FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UN/HNA/2023/0018 CHI/29UN/HNA/2023/0019 CHI/29UN/HNA/2023/0020
Property	**:**	65 Eaton Road, Margate, Kent, CT9 1XB
Applicant	**:**	Graham Alan Woodruff
Representative	**:**	In person
Respondents	**:**	Thanet District Council
Representative	**:**	Nicholas Bray
Type of Application	**:**	Appeal against a financial penalty – s.249A Housing Act 2004
Tribunal Member(s)	**:**	Judge Mark Loveday Mr Paul Smith FRICS Mr Leslie Packer
Date and venue of hearing	**:**	28 March 2024, Havant Justice Centre (remote)
Date of Decision	**:**	6 June 2024

DETERMINATION

Decision

1. These are three appeals against financial penalties under s.249A of the Housing Act 2004 ("the 2004 Act"). For the reasons given below, the tribunal finds that:
   (1) The financial penalties should be imposed in each case.
   (2) The penalties of £7,000 should be upheld in each case.

The Law

2. The Housing Act 2004 ("the Act") regulates the letting of houses in multiple occupation and establishes a licensing regime. The Act, and the regulations issued under it, include several different offences for non-compliance. Materially, they include:
   (1) Under s.30 of the Act, a person commits an offence if they fail to comply with an improvement notice without a reasonable excuse.
   (2) Regulations 7(1) and (3)(c) of the Licensing of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 ("the regulations") require a manager of an HMO to supply the latest gas appliance test certificate and an electrical safety certificate to the local housing authority within 7 days of receiving a written request. Under s.234(3) of the Act, it is an offence not to comply with these regulations.

3. As far as penalties are concerned, s.249A of the Act states that "the local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England." Subsection 249A(2) states that a "relevant housing offence" includes offences under s.30 of the Act (failure to comply with an improvement notice) and s.234 of the Act (management regulations in respect of HMOs).

4. The financial penalty itself is imposed by a local housing authority. But under Sch.13A to the Act, it may be appealed to the tribunal. By para-

graph 34(2) of Sch.13A, such an appeal is to be by way of re-hearing, but it may be determined having regard to matters of which the authority was unaware. The appeal is a "complete rehearing", but not one which disregards entirely the decision of the local housing authority: *London Borough of Brent v Reynolds* [2001] EWCA Civ 1843. The tribunal's powers are to confirm, reverse or vary the decision of the local housing authority. It may impose a penalty only if it is satisfied, to the criminal standard of proof (i.e., beyond reasonable doubt), that the offence was committed.

Background

5. The appeal relates to premises at 65 Eaton Road, Margate, Kent, CT9 1XB. The tribunal did not inspect the premises, but it was common ground they comprise a detached five floor period building comprising three 2-bedroom flats (Flats 1-3) and a 3-bedroom flat (65A Eaton Road).

6. The background can largely be taken from evidence provided to the tribunal by Mr Nicholas Bray, a Housing Improvement officer within the respondent's Private Sector Housing Team. There was also no dispute that at all material times the premises were a licensed HMO, and the appellant was the manager. Following intelligence from Kent Fire and Rescue Services and Kent police, Mr Bray inspected on 12 October 2021. He identified two category 1 hazards, namely:
   (1) Falling on stairs (lack of handrails to some sections of stairs); and
   (2) Fire (lack of an automatic fire detection and alarm system, some flats lacking smoke alarms and inadequate fire protection in escape routes from inner rooms). This included lack of proper fire doors and holes between the flats in walls and ceilings.

   There were also 5 category 2 hazards, which included (1) damp and mould growth (2) falling between levels (3) electrical hazards (4) flames/hot surfaces, and (5) collision and entrapment.

7. On 16 December 2021, the respondent served an improvement notice in respect of each of the above risks, requiring remedial works to be completed by 18 April 2022.

8. On 23 September 2022, 22 October 2022, the respondent made written requests for copies of the latest gas safety and electrical safety certificates, but none were provided.

9. The respondent issued the following Notices of Intent under para 1 of Sch.13A to the Act:

   (1) On 19 April 2023 it gave notice that it intended to impose a financial penalty of £14,000 in relation to an offence of failing to provide a gas safety certificate under the regulations.

   (2) On 19 April 2023 it gave notice that it intended to impose a financial penalty of £14,000 in relation to an offence of failing to provide an electrical safety certificate under the regulations.

   (3) On 26 May 2023 it gave notice that it intended to impose a financial penalty of £14,000 in relation to an offence of failing to comply with the improvement notice under s.30 of the Act.

