First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	**:**	**MAN/32UH/HNA/2022/0089**
Property	**:**	**30 Willingham Road, Market Rasen, LN8 3RD**
Appellant	**:**	**Gordon Graham Johnson**
Representative:	**:**	**Base Lockwood Lettings and Management**
Respondent:	**:**	**West Lindsey District Council**
Type of Application	**:**	**appeal under paragraph 10 of Schedule 13A to the Housing Act 2004 against a financial penalty under s.249A of the Act**
Tribunal Members	**:**	**Judge P Forster** **Mr N Swain FRICS**
Date of Decision	**:**	**17 January 2024**
Date of Determination	**:**	**30 January 2024**

DECISION

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Decision

The Tribunal is satisfied beyond reasonable doubt that the Appellant without reasonable excuse committed an offence under s.30(1) of the Housing Act 2004 in respect of 30 Willingham Road, Market Rasen, LN8 3RD for which he is liable to pay a financial penalty of £4,500 under s.249A of the 2004 Act.

Introduction

1. This is an appeal under paragraph 10 of Schedule 13A to the Housing Act 2004 ("the Act") against financial penalties imposed under s.249A of the Act in respect of 30 Willingham Road, Market Rasen, LN8 3RD ("the Property").

2. The Appellant is Gordon Graham Johnson who owns the Property. The Appellant is represented by Base Lockwood Lettings and Management. The Respondent is West Lindsey District Council which is the relevant local housing authority.
3. On 3 November 2021, the Respondent served the Appellant with an improvement notice in respect of the Property. This became operative on 3 December 2021. The Appellant was required to complete specified works within 28 days but he failed to do so. He did not complete all the works until 6 September 2022.

4. On 17 August 2022, the Respondent issued the Appellant with a notice of intent to impose a financial penalty in respect of the Property. The proposed penalty was £7,000. The Appellant's agent responded to the notice of intent on 2 September 2022. A final notice dated 14 October 2022 was served on the Appellant that reduced the amount of the penalty to £3,000.

5. The Tribunal issued Directions on 3 April 2023 that provided for the Respondent to address the issues raised by the appeal and to provide a bundle of relevant documents for use at the hearing. The Appellant was also required to provide a bundle of documents to include an expanded statement of the reasons for the appeal.

6. The appeal was heard on 11 December 2023 by video. The Appellant was represented by Ms Sian Kinsella from Base Lockwood Lettings and Management and the Respondent by Ms Rebecca Ward, a Housing and Environmental Enforcement Officer. The Tribunal heard oral evidence and submissions from both Ms Kinsella and Ms Ward before reserving its decision.

The Appellant's case

7. The Appellant submits that there were extenuating circumstances to explain why the required works were not completed on time. It is stated that the improvement notice was issued on 3 November 2021 and that on 15 November 2021 the agent's maintenance manager left the business without notice, and information was not passed on. When the "file was

picked up again" contractors were asked to visit the Property to provide quotes for the required works. The agent's office was closed over the Christmas period because members of staff had Covid-19. The office reopened in January 2022 with staff working remotely.

8. It is said that the tenant was slow to allow access to the contractors. The original contractors who viewed the Property were unwilling to take on the work because of the unacceptable conditions the tenant expected them to work in. New contractors were instructed, but this inevitably led to delays because many contractors had long lead times. Instructions were given in February 2022 for the windows to be repaired, but due to the need for toughened glass there was delay in it being delivered. All the required work to the windows was carried out in May 2022.

9. New contractors were asked to quote for the remaining remedial works and the quotes obtained were presented to the Appellant. The contractors could only offer long timescales. The Appellant gave the go ahead for the damp work, but he was concerned about the quote for the doors. It is said that there was a misunderstanding about "the legalities surrounding the need for fire doors within a non-HMO property". Once it was established that the doors did not need to be fire doors, a quote was agreed, and the contractor instructed to carry out the work.

10. It is claimed that the contractors were delayed by the tenant and appointments had to be rearranged several times. The tenant said that their child was in hospital or was poorly and was therefore unable to allow access.

11. The damp proofing work was completed in July 2022 but the tenant was unhappy with the work, sending videos and calling the agent to complain. These works were subsequently signed off by the Respondent.

12. When the contractor for the doors asked the tenant for access to take new measurements, they were told that the tenant's child was poorly and access could not be obtained.

