



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	: CHI/45UE/HNA/2023/0002
Properties	: 7A Gossops Parade, Gossops Green, Crawley, West Sussex, RH11 8HH
Applicant	: Pi-Gen Pharma Limited
Representative	: Ms Saika Taj, of KMP Group
Respondents	: Crawley Borough Council
Representative	: Ms Poonam Pattni of counsel
Type of Application	: Appeal against a financial penalty – s.249A Housing Act 2004
Tribunal Member(s)	: Judge M Loveday Mr B Bourne MRICS Ms T Wong
Date and venue of hearing	: 12 September 2023, Havant Justice Centre (remote hearing)
Date of Decision	: 21 September 2023

DETERMINATION

Decision

1. This is an appeal against a financial penalty under s.249A of the Housing Act 2004 (“the Act”). The penalty was imposed for an offence of failing to comply with an Improvement Notice under s.30 of the Act.
2. For the reasons given below, the Tribunal finds that:
 - (a) A defence of reasonable excuse is made out, but only to the very limited extent in paragraph 37 below.
 - (b) The penalty of £3,500 should be upheld.

Background

3. The Appellant is the owner of 7A Gossops Parade, Gossops Green, Crawley, West Sussex, RH11 8HH. Although the Tribunal did not inspect the premises, it is common ground that it comprises an end of terrace 2-bedroom flat above a pharmacy.
4. The Improvement Notice was dated 8 April 2021. It identified three Excess Cold Category 1 hazards, and by Schedule 3 required various remedial actions as follows:

Action	Period within which the remedial action is to be completed
<p>1. You must install one of the following heating systems:</p> <p>(a) A full gas central heating system throughout the whole Premises.</p> <p>or</p> <p>(b) Off Peak electric storage heaters with convector boost function of sufficient capacity to heat throughout the Premises. The storage heaters must be fixed to 13amp fused switch spurred outlet dedicated solely to each appliance. Any electrical appliance located in a bathroom or kitchen must be suitable for use in that room. An appropriate electricity meter must be fitted to measure off peak electric usage.</p> <p>Whichever of the 2 above heating systems you choose to install, the system design, size and</p>	<p>Within 49 days of the Start Date ie by 28th June 2021</p>

	<p>position of the radiators or storage heaters must meet the requirements as detailed above and must be capable of maintaining an indoor temperature of 21° (bathroom & kitchen) and 18° (in all other rooms) when the outside temperature is - 1°.</p> <p>To be clear: the fitting of electric panel heaters or oil filled radiators will not be adequate.</p>	
2.	You must supply and fit proprietary quilted or loose fill insulation material to all areas of the loft. The insulation shall be applied between and across the top of the ceiling joists. The depth of insulation shall meet the recommended depth of 270mm if it is glass wool, or 250mm if it is rock wool or 220mm if it is cellulose insulation.	Within 42 days of the Start Date ie: by 21 st June 2021
3.	You must arrange for a survey of the external walls to be undertaken by a member of either the National Insulation Association Limited or the Cavity Insulation Guarantee Association to assess whether all external cavity walls of the Premises are suitable for insulation.	Within 42 days of the Start Date ie: by 21 st June 2021
4.	You must arrange for a written report of the survey and assessment (in 3. above) to be prepared and send a copy of it to the Council by email to: ps.housing@ Crawley.gov.uk	Within 56 days of the Start Date ie: by 5 th July 2021
5.	If the survey and assessment (3. above) concludes that any or all of the cavity walls are suitable for insulation, you must arrange for a member of either the National Insulation Association Limited or the Cavity Insulation Guarantee Association to install cavity wall insulation to those walls.	Within 63 days of the Start Date ie: by 12 th July 2021
6.	You must arrange for an invasive survey of the timber clad area of the living room to be undertaken by a member of either the National insulation Association Limited or the Cavity Insulation Guarantee Association to determine the level of insulation between the external timber cladding and internal wall, and to provide an assessment as to what action can be taken to	Within 42 days of the Start Date ie: by 21 st June 2021

