FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/36UD/HNA/2020/0059**
Property	**:**	**18 HOOKSTONE AVENUE, HARROGATE HG2 8ER**
Applicant	**:**	**EUROWOOLS LIMITED**
Respondent	**:**	**HARROGATE BOROUGH COUNCIL**
Type of Application	**:**	**APPEAL AGAINST FINANICAL PENALTY: s249A, HOUSING ACT 2004**
Tribunal Members	**:**	**A M Davies, LLB** **W Reynolds, MRICS**
Date of Decision	**:**	**11 April 2022**

DECISION

DECISION

The financial penalty imposed on the Applicant by Final Notice dated 16 April 2020 is reduced to £4,500.

REASONS

HISTORY

1. The Applicant owns 18 Hookstone Avenue, Harrogate ("the property"), a three storey house with one bedroom at first floor level and an attic bedroom. From 4 May 2016 the property was let to Ms Kirk, who lived there with her children until 30 November 2018. During Ms Kirk's tenancy considerable arrears of rent built up, and Ms Kirk could not afford to heat or air the house effectively. Having on several occasions asked the Applicant to carry out repairs, Ms Kirk referred the deteriorating condition of the property to the Respondent first in January and then in October 2018. Following receipt of the October email, the Respondent's Environmental Health Officer Claire Riley inspected the property on 7 November 2018 and identified a number of hazards. One of these was a Category 1 hazard, which obliged the Respondent to take steps to ensure that appropriate remedial action was carried out.

2. On being informed that Ms Kirk had left the property and that the Applicant was considering selling it, Ms Riley issued a Suspended Improvement Notice dated 13 December 2018, which described the Category 1 hazard (excess cold) and a number of Category 2 hazards including a risk of harm by fire and exposure to hot central heating pipes. The Improvement Notice stated that the Applicant was to notify the Respondent if the property was re-let, and specified the remedial work that was to be undertaken. The remedial work was to be begun within 22 days of any re-letting and completed no later than 2 months after that date.

3. The Applicant did not appeal against the terms of the Improvement Notice. During the first half of 2019 the property was substantially refurbished with a view to re-letting, although not all the remedial work specified in the Suspended Improvement Notice was undertaken. The Applicant did not inform the Respondent when the property was re-let with effect from 15 June 2019.

4. In August 2019 Ms Riley learned that the property was occupied and informed the Applicant that a further inspection would be carried out on 18 September 2019. Ms Riley carried out that inspection in the presence of one of the tenants and Mrs Holgate who represents the Applicant. There was a discussion during which Ms Riley indicated that further work was required in order to comply with the Improvement Notice. The Tribunal heard evidence, and accepts, that Ms Riley told Mrs Holgate that she would write to the Applicant to confirm this. In the event Ms Riley did not communicate with the Applicant as expected.

5. The Applicant did not make any attempt to comply with the remaining requirements of the Improvement Notice. Mrs Holgate's evidence was that she was waiting for the written confirmation Ms Riley was to provide, as to what was still required given the intervening refurbishment of the property and advice she had received from her heating engineer.

6. On 13 February 2020 the Respondent served Notice of Intention to impose a financial penalty of £5,000. The Applicant responded in writing on 8 March, stating "the necessary work has been done" and claiming that the proposed penalty would be "hugely excessive, unfair, totally disproportionate". The Respondent initially agreed to re-visit the property but following the imposition of Covid 19 restrictions did not do so. A Final Notice confirming the financial penalty at £5,000 was sent to the Applicant on 16 April 2020.

THE LAW

7. Where there has been no appeal against an Improvement Notice and it has not been varied or withdrawn by the local housing authority that issued it, the description of hazards in the notice and the works required to remedy them become binding on the recipient.

8. Section 30 of the Housing Act 2004 ("the Act") provides that a person who fails to comply with an improvement notice commits an offence and is liable to a fine on summary conviction. Section 30(4) provides that it is a defence to show that a person had a reasonable excuse for failing to comply with the notice.

9. Section 249A of the Act enables a local housing authority, as an alternative to bringing a prosecution, to impose a financial penalty on a person who has committed an offence under section 30 of the Act. The housing authority must be satisfied beyond reasonable doubt that the offence has been committed.

10. Schedule 13A to the Act sets out the procedure to be followed by the housing authority in order to impose a financial penalty and provides a process for appeal to this Tribunal against the imposition of the penalty and/or the amount of the penalty. On appeal, the Tribunal is required to carry out a re-hearing and may take into account matters of which the housing authority was unaware when making its decision.

11. Each local housing authority is required to publish a policy setting out the matters that it will take into account when determining the amount of a financial penalty. The culpability of the offender is rated low, medium or high, and the harm or risk of harm caused by the offence is also rated low, medium or high. Penalty ranges or starting points are set out for each combination of ratings and the housing authority applies, according to its policy, increases for aggravating factors or reductions for mitigating factors, depending on the facts of the case.

