FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00GL/HNA/2022/0037**
Property	**:**	**18 Orion Street, Smallthorne, Stoke-on-Tent, ST6 1PB**
Applicant	**:**	**BK Associates (NW) Limited**
Representative	**:**	**Counsel – Mr A Rashid and Mr S Juss, instructed by MH Solicitors**
Respondent	**:**	**Stoke-on-Trent City Council**
Representative	**:**	**Counsel – Mr R Darbyshire, instructed by the Respondent**
Type of Application	**:**	**An appeal under paragraph 10 of Schedule 13A to the Housing Act 2004 against a Financial Penalty**
Tribunal Members	**:**	**Judge M K Gandham** **Mr R Chumley-Roberts MCIEH, JP**
Hearing Dates	**:**	**19 January 2023 and 19 June 2023**
Date of Decision	**:**	**21st August 2023**

DECISION

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Decision

1. The Tribunal determines that the Final Notice dated 9 June 2022 given to BK Associates (NW) Limited be cancelled.

Reasons for Decision

Introduction

2. On 6 July 2022, Mr Basil Kabbani, a director of BK Associates (NW) Limited ('the Applicant'), applied on behalf of the Applicant to the First-tier Tribunal ('FTT') to appeal a decision to impose a financial penalty, and the amount of that penalty, upon the Applicant under paragraph 10 of Schedule 13A to the Housing Act 2004 ('the Act'). The penalty had been imposed by Stoke-on-Trent City Council ('the Respondent') under section 249A of the Act, in respect of the property known as 18 Orion Street, Smallthorne, Stoke-on-Tent, ST6 1PB ('the Property').

3. The Respondent had, on 29 September 2021, given to the Applicant a notice of its intention to impose the penalty ('the Notice of Intent') and, on 9 June 2022, the Respondent gave to the Applicant a Final Notice in respect of an offence under section 30 of the Act (failure to comply with an improvement notice) ('the Final Notice').

4. The Tribunal issued directions on 27 July 2022 and a bundle of documents was received from both parties. A hearing took place on 19 January 2023, following an inspection of the Property.

5. At the hearing, which was conducted via the HMCTS Video Hearing Service (VHS), the Tribunal queried whether the Respondent had its own policy for determining the level of financial penalty, as no such policy was included within the Respondent's bundle. Mrs Sarah Fitzpatrick, an Enforcement Manager (of the Private Sector Housing Team) employed by the Respondent, informed the Tribunal that the Respondent did have a financial penalty policy and a brief recess was called to allow the Respondent an opportunity to provide the same.

6. Following the recess, Mrs Fitzpatrick confirmed that the policy (which had been emailed to both the Tribunal and the Applicant during the break and was titled the '*Stoke-on-Trent City Council Policy and Guidance on Determining level of Civil Penalty/Financial Penalty Under the Housing and Planning Act 2016 and the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020*') had come into force in October 2020. Mrs Fitzpatrick accepted that the Respondent had failed to comply with this policy when calculating the level of the financial penalty imposed on the Applicant.

7. Based on this information, the Respondent's policy and level of the financial penalty was not explored further at the hearing and, as under Schedule 13 of the Act, the appeal was by way of a re-hearing and the Tribunal could confirm, vary

or cancel the final notice, the Applicant was, instead, asked to provide a written submission in relation to the level of penalty he believed should have been imposed if the emailed policy had been followed.

8. On 27 January 2023, the Tribunal received an email from the Respondent stating that the information given by Mrs Fitzpatrick at the hearing was incorrect and that the policy emailed on that day had not come into force until October 2022. The Respondent attached, to its email, a document titled *'Charging Table for determining value of Financial Penalties imposed under Housing Act 200"* ('the Charging Table'), which the Respondent stated was the correct policy which had been in force at the time of issuing the notices to the Applicant.

