Case Reference	**:**	**CAM/26UL/HNA/2022/0003**
Property	**:**	**132 Aldykes, Hatfield, AL10 8EE**
Appellant	**:**	**Hongmei Wang**
Respondent	**:**	**Welwyn Hatfield Borough Council**
Date of Application	**:**	**16th December 2022**
Type of Application	**:**	**Application for permission to appeal against a decision on 16th November 2022 made in respect of an appeal against a financial penalty S 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge J. Oxlade** **M. Hardman FRICS IRRV (Hons)**
Date of refusal of PTA :		**3rd April 2023**

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DECISION

For the reasons set out in the statement of reasons, the Tribunal refuses the application for permission to appeal against the decision made on 16th November 2022

STATEMENT OF REASONS

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1. The Respondent relies on two grounds, set out at 2 (a) and (b) of the application, as follows.

Ground 2(a)

2. The Respondent says that:

"the Tribunal misdirected itself, in its approach to paragraph 3(b) of Schedule 13A. The Tribunal was wrong to conclude that the Council had failed to comply with the duty to provide reasons within its Notices of Intent. Further, in any event, however, even if the Notice of intent did fail to comply with the requirements of the Act, the Tribunal was wrong to assume that the consequences were necessary fatal to the validity of the Notices. The decision was wholly at odds with the principles approved in London Borough of Waltham Forest v Younis [2019] UKUT 0362".

3. The Tribunal provides at Annex A herein the material parts of the Tribunal's decision and observes that the point was settled subsequent to "Younis" in the case of Mahendra Maharaj v Liverpool City Council [2022] UKUT 140 ("Maharaj"), (para 17 and 21) which had been chosen as a case suitable to be heard as a point of public importance. It should be noted that Maharaj addresses both the importance of precision in the notice of intention and the consequence of failing to do so.

4. In expanded grounds (para 39) the Respondent says that it was procedurally unfair for the Tribunal to have raised the point of its' own volition; it should be noted that the parties were given the time asked for to enable them to address the point in submissions, and submissions were then made; no complaint was raised at the time that the Tribunal had raised it and that the Respondent was unable to adequately address it, and no application to adjourn to a different date was made.

5. For completeness, the Tribunal points out that under the heading "relevant facts", the Respondent has not (para 12) fully set out the notices of intention, which are referred to in the Tribunal's decision (paragraphs 7-14). Further, at paragraph 30, the summary of the threshold as being "low", appears to be inaccurate.

Ground 2 (b)

6. In respect of 2(b), the Respondent says that:

" The Tribunal also erred in law by substituting its own calculations for that of the Council when determining the appropriate penalty, in circumstances in which the Council's underlying CPN policy – which prescribed a "matrix" of penalties – was not challenged. The Tribunal failed to comply with the guidance supplied in Waltham Forest LBC V Marshall [2020] UKUT 35".

7. The Tribunal provides at Annex B herein the material parts of the Tribunal's decision and points out that (at para 46 of its' decision) it expressly applied the Respondent's own guidance; further, that paragraph 10 of Schedule 13A of the 2004 Act requires the Tribunal to arrive at its own conclusion, as to the appropriate penalty.

8. Finally, the Tribunal's decision to depart from the Respondent's scoring on culpability and harm/potential for harm in setting the penalty, arose from the subsequently produced EICR, and which had not featured in the Respondent's application of the matrix. The Record of Proceedings shows that the Respondent was invited to make submissions on whether/extent to which the existence of the certificate (produced late) would affect the

penalty, so the Respondent's view was indeed canvassed. That there is a scoring "range" indicates that there is room for discretion.

9. The Tribunal considers that there is no reasonable prospect of success, and so refuses the application.

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Judge Joanne Oxlade

3rd April 2023

Annex A

"34. Having shortly deliberated the point, the Tribunal concluded that the Respondent had not adhered to the process set in paragraphs 3 to 8 of Schedule 13 A, and that the NOI and Final penalty be struck out as failing to follow the statutory procedure, for the following reasons.

