fee in each band.

65. He says that the two separate Improvement Notices each had the same reference, namely 397/19-19/05131/XEU, which lead to Ms Harley being unaware that there were two Improvement Notices when she sent the letter to revoke 'the Improvement Notice'.

66. He submits that two other Notices of Intent for other properties served at the same time were revoked upon receipt of representations.

67. Mr Craft submits that the Applicant is prejudiced by the fact that Mr Tallon had considered the heating work to be compliant in the inspection on 26th February 2020 but that Ms Harley subsequently engaged a heating specialist. He asserts that this is a change of approach by which the Applicant was misled. He repeats that the Respondent had sufficient evidence of the conduct to which a financial penalty applies but engaged in a

'continuing offence' investigation during a pandemic. He asserts that the reliance on the 'continuing offence' during COVID is disingenuous.

68. Mr Craft also suggested that it was not appropriate to have several officers working with the building.

69. Ms Groves accepts that there were administrative errors but that they did not prejudice the Applicant. She submits that Ms Harley has given clear evidence as to her application of the Enforcement Policy and that it is evident that she clearly understands it. She says that the Applicant has not been misled at any stage and that it is appropriate to rely on the 'continuing offence'. Ms Groves further submits that it is not inappropriate for different Council officers to work on the same building where there are several Notices. In this case 3 officers were involved.

The Law

70. The law relating to this matter is detailed in the Appendix attached.

Deliberations

71. We considered the issues raised by Mr Craft and the Respondent's responses.

<u>Failure to serve section 239 Notice prior to inspections</u>

72. Mr Craft has not adduced any evidence to support his assertion that the provisions of s239 of the 2004 Act were not complied with prior to inspections. Section 239 does not require a formal notice in a specified format, merely that before entering any premises to carry out a survey or inspection, the authorized person must give at least 24 hours' notice to the owner of the premises and the occupier (if any). There is ample evidence within the Respondent's bundle of emails to the Applicant and Mr Craft of proposed inspection times and oral evidence from Ms Harley that she contacted the tenant by phone and text. On occasions it was Mr Craft requesting an inspection.

<u>The alleged criminal offence was out of time for prosecution;</u>
<u>Covid 19 Government Restrictions and the Respondent's Enforcement Policy;</u>
<u>The application of the Civil Penalty Matrix</u>

73. These are addressed in paragraphs 88 and 93 to 97 respectively below.

<u>Case mismanagement</u>

74. We do not accept that the Ms Harley has misunderstood the Scoring Matrix as is evident from Ms Harley' application of it as detailed in her written and oral evidence. Whilst we find the explanation that she placed the penalty at the top of the band to allow for reductions after representations somewhat concerning as this could be considered to be a manipulation of the system, that was a conscious decision for a specific reason rather than a mistake.

75. We agree that the Respondent has made administrative errors in this case firstly, by failing to realise in preparation for the inspection in October 2020, that there were two Improvement Notices as opposed to one and thus serving a Revocation Notice which referred to 'the Improvement Notice', and secondly the typographical error of the

reference to the section 11 Improvement Notice in addition to the section 12 Improvement Notice on the Notice of Intent. We do not consider either error to affect the validity of either of the Notices. We agree that matters were not assisted by the two Improvement Notices having the same reference number and the Respondent may wish to review their practice to avoid the scope for confusion in future. Landlords and the public are entitled to expect a high standard of professionalism from local authority staff and the Respondent has fallen short. However, in this case, the errors are not so egregious as to affect the matter before us.

76. We do not accept Mr Craft's submission that the fact that other Improvement Notices were revoked after representations were made means that the Respondent's failure to revoke this particular section 12 Notice is mismanagement.

77. We do not accept, as alleged by Mr Craft, the Applicant has been misled by any officer. As an experienced landlord it is the Applicant's responsibility to be 'au fait' with any Notices served on him, the works required and what works had been carried out at any particular time. He ought to have known that the works had not been completed by the required date and therefore could not expect an Improvement Notice to have been revoked when the works had not been completed, or indeed started (e.g. roof works).

78. Neither do we accept that it is mismanagement or improper for the Respondent to have several officers dealing with the building and the different Notices, though it is of course the Respondent's responsibility to ensure that there is a consistent approach.

79. We considered the appeal in three parts:

(a) Whether we are satisfied, beyond a reasonable doubt, that the Applicant's conduct amounts to a 'relevant housing offence';

(b) Whether the Respondent has complied with all the necessary requirements and procedures relating to the imposition of the financial penalty (section 249A and paragraphs 1 to 8 of Schedule 13A of the 2004 Act; and

(c) Whether the financial penalty is set at an appropriate level having regard to any relevant factors, which may include

i. The offender's means;
ii. The severity of the offence;
iii. The culpability and track record of the offender;
iv. The harm, if any, caused to a tenant of the premises;
v. The need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or
vi. The need to remove any financial benefit the offender may have obtained as a result of committing the offence.