	improve the level of thermal warmth and the heat loss from this area of the Premises.	
7.	You must arrange for a written report of the survey and assessment (in 6. above) to be prepared and send a copy of it to the Council by email to: ps.housing@ Crawley.gov.uk	Within 56 days of the Start Date ie: by 5 th July 2021
8.	You must arrange for the recommendations made following the survey and assessment (6. above), if any, to be undertaken.	Within 63 days of the Start Date ie: by 12 th July 2021
9.	You must arrange for the removal of the existing plastic infill panel below the living room UPVC window and for it to be replaced with a fixed double glazed window unit.	Within 63 days of the Start Date ie by 12 th July 2021

8. The Respondent Housing Authority served a Notice of Intent to Impose a Financial Penalty on 14 September 2022, indicating that it was minded to impose a penalty of £5,000.
9. The Appellant submitted representations, and as a result, on 20 December 2022 the Respondent served a Final Notice of Decision, which reduced the penalty to £3,500. The Notice referred to the following offence:

“Between 13/07/2021 and 16/03/2022, PI-GEN Pharma Limited, a person on whom an improvement notice dated 08/04/2021 was served pursuant to section 11 of the Housing Act 2004, did fail to comply with the said notice, contrary to section 30 of the Housing Act 2004, in that the company did not arrange for a member of either the National Insulation Association Limited or the Cavity Insulation Guarantee Association to install cavity wall insulation to the walls of the property at 7A Gossops Parade, Gossops Green, Crawley.”

It follows from this that the alleged offences solely related to paras 3-5 of Sch.3 to the Improvement Notice. There is no suggestion the Appellant did not comply with the remaining six requirements of Sch.3.

10. The appeal notice was dated 13 January 2023. Directions were given on 4 July 2023 and a hearing fixed for 19 September 2023, with the parties being permitted to attend remotely.

11. At the hearing, the Appellant was represented by Ms Saika Taj, of the managers KMP Group. The Respondent was represented by Ms Poonam Pattni of counsel, who provided a skeleton argument and who called evidence from a Council officer, Mr Chris Modder. The Tribunal is grateful to Ms Taj and Ms Pattni for their helpful and economic submissions.

The Appellant's case

12. In its appeal notice, the Appellant contended that it did comply with the said notice and arranged for a qualified contractor to install cavity wall insulation at said property in accordance with the recommendations of Crawley's Housing Manager. The necessary housing works were authorised by the Appellant with the approved contractor on 28 January 2022, and confirmed to Mr Modder. This was seven weeks in advance of the 16 March 2022 date specified in the Final Notice of Decision. The works were scheduled multiple times to be undertaken before 16 March 2022, but were delayed for a number of reasons beyond the direct control of the Appellant:
 - a. Delays in material being received by the Appellant's contractor;
 - b. The tenant getting Covid-19, and not granting access to the contractor;
 - c. The tenant unreasonably refusing access to the contractor;
 - d. The contractor's technician not being immediately available to undertake works due to the previous delays caused by the tenant;
 - e. The contractor finally confirmed to the Appellant on 21 March 2022 that it had completed the cavity wall insulation works. This was five days after the notice period referred to in the Penalty Notice; and
 - f. The eventual five-day delay in the works being completed was beyond the direct control of the Appellant and was solely due to the various delays by the contractor and the tenant.
13. The Appellant provided a statement of case dated 25 July 2023, which elaborated on the above. The Appellant had asked its agent KMP Group to deal with the works. In November 2021, Mr Modder contacted a firm of cavity wall specialists called CavityTech. On 21 December 2021, he emailed Ms Taj to say he had contacted those contractors, that he had heard back from them and that they were able to survey on 11 January 2022. On 5 January 2022, Mr Modder shared details of the contractor with the Appellant, so it could confirm the survey with CavityTech directly. CavityTech inspected on 12 January 2021 and provided a report on 19 January 2022. Their estimate to retrofit cavity wall insulation was £780 + VAT at 5%. The Appellant authorised the works on 28 January

