FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

HMCTS code (audio, video, paper) **V: CVPREMOTE**

Case reference	**:**	**CAM/33UF/HNA/2022/0009**
Property	**:**	**Flat 2, Electric House 27A Church Street Cromer Norfolk NR37 9ES.**
Applicant	**:**	**Mr Melvyn Richardson and Mrs Linda Richardson**
Representative	**:**	**Mr James Parden, solicitor, BRM Law**
Respondent	**:**	**North Norfolk District Council**
Representative	**:**	**Mr Oliver Fuller of Counsel**
Date of Application	**:**	**9 August 2022**
Type of application	**:**	**Appeal against financial penalty, pursuant to s.249A and Sch.13A to the Housing Act 2004,**
The Tribunal	**:**	**Tribunal Judge S Evans Mrs Mary Hardman FRICS IRRV (Hons)**
Date/ place of hearing	**:**	**8 March 2023, By cloud video platform**
Date of decision	**:**	**3 April 2023**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which was not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents before us were in an Applicants' bundle, a Respondent's bundle and an Applicants' Reply.

DECISION

(1) The Applicants' appeal is allowed in part, to the extent that the Tribunal determines the appropriate financial penalty in all the circumstances should be £2000;

(2) The Respondent shall pay 50% of the application and hearing fees, in the sum of £150, to the Applicants.

REASONS

Introduction

1. By their application, the Applicants, Mr and Mrs Richardson, appeal against the imposition of a financial penalty of £6,000 imposed by the Respondent Council in respect of an alleged offence under s.30(1) of the Housing Act 2004, namely failing to comply with an Improvement Notice.

Background

2. On 17 January 2000 the Applicants purchased 27A Church Street, Cromer, Norfolk NR27 9ES, which includes flat 2 Electric House, 27A Church Street, Cromer ("the Property").

3. In or about May 2019, the Applicants say, they moved their home, from 53 Mill Lane, PE22 0JF to 3 Eastward Ave, Grimsby, DN34 5BE.

4. About 2 weeks later, Mr Richardson alleges, he informed the Council Tax department of his change of address.

5. The Property has been tenanted at all material times. In February 2021 the tenants appear to have complained to the lettings Agents instructed by the Applicants about certain matters of disrepair.

6. On 10 November 2021 the Applicants served a section 21 notice under the Housing Act 1988 upon the tenants. It would seem that this prompted the tenants to complain of the state of the Property to the Respondent Council.

7. On 3 December 2021 the Respondent gave notice of entry to the Agents for the Applicants, seeking to inspect the state of the Property.

8. This inspection duly took place on 8 December 2021, when photographs were taken.

9. Sometime around Christmas 2021 Mr Richardson went to see his grandson in Spain.

10. On 16 December 2021 the Respondent sent a letter to the Applicants' Agents enclosing 2 schedules, one listing hazards of Excess Cold and Damp & Mould, the other the remedial actions which the Respondent expected the Applicants to take. Such actions included secondary glazing or equivalent to the bedroom windows.

11. On or around 5 January 2022 the tenants of the Property told the Respondent of the s.21 notice served on them, and a week later they informed the Respondent that no works had yet been done.

12. In between, on 11 January 2022, there was a conversation between the Respondent's Mr Simon Hawes and the Applicants' Agents, during which the Agents gave the Respondent the Boston address for the Applicants, as well as their email address.

13. On 13 January 2022 the Agents for the Applicants wrote to the Respondent to indicate that the Applicants were looking into secondary glazing. Indeed, on the same day, the Agents had communications with a secondary glazing company with a view to arranging a quotation.

14. On 18 January 2022 the Respondent drew up an Improvement Notice. This cited a Category 1 hazard of excess cold, and Category 2 hazards of dampness and faulty electrics. This Notice and a covering letter were sent to the Applicants, both by post to their Boston address, and by e-mail to Mr Richardson, cc to their Agents, at 13:36.

