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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/HNA/2022/0023**
Property	**:**	**52 Tavistock Place, London WC1H 9RG**
Applicants	**:**	**(1) Tony Alan Investments Limited** **(2) Mr. Alam Khan**
Representative	**:**	**Mr Baumohl of counsel**
Respondent	**:**	**London Borough of Camden**
Representative	**:**	**Ms T O'Leary of counsel**
Type of Application	**:**	**Appeal against a financial penalty, Housing Act 2004, s 249A and Sch 13A**
Tribunal Members	**:**	**Judge Prof R Percival** **Mr A Parkinson MRICS**
Date and venue of Hearing	**:**	**28 October 2022 at 10 Alfred Place, and 10 November 2022, remote.**
Date of Decision	**:**	**21 April 2023**

DECISION

Decisions

(1) The Tribunal dismisses the appeals of both Appellants.

(2) The Tribunal varies the final notices dated 22 March 2022 addressed to both Appellants as follows:

Where the words "did without reasonable excuse fail to comply with regulation 8(2a)" appear, the words "did without reasonable excuse fail to comply with regulation 8(2)" are substituted;

Where the words "2(a) internal structure of the bedsit in the HMO were not maintained in good repair because;" appear, the words "the internal structure was not maintained in good repair, or fixtures, fittings or appliances were not maintained in good repair and in clean working order; or a window was not kept in good repair, because" are substituted.

Introduction

1. By applications under section 249A and Schedule 13A of the Housing Act 2004 ("the 2004 Act") dated 19 April 2022, the two Appellants appeal against three financial penalties each imposed by the Respondent authority.

2. The property is a four storey mid terrace building. The ground floor is used as a restaurant. The upper three storeys contain four bedsits, the occupants sharing two kitchens and three WC/shower rooms. A Mr A Majid is, or was, the leaseholder of the property, and operated the restaurant at the material time. He held a house in multiple occupation (HMO) licence in respect of the residential accommodation.

3. The first Appellant was the managing agent of the HMO. The second Appellant is the sole director of the first Appellant. The financial penalties were issued in respect of alleged breaches of the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations"). The basis for the liability of the Appellants was that the first Appellant was a "person managing" the HMO (section 263(3) of the 2004 Act), and that the second Appellant was liable for the offences of the first Appellant as having been committed with his consent or connivance, or being attributable to neglect on his part, as a director of the first Appellant (section 251 of the 2004 Act).

4. The breaches alleged in final notices dated 22 March 2022 were in respect of regulations 4, 7 and 8. Both Appellants were charged £5,000 in respect of the breaches of regulation 4, and £2,000 for the breaches of regulations 7 and 8 (ie £9,000 each, a total of £18,000). The table in

the appendix to this decision sets out the particulars of each breach alleged, as specified in the final notices.

5. On the date set for the hearing, the Tribunal heard witness evidence from both parties at 10 Alfred Place, Mr Parkinson joining what was a hybrid hearing by video connection. We subsequently reconvened fully remotely to hear counsel's submissions.

The hearing

6. Mr Baumohl of counsel represented both Appellants. Ms O'Leary of counsel represented the Respondent.

7. The initial grounds of appeal settled by the Appellants were written in an unfocussed manner, and included a number of misconceptions as to the law. At the start of the first hearing day, Mr Baumohl clarified the Appellants' position. On the appeal, both Appellants sought first that the Respondent prove its case in respect of the breaches alleged, secondly they argued that they had a reasonable excuse for the breaches (section 234(4) of the 2004 Act), thirdly, the second Appellant contested his liability under section 251 of the 2004 Act, and finally both Appellants contested the amount of the penalties imposed.

The factual evidence

8. A feature of the case was that the officer of the Respondent responsible for the investigation and charging of the Appellants, Mr Adekoya, no longer works for the Respondent, and was therefore not available at the hearing. The Respondent provided his witness statement in its bundle, and the officer now responsible for the case, Ms House, gave oral evidence.

9. In setting out the evidence, it is more convenient to deal first with the general factual evidence, and then separately with the evidence relating to decision making in the local authority and the amount of the penalties imposed. Some of the evidence in Mr Adekoya's witness statement is relevant to the first category, and some to the latter. All of Ms House's evidence is dealt with in the second.

10. For the Respondent, we heard oral evidence from Mr Deegan-Fleet, Ms Day, and Ms Hodge, all tenants of the property, and Ms House, all of whom had provided witness statements. We also had a witness statement from Mr Sissons, another tenant, and Mr Adekoya.

11. The second Appellant gave evidence on his own and the first Appellant's behalf, as did Mr Ibad Khan, the employee of the first Appellant with conduct of the management of the property. Both also provided witness statements.

12. Mr Adekoya's witness statement relates that the Respondent received a complaint relating to a leak on 21 June 2021. On that day, he contacted both the second Appellant and Mr Majid about the leak, and inspected the property on 29 June 2021.

13. Mr Adekoya lists what he described as disrepair issues in his witness statement. These were:

> (a) a defective fire alarm panel on the ground floor.
> (b) a water leak. He had been told that the fire alarm panel had been moved because of the leak, but that a fault light had remained on.
> (c) damp and mould growth on the walls and ceiling in the hall as a result of leak.
> (d) a door leading into the restaurant, which constituted an intruder hazard.
> (e) a gap between that door and the floor amounting to a fire risk.
> (f) a loose radiator in a first floor bedroom, and damp on the ceiling, which he considered most likely caused by the leak above.
> (g) In a second bedroom, the window was defective and would not close, there was damp in the corner from a leak in a shower.
> (h) the stairs leading up to the first floor had hazardous loose carpet.
> (i) what he described as the mezzanine floor bathroom had a defective smoke alarm, and there was no smoke alarm in the hall.
> (j) the second floor bedroom had a leak in the ceiling, with damp and mould growth as a consequence. He noted that the tenant said that rainwater ran over electric wires when it rained.
> (k) the second floor kitchen had a defective smoke alarm and no heat detector.
> (l) the second floor mezzanine bathroom was damp.
> (m) the third floor bedroom had a leak from the roof.
> (n) there was a leak into the third floor kitchen onto electric wires, a fire hazard.

14. Mr Adekoya then explained the history of the enforcement action undertaken by the Respondent. This involved seeking information from the first Appellant and Mr Majid, and resulted in the service, in December 2021, of notices of intention to impose financial penalties on the Appellants and Mr Majid (for a wider range of offences than those now before the Tribunal). In due course, those to whom the notices were addressed made representations, and on 15 March 2022, withdrawal notices were issued to the Appellants in respect of offences under regulation 3 of the 2006 Regulations. In addition, all of the offences alleged against Mr Majid were withdrawn. Other enforcement proceedings were taken against Mr Majid in respect of failures to adhere to HMO licence conditions. On 22 March, the final notices

referred to above, the particulars of which are set out in the appendix, were served.

15. Three of the tenants gave oral evidence, Mr Deegan-Fleet first. Both Ms Day and Ms Hodge said that it had been Mr Deegan-Fleet who had taken the lead in liaising with the Appellants.