2022, some 7 weeks before the 16 March 2022 date specified in the Final Notice of Decision. The Appellant sent the CavityTech report to the Respondent on 4 February 2022. After this, there were various delays in completing the works caused by matters outside the Appellant's control:

- a. Delays in the materials being delivered by the contractor. There is an email dated 23 February 2022 stating that CavityTech had discovered it needed extra pipe, but that it hoped to proceed "in the next week or two".
- b. The tenant getting Covid-19 and not granting access to the contractor. This was reported by the tenant on 1 March 2022 by telephone. The works were subsequently booked around the tenant for 3 March 2022.
- c. The tenant unreasonably refusing access to the contractor. This was reported by CavityTech by telephone on 7 March 2022.
- d. The contractor's technician not being able to undertake the works immediately following previous delays. This was again reported by CavityTech by telephone. CavityTech subsequently emailed on the 14 March 2022 to inform the agents of their intentions to complete the works the same week.
- e. The contractors being away and unavailable for providing updates. The works were finally completed on 21 March 2022.

14. In her submissions to the Tribunal, Ms Taj referred to a witness statement she had prepared dated 29 August 2023. After the agents were instructed, they initially appointed Surrey Construction Services Ltd to undertake the works specified in the notice. On 21 April 2021, they arranged to meet on site and ran through the scope of works. This included commissioning a survey of the cavity walls and any subsequent cavity insulation works required. In the event, Surrey Construction Services Ltd advised they were completing a current job and could start the works in May 2021, ahead of the deadlines for the various works identified in Sch.3 to the Improvement Notice. Ms Taj proactively chased the contractors on numerous occasions by email along with numerous calls. In July, Surrey Construction Services Ltd told the agents that the delays were down to staff shortages due to Covid-19. On 20 July 2021, Ms Taj specifically chased the firm for the "surveys as noted on [paras 3-4 of Sch.3] of the notice". Eventually, due to the unreasonable amount of time it had taken to get these works completed, the Appellant decided to appoint another contractor, MK Trading, to take over and complete any outstanding works. MK Trading's scope of works included the cavity wall survey and any subsequent cavity insulation works required. Eventually, on 13 August 2021, MK Trading informed the Appellant that it was unable to locate a firm which had the

availability to survey the cavity walls. Ms Taj then sought assistance from another of the agents' regular maintenance contractors, Residenza Properties Ltd. Residenza emailed on 20 August 2021 to say that they were also experiencing difficulty in finding a company to complete the survey and insulation works in a timely manner. In September 2021, there was a roof leak, which took priority over other works. On 15 November 2021, Ms Taj emailed another firm the agents had previously used, who recommended Bierce Chartered Surveyors. Bierce confirmed the same day they had no availability.

15. At the hearing, Ms Taj accepted that it was not until 15 November 2021 that she first took it upon herself to locate a contractor which was a member of either the National Insulation Association Limited or the Cavity Insulation Guarantee Association. She suggested she had made enquiries with both organisations, but accepted there was no documentary evidence of this in the hearing bundle.
16. In essence, the above amounted to a reasonable excuse under s.30(4) of the Act.
17. As to the level of penalty, there was no challenge to the Respondent's application of its policy or national guidance. As explained below, at the hearing, the Tribunal nevertheless asked Mr Modder to take it through the stages of the penalty assessment. After this, Ms Taj confirmed she had no objection to the level of penalty, her argument being restricted to a reasonable excuse defence under s.30(4) of the Act.