13. The Appellant says that issues like this meant that it was hard to get the work done because those contractors that were available would refuse to attend if, as they saw it, they were wasting their time. The agents therefore had to start over again.

14. After flash floods in August 2022, the Bay window was leaking again. This was repaired on 2 September 2022. All outstanding remedial works were completed that day.

15. It is submitted that the Appellant is aware of his responsibilities to ensure that the Property is safe and that works should be completed in a timely manner. It is said that the works to the windows and electrical work was carried out within the notice period. The Appellant has provided photographs of the Property which show that the tenant was not looking after the Property in accordance with the tenancy agreement. This exacerbated the problems and the Appellant feels some frustration that he is being held responsible for work that would not have been required, if the tenant had properly looked after the Property.

The Respondent's case

16. The Respondent considers that there is sufficient evidence to meet the requisite standard of proof, beyond reasonable doubt, that there was a breach of an improvement notice pursuant to s.30(1) of the Housing Act 2004.

17. It is submitted that the level of the penalty has been set in line with guidance issued by the Ministry of Housing, Communities and Local Government (Now the Department for Levelling Up, Housing and Communities) and the Respondent's Civil Penalty Policy and Framework. The severity of the offence, the culpability of the offender, the punishment of the offender and to need to deter the offender and others from committing similar offences are factors which were considered when setting the level of penalty.

18. The Respondent believes that the Property was not appropriately maintained throughout the tenancy. It is stated that the Appellant has not provided evidence showing that appropriate steps were taken to manage the property prior to the Council's involvement in 2021. The Respondent acknowledged in the response to the representations made on behalf of the Appellant that there may be some mitigation in respect of access issues and damage caused during the tenancy. It is said that this was appropriately reflected when re-scoring the severity of harm.

19. The Respondent submits that it has given due consideration to the representations made on behalf of the Appellant. The scoring matrix was revised to reflect these representations. The Respondent does not believe that all reasonable steps were taken to try and comply with the requirements of the improvement notice.

The Law

Commission of Relevant Offences

20. All references are to the Housing Act 2004.

21. 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 in respect of premises in England (s.249A(1)). A "relevant housing offence" includes a failure to comply with an improvement notice under s.30(1).

22. In proceedings against a person for an offence under s.30(1) it is a defence that they had a reasonable excuse for failing to comply with the notice (s.30(4)).

23. An appeal against the imposition of a financial penalty is to be a re-hearing of the local authority's decision (para 10(3) to Schedule 13A). The Tribunal must therefore similarly be satisfied, beyond reasonable doubt, that such an offence has been committed.

Amount of Penalties

24. Under s.249A, a local authority may impose a civil penalty instead of bringing a prosecution. The penalty cannot exceed £30,000 (s.249A(4)). Under the Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017, it is clear that the purpose of imposing such penalties is to allow the local authority to meet the costs and expenses incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector (reg.4(1)).

Guidance

25. The Secretary of State published guidance in 2016 (Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities), which was re-issued in 2018 and is relevant to offences under section 30(1) of the 2004 Act. Pursuant to Schedule 13A, a local housing authority is to have regard to any guidance given by the Secretary of State about financial penalties.

Reasons for the Decision

26. There is little if any dispute between the parties about the facts of the case. It is left to the Tribunal to determine whether an offence was committed and, if so, the level of the penalty to be imposed.

The Offence

27. The Appellant accepts that he did not comply with the improvement notice served on 3 November 2021 within the required time. However, he submits that he has a reasonable excuse which affords him a defence.

28. On 21 October 2021, the tenant made a complaint to the Respondent about the state of the Property. On 22 October 2021, the Respondent served a notice of entry on the Appellant's agent and inspected the Property on 25 October 2021. There were concerns about the electrical system which gave rise to a fire hazard. There was no valid energy performance certificate and a number of windows in the Property were found to be inadequate giving rise to the hazard of excess cold. There was evidence of black mould growth in both the front and rear receptions rooms, disrepair to the bay window and roof and evidence of damp in the front reception room giving rise to the hazard of damp and mould. These deficiencies contributed to both Category 1 and Category 2 hazards. The hazards were scored using the Housing Health and Safety Rating System. At the time of the inspection, the Property did not have a current satisfactory electrical installation condition report. A satisfactory report was issued on 27 October 2021.