15. For present purposes, it is sufficient to note the following parts of the Improvement Notice:

    (1) Under Schedule 1, excess cold is cited as a hazard, and at (f) it is noted:

    "draughts- uncontrollable draughts and those situated to cause discomfort (single glazed sash windows to bedrooms are thermally inefficient and are in unsatisfactory condition)";

    (2) Under Schedule 2, the remedy for the above hazard is stated to be:

    "You must replace single glazed sash windows to bedrooms with units to meet building regulations or satisfactorily repair windows and provide appropriate secondary double glazing to improve thermal efficiency";

(3) Under “Rights of Appeal”, the notice set out the rights of the Applicants to appeal to this Tribunal;

(4) Under “Operation of Notice”, the Applicants were informed that if they did not appeal the Notice it would become operative at the end of 21 days from the date it was served, unless it specified that it was suspended;

(5) Under “Effect of Notice”, it is stated, amongst other things:

“If you have difficulty in finding a builder to take remedial action, or have any other problems in arranging the action, you can ask the council if they will take the action themselves and charge you with the cost (Schedule 3 Part 1)”;

(6) The start date for the works was stated to be 21 February 2022, with all works to be completed by 27 May 2022.

16. On the same day, at 14:34, Mr Richardson emailed Mr Hawes of the Respondent to say that he was stuck in Spain trying to get a ferry home, but that he understood that the Agents had the works in hand. He ended his e-mail by adding that, when he returned, he would be in touch with Mr Hawes.

17. Again on the same day, in fact about an hour later, the Applicants’ Agents emailed the Respondent to indicate that on 25 January 2022 a company would be attending the Property, to advise on installing secondary glazing; however, the landlord would like to receive 3 quotes before going ahead with any installation.

18. On 25 January 2022 Mr Richardson obtained one secondary glazing quotation, from a company called The Secondary Glazing Co, of Norwich.

19. On 29 January 2022, this company emailed the Agents to advise Mr Richardson that, should he accept the quote, the timescale for materials was considerably longer than usual, due to COVID-19 and other delays beyond their control, such that they were currently booking fittings for July 2022.

20. On 19 March 2022 Mr Richardson returned from Spain.

21. Mr Richardson alleges that in April 2022 he contacted the Mr Hawes of the Respondent to tell him that he was using the wrong postal address for the Applicants.

22. On 16 May 2022 the tenant emailed the Respondent to say that no further works had been done.

23. On 25 May 2022 the Respondent sent Mr Richardson another notice of entry by e-mail, cc to his Agents.

24. On 27 May 2022 the deadline for works to be completed came and went.

25. On 30 May 2022 the Respondent inspected the Property. Mr Hawes alleges that the Agents said that Mr Richardson had told them that the quotation obtained for the secondary glazing was too high. Mr Richardson was not present on this inspection.

26. On 22 June 2022 Mr Hawes did some calculations in relation to the imposition of a financial penalty, which he sent to his team leader for approval. Approval was given on 26 June 2022.

27. On 1 July 2022 the Respondent emailed Mr Richardson, copy to his Agents, enclosing a Notice to the Applicants of the Respondent's intention to impose a financial penalty for breach of s.30 of the Housing Act 2004, at a band 4 level, in the sum of £8000. The covering letter to the Notice indicates that it was also posted to the Applicants at their former Boston address. The Notice invited the Applicants to make representations as to why a financial penalty should not be imposed.

28. On the same day, there was a telephone call between Mr Richardson and Mr Hawes concerning the Notice. Mr Hawes says that Mr Richardson told him that he was trying to obtain quotes for windows, but nobody was able to undertake the work.

29. On 5 July 2022 the Applicants' Agents sent Mr Hawes the quotation obtained in January 2022 for the secondary glazing. The author, Laura Boyle, stated:

> "I can confirm we have now instructed this company to make and install the unit. We have been given a four week time frame for them to make the frame and then they will [be] in contact to install the unit the first week in August 2022."

30. On 11 July 2022 the Respondent emailed the Agents asking whether there would be any further representations, and reminding them of the deadline of 29 July 2022.

31. On 13 July 2022 the Agents responded to say that Mr Richardson did not wish to give any information regarding his ability to pay a financial penalty. They added that Mr Richardson wanted to make it clear that he had abided by everything that was required, and that the windows would be installed within four weeks.