The Respondent's case

18. Mr Modder gave evidence about the narrative of events and the assessment of the penalty. He relied upon a detailed and helpful witness statement dated 4 August 2023, which exhibited numerous emails and documents. But (without wishing to diminish the weight attached to this evidence), for present purposes it is only necessary to deal with two aspects of his evidence.
19. First, in relation to the reasons for delays, Mr Modder explained that the cavity wall inspection did not appear to have been carried out or even booked by the Appellant before late 2022. He had therefore looked up and made contact with firms from the websites of the National Insulation Association Limited and/or the Cavity Insulation Guarantee Association, although he could not now recall which one. This was to try to progress the work for the benefit of the tenants who were facing another cold

winter. On 17 November 2021, he forwarded an email to the Appellant from an insulation company called Slate Insulations that he had contacted via their website. The email asked for specific information regarding the property to enable Slate to provide a quote. He advised Ms Taj that there were various companies listed on the relevant website that could be contacted regarding a home insulation survey. There is no record of the Appellant following up the email from Slate Insulations. On 21 December 2021, he forwarded an email to the Appellant from CavityTech, which had replied to his earlier enquiry. When asked at the hearing, Mr Modder stated that he had not found it difficult to locate the professional body's website or to find contractors listed there.

20. Secondly, the Tribunal wished to be satisfied about the approach to assessing the level of penalty. Mr Modder explained he had applied the scoring matrix in the Council's 2017 policy *The use of civil penalties and rent repayment orders under the Housing Act 2004* and the government guidance *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities*. The offence was scored as a minimum band 3 offence with a starting point of £10,000. The Respondent had then considered aggravating and mitigating circumstances and proportionality. For the purposes of the Notice of Intent on 14 September 2022, the Respondent had allowed 50% for proportionality, to arrive at a proposed penalty of £5,000. On 23 October 2022, the Appellant made written representations, which referred to delays caused by both "Access Issues" and "Unreliability of the contractors". The Respondent took these into account when assessing the final penalty on 20 December 2022. At that stage, Mr Modder explained that he allowed a further £1,500 to reflect problems with the contractors and the fact that the Appellant "did liaise with CavityTech regarding a home insulation survey and cavity wall installation once that company's details had been provided by the Private Sector Housing Team".
21. In her submissions, Ms Pattni referred to the statutory defence under s.30(4). In *IR Management Services v Salford City Council* [2020] UKUT 81, it was held that the burden of proving a reasonable excuse falls on the defence and, that the defence need only be established on the balance of probability: a landlord is running a business and ought to be expected to understand the regulatory environment in which that business operates, not all businesses are the same. Nothing that had been suggested by the Appellant amounted to a reasonable excuse for not undertaking the investigations, preparing specialist reports or carrying out the works by the date specified in Sch.3 to the Improvement Notice. This was a case of the

Appellant simply “leaving late, and then complaining about the traffic”.

The legislation

22. A person on whom an Improvement Notice is served may appeal to this Tribunal under Sch.1 to the 2004 Act. If there is no appeal, s.15(2) of the Act provides that an Improvement Notice becomes operative 21 days after it is served. Under s.30 of the Act, the person on whom it was served commits a criminal offence if they fail to comply with the Improvement Notice. Section 30(4) provides that:

“(4) In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice.”

23. Sch.13A provides for appeals against financial penalties imposed for breach of Improvement Notices. In the event of such an appeal, it is provided by para 10(3) of Sch.13A that it:

“(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”.

24. In *Sutton and another v Norwich City Council* [2020] UKUT 90 (LC), 214-216 the Deputy President elaborated the following test statutory housing defences:

“214. ... we nevertheless agree that in each case, once the facts amounting to the relevant housing offence have been made out by the local authority, it is for the person wishing to rely on the defence to prove that they had a reasonable excuse. Since the hearing of these appeals the Tribunal has considered where the burden of proof lies where the defence of reasonable excuse is relied on in answer to a relevant housing offence, and has confirmed that it is for the landlord or manager to prove that they had a reasonable excuse for their conduct: *IR Management Services Ltd v Salford City Council* [2020] UKUT 81 (LC).

215. Mr Croskell accepted that the question whether [the landlord] had a reasonable excuse for its conduct should be determined applying the civil standard of proof, the balance of probability. We agree.