29. On the 3 November 2021 the Respondent served an improvement notice to address the hazards and associated deficiencies. The required works were to commence no later than 3 December 2021 and to be completed within the timeframes specified on Schedule 2 of the notice. The Appellant did not appeal against the notice.

30. The Appellant says that the agent's maintenance manager left the business on 15 November 2021 without notice and that "therefore crucial information was not passed on". It is stated that the "file was picked up again by the Directors and contractors were asked to visit the property to obtain quotes for the work requested".

31. There is evidence of contact between the agent and the Respondent after the service of the improvement notice. Therefore, the Appellant was clearly aware of the urgent need to carry out remedial works. This was before the departure of the maintenance manager on 15 November 2021. There is evidence of communication between the tenant and the agent. There is evidence of activity before October 2021. A gas engineer was instructed in June 2021 and had difficulty getting access to the Property. Electrical checks were booked in July 2021 but again the contractor appears to have experienced problems with access. Instructions were given by the agent to a locksmith and a window contractor on 11 November 2021 before the maintenance manager left.

32. The Tribunal was told at the hearing that improvement notices had been previously served in respect of the Property. No details of this were provided to the Tribunal. The Appellant through his agent will have known that there was an unsatisfactory electrical report and no valid energy performance certificate in place. It is clear to the Tribunal that the improvement notice on 3 November 2021 should have come as no surprise to the Appellant or his agent.

33. The Appellant has not provided any inspection records for the Property. These would have enabled the Tribunal to form a better view about the maintenance history and the Appellant's attention to his duties as landlord and the tenant's compliance with her obligations under the tenancy agreement. It is likely that the defects identified in the improvement notice accrued over an extended period of time.

34. The Appellant has been a commercial landlord for at least forty years. He owns more than thirty properties. Therefore, he is an experienced landlord and should have been very aware of his legal responsibilities.

35. There is evidence in an email sent on 15 October 2021 by the agent that the Appellant had decided to sell the Property. This pre-dates the tenant's complaint to the Respondent on 21 October 2021. It is likely that these two events were connected. It is reasonable to infer that the Appellant's intention to sell may have affected his willingness to incur the cost of repairs.

36. The Appellant's agent emailed the Council on 10 November 2021 which evidences the service of the improvement notice. The Respondent was informed that contractors had been instructed in respect of some of the required works. On 16 November 2021, the agent wrote to the Respondent to the effect that at least come of the damage had been caused by the tenant. A list of works carried out within the last two years was provided. The Respondent was of course required to assess any deficiencies in the Property as at the date of inspection.

37. The Respondent contacted the agent on 17 January 2022 and was advised that the Property

was being checked. This appears to have been the prompt for someone to pick up the file after the departure of the maintenance manager. By this time the deadlines in the improvement notice had expired. The Respondent asked the agent for an update on 26 January but there was no response. A further request was sent on 10 February 2022. The reply was that the issues were being "chased". The agent informed the Council on 15 February 2022 that the maintenance manager had left. The Respondent reminded the agent that the deadlines had expired. On 24 February the agent sent an email stating that the co-director felt the need to go through the notice himself and asking for a meeting to discuss the requirements of the notice. The time for appeal against the notice had by this time long expired.

38. The Respondent chased the agent on 14 April 2022. A reply was not received until 20 April 2022 to the effect that there were "lead time issues with all trades" and dates were awaited. The Respondent contacted the agent on 8 June 2022 and was told that it was believed all works had been completed but requesting clarification on the required specification for the internal doors. Clearly, all the works had not been done. It became evident that the damp proofing work had not been completed. The Council asked for further information on 24 June 2022 again pointing out that the deadlines in the improvement notice had long since expired and warning that formal action would be taken.

39. On 4 July 2022, in the course of a telephone call from the agent to the Council, it was said that the Appellant would not be carrying out the remaining works. This undermines the argument that the Appellant has a reasonable excuse for breaching the improvement notice. It is evidence of the Appellant's reluctance, at best, to comply with his obligations.

40. There was further correspondence through July between the agent and the Respondent. Issues were raised about the tenant not allowing access and having to move furniture. The tenant raised objections to some of the proposed works. The Respondent inspected the Property on 2 August 2022 and while some work had been done other elements were still outstanding particularly those relating to the fire and damp hazard.