32. On 21 July 2022, before the period for representations came to end, the Respondent imposed a Final Notice of financial penalty. It was emailed to the Applicant's Agents, cc'd to Mr Richardson. The e-mail also stated that the Notice had been dispatched by first class post to the Applicants.

33. The Notice cited the offence of section 30 (failure to comply with an Improvement Notice) with the date of the offence being 27 May 2022. The financial penalty imposed was £6000. The Respondent's reasons were given as follows:

> "Failing to fully comply with an Improvement Notice i.e. failing to replace single glazed sash windows to bedrooms with units to meet building regulations or to satisfactorily repair windows and provide appropriate secondary glazing to improve thermal efficiency".

34. The Notice said that the penalty had to be paid by 19 August 2022, and notified the Applicants of their rights to appeal to this Tribunal within 28 days.

35. On the following day, 22 July 2022, the Applicants' Agents emailed the Respondent to inform it that the secondary glazing would be installed that Saturday (23 July 2022).

36. It would appear that the secondary glazing was indeed fitted on 23 July 2022. An e-mail before us dated 28 July 2022 from the Secondary Glazing Co confirms this. The email gives apologies for the delay, citing severe supply problems with the aluminium profile required for their construction, which it said was beyond its control.

37. On 9 August 2022 the Applicants filed their appeal against the financial penalty.

38. On 25 August 2022 the Tribunal Procedural Judge gave directions in the case, pursuant to which both Mr Hawes and Mr Richardson have provided a witness statement.

39. The Tribunal was informed that a meeting had taken place between the parties on 9 September 2022, per the Tribunal directions, but it had not borne any resolution.

The Application

40. The appeal grounds may be summarised as follows:

- The Applicants contend that they and their Agents made every effort to replace the single glazed windows in compliance with the Improvement Notice.

- They accept that there was a delay in installation, but the building company were unable to complete the works any earlier. Therefore the matter was outside of the Applicants' control.

- They made every effort to keep the Respondent informed of matters.

- They were not served with the Improvement Notice or the financial penalty notices.

- It was wholly unreasonable of the Council to impose the notice on 21 July 2022; the Respondent had the power to suspend the operation of the notice but failed to do so.

- The tenants had been suffering from the impact of Covid 19, which had caused further delays, as well as delays in obtaining building supplies out of the landlords' control.

- No account was taken of Mr Richardson's vascular dementia, skin cancer and 2 heart attacks, and his consequent reliance on other persons.

Relevant Law

41. The statute law applicable to this matter is set out in the Appendix attached.

42. The Tribunal is mindful of the cases of *Sutton v Norwich CC* [2020] UKUT 90 (LC) and *London Borough of Waltham Forest v Marshall* [2020] UKUT 0035 (LC), in which the Upper Tribunal emphasised that the First Tier Tribunal should give due deference to the Council's decision, and not depart from a local authority's Policy in determining the amount of a financial penalty, except in certain circumstances (e.g. where the Policy was applied too rigidly), albeit that the Tribunal's task is not simply a matter of reviewing whether a penalty imposed was reasonable: it must make its own determination as to the appropriate amount of the penalty, having regard to all the available evidence.

43. The Tribunal also bears in mind *Opara v Olasemo* [2020] UKUT 0096 (LC) at paragraph 46, in which the Upper Tribunal warned that, when applying the criminal standard to their fact finding, Tribunals should avoid being overcautious about making inferences from evidence. It observed that, for a matter to be proved to the criminal standard, it must be proved beyond all reasonable doubt; it does not have to be proved beyond all doubt at all.

44. The Tribunal also bears in mind *IR Management Services v Salford City Council* [2020] UKUT 0081 (LC) where on appeal, the Upper Tribunal confirmed that, whilst a Tribunal must be satisfied beyond reasonable doubt that each element of the relevant offence had been established on the facts, an appellant who pleads a statutory defence must then prove on the balance of probabilities that the defence applies.