216. Whether an excuse is reasonable or not is an objective question for the jury, magistrate or tribunal to decide. In *R v*

Unah [2012] 1 WLR 545, which concerned the offence under the Identity Cards Act 2007 of possessing a false passport without reasonable excuse, the Court of Appeal held that the mere fact that a defendant did not know or believe that the document was false could not of itself amount to a reasonable excuse. However, that lack of knowledge or belief could be a relevant factor for a jury to consider when determining whether or not the defendant had a reasonable excuse for possessing the document. If a belief is relied on it must be an honest belief. Additionally, there have to be reasonable grounds for the holding of that belief.”

Discussion

25. The Tribunal starts with the offence itself. It finds, beyond reasonable doubt, that the Appellant failed to comply with paras 3-5 of Sch.3 to the Improvement Notice, contrary to s.30 of the Act. The suggestion in the Appellant’s statement of case that the relevant dates were 16 March 2022 for compliance proceeds on a misunderstanding. That date was the last day that the Final Notice of Decision specified as the period of the offence. In fact, the Appellant committed an offence (subject to s.30(4) of the Act) when it failed to arrange a survey by 21 June 2021 (Sch.3 para 3), to send a copy of a report to the Respondent by 5 July 2021 (Sch.3 para 4) and to install cavity wall insulation by 12 July 2021 (Sch.3 para 5). It is common ground that the Appellant did not meet any of these deadlines.
26. As to the defence of reasonable excuse, it was reasonable for the Appellant to entrust compliance with the notice to its managing agents KMP Group. But the real difficulty seems to be that neither the Appellant nor KMP Group recognised the significance of the deadlines in paras 3-5 of Sch.3 to the Improvement Notice. Unless and until prompted by the Respondent, their efforts to deal with cavity wall insulation issues were simply inadequate.
27. The first deadline in para 3 of Sch.3 to the 8 April 2021 Improvement Notice was not a particularly onerous one. This required a survey by an accredited cavity wall firm within 7 weeks (21 June 2021). The Appellant complied with this requirement on 11 January 2022, when CavityTech first went to the property and surveyed the external walls.
28. The essential excuse advanced by the agents is that they further delegated the procurement of the specialist cavity wall survey to Surrey Construction Services and other contractors, that they consulted other contractors,

and that this delayed the commissioning of CavityTech to undertake the survey.

29. The difficulty with this argument is that Mr Modder's evidence was that in late 2020, he was able to find the two specialist cavity wall organisations on the internet, and that he had relatively little difficulty in identifying suitable firms who met the criteria within a short period of time. It is true that at the time of the Improvement Notice, Covid-19 restrictions were in the process of being lifted (for example, on 12 April 2021, non-essential retail, personal care premises and public buildings were reopened to the public). But there is no suggestion that the websites for the two organisations specified in the Improvement Notice were not functioning in the Spring of 2021, or that accredited cavity wall firms were not carrying out surveys. By contrast, the Appellant was unable to show that it (or any agent or contractor it employed) went through a similar simple process to Mr Modder before or after 21 June 2021.
30. As to the further delegation to contractors, there is no evidence of clear and specific written instructions being given to them, or that KMP Group (or the Appellant) ever supervised this aspect of the contractors' work. Compliance with all the deadlines in the notice was important, since it was a criminal offence not to do so. But the deadline of 21 June 2021 seems to have simply come and gone without the agents realising the significance of the importance of the cavity wall survey. The more expensive and onerous works in Sch.3 to the Improvement Notice appear to have taken precedence, to the extent that the timescale for the cavity wall survey was apparently overlooked. An ordinary, prudent landlord in the Appellant's position or its agents would have either ensured the building contractor procured the relevant cavity wall survey or taken it upon itself to identify a suitable specialist cavity wall firm well ahead of the deadline of 21 June 2021. Ms Taj accepted she did not herself try to secure a report until 15 November 2022 – which was over a year after the date specified in para 2 of Sch.3 to the Improvement Notice. Even then, it is clear that it was the Respondent and Mr Modder who researched and identified CavityTech as an appropriate firm. It was not for the Respondent to do this; it was for the Appellant to comply with the notice.
31. That is not a reasonable excuse for failing to undertake the relatively simple task of contacting one of the two accreditation bodies specifically mentioned in para 3 of Sch.3 to the Improvement Notice and identifying a suitable insulation firm.