16. Mr Deegan-Fleet explained that the tenants had access to a portal called PropertyFile to communicate with, and make complaints to, the first Appellant.

17. Mr Deegan-Fleet also clarified the layout of the HMO, by reference to a floor plan provided by the Respondent. The HMO was reached via a staircase from the ground floor (ie the floor on which the restaurant was located). On the first floor of the HMO were bedrooms 1 and 2, occupied by Ms Hodge and Ms Day. Up from that floor, on a half-landing, or mezzanine (in Mr Adekoya's term) was the first bathroom. On the second floor was bedroom 3, occupied by Mr Sissons, and the first kitchen. The second bathroom was on the half-landing up from there, and on the third floor was bedroom 4, Mr Deegan-Fleets', the second kitchen and a WC. Kitchens, bathrooms and WC were all shared between all four occupants.

18. In his witness statement, Mr Deegan-Fleet stated he had moved into a room at the property in September 2020. Since that date, there had been a leak into his bedroom on the third floor of the HMO, and the kitchen on that floor. He related that he had complained about one or both leaks numerous times. A contractor had visited early on, and had said that major works were needed to the roof. After that, he heard nothing, although a number of other contractors visited the building, on occasion without notice to the tenants, and gaining access themselves. The tenants were told at some point that the roof repairs would only be undertaken when they moved out of the property.

19. Mr Baumohl put it to Mr Deegan-Fleet that he had been told by either the second Respondent or Mr Ibad Khan that the landlord was refusing to do the work on the roof until the tenants moved out. Mr Deegan-Fleet said that he remembered a conversation in which it was said that the work would only be done once they moved out, but he did not remember the attribution of this approach to the landlord. He conceded that it could have been put like that, however, and that the wording of his witness statement indicated that it was so.

20. In relation to the fire alarm, the effect of Mr Deegan-Fleet's evidence was that, before the alarm panel was moved, the tenants were disturbed by repeated incidents of the alarm going off. This was supported by a PropertyFile complaint dated 25 November 2020, and as we understood it, was not contested. He agreed that a "maintenance certificate" relating to the fire alarm panel, dated 23 January 2021 must

have been prepared after the moving of the panel, and that the text on that indicated that it was "all working ok". He agreed that the alarm did not go off after that.

21. Mr Baumohl took him to a Property File complaint dated 27 April 2021 which referred to a fault light on the panel being illuminated. Mr Deegan-Fleet was prepared to accept that it was probable that the light had not been on between the moving of the panel in January and this report in April. Ms Day was to give evidence, however, that she did not recall the light ever having been off. She also said that the light was on on the day that Mr Adekoya inspected the property. Ms Hodge also said she thought there had always been one light on.

22. Ms Day's witness statement refers to the alarm issue, the leaks and associated damp and mould, the use of the restaurant door, the radiator in bedroom 1, the stair carpet, and the smoke alarm in the first bathroom. She agreed in cross examination (as did Ms Hodge) that it was Mr Deegan-Fleet who took the lead in liaising with the Appellants in respect of these issues.

23. Both Ms Hodge's and Mr Sissons' witness statements covered broadly the same ground. It was in Ms Hodge's room that the radiator was not fixed properly. Mr Sisson's room (bedroom 3) suffered from one of the rainwater leaks.

24. All the tenants maintained that the restaurant door had been used by contractors to access the property. In cross-examination, Mr Deegan-Fleet accepted that Mr Majid entered through the door, and did so with contractors. He thought, when giving oral evidence, that Mr Majid had only come in on one occasion, but accepted that the terms of his witness statement suggested that it had happened more often, and that he had made the witness statement nearer the time.

25. Ms Hodge related an incident when she had come across two men coming up the stairs as she came out of the shower, at a time when she was alone in the property. They must have entered through the restaurant door. On another occasion, she said that she, with Mr Deegan-Smith and Mr Sissons saw Mr Majid in the property with some contractors. We understood that Mr Majid identified himself, but the group were otherwise uncommunicative.

26. Mr Deegan-Fleet and Ms Day said that they had not seen the second Appellant or Mr Ibad Khan at the property at any time.

27. In cross-examination, Ms Day agreed that she had had a telephone conversation with the second Appellant towards the end of the tenancy – May or June 2021 – in which she had asked for the landlord's details. She did so, she said, by way of escalating the tenants' concerns rather

than because it was understood that repairs were the landlord's responsibility rather than the first Appellant's.

28. The second Appellant gave evidence. His witness statement is in an unfortunate form. It does contain some statements of fact of which the second Applicant could give evidence, but it also proceeds by means of a large number of argumentative statements. These are not appropriate to a witness statement; and in any event, for the most part appear to be based on the same legal misconceptions apparent in the original expanded grounds of appeal, and which were (inevitably) not pursued by Mr Baumohl. These included that the property was not an HMO, that it did not need a licence, that the Regulations therefore did not apply, and that the first Appellant was not a person managing the property. We try hereunder to set out the statements of fact in a logical order (not necessarily that in the witness statement).

29. The second Appellant is the sole director of the first Appellant, a business for the management of residential properties. The first Appellant had been managing nearly 200 properties in London.

30. The second Appellant let the property on behalf of the Landlord, Mr Majid. The second Appellant was not aware that Mr Majid held an HMO licence for the property. Although not stated in the text itself, the heading of one paragraph suggests that the agreement between the first Appellant and the Landlord was a verbal one.

31. The Landlord gave the second Appellant limited authority to spend money on minor maintenance work. Where minor works costing about £100 to £200 had to be done, the first Appellant undertook them (as authorised by senior staff) and deducted the cost from the rent passed on to the Landlord.

32. The Landlord had agreed that he would do major works himself. At the request of the Landlord, the second Appellant had sought and secured quotations from contractors for the major works (which, although it is not stated, must mean the roof repairs). This happened in November 2020 (and again in May 2021). This explains some of the visits by contractors described by the tenants. After receiving complaints from the tenants, the Appellants reminded the landlord to complete the works. The Landlord did not seem interested in undertaking the work, which the second Appellant attributed to his desire to sell his leasehold interest in the property. At one point in the witness statement, the second Appellant says the tenants "were told that the only time the leaks could be fixed was when they had moved out. The landlord had told them an early contract termination through us for the work to be done."

33. Somewhat later in the witness statement, a passage appears dealing with the arrangement between the first Appellant and Mr Majid. The

second Appellant states that it was the Landlord's responsibility to do all the repair works required for the maintenance of the property. The passage continues

> "My involvement was solely with regards to finding the appropriate tenants for the property. Once the tenants were found, they were introduced to the Landlord; after both parties had agreed, I assisted them in preparing the necessary documents.
>
> Later, I and the Landlord agreed that I would collect the rent on monthly basis, would make payments to the Landlord and maintaining the communication between the Tenants and the Landlord, drawing up the necessary paperwork and transmitting the messages between the parties. This was because the Landlord was shying away from communicating with the Tenants. It should be well understood that this work did not involve repairs of the Property. This is because the repairs were a costly venture. I never had the authority to carry it out on my own."