12. The Tribunal is required to give considerable weight to the calculations applied by the housing authority and its reasons for reaching a decision as to the imposition and amount of a penalty. Guidance in this respect has been provided by the Upper Tribunal in two cases heard together under the title *London Borough of Waltham Forest v Marshall* and *London Borough of Waltham Forest v Ustek* [2020] UKUT 0035 (LC). In that case Judge Elizabeth Cooke stated at paragraph 54 of her judgment: "The Tribunal is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so." The Tribunal must also "pay great attention to any view expressed by the Local Housing Authority, and should be slow to disagree with it" – per Buxton LJ, *Brent London Borough Council v Reynolds* [2001] EWCA Civ 1843, approved by Judge Elizabeth Cooke at paragraph 64 of her judgement.

THE RESPONDENT'S DECISION

13. The Notice of Intention advised the Applicant that unless the intended penalty was paid in full and the required remedial work was carried out within 28 days, the proposed penalty (£5,000) could not be reduced. It ended "At any point after 28 days of service of the notice of the Notice of Intent [sic] there will be no further offer of any reduction in the level of penalty." This advice is at odds with paragraph 5 of Schedule 13A to the Act, which provides that the Respondent, having allowed 28 days for the Applicant to make representations about the proposal to impose a financial penalty, may only then decide whether to impose the penalty, and if so to make a final decision as to the amount to be paid. Ms Woods, the Respondent's Area Environmental Health Office in Private Sector Housing, told the Tribunal that if representations were received during the 28 day period the Respondent would in fact review the application of any mitigating factors.

14. The Respondent assessed the culpability of the Applicant as "low", and the Tribunal accepts that assessment. The harm or risk of harm was assessed as "medium". The resulting civil penalty level was £5,000. 5% (£250) was added for an aggravating factor, namely a failure to address Ms Kirk's reports of disrepair. 5% was deducted to allow for the fact that the Applicant had no previous convictions, leaving the penalty at £5,000. The Applicant did not make any representations which, in the opinion of the Respondent, would justify a change in this assessment, and the penalty was confirmed.

THE HEARING

15. The appeal was heard by video hearing, at which the Applicant was represented by its director Mr Holgate and his wife, and the Respondent was represented by Ms Cheetham of counsel. Ms Woods gave evidence for the Respondent. The Tribunal had the benefit of a comprehensive bundle of documents.

16. Mr Holgate acknowledged, on being taken through the history of the matter by counsel, that the statutory procedures had been properly followed, and that he had misunderstood and missed his opportunity to appeal against the Suspended Improvement Notice when it was served on the Applicant in December 2018. He accepted that it was now too late to make any representation as to the hazards and remedial works specified in that notice.

17. The Applicant's case was that the Respondent's assessment of harm was incorrect, because the risk of injury arising from the exposed central heating pipes was small, the escape route through the first floor window was available in the event of fire even though the window opening was slightly higher than permitted by regulations, and the damp problems at the property in 2018 had been caused mainly by the tenant's use of the house and only partly by defects in the fabric of the building. Mr Holgate also argued forcibly that a penalty of £5,000 was excessive where the Applicant had lost over £7,000 in unpaid rent during Ms Kirk's tenancy, had permitted her to remain in the house as an act of kindness, and had subsequently carried out substantial renovation of the property. He sought a reduction in penalty to £2,000 but he did not specifically challenge the Respondent's Civil Penalty Policy. The Tribunal notes that the hearing bundle contains a draft policy dated 1 May 2018 whilst the published policy (which does not differ) is dated 18 July 2018.

DECISION

18. The Tribunal accepts that the Applicant had no reasonable excuse for failure to comply with the Suspended Improvement Notice and committed an offence under section 30 of the Act.

19. As explained above, the Tribunal is obliged to start from the Respondent's policy and its application to the facts as found by the Respondent. However, the Tribunal applies a 5% mitigation because of the Respondent's failure to write to the Applicant as agreed in September 2020, to explain what work was still to be carried out. Had it done so the Applicant would have had an opportunity largely to comply – albeit late – with the Suspended Improvement Notice, although its failure to advise the Respondent in June 2019 that the property was re-let could not be remedied. The Tribunal does not accept Ms Riley's assertion that the Notice of Intention to impose a financial penalty was itself the written communication she had agreed to send. The Tribunal finds a delay of nearly 5 months between the Respondent's inspection in September 2019 and service of the Notice of Intention in February 2020 to be unconscionable.

20. The Tribunal applies a further reduction of 5% because of the actual or potential misunderstanding caused by the final part of the Notice of Intention to impose a penalty, which would have suggested to the Applicant that there was no point in making any representation other than a complete acceptance and payment of the financial penalty.

Judge A M Davies

11 April 2022