80. As the Applicant did not attend the hearing, and no witness statements were submitted in support of his case, in relation to the Applicant's evidence and means, we were restricted in our deliberations to consideration of the documentary evidence submitted on his behalf. and submissions by Mr Craft.

Has a criminal offence been committed?

81. Section 30 of the 2004 Act provides:

> *"(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) no later than the date specified under section 13(2) (e) and within the period specified under section 13(2)(f):*
> > *(b) …*
> > *(c) …*
>
> *(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 a 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) …*
>
> *(8) …"*

82. The Improvement Notice relating to Category 2 Hazards dated 26th November 2019 required the works to be started no later than 2nd January 2020 and to be finished no later than 15th February 2020. The Improvement Notice stated that the works could commence earlier if the Applicant wished. The Applicant submitted an appeal against the Improvement Notice but it was out of time and therefore not proceeded with. The Respondent's evidence of the inspections on 26th February 2020 and 22nd October 2020, which is not disputed by Mr Craft, is that the works had not been completed by the required date of 15th February 2020.

83. Mr Craft submits that the works had been completed by February/March 2021. Even on that basis, there had been a failure to comply with the Improvement Notice. The Respondent's evidence was that despite the submission of the Electrical Installation Report dated 1st April 2021 which identified no outstanding Code 1 or 2 works, works to the bathroom extraction fan and the front door remained outstanding in May 2021 and the Applicant had not confirmed that they had been completed. We are clear that the Applicant failed to comply with the Improvement Notice as the works were not completed by the required date of 15th February 2020.

84. We then considered whether the Applicant had a reasonable excuse for the failure to comply with the Improvement Notice. Whilst Mr Craft has raised many issues arising post the required date of completion of 15th February 2020, he has not proffered any reasons as to why the Improvement Notice was not complied with by the due date. When we pressed him, he says that the Applicant 'was busy' but has not provided any supporting evidence. He also suggests that the Applicant would have been overwhelmed with the number of Improvement Notices which had been served on the building. However, no supporting evidence was submitted and there is no evidence that this was raised with the Respondent at any time. Whilst we accept that there were several Notices in relation to the building, the Applicant is an experienced landlord and it is reasonable to expect that he should be able to organize matters relating to his property portfolio, either by having an efficient administrative system or by engaging a person to assist/project manage such that he would not be so overwhelmed. Failure to do so does not amount to a reasonable excuse for failing to comply with an Improvement Notice.

85. The Property was not occupied from 20th January 2020 which would have assisted in the ability to carry out the works by the required date. Mr Craft refers to the impact of Covid- however, this was not formally announced until 23rd March 2020 some 5 weeks later after the date for completion of the works. Whilst the impact of Covid may be relevant to subsequent enforcement considerations, it is of no relevance to whether an offence had been committed by failing to carry out the works by 15th February 2020.We find that the Applicant did not have a reasonable excuse to fail to comply with the Improvement Notice. We are satisfied, beyond a reasonable doubt, that the Applicant has committed an offence under section 30 (1) of the 2004 Act.

Has the Respondent complied with the procedural requirements?

86. We are satisfied that the Respondent had complied with the requirements regarding the service of the section 11 Improvement Notice and that the offence was continuing throughout 2020 and to May 2021.

87. With the exception of the argument regarding 'continuing offence', Mr Craft has not disputed that the Respondent has complied with paragraphs 1 to 8 of the 2004 Act in connection with the service of the Notice of Intent and Final Notice of Financial Penalty. The Notice of Intention was served on 12th May 2021 and included the information required under paragraph 3 of Schedule 13A of the Act. Representations were received from the Applicant on 9th June 2021 and on 16th September 2021 the Final Notice was issued by the Respondent. Whilst there was a typographical error on the front page of the Notice of Intent we do not find that this was material or affected the validity of the Notice, as the remainder of the Notice was clear as to which Improvement Notice it referred to.

88. Unless the offence is continuing, the Notice of Intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates. Paragraph 2 of Schedule 13A of the 2004 Act, and specifically paragraphs 2(2) and 2(3) make it quite clear that where the conduct, (in this case failing to comply with an Improvement Notice) continues, the Notice of Intent may be given at any time when the conduct is continuing. The Improvement Notice reflects the provisions of section 30(5) of the 2004 Act and states that the obligation to carry out any incomplete works specified in Schedule 2 of the Improvement Notice continues despite the fact that the period allowed for

compliance under the Improvement Notice has expired In this case, the failure to comply with the Improvement Notice had not ceased as at May 2021 and therefore the Respondent was entitled to issue the Notice of Intent when it did and was not required, as Mr Craft suggests, to issue the Notice within 6 months of either the February 2020 or October 2020 inspections.