34. The Appellants only entered through the front door, not the restaurant door. Any entry through the restaurant door was by the Landlord or his agents. The Landlord, in pursuance of his intention to sell his interest, allowed potential purchasers to view the property by allowing them to enter through the restaurant door.

35. As for the fire alarm, there was a "valid certificate" for it issued after the "repairs" in January 2021. A further inspection took place in 28 June 2021. It was satisfactory, although there was a recommendation that further work be carried out. The Landlord refused to carry out that work.

36. At the outset of his oral evidence, in additional examination in chief, the second Appellant further clarified the relationship between the first Appellant and Mr Majid. He said normally, there were two modes of operation. The first was that the first Appellant only secured tenants for a landlord. In the second, they provided a full property management service. The arrangement in respect of this property (which the second Appellant confirmed was a verbal agreement) was unusual, in that it was somewhere between the two. The reason for that was that Mr Majid was operating his business on the ground floor, and they were told they would have minimum involvement with the property, confined to collecting the rent and communicating with the tenants. Mr Majid would take care of the building and deal with repairs. They charged a commission of 5% of the rental income for this service. Had it been a full property management service, they would have charged 12% or 14%.

37. The second Appellant was extensively cross examined. He said that they had first taken the property on in 2015. Ms O'Leary put to him a

statement in the representations on the notices of intent in which his solicitors said that their involvement started only in September 2020, and previous correspondence in respect the HMO licence would not come to them. He said that was incorrect, but the statement was really about the HMO issues, which were directed to the landlord. He agreed the first Appellant was named as Mr Majid's agent on an assured shorthold tenancy agreement of the property dated 2014. He said that he had known Mr Majid had an HMO licence, and said that his witness statement was wrong to state that he did not. He believed that the first Appellant had a copy of the 2017 license. He had not known that his then office manager had helped Mr Majid renew his licence in 2019. Management software maintained by the first Appellant would have flagged up the renewal.

38. He said that he did know that he had to comply with the 2006 Regulations, but that complying with them was mainly a matter of securing certificates for safety checks and undertaking an inventory. The Regulations, he said, were not broadly defined. No-one at the first Appellant would check an inventory for breaches of the regulations, but the inventory clerk might raise them. There had been no inspections, and no inventory, but this was attributable to the pandemic.

39. When the terms of the assured shorthold tenancy under which the tenants held were put to him, he agreed that the first Appellant was identified as the landlord's agent, to which the rent was to be paid, notices sent and disrepair reported; that it was the first Appellant that had access to the landlord's end of the PropertyFile system; and that the tenants had no way to identify the landlord.

40. Asked about the level of authorisation of more minor works, the second Appellant agreed that he had no clear or firm threshold for authorisation, and that he had a certain discretion, but any landlord would question large sums. He said that the sum charged for moving and replacing the alarm panel in January 2021 (£1,468.80, according to the first Appellant's records provided in the bundle) would have been approved by Mr Majid. Taken to an email that suggested, as Ms O'Leary put it, that the first Appellant had instructed the work to be undertaken on its own authority, he said that would be the case in an emergency (ie, such as this). However, shortly thereafter, he said that he would need authorisation in advance for every item of expenditure, even for small amounts. The only situation in which prior authorisation would not be secured was if a landlord failed to respond and it was an urgent safety matter. The Tribunal put it to the second Appellant that he was contradicting himself, but he simply repeated both that they had a discretion to spend small amounts and that they always sought advance authorisation.

41. When Ms O'Leary put to him the photographic evidence produced by Mr Adekoya that alarms were not working (and there was no heat

detector in the second kitchen), initially, the second Appellant said that the first Appellant could not police the property all the time, that tenants (in general) tended to remove batteries from smoke alarms, and that a qualified engineer had certified the day before that the fire alarms were functioning. When pressed, he accepted that the engineer had only been inspecting the fire alarm panel, and denied that he was suggesting that these tenants had removed the batteries from the fire alarms overnight between the engineer's visit on 28 June 2021 and Mr Adekoya's inspection the following day. He then said that, even though he had not been so instructed, the engineer should nonetheless have reported any failings in the fire alarms and the lack of heat detectors.

42. Remedying the trip hazard on the stairs, the ceiling lights and the radiator hanging off the wall would all have been within their discretion, but the Second Appellant added that the owner was in and out of the property all the time (presumably by way of indicating that the landlord should have resolved the issues). He was aware of the leaks, but, he said, he had spoken to the landlord about undertaking the work on the roof "many times".

43. Ms O'Leary put to the second Appellant an email exchange between Mr Ibad Khan and the landlord. Mr Ibad Kahn sent the landlord photographs and a video relating to the leak on 28 June 2021. The next day, the landlord replied asking Mr Ibad Khan to relocate the tenants so that the work could be done. This, Ms O'Leary suggested, indicated that the landlord's position was that there should be relocation of the tenants for the work to be done, whereas the second Appellant's case was that he wished to see eviction or would undertake the work at the end of the tenancy. He rejected the implication, asserting that it was a "misleading email". He insisted that he had offered the tenants relocation (contrary to the position of the landlord), but that the tenants did not wish to move. When it was put to him that the tenant's evidence was that relocation had never been mentioned, he said that there were emails from the Appellant to the tenants. We understood that answer to mean that the possibility of relocation had been put to the tenants. He said that these emails were not in the bundle. The Tribunal briefly established from Mr Baumohl that he had not put it to the tenants that relocation had been offered. Thereafter, the second Appellant "clarified" that relocation had not been offered, just that the landlord wanted the property back. The tenants, he said, were told that that was the case, because that is what the landlord had told the Appellants. He insisted that when the landlord said "can you relocate your tenant", he meant that he wanted them evicted. It was not economic to relocate the tenants, who were students, at that time.

44. Mr Ibad Khan, the first Appellant's property manager responsible for the property, gave evidence. In his witness statement, he said that he was responsible for relations with the landlord. He produced some email exchanges with the landlord, but said that most of their interactions were by telephone, as the landlord routinely ignored emails

and text messages, and it seemed that he did not really care about he property.

45. In cross-examination, Mr Khan said he was aware the property was being used as an HMO, and that it had an HMO licence. It was not his role to ensure compliance with the 2006 Regulations. He did deal with repair issues, and it was he who was responsible for monitoring matters brough up by the tenants on the PropertyFile app. It was the second Appellant, not Mr Khan, who arranged quotations from contractors to undertake the roof works.

46. Mr Khan indicated that the original invoices (of which there were two, for £99) for the fire detection and alarm system inspection report dated 28 June 2021 (which showed a fault light was on, and indicated "needs repair") had been cancelled, and another two issued and paid, both for £125, on 5 July. This, he suggested, would have been to allow for a return visit to remedy the fault. The small increase in the invoice indicated to Mr Khan that the repair would have been something simple, like replacing a light bulb or fuse.