35. The legislation provides that the Respondent can impose a criminal penalty. The burden of showing a breach of the legislation is on the Respondent to show to a high standard – namely, beyond reasonable doubt – that there is a breach. An Appellant is entitled to know *precisely* what allegation is being made against them in the NOI, to enable the representation process to be as effective as possible: clear allegation met by apposite representation; it is akin to counts on an indictment or a charge sheet. To provide sufficient information is to know the allegation, and it is not adequate to rely on previous correspondence, which might have been had up to 6 months before, and when the nature of the works and allegations may well (and usually does) evolve over time; had it been attached or referred to as the detailed allegations made therein, the matter could have been different.

36. Paragraph 3 of Schedule 13A sets out the matters to which the NOI must refer, which includes the reasons for proposing to impose a financial penalty, and details as to how to make representations against it. In NOI 1 and 2, the Respondent's allegations which (if proved) could give rise to the power to make the penalty, are given in sparse detail – very much less so than the final penalty notice, and without good explanation for this difference. It is not adequate to rely on the fact that there was previous correspondence about the matter, some months before. In this case the schedule of works was issued at the end of October 2021 and this notice of intent was issued in February 2022. The Appellant is entitled to have clarity over what she is being accused, which is not apparent from NOI 1 and 2.

37. The waters are muddied by the reference to "overcrowding"; we accept that this was a case of a template being used, inappropriate parts not having being deleted. However, to the recipient, it can only have been received as indicating that the Respondent gave great weight to immaterial matters which played a significant role in the decision-making and penalty set.

38. It is also apparent that the Respondent has not explained the reasons for deciding to impose a penalty with the detail which justifies taking the action. That the Respondent has the discretion to do so, but does not explain why that step was taken. That it is "the most appropriate course of action" does not take the matter very much further. That there is guidance which assists in setting the level of penalty, but does not justify why imposing a penalty itself is appropriate. That there is alleged overcrowding is a distraction, and irrelevant.

39. For the reasons given above, we find that there is has not been compliance with the legislation, specifically Schedule 13A, para 3 (b) and this invalidates NOI 1 and 2, and so the final penalties issued."

Annex B

"40. The Appellant conceded that though she had an EICR for the electrical safety gap, it was not provided to the Respondent in the allotted time (by 2nd December 2021), and very much later in the course of these proceedings. In short, the Appellant had not realised that she had the certificate and only came across it when preparing her appeal.

41. During the hearing the Respondent took the Tribunal through and explained the matrix, which lead to the imposition of the penalty of £2500. Whilst conceding that the Tribunal's jurisdiction permitted the Tribunal to take into account matters not known to the Respondent at the time that the penalty was set, the Respondent did not consider the fact that the Appellant did have the EICR, to be a reason to reduce it. In fact, it rather, showed poor management.

42. The matrix relied on seeks to marshal the facts according to the various factors set out in the Local Authority guidance (p 317) and which forms the Respondent's policy.

43. The Respondent considered that the Appellant's culpability incurred a high score of 20 (mid-way between 16-24), which applied where the landlord showed "some awareness of the law, but the person still committed/allowed the offence", applied an asset/profits score of 10, because the Appellant had two properties and so fell within the band 5-10 for those with "little asset value and little profit made by the offender", there was nothing given for offending history as there had been no previous offences, and as for harm/potential harm the Respondent doubled the score of 5, to 10, which band applies where there is likely to have been some low level harm to health of tenants.

44. The Appellant's submissions on this were brief, pointing out that the Appellant had been engaged in the process of undertaking the schedule of works, which had been completed, that many certificates had been provided on time, that there was one which had not, but it existed.

45. The Tribunal finds that the appropriate penalty is £500, for the following reasons.

46. Using the Respondent's guidance on culpability we set at a score of 5 because we conclude on the evidence that the Appellant had an awareness of the legal system in place – shown by commissioning and having the certificate - but that her system was defective in not ensuring that it could be provided timeously. We agree with the Respondent's assessment that there was little profit/ gain from the failure to comply, so give a score of 5 for asset/profit made. There was no offence history so the score of 0 is apposite. As for harm, there was no harm caused to the tenants; this we conclude because the electrics had been checked by the electrician before issuing the certificate, as there were no vulnerable occupants and there was no evidence provided by the tenants of any impact on them. That being so, the score of 10 applies, which leads to a penalty of £500.

47. Accordingly on FP 3 we find the penalty of £500 payable".