   The assessment of the financial penalties was made by Mr Bray, and reviewed by Mr Richard Hopkins, a Private Sector Housing Manager.

10. On 10 May and 24 June 2023, the applicant made representations to the respondent. The respondent confirmed the financial penalties under para 5 of Sch.13A to the Act as follows:

    (1) On 3 August 2023, it gave a Final Notice in relation to the gas safety certificate. This imposed a reduced penalty of £7,000 for an offence committed on 22 October 2022. The applicant received this on 10 August 2023.

    (2) On 3 August 2023, it gave a Final Notice in relation to the electrical safety certificate. This imposed a reduced penalty of £7,000 for an offence committed on 22 October 2022. The applicant received this on 10 August 2023.

(3) On 31 August 2023, it gave a Final Notice in relation to the improvement notice. This imposed a reduced penalty of £7,000 for an offence committed between 12 December 2022 and 4 January 2023. The applicant received this on 4 September 2023.

Again, the assessment of the financial penalties was made by Mr Bray and reviewed by Mr Hopkins.

11. On 17 September 2023, the applicant appealed to the Tribunal against all three financial penalties. However, since the Final Notices for the two safety certificate offences were issued earlier than the notice relating to the improvement notice, the former were strictly speaking out of time: see r.27(2) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. On 24 January 2024, the Tribunal therefore directed that it would consider an application to extend time under r.6 at the appeal hearing.

12. The appeal took place on 28 March 2024 by way of a remote video hearing. The applicant was only able to access the hearing remotely by telephone, but no objection was made to this. Mr Bray appeared on behalf of the respondent by video, with Mr Hopkins tendered as a witness.

Extending time (rule 6)

13. The applicant explained he had been confused by the two different time limits for appealing the penalties. He had been involved in protracted High Court proceedings against his property manager, and the "turmoil" meant he had "lost all sense of time". Mr Bray accepted the Council had suffered no prejudice by the short delay. The Tribunal therefore exercised its powers under r.6(3)(a) to extend time under r.27(2) in relation to the appeals against the two earlier penalties. An extension enabled the tribunal to deal with the case fairly and justly. Given the short periods involved, the nature of the default and the lack of prejudice to the respondent, an extension ensured both parties could participate fully in the proceedings.

The applicant's case

14. In his opening submissions, the applicant confirmed (1) no gas or electrical safety certificates were in place on 27 October 2022 and (2) the improvement notice was not fully complied with on 4 January 2023. He accepted there were no procedural or jurisdictional objections to the penalties, and that he was not arguing he had any "reasonable excuse" for the offences. Although the appeal was by way of re-hearing, he explained "the appeal was about the penalty". The applicant therefore limited himself to the question about the amount of the penalties. He substantially relied on arguments in the three application forms and his witness statement dated 4 March 2024.

15. The applicant stated he had been a landlord for over 20 years, and all of his properties had electrical safety and gas safety certificates. The lack of certificates for this property was an oversight. It had in fact been sold at auction in December 2023, with completion taking place on 18 January 2023 (confirmed in oral evidence). The applicant confirmed he was the legal owner of the premises until that date. Safety certificates were completed for the new owner on 20 November 2022 (electrical safety) and 27 January 2023 (gas safety) and sent to the respondent on 27 January 2023 and 11 May 2023. The applicant's failure to provide the certificates was therefore rectified within a short time of the respondent's requests. In any event, he had been under considerable stress. Apart from the High Court dispute with his former agent, there had been bankruptcy proceedings. There had also been a dispute with the tenant in the premises, who had threatened to kill him. The applicant felt victimised. After a Freedom of Information Act request, he discovered the applicant was the only person to be fined by the respondent in 2023 out of 150 investigations into alleged lack of gas safety certificates, 48 investigations into electrical safety certificates and 61 improvement notices. As to the improvement notice, he had carried out substantial works, including new fire doors.

16. In relation to his means, the applicant referred to the bankruptcy proceedings, which involved a claim for £212,822.63 and another statutory demand from HMRC for £753,028.53. The applicant had a loan of £133,732.74 taken out to pay for the litigation with the former manager, and legal bills and adverse costs payments associated with the claim came to £415,000. There were large mortgage arrears and overdrafts of £42,599.85 and £2,999.96. The applicant had disposed of several properties to meet these liabilities, but even if he and his wife sold everything, they would still owe over £84,255, have no income and be homeless.

17. The applicant was cross-examined by Mr Bray. The assets most recently disposed of were in North Yorkshire, but "whatever came in, went out again". Other debts were secured. The applicant had about £15,000 in one bank account. He was not planning to keep any properties; he just wanted to live in his house.