47. As to the question of authority to spend money on repairs, Mr Khan was clear that "even if £1 was spent", it was necessary to get advance authorisation from either the landlord or his manager. He agreed that if a safety matter involving only a small amount of money came up, the second Appellant would give authority for the money to be spent.

48. Between March 2020 and August or September 2021, no property inspections at all were carried out, because of the Covid-19 pandemic.

The Respondent's evidence on penalties

49. Ms House produced the Respondent's enforcement policy and the statutory guidance. Mr Adekoya's witness statement went through the decision making process at the Council, the notices of intention to impose a financial penalty and the final notices.

50. The matrix setting out the levels of financial penalties provided for in the Respondent's policy (and reproduced in Mr Adekoya's witness statement) was as follows.

Band Number	Severity of offence	Band width [£]
1	Moderate	0-5000
2		5001-10,000
3	Serious	10,001-15,000
4		15,001-20,000
5	Severe	20,001-25,000
6		25001-30,000

51. Mr Adekoya's referred to the Council's policy in setting out the decision-making as to penalty. It noted that while all breaches were important, the severity of breaches would vary.

52. He quoted a passage in the policy that stated that a landlord or agent controlling or managing one or two HMOs who failed to maintain a fire alarm in working order, with no other aggravating or mitigating features, would fall into the lower "severe" category, category 3. Mr Adekoya then reported that it was considered that the regulation 4 offence in this case was a "moderate" one, and should attract a penalty of between £1,000 and £5,000 (ie within band 2), despite the aggravating feature of non-compliance with warnings.

53. In respect of the regulation 7 and 8 offences, Mr Adekoya stated it was again moderate, and should attract a penalty of between £1,000 and £5,000. In respect of both, there were aggravating factors (failure to comply with warnings, and, in respect of the regulation 8 offence, previous history), but in both cases the Respondent "exercised discretion", and had taken account of the other penalties.

54. Ms House's witness statement confirmed the final notices.

55. In evidence, Ms House said that had she been responsible for proposing the penalties, that for regulation 4 would have been higher. In the light of that answer, Mr Baumohl asked her, in cross-examination, to look at the fire alarm engineers report form dated 28 June 2021. He put it to her that, despite the fact the engineer noted that the alarm was showing and needed repair, the engineer had ticked, as operating, the list of functional issues provided on the form. Ms House said that she would have questioned the engineer, as he had ticked (among 52 distinct items) the item which read "All indicators and monitoring of their circuits operate correctly". That, she said, appeared to contradict the statement earlier in the form that a fault light was showing and required repair. Had she instructed an engineer, she would have followed that up.

Submissions

56. Mr Baumohl made submissions according to his four key areas – proof of breach; reasonable excuse; liability of the second Appellant as director; and the amount of the financial penalty – in respect of each of the three pairs of notices/penalties – those contrary to regulation 4, regulation 7 and regulation 8. He organised his submissions alleged breach by alleged breach.

57. At the outset, he urged us to exercise caution in respect of the witness statement of Mr Adekoya, as he had not been available for cross-examination.

58. In respect of the offences contrary to regulation 4, Mr Baumohl asked us to infer that the only fault upon which the Respondent could rely was the illumination of the fault light on the fire alarm panel on the day that Mr Adekoya visited (and as documented in the report of the engineer's visit the previous day). We should not conclude that the light had remained on before April 2022, when the complaint to that effect was made on PropertyFile. Nor should we infer that there was a fault beyond the illumination of the fault light itself.

59. As a result, he argued, first, that the requirement in regulation 4(2) that a fire alarm should be maintained in "good working order" had not been breached. The erroneous fault light did not mean that the system was substantively not working, which meant it could not be said to be not in "good working order".

60. Secondly, in the alternative, the Appellants had a reasonable excuse. They had taken appropriate steps to deal with the fault light, which (we should infer) were successful, as a result of the engineers second visit.

61. Thirdly, and further in the alternative, even if the first Appellant was guilty of the offence, it could not be said that it was with the consent or connivance of the second Appellant, or that it was attributable to his neglect (2004 Act, section 234). His evidence had been that he was not personally involved in the day to day management of the properties under the management of the first Appellant, a proposition reinforced by the evidence of the tenants that he had never visited the property, and there was nothing to suggest that the breach had been a result of systemic failings of management by the first Appellant, for which he could be held responsible.

62. Finally, as to the amount of the financial penalty, it was, if we accepted his submission as to its gravity, the most minor possible technical breach. He took us to a passage in the Respondent's guidance that stated "[w]here contraventions are minor or there are no aggravating factors enforcement staff may send a warning letter asking for contraventions to be addressed by a certain date." There were, he submitted, none of the listed aggravating factors set out in the guidance. So in the first place, this was a case in which no penalty would be appropriate. Secondly, if there were to be a penalty, none of the indicia of seriousness, drawn from the statutory guidance, applied to the breach, and accordingly, any penalty should be at the bottom end of the Respondent's lowest "moderate" band, band 1, and not the top of that band (ie the amount imposed, £5,000).

63. The alleged breaches of regulation 8 specified in the relevant notice are set out in the appendix. Mr Baumohl drew attention to apparently ambiguous numbering of the provision breach of which is alleged, and submitted that we should conclude that it is regulation 8(2)(a), relating to the maintenance of the "internal structure". In the absence of

authority on the meaning of that term in relation to regulation 8, we should, he submitted, look at authority in relation to repair covenants, and thus it is essential appearance, stability and shape, and does not include fitting out and equipment, or decoration: *Irvine's Estate v Moran* [1991] 1 EGLR 261. It would thus not include the defect to the radiator (although that might come within regulation 8(2)(b)). Similarly, the presence of dampness does not count as damage to the internal structure (unless and until plaster is damaged), nor is a light not working. The problem with the window might come under regulation 8(2)(c), but not regulation 8(2)(a). Mr Baumohl accepted that the third allegation, of the leak through the roof, could properly be identified as a breach of regulation 8(2)(a), and in respect of that, he submitted, the reasonable excuse relating to the major works excused the Appellants.

64. In connection with the defence, Mr Baumohl noted Ms House's response in cross-examination that an alternative open to the first Applicant, in the absence of authority to conduct the major repairs and the absence of action from the Landlord, was to withdraw from the contract. He submitted that the reasonable excuse defence must have been included precisely to deal with a situation such as this, where the managing agent was unable, as a matter of contract, to "ensure" the matters required by the regulations. Were it otherwise, no managing agent would take on a property where, for instance, their only role was to collect the rent.

65. We put it to Mr Baumohl that the contrary incentive would also be present, if a lack of contractual authority to remedy a defect were to amount to a reasonable excuse (or would not amount to the offence in the first place). Managing agents could always escape liability by drawing up contracts that prevented them from "ensuring" that the regulations were complied with. Mr Baumohl's response was that the freedom to contract must be the starting point. It was a matter between the landlord and the agent how they were to manage their affairs. If they did so in such a way that the managing agent did not offer repair services, then it was right that the reasonable excuse defence could be invoked. Further, in this case, the managing agent had been, according to the evidence, doing what they could to get the landlord to undertake the repairs.