41. On 3 August, the Respondent decided to instigate the process to impose a penalty on the Appellant. A notice of intent was served on 17 August 2022. It seems that at this point the Appellant began to appreciate the urgency of the situation. Works were carried out and the Property was inspected on 6 September 2022. The works were finally approved and the improvement notice accordingly revoked. Representations against the proposed penalty were made by the agent on 2 September 2022. It took the service of the notice of intent to achieve completion of all the required works.

42. The works required under the improvement notice were to start not later than 3 December 2021. The category 1 hazards were to be completed within 14 days. The category 2 hazards were to be completed within 28 days. It was established at the hearing that time for work on doors was extended to 14 February 2022 but was not completed until 2 September 2022. Issues with the windows were resolved by May 2022, work to resolve damp and mould was

completed in July 2022 and all the works were not completed until September 2022. It is very apparent that the Appellant showed no urgency and failed to comply with the improvement notice by a considerable margin.

43. In respect of the departure of the agent's maintenance manager, the Tribunal finds that it is reasonable to expect the agent to have had arrangements in place to cover for the absence of a particular member of staff. The Tribunal has not been told why the maintenance manager left so abruptly on 15 November 2021. There should have been systems in place to respond quickly to deal with serious defects that affect the safety and wellbeing of tenants. Matters should not be left for someone to "pick up the file".

44. The Tribunal does not accept that Christmas is a reasonable excuse for the delay which occurred. This was seven weeks after the service of the improvement notice. Very little detail has been provided about numbers of staff employed by the agent and those effected by Covid. In any event, staff were working remotely after the Christmas holidays. Given the nature of property management, arrangements should have been in place to cover for the holiday period and any unforeseen difficulties.

45. The Tribunal finds evidence to suggest that the tenant neglected the Property. This is demonstrated by photographs showing the Property before it was let to the tenant and after the tenancy had ended. However, most if not all of the required works were the responsibility of the landlord and of a longstanding nature. The Panel has not been informed about any action taken by the Appellant to enforce the terms of the tenancy agreement.

46. Based on its findings, the Tribunal concludes that the reasons given by the Appellant for the delay in complying with the improvement notice do not provide him with a reasonable excuse in law.

47. The Tribunal is satisfied beyond reasonable doubt that the Appellant without reasonable excuse committed an offence under s.30(1) of the Housing Act 2004.

The penalty

48. When considering the amount of the penalty to be imposed, the Tribunal is required to pay great attention to the Respondent's Enforcement Policy and it should be slow to depart from it. The burden is on the Appellant to persuade the Tribunal to take a different course - Waltham Forest LBC v Marshall [2020] UKUT 35 (LC) endorsed by the Court of Appeal in Sutton v Norwich [2021] EWCA Civ 20.

49. The proposed penalty in the notice of intent was £7,000. After considering submissions made by the agent on his behalf, the Respondent reduced the penalty to £3,000. The Tribunal asked the Appellant to provide his own figure based on the Council's Civil Penalty Policy and he dismissively said that it should be nothing at all. When pressed to give a realistic amount, he suggested £100. The Appellant's submissions in respect of the amount of the penalty were very limited and did not engage with the Respondent's Civil Penalty

Policy.

50. This is a rehearing of the Respondent's decision and as such the Tribunal makes its own decision based on the evidence before it. The Tribunal has regard to the Respondent's Civil Penalty Policy and applies it to the facts of the case to determine the amount of the penalty to be imposed on the Appellant for his failure to comply with the improvement notice. The Tribunal may come to the same conclusion as the Respondent or it may determine a figure which is less than or greater than the £3,000 fixed by the Council.

51. The Respondent's Civil Penalty Policy states that it is intended to reflect the statutory guidance issued by the Department for Levelling up, Housing and Communities. The Policy calls for consideration of the severity of the offence, the culpability and track record of the offender, the harm caused to the tenant, the punishment of the offender, whether it will deter the offender from repeating the offence, whether it will deter others from committing the offence and whether it will remove any financial benefit the offender may have obtained as a result of committing the offence.

52. The level of the penalty is determined based on the cumulative sum of penalties (Table 1) plus the sum of penalties for any additional offences (Table 2) plus a level of penalty determined by an impact scoring matrix (Table 3). All three tables are found in appendix 1 to the Policy. The final penalty is calculated using Table 1 once consideration has been given to Tables 2 and 3.