9. In light of the information given in the Respondent's email, the Tribunal decided that a further hearing would be required, restricted to questions relating to the Respondent's enforcement policy and the level of the penalty imposed under the Charging Table. The further hearing took place on 19 June 2023, following which the Respondent supplied a copy of a Report of Infringement ('the Infringement Report') the Respondent had referred to at the new hearing.

The Law

10. Under section 249A of the Act, a 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'*. The imposition of the penalty is an alternative to prosecution for a relevant housing offence.

11. Section 249(A)(2) defines the relevant housing offences as offences 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).

12. Section 249A(3) of the Act confirms that only one financial penalty can be imposed on any person in respect of the same conduct and section 249A(4) confirms that the amount of any financial penalty cannot exceed £30,000.

13. Paragraphs 1 to 9 of Schedule 13A to the Act set out the procedure for imposing financial penalties and provide:

    Notice of Intent

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

    2 (1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.
    (2) But if the person is continuing to engage in the conduct on that day, and

the conduct continues beyond the end of that day, the notice of intent may be given—

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

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

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

3 The notice of intent must set out—

(a) the amount of the proposed financial penalty,

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

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

Right to make representations

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

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

Final Notice

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

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

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

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

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

8 The final notice must set out—

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the notice.

14. The person upon whom a final notice is given may appeal to the Tribunal under paragraph 10 of Schedule 13A to the Act which provides:

Appeals

10 (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—
(a) the decision to impose the penalty, or
(b) the amount of the penalty.
(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.
(3) An appeal under this paragraph—
(a) is to be a 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.

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

- the severity of the offence;
- the culpability and track record of the offender;
- the harm caused to the tenant;
- the punishment of the offender;
- to deter the offender from repeating the offence;
- to deter others from committing similar offences; and
- to remove any financial benefit the offender may have obtained as a result of committing the offence.

Inspection

16. The Tribunal inspected the Property on 19 January 2023, in the presence of Mrs Fitzpatrick and Mr Robert Darbyshire, counsel for the Respondent from 9 St John Street Chambers. Mr Kabbani did not attend. The Tribunal was informed that the Property was no longer in the ownership of the Applicant but that the new owner, and current occupier, had both granted access for the purpose of the inspection.

17. The Property was a two storey, mid-terrace house of brick construction with a pitched tiled roof. To the ground floor there were two reception rooms, a kitchen, a rear hall (from which a door led to a small back yard) and a bathroom situate in a single storey extension. The first floor comprised of a small landing leading to two bedrooms, one to the front of the Property and one to the rear. The Property had the benefit of double glazing and central heating.

18. At the time of the inspection there was no evidence of existing damp, although there was some water staining on the walls and around the chimney breast to the front bedroom and on the ceiling to the rear bedroom. The Tribunal also noted that there was no extractor fan to the kitchen, the door to the back yard was poorly fitted and the garden gate at the rear of the yard was missing.

Background

19. On 11 March 2020, a general disrepair enquiry was raised by Miss Walker, the tenant of the Property, with the Respondent's Private Sector Housing Team. The enquiry referred to door security issues, water ingress, mould and leaks to the kitchen sink and boiler. The Respondent had also been involved with the Property in April 2015 in relation to some general disrepair, however, the then tenant had moved out of the Property and the case had been closed in June 2015.

20. A new boiler was installed at the Property on 31 March 2020.

21. Miss Loretta Blakeman, an Environmental Health Officer employed by the Respondent, managed to make contact with Miss Walker in July 2020 and an inspection of the Property took place on 22 July 2020.

22. Miss Blakeman stated that the inspection identified a number of category 1 and category 2 hazards under the Act and that she had concerns regarding fire safety, an ongoing leak to the boiler, water ingress, water penetration, mould growth and defects with the rear entrance door. Some repairs were carried out to the Property between July and August 2020, however, some works remained outstanding.