66. Further, Mr Baumohl submitted that Ms House's suggestion was absurd and extreme. The reality was a managing agent was trying to work with a landlord to sort out the repairs, and they should be given some leeway in how they do that and what they do.

67. As to the alleged breaches of regulation 7, Mr Baumohl accepted that the alleged conduct of the Appellants was capable of breaching, respectively, regulation 7(1)(a), 7(1)(b), 7(2)(c) and 79(2)(e). First, Mr Baumohl said we should be careful to consider whether Mr Adekoya's

report was corroborated by the evidence of the tenants. He accepted that there was some corroboration in respect of the leaks and the defect in the stair carpet. To the extent that there was corroboration of other elements of the allegations, that was in the witness statements, and in context that looked like a repetition of Mr Adekoya's report, rather than genuinely independent complaints.

68. Secondly, Mr Baumohl sought to introduce an additional factual point in relation to the smoke detectors (and thus relevant to the breach of regulation 7(1)(b)), which had, he said, become apparent to his clients during the course of proceedings at the earlier hearing. We decline to consider the point, as an attempt to introduce new evidence in submissions.

69. Mr Baumohl accepted that to the extent that matters fell within the authority for minor repairs, the Appellants were in some difficulty in respect of the regulation 7 breaches.

70. Mr Baumohl repeated his submissions in relation to the liability of the second Appellant.

71. In respect of the level of penalty for breaches of regulations 7 and 8, Mr Baumohl accepted that the penalties were towards the bottom end of the range, but submitted that the entry point should be no penalty at all, or a bottom end fine.

72. As preliminary points, Ms O'Leary asked us to have in mind that the offence was one of strict liability, that there was no requirement of proportionality in the power to impose financial penalties under section 249A of the 2004 Act; and the statutory purpose, as explained in *Urban Lettings (London) Ltd v Haringey London Borough Council* [2015] UKUT 104 (LC), [32] (" to ensure that the premises were suitable for multiple occupation, that the licensee was a fit and proper person and that the management arrangements were satisfactory and to provide both criminal and civil sanctions if the provisions were not complied with").

73. Finally before considering the breaches themselves, she referred us to *Adil Catering Ltd v City of Westminster Council* [2022] UKUT 238, which, she observed, involved a rather similar property to that in this case. In that case, the Deputy President's discussion of the meaning of "ensure" in section 234 from [33] concludes, at [40], that "an obligation to ensure involves making sure that something happens".

74. *Adil Catering* also concerned breaches of regulations 4 and 7. Ms O'Leary argued that, just as in that case, a breach of regulation 4(1) imposed an absolute duty (in contrast to the different wording of regulation 4(4)), so too the obligation in respect of the maintenance of

fire alarms was an absolute one to achieve an outcome (contrasted with that to perform activities, as in regulation 4(4)). A similar analysis applies in relation to regulation 7(2) (*Adil Catering*, [41] to [43]). The Deputy President, in [44], notes the severity of the requirements is tempered by the reasonable excuse defence.

75. In respect of regulation 4, Ms O'Leary submitted that the Respondent alleges breaches of both regulation 4(2) and regulation 4(4). The Respondent did not need to satisfy us that both were made out. She relied primarily, she said, on regulation 4(2). As to the issues with the fire alarm, Ms O'Leary noted that a problem was first identified more or less when the tenants moved in in September 2020. In June the following year, there was still not a working alarm system when Mr Adekoya inspected. The requirement was that the alarm was in good working order (not *reasonable* working order, or some similar qualification). There was a fault light on, at that time, and the engineer apparently returned. It was speculated that the fault must have been a minor one, such as a battery or a fuse, but we do not know whether that was a critical or a minor issue, in the event of a fire. But in any event, "good working order" must mean there are no faults, of whatever significance.

76. In respect of Mr Baumohl's argument on regulation 8 that the defects specified did not breach regulation 8(2)(a), the specified provision, Ms O'Leary submitted that if we were satisfied that there were breaches of regulation 8(2)(b) and (c), we could vary the final notice under paragraph 10(4) of schedule 13A to the 2004 Act.

77. Ms O'Leary directed us to *London Borough of Waltham Forest v Younis* [2019] UKUT 362 (LC), [2020] H.L.R. 17, a case in which the adequacy of the notice of intent was questioned. Both the notice of intent and the final notice require the local authority to give its "reasons" for (respectively) proposing, or actually imposing, the penalty. In *Younis* the Upper Tribunal said at [49] that it

> "was noticeable … that the requirement has been framed by reference to the authority's reasons, rather than by reference to some more technical requirement. So long as the notice explains why a penalty is proposed it will have done what is required of it."

78. The Deputy President went on to say that the reasons were not inadequate, but even if they had been, that would not have invalidated a notice, and more generally, at [74], that

> "[t]he seriousness of the offences for which civil penalties could be imposed, the relative shortness of the time available to a local authority to take action, and the availability of a right of appeal in the merits to an independent tribunal, are all features of the statutory scheme which militate against the

adoption of an excessively technical approach to procedural compliance".

79. Ms O'Leary further argued that there was no possible prejudice occasioned to the Appellants by the identification of regulation 8(2)(a) rather than other parts of the regulation. She suggested that the proper course would be for the Tribunal to vary the final notice.

80. In respect of regulation 7, Ms O'Leary emphasised the cogency of the tenants' evidence and the support provided by the photographs provided by Mr Adekoya.

81. Ms O'Leary also pointed to the existence of other defects not specifically covered by the final notices, including the gap below the door to the restaurant (which amounted to a failure in respect of fire separation) and defective alarms in two of the bedrooms. While not specifically covered, she suggested that these may be relevant to the amount of the financial penalties imposed.

82. As to director's liability, first, Ms O'Leary suggested that, in the absence of immediately available clear authority, the safest course was for us to proceed on the basis that we should consider ourselves bound by the criminal standard of proof when deciding whether the criteria for the imposition of a financial penalty on a director were made out.

83. Ms O'Leary first submitted that the breaches were the result of the neglect of the second Appellant. There was neglect in respect of the company's record keeping in relation to HMO licensing. Ms O'Leary submitted that the second Appellant's evidence was that he knew that there was an additional licencing scheme in place in the borough, and that the property had been used as an HMO, but he did not know that a previous employee of the first Appellant had assisted with the application for a licence, and that no steps were taken when the property was let to these tenants that a licence was in place.

84. There was no system in terms of the inventory process that checks were made as to compliance with the regulations.

85. Cross-examination also showed that the second Appellant's understanding of the law relating to HMOs was inadequate. In particular, he thought that if licensing did not apply, then neither did the regulations. He had not made sure that he was properly informed of the responsibilities under the regulations, which would have allowed him to run a company that adhered to them. In addition, his witness statement showed that he did not understand that the company was a manager for the purposes of section 263, to similar effect.