89. We are satisfied that the Respondent has complied with paragraphs 1 to 8 of the 2004 Act.

Imposition of and Amount of Financial Penalty

90. In determining whether the penalty was set at an appropriate level, we had regard to *London Borough of Waltham Forest v Allan Marshall* and *London Borough of Waltham Forest and Huseyin Ustek* both of which are noted under *[2020] UKUT 0035 (LC).*

91. The Upper Tribunal held that the FTT must accept the local authority's policy. *"The FTT is not the place to challenge the policy about financial penalties"*. When determining an appeal, the FTT must "*start from the policy", and although it may depart from it, it may only do so in certain circumstances*. In addition, the Applicant bears the burden of persuading it to do so, and in considering whether it should do so, the FTT must*:*

> *"Look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed"* and
>
> *"Consider the need for consistency between offenders, which is one of the most basic reasons for having a policy and an essential component of fairness in the financial penalty system."*

92. As an appeal under Schedule 13A to the 2004 Act is by way of a rehearing, we must make our own decision. In doing so, however, we must afford the local authority's decision particular weight, described variously by the Upper Tribunal as *"special weight",* "*considerable weight"* and "*great respect*". Parliament has conferred the primary decision
making function on democratically elected and accountable local authorities.

93. Mr Craft has not provided the basis or any evidence to support his assertion that the Respondent has deviated from the Respondent's Enforcement Policy and CPN scoring matrix. Ms Harley's written and oral evidence was clear as to the Enforcement Policy she applied, namely that of July 2019 and why she had scored each factor as she had, and as detailed in the Statement of Reasons attached to the Final Notice of Civil Penalty. We find that there has not been a deviation. Nor has Mr Craft satisfied us that the Enforcement Policy was the incorrect one or that it was applied inappropriately as a result of the Covid pandemic.

94. We first considered whether enforcement action was appropriate. The works were not completed by 15th February 2020 as required by the Improvement Notice. The Applicant did not ask for the Improvement Notice to be suspended or for an extension of the compliance period either prior to the Covid pandemic or thereafter. There was no compelling reason given why the works could not have been completed before the Covid pandemic. Whilst we appreciate that the Covid pandemic announced on 23rd March 2020 may have impacted on the opportunity to get work completed immediately, there

were periods during 2020 when there were no restrictions on tradespeople entering properties. Further, the Property was vacant between 20th January 2020 and 4th September 2020 when works could have been carried out. The Applicant let the Property to a new tenant on 5th September 2020 without the benefit of an EICR and redecorated the Property without completing remedial works to prevent the damp and mould growth. Despite the need to serve an Improvement Notice following failure to progress under informal action; constant correspondence with the Applicant and Mr Craft including reminders, warnings, inspections; the service of an Abatement Notice and having had 18 months to remedy the situation, the works had still not been completed by May 2021.The service of the Abatement Notice reflected the severity of the mould growth due to the lack of compliance with the Improvement Notice. Having regard to the Respondent's Enforcement Policy, we therefore find that enforcement action was appropriate. As the Applicant failed to attend an interview under caution the Respondent was not provided with an explanation by the Applicant either for his failure to comply with the Improvement Notice or why the Respondent should not consider taking enforcement action, we do not consider the administration of a caution to be appropriate

95. The Respondent's Enforcement Policy states that civil penalties are favoured against prosecutions due to the cost and time involved in prosecutions but excepts specified categories of cases where Civil Penalties will not be considered. This case does not fall within those exceptions and we find that the imposition of a Civil Penalty was appropriate. We do not find that the Applicant has been treated unfairly by the imposition of a Civil Penalty Notice. Mr Craft did not provide any evidence to substantiate the allegation. We accept the Respondent's evidence that other landlords had also received Civil Penalty Notices.

96. The Respondent's power to carry out works in default with the recovery of the costs involved is in addition to, rather than as an alternative to, prosecution or imposition of a Civil Penalty. Carrying out works in default places an initial financial burden on the council tax payer and the money spent may not be recovered from a landlord for a considerable period of time. Further, undertaking work in default is also burdensome on officer time. We find that in the circumstances of this case, it was not appropriate to consider works in default.

97. In written and oral evidence, Ms Harley expanded on her application of the Scoring Matrix which determined the level of Civil Penalty. We considered the scores applied to the various matrix factors and made our own determination, taking account of the evidence provided and that our role is to 'rehear' the case as it is at the date of the hearing. Accordingly, we determined the scores as set out in the paragraphs below.

98. We scored 'severity and number of offences' as 5. We did not take into account the offences under sections 235 and 238 of the 2004 Act as they do not relate to a failure in respect of housing standards. We had regard to the fact that this was one offence of failing to comply with an Improvement Notice dealing with Category 2 Hazards as opposed to Category 1 Hazards. We accepted that credit for works done were reflected in mitigating factors.