45. Regarding procedural compliance, the Tribunal referred the parties to *Waltham Forest LBC v Younis* [2019] UKUT 362 (LC); [2020] HLR 17. This case is discussed later below.

The Hearing

46. Given that the matter was in effect a rehearing of the Respondent's decision to impose the financial penalty, we heard an opening from Counsel for the Respondent, followed by the evidence of Mr Hawes MCIEH, a Senior Environmental Protection Officer. He was asked some questions by the Applicants' solicitor and the Tribunal. Mr Richardson was reminded of his privilege against self-incrimination, as set out in the Procedural Judge's directions. We then heard evidence from Mr Richardson. He was asked questions by Counsel for the Respondent and the Tribunal. Closing remarks were made.

47. During the Respondent's' opening, we had drawn the parties' attention to the *Younis* decision, as well as paragraphs 3-5 of Schedule 13A to the Housing Act 2004, noting that the Final Penalty in this case had been imposed before the Respondent's cut-off date for representations as stated in the Notice of Intent. Both parties were given time to consider their position in the light of the above.

On return to the hearing, both parties indicated they were in a position to address the issue, without needing more time, or an adjournment.

Issues

48. The issues are:

(1) Whether the Local Housing Authority has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty;

(2) Whether the Tribunal is satisfied, beyond reasonable doubt, that the Applicant's conduct amounts to a "relevant housing offence" in respect of the Property;

(3) Whether the financial penalties are set at an appropriate level having regard to all relevant factors.

(1) Whether the Local Housing Authority has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty;

49. Although Mr Parden for the Applicants questioned Mr Hawes as to the correct address for postal service of the Notices, it was conceded during the course of argument that all Notices had been served, and so the appeal ground of non-service was no longer advanced. This appeared to the Tribunal to be a sensible concession, given that all necessary Notices had been sent by email to Mr Richardson, and copied to his Agents as well.

50. There remained the issue of the propriety of the imposition of the Final Penalty before the deadline for receiving representations had expired.

51. The Applicants' solicitor made the point to Mr Hawes in evidence that, had the Respondent waited until 23 July 2023, the windows would have been fitted by that date, and as such, the Respondent had not been able to take that fact into consideration within its decision-making. In answer to such questions, Mr Hawes explained that the penalty was for non-compliance by the deadline of 27 May 2022. He denied that the completion of works on 23 July 2022 would have affected his consideration of the matter; he asserted the work had still not been done in time, and he emphasised the need for deterrent effect. He also denied that the fact that the Property was seemingly going to be marketed for sale around that time had been a factor in any of his thinking. He remarked that the financial penalty had been reduced from £8000 in the Notice of Intent to £6000 in the Final Notice, as a result of co-operation on the part of the Applicants.

52. In closing submissions, Mr Parden's position was that "any representations must be made within the period of 28 days beginning with the day after that on which the Notice was given". Given the 28 day period had not expired, he submitted, the Notice was invalid, and that was the end of it.

53. For the Respondent, Mr Fuller of Counsel contended that the giving of the Notice on 21 July 2022 and before 29 July 2022 was not fatal to the proceedings. He relied on the headnote to the case of *Younis* in the Housing Law Reports at H9, which reads:

"Where a statute prescribes a procedure which a person must follow in order to exercise or require a right under it, not every failure to comply will invalidate the process; the question is whether Parliament can fairly be taken to have intended total invalidity to follow from non-compliance: *R v Soneji* UKHL 49; [2006] 1 AC 340."

54. He also relied on paragraph 74 of the *Younis* decision, in which the Upper Tribunal had found that, even where reasons in a Notice are unclear or ambiguous, Parliament would not have intended that the notice of intention should invariably be treated as a nullity. The seriousness of the offences for which civil penalties can be imposed, the relative shortness of the time available to a local authority to take action, and the availability of a right of appeal on the merits before an independent Tribunal, are all features of the statutory scheme which militate against the adoption of an excessively technical approach to procedural compliance, the Deputy Chamber President held. Further, at paragraph 75, the Upper Tribunal noted that there was no credible suggestion that Mr Younis had been prejudiced by the features of the notice of intent with which his barrister took issue. He was able to advance a full challenge in the FTT.