23. On 12 August 2020, Miss Blakeman received an email from Miss Walker advising her that she was currently without electricity and that the Property had been flooded. She sent a further email the same day confirming contractors were on-site. Mr Tom Amblin (a colleague of Miss Blakeman) inspected the Property on that day and confirmed that it did have working electricity and that there was no immediate cause for concern.

24. Miss Blakeman completed a Housing Health and Safety Rating System (HHSRS) assessment and a full schedule of works was forwarded to the Applicant on 19 August 2020, listing the deficiencies at the Property and confirming that the works were required to be completed by 30 September 2020.

25. On 24 September 2020, Miss Blakeman sent an email to Mr Kabbani requesting an update regarding the works. She received an email reply stating that the tenant was not engaging with the contractors and was asked if she could meet the contractors at the Property.

26. A further inspection of the Property was carried out on 8 October 2020, which identified no progress with the works. Works were, however, carried out after that date and, on 26 October 2020, Miss Blakeman received an email from Mr Kabbani asking for confirmation as to what works remained outstanding.

27. A third inspection was carried out by Miss Blakeman on 27 October 2020, following which Miss Blakeman emailed Mr Kabbani, identifying the outstanding works and asking for the same to be completed by 9 November 2020. Further correspondence was entered into after this date and, on 13 November 2020, Mr Kabbani contacted Miss Blakeman again regarding access difficulties.

28. As works still remained outstanding, on 24 November 2020, the Applicant was served with an improvement notice in respect of the outstanding works ('the Improvement Notice'). The Improvement Notice confirmed that the outstanding works, as detailed in the schedules to the notice, were to be commenced by 24 December 2020 and required completing by 1 March 2021. The Applicant did not appeal the service of the Improvement Notice.

29. On 16 March 2021, Miss Blakeman received an email from the Applicant's contractor stating that he was having difficulties regarding access. Further correspondence was entered into between the tenant, Miss Blakeman and the contractor regarding the same. The Property was re-inspected by Miss Blakeman on 7 April 2021, after which there was further correspondence regarding access issues.

30. As Miss Blakeman considered that works were still outstanding at the Property and that the Applicant had failed to comply with Improvement Notice, the Notice of Intent was served by the Respondent on the Applicant on 29 September 2021. Representations were received from MH Solicitors, the Applicant's representative, on 25 October 2021.

31. On 26 January 2022, Miss Blakeman inspected the Property again and noted that works were still outstanding and, on 28 January 2022, Mrs Fitzpatrick responded to the representations received. Although MH Solicitors sent further representations, these were received outside the 28-day period for representations to be considered.

32. The Property was inspected by Mr Michael Spearman (another Environmental Health Officer employed by the Respondent) on 29 April 2022, who identified a number of defects including that the Property was still suffering from damp and that the back door was unusable.

33. On 9 June 2022, the Final Notice was served on the Applicant.

34. The decision to impose a financial penalty, and the level of penalty imposed, was determined by the Respondent on the basis of the Infringement Report and the Charging Table.

Hearings

35. As previously stated, hearings were held on 19 January and 19 June 2023. Mr Kabbani attended on behalf of the Applicant on both dates, and the Applicant was represented by Mr Aftab Rashid from Reliance Law Limited on the first date and by Mr Satvinder Juss, counsel from 3 Hare Court Chambers, on the second.

36. Mrs Fitzpatrick and Miss Blakeman attended both hearings on behalf of the Respondent, and the Respondent was represented by Mr Darbyshire. At the second hearing Miss Ashleigh Pennill (from the Respondent's legal department) and Mr Harrison Edmonds (a pupil from 9 St John Street Chambers) were also in attendance.

The Submissions

37. The Background to the application (as detailed above) was established from the submissions of both parties and did not appear to be in dispute.

The Applicant's submissions

38. The Applicant submitted that the imposition of the Final Notice was unreasonable and procedurally flawed, so ought to be quashed.