86. As to consent, he agreed the hybrid, unwritten contract with Mr Majid. He also admitted that he knew about the tenants' complaints through Mr Ibad Khan, including the serious water ingress, and that that was a long-standing issue. He gave evidence that he had obtained quotations for the roof works necessary to remedy the faults. He was clearly aware of what was happening, and he was responsible for the failure to address the problems. Mr Ibad Khan's evidence was that he would need to have the approval of the second Appellant to spend any money, so he knew about and approved the expenditure on the fire safety engineer. This must have meant, she argued, that he must have known about the maintenance issues.

87. It may have been, said Ms O'Leary, that the second Appellant was not in general involved in day to day management decisions with properties, it was clear from his evidence that he was, in fact, closely involved with the management of this property.

88. As to reasonable excuse, Ms O'Leary cited other authorities (*Aytan v Moore* [2022] UKUT 27 (LC), *R (Mohamed and Lahre) v Waltham Forest* [2000] EWHC 1083 (Admin) and *Sutton v Norwich City Council* [2020] UKUT 90 (LC) and [2021] EWCA Civ 20), and particularly referred us to a passages in *Adil Catering* at [51], emphasising that the reasonable excuse must relate to the offence in question; and [57], that the "duty to ensure the safe condition of the HMO is not a duty to remedy defects of which the manager has notice" and that "It was for the appellant to inform itself sufficiently of the condition of the premises to enable it to take timely remedial action. The evidence was that it had failed to do so."

89. The lack of contract, Ms O'Leary argued, meant there was little force in Mr Baumohl's argument that the first Appellant was not contractually required to undertake repairs. There were other things that the first Appellant could have done, other than walking away from the property, such as putting in place a written contract with Mr Majid when it became obvious that there were serious problems. The first Appellant could also have helped to rehouse the tenants, as requested by Mr Majid on 29 June 2021.

90. As to credibility, Ms O'Leary noted that there were serious discrepancies between the second Appellant's witness statement and his oral evidence.

91. In respect of the level of penalties, Ms O'Leary noted that the Council's policy was not, in general, to take informal steps before prosecution. She emphasised that all the penalties were at the bottom level of the relevant ranges.

Determination

92. We set out our conclusions in relation to:

(i) Finding of breach;

(ii) Reasonable excuse;

(iii) Liability as a director of the second Appellant; and

(iv) The amount of the penalties imposed.

93. Before we do so, we make some initial observations on the evidence. First, we accept Mr Baumohl's point that he was unable to cross-examine Mr Adekoya, and so we take that into account in considering how much reliance to place on his evidence. In general, any tribunal or court will be cautious of relying on untested evidence provided in a witness statement. However, in this case, we do not think that that takes us very far. Mr Adekoya's factual findings on the day that he inspected are not seriously challenged by the Appellants, and could not be, given their nature and the fact that they are supported by photographs. That aside, Mr Adekoya's evidence on the procedure followed within the Council was uncontested, and that in relation to decision making was capable of being tested in cross examination of Ms House.

94. As to the other witnesses, we found all of the tenant witnesses to be straightforward and honest. We made a similar assessment of the evidence of Mr Ibad Khan.

95. The evidence of the second Appellant was, however, thoroughly unsatisfactory. He contradicted the evidence in his witness statement (the unsatisfactory nature of which we noted above), and hardly considered that the contradiction merited explanation. He also showed himself willing to change his evidence, and indeed to contradict himself within a few sentences, if he thought it might be to his advantage to do so. Although he also admitted matters to his disadvantage, our impression was that he did so unwittingly. Had there been significant conflicts of factual evidence between him and the other witnesses, we would have preferred their evidence to his. As it happens, there is little direct factual conflict which we are required to resolve.

96. We find the breaches proved beyond a reasonable doubt.

97. The breach of regulation 4 is unavoidable, but the severity of the breach is clearly an important issue. Mr Baumohl does not, and in the light of the fire alarm engineer's report of the day before, could not deny that

the alarm showing a fault light when Mr Adekoya inspected. Contrary to Mr Baumohl's submission, we find that at the very minimum, if a light is wrongly showing that there is a fault in the functioning of the alarm, that in itself is a fault. Even if the fault light was itself a malfunction, because there was, in fact, no fault, it amounts to a deviation from being "in good working order".

98. We are not, however, prepared to conclude that that is all that was wrong with the alarm, and that we should accept that it was resolved shortly thereafter when the engineer returned to the property.

99. First, we are not prepared to rely on the fact that the engineer ticked every functional item set out in the list on the form as being adequate evidence that all of those functions were in fact working on the first inspection. As Ms House helpfully pointed out, he or she had also ticked the box indicating that fault indicators were functioning properly, which substantially undercuts the credibility of the ticks on that list.

100. Secondly, the existence of a fault light on an alarm panel gives rise to a strong inference that there is a fault with the functioning of the alarm. The Appellants' case is that the fault must have been rectified by the return visit of the engineer, for which he submitted a further (small) invoice. But there is no direct evidence of what the engineer did. The Respondent asks us to infer from the visit, and the invoice, that whatever the fault was (whether simply the malfunction of the fault light itself, or some other substantive functional fault) was remedied properly by that visit. There is simply no direct evidence that that is in fact what happened. We are left with the inference of a fault existing from a fault light.

101. Finally, we cannot be satisfied that the fault was rectified, given the evidence of two of the tenant witnesses that the fault light stayed on until the following April. It is true that one of the witnesses said that he could not be sure that the light was on after (we are asked to infer) the engineer's second visit, but the other two expressed themselves as sure that the light did remain on. We consider it much more likely than not that those two witnesses are right, and that conclusion is not contradicted by the witness who was no more than not sure that the light remained on.

102. On the basis of these conclusions, we also reject Mr Baumohl's argument that the Appellants had a specific reasonable excuse in respect of this breach. We are not satisfied that the fault was only as to the illumination of the light. But even if that were wrong, the fact that the Appellants are compelled to rely on the argument that we should draw an inference that the fault was corrected from a substituted invoice, without any proper description of the work, indicates a failing

of the Appellants' systems to monitor and control the maintenance of the fire alarm.

103. As to regulation 7, we are satisfied that the faults identified on the final notice were present when Mr Adekoya inspected. Mr Baumohl did not formally accept that that was the case, but in truth he was unable to provide a serious challenge to it.

104. As to regulation 8, Mr Baumohl relied on the failure to identify the correct provision within the regulation to justify the breaches alleged.

105. We accept Mr Baumohl's arguments, first, that the reasons given for the financial penalty in the final notice identify regulation 8(2)(a) as the provision breached, and, second, that the specific breaches alleged did not amount to breaches of those heads. We do not have to decide if Mr Baumohl is right that "internal structure" should be interpreted according to the case law that he identified, but we do conclude that it is difficult to see the faults as amounting to that description. That conclusion is reinforced by the fact that they clearly do fall within regulation 8(2)(b) and (c), so those heads would have been unnecessary if the drafter intended such matters to come within regulation 8(2)(a).