55. Applying the law to the undisputed facts in this case, the Tribunal finds that there was no procedural impropriety on the part of the Respondent in coming to its decision to impose the final notice on 21 July 2022. We are satisfied by the explanation given by Mr Hawes that the fact of works being completed 2 days after the final notice would not have affected the Respondent's decision, acting reasonably, because the financial penalty was imposed, first and foremost, for non-compliance by a deadline which had expired almost 2 months earlier. In such circumstances, just as in the *Younis* case, we find there was no prejudice to the Applicants in the procedures adopted by the Council.

56. Moreover, we are able to consider, and do consider, under issue (3) below, whether the financial penalty was set at an appropriate level having regard to all relevant factors, including the works done on 23 July 2022.

(2) Whether the Tribunal is satisfied, beyond reasonable doubt, that the Applicant's conduct amounts to a "relevant housing offence" in respect of the Property

57. The Tribunal is satisfied beyond reasonable doubt that the requirements of section 30 of the Housing Act 2004 have been made out by the Respondent, in so far as they have proved that the Applicants failed to comply with the Improvement Notice. Given that the Applicants did not appeal the Notice, pursuant to section 30 of the Act, they had to complete the work by the date stated in the Notice, namely 27 May 2022. They did not do so. They completed

the majority of the works which are not relevant to this appeal, but not the glazing works.

58. However, their reasons for not doing so might amount to a defence, even if not advanced explicitly as such. The Tribunal is mindful that it would be a defence (pursuant to section 30(4) of the Housing Act 2004) that the Applicants, on balance of probability, had a reasonable excuse for not complying with the Notice.

59. We have considered everything carefully which the Applicants say about the circumstances of this case. However we do not consider that any of the actions or representations by the Applicants amount to a reasonable excuse, for the following reasons.

60. We do not accept that the Applicants and their Agents made every effort to replace the single glazed windows in compliance with the Improvement Notice. The evidence of Mr Richardson was that he had engaged his Agents for 6 years, and they would manage the relationship with tenants. Moreover, he had said to the Agents words to the effect of 'any work which needs doing, get it done.' Whilst the quotation from the glazing company was obtained within a week of the service of the Improvement Notice, the email said a deposit of 50% of the cost of £2264.82 was required when the order was placed. We had no documentary evidence as to when the deposit was paid, and we are not satisfied that the company refused to accept any deposit, as Mr Richardson alleges in his witness statement. In evidence Mr Richardson said that was what the Agents told him, but the letter from the Agents dated 3 October 2022 exhibited to his witness statement makes no such claim. In these circumstances, we look to the other documents: the email from the glazing company dated 25 January 2022 requests a deposit, and their email 4 days later, which advised of delays until July 2022, says nothing about waiver of deposit.

61. In oral evidence, Mr Richardson claimed he could not instruct a contractor because he couldn't get the money to the Agents from abroad. We do not consider this evidence to be credible, and in any event, it would not explain his failure to instruct contractors once he returned to the UK on 19 March 2022.

62. Despite delays in works being inevitable until July 2022, as advised by The Secondary Glazing Co, we have no evidence the Applicants sought quotations from any company other than that company. Whilst the Agents wrote to the Respondent on 1 July 2022 to say "we have received another quote to compare the first", the evidence, as we understand it, is that Mr Richardson had approached The Secondary Glazing Company independently of Ms Boyle sometime after March 2022, in ignorance of her initial contact in January.

63. We have considered the letter from the Agents dated 3 October 2022, but it makes no reference to when the order for the glazing was placed. Rather significantly, we find, the author Ms Boyle does accept that on 30 May 2022 she told Mr Hawes that "the landlord was wanting to seek another quote for the windows to check the one I received was reasonable". This seems to us to grate with Mr Richardson's oral evidence that he placed the order for the glazing in

April 2022. The statement made by Ms Boyle to Mr Hawes came 3 days after the deadline for works, notably.