99. We scored 'culpability and serial offending' as 5. The Applicant has complied with the Improvement Notices served in respect of other lets within the building and the Improvement Notices had been revoked. It appears that the Applicant complies but needs close management in order to do so. The fact that complaints had been made by

the occupants in the building does not, of itself, give greater weight to the Applicant's alleged 'serial offending'.

100. We agreed with the Respondent on a score of 10 for 'harm, or potential harm caused' for the same reasons as the Respondent and note that an Abatement Notice was required due to the failure to carry out the works to remedy the damp and mould growth. We disregarded the stated vulnerability of the tenant as when scoring Hazards, no regard should be had to vulnerability unless dealing with specific vulnerable groups such as children under 14.

101. We agreed with the Respondent's score of 10 in relation to 'deter offender and landlord community from future offending'. We did not take into account the Applicant's appeal against Improvement Notices as that is entirely within his rights and he should not be penalized for doing so, although note that the Applicant was in fact part successful in those appeals. We had regard to the fact that he had complied with the section 11 Improvement Notice on the same Property.

102. We scored 10 for 'portfolio size/assets' and this matches the score ultimately given by the Respondent after consideration of the Applicant's representations. We agree that the proper assessment of the Applicant's number of properties falls within band 6-10. We note that there was no evidence that the Appellant's other properties were in a bad condition.

103. We scored 'potential gross rental income per month' as 5. The National Guidance refers to removing any financial benefit the offender may have obtained as a result of committing the offence and therefore we cannot see how this would allow rent from properties not proven to be in a bad condition to be taken into account. The. Respondent's assessment of gross potential income was based on a simple multiplication of the 'local housing allowance' i.e. a local reference rent and is therefore theoretical. It takes no account of variation of rent levels between properties or possible levels of vacancy (which had occurred in this Property).

104. This led to a total overall matrix score of 45 which places the Civil Penalty level at the mid -point within the band £5,000 to £7,500. We had regard to the aggravating factors identified by the Respondent with which we agreed, but also accepted that additional works had been carried out since the time of the Respondent's original calculation, although there were still two outstanding items. We considered that the aggravating factors and remedial work (mitigating factors) balanced themselves out and therefore determined that it was appropriate to fix a Civil Penalty at the mid -range of the band, namely £6,250.

Appeal

105. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

....

Judge T N Jackson

Appendix – The Law

The Law

The regime of financial penalties as an alternative to prosecution for certain housing offences came into force on the 6th of April 2017.

Section 249A of the Housing Act 2004, (inserted by section 126 of, and paragraphs 1 and 7 of Schedule 9 to, the Housing and Planning Act 2016) provides –

(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, not the persons conduct amounts to a relevant housing offence in respect premises in England.

(2) In this section 'relevant housing offence' means an offence under –

(a) section 30 (failure to comply with improvement notice),
(b) section 72 (licensing of HMO's),
(c) section 95 (licensing of houses under Part 3),
(d) section 139(7) failure to comply with overcrowding notice), or
(e) section 234 (management regulations in respect of HMOs).

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

(4) The amount of 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,
(d) guidance in respect of financial penalties.

(7) The Secretary of State may be 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 the change in the value of money.

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

Paragraphs 1 to 8 of Schedule 13A to the Housing Act 2004 set out the procedure for imposing financial penalties as follows:

Notice of Intent

1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").

2 (1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a) at any time when the conduct is continuing, or

(b) within the period of 6 months beginning with the last day on which the conduct occurs.

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

3 The notice of intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

Right to make representations

4 (1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

Final Notice

5 After the end of the period for representations the local housing authority must—

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty."

7. The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8. The final notice must set out-

(a) the amount of the financial penalty,
(b) the reasons for imposing the penalty,
(c) information about how to pay the penalty,
(d) the period for payment of the penalty,
(e) information about rights of appeal, and
(f) the consequences of failure to comply with the notice.

Withdrawal or amendment of Notice

9. (1) A local housing authority may at any time-
(a) withdraw a notice of intent or final notice, or
(b) reduce the amount specified in the notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

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 rehearing 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.

Paragraph 12 of Schedule 13A to the Act provides that a local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions to impose financial penalties. In this regard the Secretary of State has issued "Guidance for Local Housing Authorities: Civil penalties under the Housing and Planning Act 2016 (April 2018)" ('the Guidance'). Paragraph 3.5 of the Guidance sets out a list of factors which local housing authorities should consider when assessing the level of any penalty, these being:

the severity of the offence;
the culpability and track record of the offender;
the harm caused to the tenant;
the punishment of the offender;
to deter the offender from repeating the offence;

to deter others from committing similar offences; and

to remove any financial benefit the offender may have obtained as a result of committing the offence.