39. Mr Rashid, on behalf of the Applicant, stated that the representations made following the Notice of Intent had not been properly considered and that the Respondent had failed to take into account that a number of works had been carried out and completed at the Property following the issuing of the Improvement Notice.

40. Mr Rashid referred to various invoices and a schedule of '*Trouble Tickets*' (included within the Applicant's bundle) which detailed works which had been completed between June 2016 and September 2022, including roofing repairs, guttering replacement, works to the kitchen cabinets and the installation of a soakaway.

41. Mr Rashid also submitted that there was substantial disagreement between the parties regarding the deficiencies detailed in the Improvement Notice.

42. In relation to the category 1 hazard relating to an ongoing leak from pipework underneath the boiler, Mr Rashid submitted that the classification of this deficiency as a hazard was a matter of interpretation, as the Respondent had itself acknowledged in the Improvement Notice that it was "*not currently causing any issues with the heating system*". He pointed to the fact that the Gas Safety Certificate, issued in April 2021, confirmed that the boiler was working correctly and that a plumber had also confirmed that the leak did not affect the working of the boiler in any way. Despite this, Mr Rashid stated that the Applicant had arranged for the faulty condensation pipe to be replaced.

43. In relation to the kitchen cabinet doors, Mr Rashid stated that the units had been in good working order at the beginning of the tenancy and that there had been no investigation by the Respondent to see whether such work had been completed prior to service of the Notice of Intent. He stated that the evidence showed that repairs to both the doors and the edging strips had been completed prior to the Notice of Intent being issued.

44. With regard to water ingress to the Property, Mr Rashid contended that the Respondent had given insufficient time to the Applicant to discover what was

causing the problems. He stated that the Applicant had carried out works to the roof and evidence of the same had already been provided to the Respondent. The Applicant had also boarded up the rear entrance door, so as to prevent drafts and any further water penetration into the Property.

45. In relation to the damp to the walls and the floors, Mr Kabbani stated that this had been caused by a leak in a mains pipe for which an investigation had been carried out by Severn Trent, that an insurance claim had been settled, that all of the works had been completed and that water penetration was no longer an issue. Mr Kabbani accepted that it had taken some time for the investigations to reveal what was causing the damp and that the works were not completed until late 2021 or early 2022, but submitted that this was an unavoidable delay.

46. In relation to the time taken to complete other works, Mr Rashid stated that the Applicant had encountered a number of issues with regard to access, firstly, due to the national lockdowns as a result of the COVID-19 pandemic and, secondly, because the tenant had been obstructive.

47. Mr Rashid submitted that Miss Blakeman had been made aware of the issues with the tenant, as was clearly evidenced in her witness statement. He also submitted that the evidence included within the Applicant's bundle (letters, emails and text messages) indicated that contractors had faced regular difficulties in gaining access to the Property to carry out the works and that the tenant had also been abusive towards several of them.

48. In relation to the level of penalty, Mr Juss contended that the starting sum of £5,000 was arbitrary and that the premium added for multiple significant hazards was incorrect as there had been no proper scrutiny of the items detailed in the Improvement Notice. He also submitted that the Respondent had failed to take into account that much of the works detailed in the Improvement Notice had already been completed by the Applicant prior to the Notice of Intent being issued and that the addition of this premium was, therefore, unjustified.

49. In relation to the premium for multiple properties, Mr Juss submitted that this had been added based on the Respondent having a 'belief' that the Applicant had a large housing portfolio, rather than any evidence that this was in fact true.

50. Finally, at the end of the second hearing, when it became apparent that the Respondent did not have any enforcement policy in place in respect of civil penalties at the time of issuing either of the notices, Mr Juss submitted that the penalty should be cancelled as, without such a policy, the Respondent was unable to show that it had lawfully exercised its discretion when deciding to issue a penalty.

51. Mr Kabbani did confirm, at the hearing, that the Applicant managed a housing portfolio of over 10 properties and that he had been a property investor for over 25 years. He stated that this was the first civil penalty either he or the Applicant had ever received and that he had no prior history of non-compliance with either this or any other property.