64. Moreover, the Agents' email of 1 July 2022 said that "we…hope to proceed with getting the windows fitted with secondary glazing asap, just waiting for an instal date". This dovetails with Mr Hawes' unchallenged evidence concerning his telephone call, also on 1 July 2022, when Mr Richardson said he was trying to obtain quotes for windows/glazing - which we construe as meaning "alternative quotes".

65. Last but not least, we note the express terms of the Agents' email dated 5 July 2022. This said, "I can confirm that we have **now** instructed this company to make and install the unit" (our emphasis).

66. The emails and documents we have, therefore, tend to evidence that the order for the secondary glazing was placed on or after 1 July 2022 and before 5 July 2022.

67. We are not therefore satisfied that the Applicants put significant pressure on The Secondary Glazing Company to ensure the works were completed prior to the May deadline, as Mr Richardson alleges in his witness statement at paragraph 30. He did not instruct that company before 1 July 2022, we find.

68. Further, although Mr Richardson complains in his statement that Mr Hawes never told him at any time the Applicants could seek an extension of time, it seems to us that was an exercise in pure common sense. Moreover, the Improvement Notice expressly stated the Applicants could ask the Respondent to do the works if the Applicants were having difficulty getting a contractor. The Applicants took neither of these steps.

69. As regards delays caused by tenants due to COVID and bereavement, we had no evidence that this related to the glazing works, as opposed to other work, aside from Mr Richardson's witness statement, which alleged there was a 6 week delay. However, in answer to questions, he pinpointed this period as falling between March and April 2022. This was before the time when even Mr Richardson said the glazing contractor was instructed. We had no documentary evidence of failed access attempts from the contractor corroborative of Mr Richardson's statements. The contractor's apologetic email of 28 July 2022 says nothing about difficulties of access, only about supply problems. We are not therefore satisfied on balance that access issues played any part in the delay in the installation of glazing.

70. In summary, we are not satisfied on balance of probability the Applicants have a reasonable excuse for non-compliance with the deadline in the Improvement Notice.

71. We do not accept that the Applicants kept the Respondent informed of all material matters. We have no email or other evidence that the Respondent was informed that the glazing company could not undertake the works until July 2022. If this were the case, we would have expected Mr Hawes to have emailed to comment about it.

72. In closing remarks, Mr Parden withdrew the allegation that no account was taken of Mr Richardson's vascular dementia, skin cancer and 2 heart attacks, and his consequent reliance on other persons. We therefore say no more about that.

73. Finally, we do not consider that the Respondent should have suspended the operation of the Improvement Notice at any time, particularly as it was not informed of any delays which the contractor was suffering whether at the time of the service of the Notice or up to the deadline date of 27 May 2022.

(3) Whether the financial penalties are set at an appropriate level having regard to all relevant factors.

74. In considering this issue, the Tribunal has had regard to the Government Guidance for Local Authorities issued under paragraph 12 of Schedule 13A to the 2004 Act. The Guidance encourages each Local Authority to develop their own Policy for determining the appropriate level of penalty. The maximum amount (£30,000) should be reserved for the worse offenders. The amount should reflect the severity of the offence as well as taking into account the landlord's previous record of offending, if any. Relevant factors include:

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

75. As noted above, the Respondent does have such a Policy, dated March 2018, to which the Tribunal must give due deference. Mr Hawes explained that this Policy was drafted in partnership with other local authorities.

76. This Tribunal has no reason to go behind the Policy, nor the Respondent's decision to impose a penalty, rather than a prosecution. The Applicants did not contend otherwise. We find the decision to impose a financial penalty in these circumstances to have been a legitimate approach.