32. As to lack of building materials, alleged refusal of access, illness and the other factors relied upon by the Appellant, none of these relate to the delay in obtaining a cavity wall survey. Mr Modder's evidence was that (even over the Christmas holiday period) in 2021-22 it took CavityTech about 8 weeks from first enquiry to cavity wall report, and there is no evidence this was delayed by lack of access, etc. Still less do these factors explain the delay in commissioning a report between June 2021 and January 2022.
33. The second deadline in para 4 of Sch.3 to the 8 April 2021 Improvement Notice was also not a particularly onerous one. It required the specialist's report to be provided to the Respondent within 8 weeks (5 July 2021). The Appellant complied with this requirement on 4 February 2022, when it sent the CavityTech report to the Respondent.
34. In essence, for the same reasons given above, there is no reasonable excuse for failing to send a specialist report to the Respondent before 5 July 2021 or for not doing so before 4 February 2022. Indeed, having received the report from CavityTech on 19 January 2022, it is far from clear why the agents did not simply send this onto the Council on the same day. Instead, it appears they waited over two weeks to do so.
35. The third deadline in para 5 of Sch.3 to the 8 April 2021 Improvement Notice relates to arrangements for the cavity wall works themselves. The date specified in Improvement Notice was 9 weeks after the notice. In the event, the required insulation works turned out to be fairly modest (costing only £780 + VAT). The first arrangements were put in hand when the Appellant instructed CavityTech to proceed on 28 January 2022, and they were completed on 21 March 2022.
36. Plainly, the principal reason for the delay in completing the works was the delayed start date, and Tribunal has already found there was no reasonable excuse for that. The Appellant cannot realistically rely on delays by contractors, alleged lack of access etc., before 28 January 2022. As counsel succinctly put it, this would be an excuse of 'leaving late, and then complaining about the traffic'.
37. After 28 January 2022, the Tribunal accepts that some of the delay may well have been caused by the tenant failing to allow access (whether deliberately or otherwise) and/or by CavityTech not having suitable stocks of materials. The Respondent does not challenge the matters in paragraph 13 above. The Tribunal can therefore properly find that these matters amounted to a reasonable excuse for failing to comply with para 3 of Sch.3

to the Improvement Notice for part of the period after 28 January 2022. The element of excusable delay is likely to be limited, since (in the event) it took only 7 weeks between instructing CavityTech to proceed to completion of the works. Doing its best, the Tribunal finds there was a reasonable excuse for failing to complete the cavity wall works for 3 weeks after 28 January 2022. The period of the offence should therefore be limited to the period up to 1 March 2022.

38. However, the Tribunal does not consider this is a sufficient reason to interfere with the level of penalty imposed, essentially for two reasons. First, the reasonable excuse defence has only a relatively minor effect on the overall periods of offending. The successful defence relates to 3 weeks out of a total period of offending of over 88 weeks – and only in relation to one out of the three breaches of the requirements in Sch.3 to the Improvement Notice. Indeed, since the Final Notice of Decision suggests the penalty was based on a period of offending up to 16 March 2022, the Appellant has only succeeded in establishing a reasonable excuse to the extent of 2 weeks for one of the three offences. Secondly, and more significantly, Mr Modder’s evidence was that the Appellant’s arguments are already reflected in the end adjustment made in December 2022 which reduced the penalty from £5,000 to £3,500. Although the December 2022 Final Notice does not specifically mention delays caused by access difficulties, etc., these were explained in the Appellant’s representations, and Mr Modder expressly said the additional reduction reflected those representations. Mr Modder’s allowance therefore already reflects the considerations set out in the paragraph 37 above.

Conclusions

39. The Tribunal finds that the Appellant’s defence that it had a reasonable excuse under s.30(4) of the Act is made out, but only to the very limited extent in paragraph 37 above. For the reasons given, it does not interfere with the level of penalty imposed.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.