106. However, we also accept Ms O'Leary's argument from *Adil Catering* to the effect that a non-technical approach should be adopted in relation to what must be specified in a notice. Mr Baumohl counters that *Adil Catering* concerned a notice of intention to impose a financial penalty, not a final notice. We do not think that that alters the broader point made by the Deputy President in paragraph [74]. The description of the requirement for reasons set out in schedule 13A to the 2004 Act in respect of notices of intention and final notices are in substance identical, and the points made in the passage from [74] we quote at paragraph [78] above apply equally to both.

107. It is also clear that there is no possible prejudice caused to the Respondent by the mis-identification of the relevant head within regulation 8(2). Both Appellants must have been quite clear as to what was being alleged.

108. Ms O'Leary suggested that the correct course is for us to vary the final notices to correct the misidentification. We have some doubt as to whether it is necessary for us to do so, but are content to make the variation in the circumstances.

109. Accordingly we order that the notices should be varied to identify the provision breached as simply "regulation 8(2)", rather than "regulation 8(2)(a)" (or the variations of that identification), and make consequential amendments to the text. We do not consider that it is necessary for the specific heads within paragraph 8(2) to be specified.

110. We now consider reasonable excuse.

111. Mr Baumohl's core submission is that, where a managing agent is not contractually bound to engage with repairs to the property, or at least, repairs costing more than the authority afforded to the managing agent in advance by the landlord, the managing agent has no power to ensure that the repairs are undertaken, and that that constitutes a reasonable excuse. What else can the managing agent do? asks Mr Baumohl, rhetorically. We add that the argument was put principally, or possibly exclusively, in relation to the major works required to the roof to remedy the leaks.

112. We interject to observe that the evidence was not as clear as to the existence or extent of advance authority in respect of minor repairs as Mr Baumohl's submission supposes. In cross-examination, the second Appellant said both that there was such authority and that he had to get prior authorisation for all expenditure; and Mr Ibad Khan said that there had to be prior authorisation for every pound that was spent.

113. If Mr Baumohl was wrong as to that, then the reasonable excuse would extend further, to all repairs expenditure. However, lest it be thought that we are relying on an argument ab absurdum based on very small expenditures, we are prepared to assume for current purposes that there was the advance authority that Mr Baumohl asserts.

114. We reject Mr Baumohl's argument.

115. First, the contention that a manager's duty to "ensure" is limited by its contractual rights or obligations does not fit with the structure of the offences. The Deputy President analysed the two different kinds of offences provided for in the regulations in *Adil Catering*. Each of the offences we are dealing with specify that "the manager must ensure …" (on the basis that Ms O'Leary relied on a breach of regulation 4(2), not 4(4)). They are "outcome" offences, rather than "performing activities" offences, using the Deputy President's analysis. It would be wrong, the Deputy President, to treat provisions like regulation 4(2) as if they were to the same effect as a provision such as regulation 4(4), which requires a manager "to take all such measures as are reasonably required …".

116. In *Adil Catering*, counsel for the landlord was arguing that "ensure" had a more limited meaning, so the base offence would not be committed in the sort of circumstances that inspired Mr Baumohl's reasonable excuse argument. If that contention was right, then the distinction between "outcome" and "perform activities" offences – which, as the Deputy President demonstrates, flows through the regulations – would break down, or at least be substantially reduced.

117. On the face of it, a requirement to take measures that are reasonably required, or similar formulations, will at least be limited by the contractual ability of the manager to take those steps. No doubt the manager would be obliged to advise the landlord, beyond the strict bounds of its contractual obligations, but it is not an obligation to "make sure" that the required outcome comes about.

118. The "ensure" type of offence, on the other hand, is designed to impart a strict standard. As the Deputy President says, in respect of contrasting "outcome" and "perform activities" offences in regulation 4, the argument of counsel in that case, which was to similar effect (although not exactly the same) as that put by Mr Baumohl:

> "The effect of [counsel's] argument would be that the duty to ensure means of escape are free from obstruction would be equivalent to a duty to take all such measures as are reasonably required to ensure that the means of escape are free from obstruction. But the substance of the duties are different: sub-paragraph (4) requires the manager to perform activities, whereas sub-paragraph (1) requires the manager to achieve an outcome. The standards which the two formulations import are also different: one is absolute, the other is relative. When the regulation already applies a relative standard to one duty, it would not be appropriate to water down the absolute language which has been chosen to describe a different duty."

119. So the distinction between the two types of offence is a fundamental feature of the regulations. As the Deputy President points out, the strict standard imposed by "ensure" offences is mitigated not by the form of the offence itself, but by the long-stop of the reasonable excuse defence. However, the purpose of the reasonable excuse is to prevent absurd consequences flowing from strictness of the offence itself, not to undermine it (see [44] of *Adil Catering*). If we accepted Mr Baumohl's submission, then exactly the approach rejected by the Deputy President in relation to the definition of the offences in *Adil Catering* would be reintroduced in its entirety by the backdoor of an over-extensive reasonable excuse defence. Rather than providing a back-stop against absurdity, the defence would wholly negate the distinction fundamental to the structure of offences created by the regulations.

120. Secondly, if it was generally understood that a manager's obligations were coterminous with its contractual obligations as a result of approach to reasonable excuse, it would undercut the purposes of the legislation.

121. Those purposes, un-controversially, include to improve standards in the private rented sector. The legislation uses obligations placed on managers of property. Managers, in the somewhat contorted terms of the definition in section 263, include both owners and lessees receiving

rent (etc) on the one hand, and, where rents (etc) are received by agents, the agent. The legislation thus uses managing agents, which are obviously a key sector in the private rented sector market, as a means of leveraging improved standards in the sector by (inter alia) imposing strict outcome offences on them in the regulations.

122. If it were generally understood that those strict offences could be evaded via the reasonable excuse defence by excluding relevant matters, such as fire safety or the physical condition of the property, from the contractual obligations of managing agents, agents would be incentivised to provide standard contracts that achieved those aims. That would defeat the object of the legislation, and distort the market in managing agents services, and introduce legally undesirable uncertainty into the relations between landlords and managing agents (to the extent that the written contract might be subject to unwritten understandings as to the services to be provided by the agent).

123. Thirdly, in any event, the comparator implied by Mr Baumohl's argument does not exist. He posits that this contract, because of its hybrid nature, did not impose responsibilities in relation to – particularly – major works on the managing agent, and thus provided a reasonable excuse that would not be available to a managing agent which did have contractual responsibility for repairs. However, no contract between a managing agent and a landlord that the Tribunal is aware of gives actual authority to an agent to undertake, and pay for, major works without the consent of the landlord. Such contracts typically make provision for a managing agent to, for instance, manage a section 20, Landlord and Tenant Act 1985 consultation process, and then either project manage the major works themselves, or organise the project management function via some other party, and so on. The idea that the managing agent could, on its own and without the specific consent of the landlord, manage and pay for major works, from the resources of the landlord, is wholly unrealistic. Indeed, the logic of Mr Baumohl's position is that a managing agent upon whom the offences did bite would have to have a contractual right to undertake major works in the face of the opposition of the landlord. Given Mr Majid's opposition to undertaking the major works (while the tenants were in place), nothing less, in terms of the contract between the first Appellant and Mr Majid, would not have given rise to the defence.