77. As regards determining the penalty, the Respondent's Policy sets out those matters contained the national guidance, set out above. Then, at paragraph 7 of the Policy, the Council explains how it imposes a penalty band based on a judgment of culpability and harm, applying the following matrix:

	Very High Culpability	High Culpability	Medium Culpability	Low Culpability
Harm				
High	6	5	4	3
Medium	5	4	3	2
Low	2	1c	1b	1a

78. The Bands lead to a penalty range:

Band	Financial penalty range/£	Assumed starting point/ £	Adjustment increment/ £
1a	100	-	-
1b	150	-	-
1c	200	-	-
2	200-800	400	200
3	1000-4000	2000	1000
4	6000-12000	8000	2000
5	14000-20000	16000	2000
6	22500-30000	25000	2500

79. As the Policy then explains, the penalty may be adjusted by an incremental value, to reflect the level of cooperation experienced following identification of the offence:

Full cooperation from an identification of offence	Reduced from starting point by 1 increment
Minimal further input required by the council to achieve compliance	No adjustment
Significant involvement by the council required to achieve compliance	Plus one increment
A significant lack of cooperation and or obstruction leading to significant further enforcement activity (e.g. works in default)	Plus 2 increments

80. The Policy goes on to consider the relevance of a landlord's finances, noting that the Council will invite representations, to include evidence of the person's ability to pay the penalty, and that if no representations are received, the presumption will be the person is able to pay the full amount.

81. There follow in the Policy some paragraphs concerning representations and appeals and recovery, which are not directly relevant for these purposes. An appendix to the Policy sets out in tabular form how the Council assesses both culpability and harm:

Culpability

Band	**Description**	**Examples**
Very High	offender has intentionally breached or flagrantly disregarded the law	• the offender has a track record of failure to comply • there is evidence that the offender has deliberately delayed compliance, for example to prevent a complainant from benefiting from improvements • an opportunity to comply was deliberately avoided, for example, by moving a new tenant into the Property before a known hazard or breach has been remedied • deliberate avoidance of significant costs through non-compliance
High	actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken	• offender had knowledge of the breach, for example through a complaint, but has not responded • a clear requirement by the council has been ignored. This would include an Improvement Notice that has not been complied with, or the failure to respond to a letter requesting action to address a management failure

		• the offender is a member of a professional body which makes clear requirements that have not been followed, leading to the breach • offender had not started the works by the Notice expiry date and had not made a reasonable case for an extension of time
Medium		• a failure to carry out regular inspections, for example, of the common parts of a house in multiple occupation (HMO) • failure to have adequate systems in place to avoid the offence, for example, an emergency contact or regular maintenance contract for gas appliances or fire alarm systems • the offender did not provide sufficient contact information to the tenant to enable the problem to be addressed • offender has failed to comply with Notice start by date but, nevertheless, completed the works satisfactorily within time
Low	Offence committed with little fault, for example because: • significant efforts were made to address the risk although they were inadequate on this occasion • there was no warning	• failure to comply with the licence conditions aimed at lessening the impact of the use of the Property on the community of the local area (e.g. keeping yards and gardens in reasonable condition) where there is no ongoing history of similar breaches • failure to display an information Notice

	circumstance indicating a breach • failings were minor and occurred as an isolated incident	where required to do so

Harm

Band	Description	Examples
High	• Serious adverse effect(s) on individual(s) and/or having a widespread impact • High risk of an adverse effect on individual(s)	• failure to comply with an Improvement Notice served under section 11 of the Housing Act 2004 (category one hazard) • failing to maintain fire precautions
Medium	• Adverse effect on individual(s) • Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect • Legitimate industry substantially undermined by offenders activities	• failure to comply with an Improvement Notice served under section 12 of the Housing Act 2004 (category two hazard) • failure to maintain facilities or to clean common parts in houses in multiple occupation (HMO) • unfair competition with landlords who do not commit offences e.g. by overcrowding
Low	Low risk of an adverse effect on the individual(s)	• failure to display an information Notice in the house in multiple occupation (HMO) where the tenants possessed that information through other means • minor inconvenience

		either to tenants or local residents through a failure to comply with licence conditions

82. In the instant case, the Respondent within its Financial Penalty Calculations, exhibited to the statement of Mr Hawes, categorised the culpability as high. As to harm, the Respondent considered that it was the medium. Hence Band 4.

83. When questioned during the hearing, Mr Hawes' evidence was less certain of the Council's thinking at the Financial Penalty stage, saying that he had to make a judgment based on what works had been done, and not done, and that in his judgment culpability and harm fell in the gaps between high and medium, not least because the contractors had not been instructed until after the deadline. He accepted the tables in the Policy were "very black and white", and it would be good for the policy to have some flexibility. Ultimately, he considered Band 4 was a fair categorisation.