The Respondent's submissions

52. Mr Darbyshire, on behalf of the Respondent confirmed that it was no longer in dispute that the Applicant was the manager of a large portfolio of properties and, consequently, submitted that the only questions for tribunal were, firstly, whether an offence had been committed, secondly, whether any breach could be defended and, thirdly, whether there should have been any penalty added for the multiple hazards.

53. In relation to any breach, Mr Darbyshire stated that the inspection carried out by Miss Blakeman on 7 April 2021, one month after the deadline for works in the Improvement Notice had expired, revealed that not all of the works had been completed. He stated that photographs taken by Miss Blakeman at the time evidenced that there was still a leak beneath the boiler, that storage cupboard doors were missing, that there was still water ingress to the kitchen (evidenced by gaps in the flooring being plugged with plastic bags) and that the rear entrance door was still defective. Accordingly, Mr Darbyshire submitted that there was no doubt that there had been a breach.

54. As to whether the Applicant had a reasonable excuse for not carrying out repairs, Mr Darbyshire submitted that this was for the Applicant to prove on the balance of probabilities.

55. Mr Darbyshire stated that the Applicant had first been made aware of the deficiencies at the Property by Miss Blakeman in August 2020. As such, he submitted that the Applicant had been given more than sufficient time for the works to be completed prior to the issuing of the Notice of Intent and that some of the works carried out at the Property appeared to be patch jobs rather than a proper attempt to resolve the underlying issues.

56. With regard to access issues relating to the pandemic, Mr Darbyshire stated that the lockdown did not prevent essential repairs to rental properties and, thus, without anything more, this could not be regarded as causing any delay.

57. In relation to any access issues caused by the tenant, although Mr Darbyshire stated that the Respondent accepted that there had been a few issues in this respect, he pointed to the fact that there were long periods of time when there appeared to have been no activity by the Applicant at the Property or any attempt to contact the tenant, such as between the middle of December 2020 and the middle of March 2021.

58. Miss Blakeman confirmed that she had been informed of some access issues prior to and including in December 2020, but had heard nothing further until she received an email from one of the Applicant's contractors on 16 March 2021, stating that he was awaiting a response from the tenant regarding access.

59. Miss Blakeman confirmed that in her emails of 16 November 2020 and 4 December 2020, she had made it clear that she was able to offer assistance with gaining access if the Applicant was encountering problems. She also noted that

the Applicant had managed to gain access to carry out some of the works, so presumed that this was not a consistent issue.

60. In relation to the water penetration, Miss Blakeman stated that she had not received any communication with regard to any insurance claim, nor had she been told prior to 1 March 2021 that any extension would be required due to any ongoing investigations with regard to the cause of the water ingress.

61. With regard to the wording of the Final Notice, on questioning by the Tribunal, Miss Blakeman accepted that, although it detailed the reasons for "*proposing to impose the financial penalty*", it did not confirm the reason for the Respondent *actually* deciding to proceed with the imposition of the penalty, as required under paragraph 8 of Schedule 13A to the Act.

62. Miss Blakeman also accepted that the period for payment of the penalty detailed on the Final Notice, as also required under paragraph 8 of Schedule 13A, was incorrect as it stated that the penalty was "*payable within 28 days of the date of this notice*" rather than stating that is was payable "*within the period of 28 days beginning with the day after that on which the notice was given*", as set out the paragraph 7 of schedule 13A to the Act.

63. In relation to any enforcement policy in place at the time of issuing the notices, although there was initially some confusion as to which policy, if any, the Respondent had in place, at the second hearing Mrs Fitzpatrick confirmed that the only 'policy' in place at the time was the Charging Table.

64. On questioning by the Tribunal, Mrs Fitzpatrick accepted that the Charging Table determined the level of the penalty to be imposed, rather than detailing whether a civil penalty should have been considered in the first instance. She also accepted that it did not consider the public interest stage of the test at all.