53. The starting point is Table 2 where penalties are prescribed for specific offences under the 2004 Act. The penalty for non-compliance with an improvement notice is £2,000. There is provision for an additional penalty of £3,000 where there are two or more category 1 hazards. This does not apply here because by the date of the final penalty notice some but not all of the deficiencies had been remedied and there was only one category 1 hazard outstanding.

54. In Table 3, the offence is categorised as either low (0 points), moderate (20 points), high (30 points) or severe (40 points). The Respondent initially assessed the severity of the offence as "moderate" and then revised it to "low". When the penalty was imposed, some of the works had been completed including the removal of the hazard of excess cold. The concerns around the electrical system had been actioned which reduced the risk of fire. There were still works required to address the risk of fire and category 2 hazards in respect of damp and mould. The Tribunal finds that the risk posed to the occupiers of the property had been reduced but not removed completely. Therefore, it cannot be said that there was no identifiable risk such as to fall within the definition of "low". The Tribunal assesses the severity of harm as moderate withing the definition in Table 2. This carries with it a score of 20 points

55. The Appellant has in excess of thirty properties but it seems only 4 to 7 of these are within the Respondent's "district". This being the position, he falls into the "high" bracket and scores 30 points.

56. The Respondent initially put the Appellant in the "high" bracket for culpability and track

record but revised that decision to "moderate" because although he had received two improvement notices in respect of the Property, he had complied with them. The evidence does not establish that the Appellant's actions were not deliberate within the "moderate" definition but rather says that he ought to have known that his actions or inaction in respect of the 2022 improvement notice put him in breach of his legal responsibilities. This places the Appellant firmly within the "high" bracket which scores 30 points.

57. However, when assessing the impact of the Appellant's conduct, the correct approach should be to take into account any relevant mitigating factors. The Respondent's Policy does not expressly refer to such matters but in this respect the Tribunal may depart from it. Indeed, it can be inferred from the Respondent's decision to reduce the penalty to £3,000 that it took relevant mitigation into consideration.

58. The Tribunal accepts as submitted that the Covid-19 pandemic is relevant in the present case. The agent's staff were laid low by the virus over the 2021 Christmas period and its ongoing effects on the contractors was to extend lead-in times for works. The timescales imposed by the Respondent in the improvement notice, albeit that they were extended, were very tight and in the prevailing circumstances were too short. The Tribunal invited the Appellant's representative to comment on this at the hearing but she chose not to address the point. There was no appeal against the improvement notice at the relevant time. An additional factor which mitigates in the Appellant's favour is the conduct of the tenant who on the evidence made it difficult for contractors to do their work. To an extent, the tenant contributed to the defects in the property but most were the responsibility of the Appellant and he cannot absolve himself in this respect.

59. The Appellant's culpability falls into the "high" bracket which would attract 30 points, but in the Tribunal's view this is mitigated by other factors. Therefore, the Tribunal puts the Appellant in the "moderate" bracket for culpability which scores him 20 points.

60. The removal of financial benefit has to be considered. The rent payable was £600 per month. The Respondent acknowledged that at least part of the rent had not been paid by the tenant. This was equivalent to about two months rent. The money remained due from the tenant and the Tribunal does not find it appropriate to reduce the bracket to "low income received". The Tribunal finds that it is right to assess the income received as "moderate" and to score the Appellant 30 points.

61. Finally, "deterrence and prevention" must be considered. The Respondent assessed this as "low" being "high confidence that the penalty will deter repeat offence". The Tribunal accepts this view although it may be considered as lenient given the lack of deterrent afforded by the two previous notices served on the Appellant. The Appellant scores nil points.

62. The Points assessed by the Tribunal applying the Council's Policy total 90.

63. The final penalty is calculated using Table 1 once consideration has been given to Tables 2 and 3. Applying Table 1:

(1)	Non-compliance with an improvement notice: (Table 2, column A)		£2,000
(2)	Impact matrix score (Table 3)	90 points	£2,500
(3)	Cumulative total		£4,500

64. The Tribunal imposes a penalty of £4,500 on the Appellant under s.249A of the 2004 Act.

Judge P F Forster

Dated 17 January 2024

RIGHT OF APPEAL

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.

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.

If the person wishing to appeal does not comply with the 28-day time limit, that 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.

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.