124. Finally, as Ms O'Leary argued, there were things that the first Appellant could have done, but did not, at least in relation to the major works issue. Our understanding of what the second Appellant said in evidence was that the reason he did not offer the tenants alternative accommodation when invited to do so by Mr Majid in June 2021, to allow the works to be carried out, was that it was *uneconomic* to do so. There were properties available to the first Appellant, but starting a new tenancy at that time was disadvantageous, because it did not maximise income in the student rental market. That "ensuring" an

outcome costs money does not provide a manager with a reasonable excuse not to do it.

125. Further, Ms O'Leary submitted that the managing agent could have, and should have, walked away from the contract, as Ms House suggested in her evidence. Mr Baumohl objects that removing the agent would not have been in the tenants' interests. That, we consider, ignores the broader regulatory context. If a landlord obstructs a managing agent in ensuring an outcome, and that leads to the managing agent refusing to continue with the contract, that puts on the landlord the sort of pressure to comply that the regulations are designed to achieve. Ex hypothesi, it is in the landlord's interests to engage a managing agents (or he would not do so), and contrary to his interests if he cannot engage a managing agent because of a refusal to allow the managing agent to ensure an outcome required by the regulations.

126. We turn now to the liability of the second Appellant as director. By section 251, where a company commits an offence, a director may also commit the offence if the company's offence was committed "with the consent or connivance of, or is to attributable to a neglect" on the part of the director. We have found that the company committed all of the offences set out in the final notices, as varied. We accept Ms O'Leary suggestion that we apply the criminal standard to our determination as to whether the criteria for parasitic directors' liability apply.

127. As a preliminary, the first Appellant is a relatively small company, and the effect of the evidence was that the second Appellant is clearly the controlling mind of the company for all purposes.

128. We accept Ms O'Leary's submission that all of the breaches were attributable to the neglect of the second Appellant to inform himself of the basics of the first Appellant's obligations under the regulations and to establish proper systems to ensure that the regulations were complied with.

129. In his evidence, it became apparent that the second Appellant thought that the Regulations only applied to HMOs requiring a licence, that all HMOs had to be licenced, and that the Regulations were mainly about securing safety certificates and conducting an inventory. He signed a witness statement that asserted that the property was not an HMO, that it was not licensable, and that the first Appellant was not a manager in the relevant sense. All of these are errors that a person in the second Appellant's position – the director and controlling mind of a small managing agent – should not make. There was no provision for proper advice on these sorts of matters to the first Appellant other than from the second Appellant in person.

130. The second Appellant's evidence was that there was no system in place at all to secure compliance with (or even to understand) the Regulations. He suggested at one point that the inventory clerk might bring up matters he or she observed, but it should be clear that this was at best haphazard, and in any event we would not expect an inventory clerk to have sufficient expertise to assess the compliance of a property with the Regulations. There was no indication from either the second Appellant or from Mr Ibad Khan that, as the person with day to day management responsibilities, the latter was expected to assess compliance, or that he had the necessary expertise.

131. We conclude that this alone is sufficient to warrant the imposition of liability on the second Appellant for all breaches. It is also clear that the failure to deal with the roofing issue was a matter in which he took direct personal control, his evidence being that he had on a number of occasions sought to pursued Mr Majid to deal with it; and it was his decision not to offer the tenants alternative accommodation, as requested by Mr Majid. Insofar as we have found that this issue constituted a breach, and that there no reasonable excuse, the breach was committed with his consent or connivance.

132. Finally, we consider the level of penalties.

133. In respect of the regulation 4 breaches, we have indicated our approach to the severity of the fire alarm issue above, when we dealt with breach. We do not accept that the breach was at the lowest possible level of severity, as Mr Baumohl submitted. We note that the starting point in the Council's policy is twice the level actually imposed on each Appellant. If there is a fault with the penalty imposed, it is (as Ms House's evidence suggested) that it was too low. We do not think that it would be appropriate for us to vary the notice to increase the penalty, but the level it was set at is certainly not too severe.

134. Mr Baumohl accepted that he had difficulty in contesting the level of penalty for the regulation 7 breaches. They were low on the level of seriousness, he argued. But at £2,000 per Appellant, they were also at a low level in the range identified in the policy. Similar considerations apply to the regulation 8 breaches. Again, if there was anything wrong with the penalties imposed, it was that they were too low.

135. Having noted that the individual penalties were on the low side, Ms House suggested that the officers concerned may have considered that they should be mitigated by consideration of the totality of the penalties imposed. While we can see no express reference to a totality principle in the Council's policy, we consider that it would be proper for the Respondent to make an assessment of the totality of the penalties imposed, as a check on the appropriateness of the individual penalties. We have also done so, and can see nothing that suggests that, at the level imposed, the totality of penalties requires any readjustment.

136. Accordingly, we decline to vary the final notices, apart from varying the description of the provision breached in regulation 8 to "regulation 8(2)", as set out above.

Rights of appeal

137. 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 London regional office.

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

139. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

140. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 21 April 2023

Appendix: the alleged breaches

Regulation	Particulars	Penalty charge
4(2)	failed to ensure that any fire fighting equipment and fire alarms are maintained in good working order because the automatic smoke detection system in the property is not working and fault lights are on	
4(4)	there is a defective fire alarm panel which the tenants claim was first reported in need of repair in September 2020 when it went off at random, after this, it was turned off at the fuse. There was a water leak that was affecting this panel and the tenants claim they reported it again and the panel was moved to avoid water leaking into it but was not tested and the fault light remains on	
Penalty for breaches of regulation 4		£5000
7(1)(a)	There is damp and mould growth on the ceiling to the entrance hallway	
7(1)(b)	There is a leak dripping down from the previous location of the fire panel causing damp and mould growth on the walls in the hallway. The mezzanine floor bathroom has a defective smoke alarm in the ceiling with no other smoke alarm in the hallway. The 2nd floor kitchen has a defective smoke alarm and no heat detector. The 2nd floor mezzanine bathroom has some damp caused by a leak. There is a leak in the 3rd floor kitchen onto electric wires causing a fire and electric hazard	
7(2)(c)	there were loose carpet in the floor-board on the stairs.	
7(2)(e)	The common parts staircase lighting was on a timer but the lights did not allow time for someone to walk a flight of stairs. There was no common parts lighting switches to the mezzanine floors and staircase. There was no way of operating the light system when coming out of the shared bathroom or shared shower room	
Penalty for breaches of regulation 7		£2000
8(2)(a)	a) The 1st floor bedroom number one the radiator is loose and dislodged off the wall. There is damp on the ceiling and the lights to this room are not working. b) The 2nd bedroom the window has a defective	

	window which does not shut. There is damp in the corner of the ceiling from a leak from the shower in the adjoining wall or from the mezzanine floor shower. c) The 3rd floor bedroom has a leak from the roof. Tenants were told the roof will be fixed when they end their tenancy. The leak has resulted in damp to the ceiling	£2000