65. Mrs Fitzpatrick did state that, prior to issuing a civil penalty, a report on the infringement would have been carried out, whereby a senior manager and the legal team would have reviewed the file. She confirmed that a copy of the report in this matter, if available, could be provided to the Tribunal if required. [The Infringement Report was, at the Tribunal's request, supplied to both the Applicant and the Tribunal following the hearing].

66. In relation to the calculation of the level of the penalty, Mrs Fitzpatrick stated that she was not aware as to why the starting point of any penalty for breach of an improvement notice started at £5,000. She also accepted that there was no sliding scale in the Charging Table which took into account the seriousness of the offences detailed in the Improvement Notice in question.

67. In relation to the application of the multiple significant hazards premium of £2,500, Miss Blakeman accepted the Tribunal's observations that some of the deficiencies at the Property had been repeated across a number of different hazards in the Improvement Notice. As the Charging Table stated that a multiple significant hazards premium was payable when there had been a failure to comply with three or more category 1 or high-scoring category 2 hazards across "*different*

building deficiencies", she agreed that the 'Fire' hazard and the 'Collision & Entrapment' hazard referred to the same deficiencies as had been detailed in the 'Damp & Mould' and 'Food Safety' hazards, and that the leak underneath the boiler had been detailed both as a 'Damp & Mould' hazard as well as a hazard in relation to 'Excess Cold'.

The Tribunal's Deliberations and Determinations

68. The Tribunal, under paragraph 10 of Schedule 13A to the Act, may confirm, vary or cancel a final notice, determining the matter as a re-hearing of the local housing authority's decision.

69. In reaching its determination the Tribunal considered the relevant law and all of the evidence submitted, both written and oral, and briefly summarised above.

Reasonable Excuse

70. Under section 249A of the Act, a local housing authority may only impose a financial penalty on a person if it is satisfied "*beyond reasonable doubt*" that a person's conduct amounts to a relevant housing offence.

71. In this matter, it was not disputed that all of the deficiencies detailed in the Improvement Notice had not been rectified by the completion date detailed in the notice, being 1 March 2021.

72. As to whether an offence under section 30 of the Act had been committed, although not specifically argued by the Applicant, the Tribunal considered whether the issues raised by the Applicant amounted to a defence under section 30(4) of the Act, in that the Applicant had a reasonable excuse for failing to comply with the Improvement Notice

73. In relation to the deficiencies detailed on the Improvement Notice, the Tribunal noted that the Applicant had not appealed the service of the notice and, as such, considered it was too late to make submissions regarding whether or not certain items should have required any remedial action.

74. In relation to the issues with access, the Tribunal agreed with Mr Darbyshire that the lockdown did not restrict tradesmen carrying out essential repairs to tenanted properties. The Tribunal also considered that, even if the pandemic had caused some delays to instructing workmen, the Applicant had received ample opportunity (having been informed of the defects over six months prior) to carry out the repairs before the deadline detailed in the Improvement Notice.

75. With regard to any access issues caused by the tenant, the Tribunal acknowledged that the Applicant's contractors had encountered difficulties gaining access to the Property at certain times. This was evidenced not only in emails and text messages supplied by the Applicant, but also in the witness statement of Miss Blakeman. The Tribunal did, however, accept that following 10 December 2020, no further difficulties appeared to have been communicated to Miss Blakeman

regarding access until 16 March 2021, some two weeks after the deadline for completion of the works had passed.

76. The Tribunal also accepted that Miss Blakeman had informed Mr Kabbani by email, in both November and December 2020, that she would be willing to help assist the Applicant with access to the Property should he require the same. In addition, the Tribunal also noted that there was no evidence to suggest that the Applicant had requested any extensions of time regarding investigations into the water ingress prior to 1 March 2021.