84. When asked by the Applicants' solicitor why it was not a Band 3 case, he said he did not feel it was a case of medium or low culpability, or low harm. It was still a Category 1 hazard. He denied it was a relatively minor breach.

85. Using the matrix set out above, the Respondent had accordingly determined that this was a Band 4 case with a starting point of £8,000. It had adjusted that figure, on grounds that there had been full co-operation following identification of the offence. Hence the reduction to £6000.

86. In the Tribunal's determination, punishment of the offender, deterrence of the offender repeating the offence, and deterrence of others from committing similar offences speak for themselves in all cases. These are, in effect, a given.

87. As to the 4th bullet point in paragraph 74 above, there is no assertion that the Applicant has derived any financial benefit from committing the offence.

88. As to severity of offence, culpability and harm, we look firstly at the Respondent's Policy. The Policy makes clear that the Council will consider whether the imposition of a financial penalty is in the public interest, and if it does, the amount of the financial penalty will reflect the seriousness of the offence, and will be determined in a consistent and transparent way.

89. In the Tribunal's assessment, the correct approach to culpability and harm is to consider the "description" column as a starting point in order to determine the Band. The examples column contains but examples, and they will not fit every case. They may be a helpful guide, but no more.

90. In our determination this was a **medium** culpability case. The offence was committed primarily through a lack of care by the Applicants, in particular the Applicants' lack of supervision of/communication with their Agents. We do not

consider it was a case of foresight of or wilful blindness to a risk of offending, and the Applicants running that risk. Not every case of failure to comply with an Improvement Notice can be high culpability, we find; in so far as the Policy purports to categorise every failure to comply with an Improvement Notice as "high" culpability, it would be too rigid; and Mr Hawes accepted there has to be flexibility in application of the Policy. We also take into account that the period of the offence was just under 2 months.

91. This was not a low culpability case, we find, which is reserved for offences committed with little fault.

92. In terms of harm, we consider this was a **medium** category case. Although it was a Category 1 hazard, the adverse effect is, we find, not long-lasting, the offence lasting for only 2 months. The Applicants had fixed the heating and the damp/mould. There was therefore a medium risk, we judge, of adverse effect on the tenants, or a low risk of serious adverse effect, for the period in question. It was not a serious adverse effect or widespread in impact, so as to merit a high categorisation. We therefore agree this was a Band 3 case, with a starting point of £2000.

93. Lastly, we consider 2 further matters. Firstly whether any adjustment could be made on the basis of alleged full co-operation from the Applicants, which might then give an incremental adjustment, so as to lower the penalty further. In the Tribunal's determination, no such adjustment should be made. The Applicant was very slow to effect the repair, and did not keep the Respondent informed of delays. This was rather a case of minimal input required by the Council to achieve compliance.

94. Secondly, the issue of the Applicants' finances. The Notice of Intent asked them to put forward evidence of assets and income and ability to pay. They did not do so then, and did not do so within their documentary evidence in support of their case at the hearing. The Respondent rightly considered that the Applicant had the means to pay.

95. We conclude, therefore, by finding that the penalty should be set at an appropriate level of £2000 and that it is payable by the Applicants. We allow the appeal in part, accordingly.

96. Given that the Applicants succeeded in part on the appeal, the Tribunal considers it just that they recover half of their application and hearing fees (£150).

97. We conclude by thanking the parties for their helpful representations and approach to this case.

Name: Tribunal Judge S Evans **Date**: 3 April 2023.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the Property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix

Housing Act 2004

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.

S.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),

(b) section 72 (licensing of HMOs),

(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 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.

Schedule 13A

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.

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").

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.

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 a 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.

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.

11 (1) This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2) The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a) signed by the chief finance officer of the local housing authority which

imposed the penalty, and

(b) states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5) In this paragraph *"chief finance officer"* has the same meaning as in section 5 of the Local Government and Housing Act 1989.

12 A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A.