77. As such, the Tribunal found that any access issues did not amount to a reasonable excuse for failing to comply with the Improvement Notice and, as the notice had not been complied with, the Tribunal found that the Applicant had committed an offence under section 30 of the Act. Consequently, the Tribunal found that the Respondent was able to consider, under section 249A of the Act, whether a financial penalty could be imposed in respect of that offence.

Validity of the Notice

78. Although not raised specifically by the Applicant, the Tribunal considered whether the defects that had been identified in the Final Notice meant that the notice was invalid, and thus of no effect.

79. In considering the same, the Tribunal took into account the decision of the Upper Tribunal in *London Borough of Waltham Forest v Younis* [2019] UKUT 0362 (LC) ('*Younis*'). In that decision, not only did the Upper Tribunal find that, based on the circumstances of that case, that the notice of intent was not defective, but went on to consider the general importance with regard to defects in notices, citing the decision of the Court of Appeal in *Newbold v Coal Authority* [2014] 1 WLR 1288.

80. In this matter, the first two paragraphs of the Final Notice referred to the reasons that had been given for *proposing* the financial penalty and the amount of the penalty that had been *proposed*, neither of which were required to be detailed in the Final Notice. It failed, however, to comply with paragraphs 8(b) and 8(d) of Schedule 13A to the Act, in that it did not specify the reasons why the Respondent had concluded that it was going to impose a civil penalty and also gave incorrect information regarding the period for payment of that penalty.

81. With regard to the period for payment, the Tribunal accepted that this was a minor error in the calculation of the days. Although the Tribunal considered that there was little reason why such an error should be made (as the wording required was clearly detailed in paragraph 7 of Schedule 13 to the Act), the Tribunal found that this in itself did not affect the validity of the notice.

82. The Tribunal did, however, consider that the failure of the notice to set out the reasons for imposing the penalty were considerably more important. As the Upper Tribunal had stated in paragraph 73 of the *Younis* decision, the purpose of a notice of intent is to inform the recipient as to the reasons why the authority is contemplating the imposition of a financial penalty, however it "*does not*

represent the last word on any issue". The recipient has the opportunity to make representations, the authority is obliged to look at its decision again and there is a right of appeal to the FTT. The Upper Tribunal went on to state that, if any reasons given in the notice of intent were unclear or ambiguous, Parliament would not have intended that a notice of intent should invariably be treated as a nullity taking into account all the features of the statutory scheme, including the availability of a right of appeal on the merits before an independent tribunal.

83. Following the reasoning in *Younis*, the Tribunal found that the purpose of a final notice is to confirm why the local authority has decided that the imposition of a penalty is justified in the circumstances of the case. In this matter, the Respondent had simply stated:

    "*The Council has considered any written representations that were made following a Notice of Intent that was sent to you on 29 September 2021 and determined a Financial Penalty of £10,000 and this must be payable within 28 days of the date of this notice*"

    There was no explanation as to why it had come to this final conclusion, as is required under paragraph 8, and, as this was the purpose of the notice, the Tribunal found that the notice had not even adequately complied with the provisions of the statutory requirements.

84. Unlike a notice of intent, the next step following a final notice is the appeal to the FTT. As such, the Tribunal considered that if the final notice was unclear or ambiguous, it might fail to convey sufficient information for the receiver to decide whether or not to appeal the notice to the FTT. Although this did not happen in this matter, it did not necessarily follow that this would always be the case. Consequently, the Tribunal considered that the possible effect of non-compliance with the requirements of a final notice could put the recipient at a substantial disadvantage.

85. Accordingly, the Tribunal did have serious reservations regarding the validity of the Final Notice.

Imposition and Level of the Penalty

86. Although the Tribunal considered that there were issues regarding the validity of the Final Notice, in case it was wrong on that point, it went on to consider the facts in this matter and as to whether the Respondent had been justified in its decision to impose a civil penalty on the Applicant.

87. By the end of the second hearing day, it became quite clear that, at the time the Notice of Intent and Final Notice were issued, the Respondent did not have an enforcement policy in place in relation to determining when to issue a civil penalty. The only policy in place at the time was the Charging Table which simply related to the determination of the level of penalty imposed.

88. The Tribunal found that the Charging Table in itself had a number of flaws in that there was no justification regarding the starting point for the level of penalty (in

this case being £5,000), nor did the table take into account the severity of any offence when deciding the final penalty imposed. The Tribunal noted that this had, in part, been rectified in the Respondent's new policy.

89. The Tribunal did not, however, accept Mr Juss' submission that the failure of the Respondent to have a policy meant that the notice should be cancelled, as the Guidance referred to local housing authorities being "*expected to develop and document their own policy*" but this was not a mandatory requirement.

90. As the Respondent did not have a policy, and as the appeal to the FTT is as a rehearing of the local authority's decision under paragraph 10(3) of Schedule 3 to the Act, the Tribunal referred to the Guidance in determining whether the circumstances of the case justified the imposition of a penalty.

91. The Guidance confirms that the same criminal standard of proof is required for a civil penalty as is required for prosecution. It also states that "*before taking formal action*" a local authority should satisfy itself that there would be a realistic prospect of conviction. In doing this, it states that local housing authorities should consult the Crown Prosecution Service's 'Code for Crown Prosecutors' ("the Code"), which has two stages - the evidential stage and the public interest stage.

92. The Tribunal, for the reasons stated in paragraphs 70 to 77 above, was satisfied that there was sufficient evidence that an offence had been committed for which there was a realistic prospect of conviction.

93. The Tribunal went on to consider whether it was in the public interest to impose a civil penalty. In doing this, the Tribunal took into account the questions set out in paragraph 4.14 of the Code.

94. The Respondent's evidence with regard to the public interest in imposing a civil penalty on the Applicant was detailed in the Infringement Report. The Tribunal noted that this had only been completed on 10 May 2022, after the Notice of Intent had already been given, and contrary to the Guidance which stated that this exercise should have been carried out prior to any formal action having been taken.

95. Paragraph 4.14(a) of the Code refers to the seriousness of the offence. The Tribunal noted that the Infringement Notice did not clearly detail whether the Respondent considered that the offence was serious, although it did refer to the court being likely to impose a "*significant*" penalty for the offence. Taking into account the deficiencies referred to in the Improvement Notice, the Tribunal did not agree.

96. The Tribunal found that, although the failure to comply with an improvement notice might generally be considered to be a 'serious' offence, the Code referred to considering the culpability of the offender and the harm caused by the offence when assessing seriousness.

97. Based on its own expertise, the Tribunal did not consider that the ongoing leak from the condensation pipe was a category 1 hazard, nor that deficiencies to the door and missing edging strips should have resulted in these items being considered as separate hazards. The Tribunal did accept that there were category 2 hazards in relation to Damp & Mould and Food Safety but found that the risk of harm to the tenant from the same was low. (The Tribunal noted that the Respondent had, in the Infringement Notice, accepted that any harm to the tenant was minor, despite her being pregnant).

98. In addition, although the Tribunal accepted that the Applicant was culpable, it found that the offending was not premeditated or planned, that there was no previous history of non-compliance, that there had been some access issues caused by the tenant in carrying out the work and that most of the works had been completed prior to the issuing of the Notice of Intent.

99. In relation to any impact on the community, the Tribunal considered that the Respondent had failed to provide sufficient information to suggest that any prosecution or imposition of a penalty on the Applicant would have had any significant impact on the community and the Tribunal found that prosecution would not have been a proportionate response.

100. Accordingly, based on all of the information, the Tribunal found that the imposition of the civil penalty failed to meet the public interest stage test and, consequently, that the Final Notice should be cancelled.

Appeal Provisions

101. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M K GANDHAM
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Judge M K Gandham