18. During closing remarks, the tribunal asked the applicant to address the respondent's Private Sector Housing Enforcement Policy. Understandably, the applicant had limited experience of the application of the various criteria set out in the policy. But he asked the tribunal to reconsider the culpability score of "high" and the harm score of Level 2. The starting point penalty for each offence of £14,000 (or £42,000 in total) was therefore too high, indeed, it was ludicrous. Taking into account the applicant's "extreme" financial difficulties, he had not got the money. The penalties and mitigation did not reflect the terrible financial state he was in. A "realistic sum was £5,000-£6,000 in total".

The respondent's case

19. Mr Bray gave oral evidence at the hearing and referred to the respondent's statement of case dated 26 February 2024. Given the applicant's helpful concession relating to the offences themselves, it was only necessary to focus on the level of penalty.

20. The respondent's policy on civil penalties appeared in its *Private Sector Housing: Policy for imposing Financial Penalties under the Housing Act 2004 and Housing and Planning Act 2016*, a copy of which was included in the hearing bundle.

21. The starting point is to determine the severity of the offence within a range of penalties of £1,000 to £30,000. This involves what is described as a four-step assessment:

- Culpability. Culpability is a key factor within the assessment of the severity of the offence. The premium is initially set by calculating the "culpability premium" by reference to categories of "very high", "high", "medium" and "low" described in some detail in paras 27-31 of the policy.
- Track record. The offenders track record is classed as either "significant", "some" or "none or negligible".
- Portfolio size. The respondent then allocates a portfolio size within one of four categories ranging form one unit of accommodation, through 2-4 units, then 5-19 units and finally 20+ units.
- Risk of harm. This risk is assessed according one of four categories ranging from Level 1 to Level 4. Guidance is given in paragraphs 48-55 of the policy.

22. There is then a table of financial penalties. Materially, in this case a "High" Culpability attracts an 80% premium. When applied to a track record classification of "some", a portfolio size of 20+ and Level 2 risk of harm produces a starting point of £14,000.

23. The next step is to review mitigating and aggravating features. Examples are listed in paras 57-65 of the policy. It is suggested the adjustment range should be limited to an amount of 50% higher or lower than the starting point.

24. Finally, paras 106-112 of the policy deal with multiple offences. They expressly engages the totality principle, namely whether the cumulative total of the penalties is just and proportionate.

25. The assessment was made on forms attached to the Notices of Intention and Final Penalty Notices.

26. At the hearing, the Tribunal asked Mr Bray to take it through the details of his assessment, applying each stage of the policy in turn. For each offence, he gave a culpability as "high", a track record as "some", a portfolio size of 20+ and a risk of harm of Level 2. At the final stage, he made a 50% reduction for mitigating circumstances, the maximum permitted under the policy. This produced penalties of £7,000 for each offence. As explained, the applicant was unfamiliar with the policy scoring and had limited input in cross-examination. But the tribunal challenged Mr Bray on each element of the assessment to test the respondent's evidence.

27. Finally, Mr Hopkins also gave evidence, referring to his witness statement, and confirming Mr Bray's evidence.

Determination

28. The *Guidance on Civil Penalties* issued to local authorities by the Ministry of Housing, Communities and Local Government under the Housing and Planning Act 2016 contains a list of factors that may be relevant to the quantum of a civil penalty. The Guidance requires local housing authorities to draw up their own policy on civil penalties. In Sutton v Norwich CC [2020] UKUT 90 (LC), the Upper Tribunal summarised the proper approach at [245]:

> "If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision".

Paragraph 3.5 of *Guidance on Civil Penalties* states that 'The actual amount levied in any particular case should reflect the severity of the offence, as well as taking account of the landlord's previous record of offending'. The same paragraph lists several factors that should be taken into account to ensure that the civil penalty is set at an appropriate level in each case:

- Severity of the offence. The more serious the offence, the higher the penalty should be.
- Culpability and track record of the offender. A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.
- The harm caused to the tenant. This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.
- Punishment of the offender. A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrates the consequences of not complying with their responsibilities.
- Deter the offender from repeating the offence. The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set at a high

enough level such that it is likely to deter the offender from repeating the offence.

- Deter others from committing similar offences. While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the level of civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.
- Remove any financial benefit the offender may have obtained as a result of committing the offence. The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e., it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

29. The approach adopted by the respondent's policy largely follows the national guidance. The tribunal has regard to that policy when considering the level of penalty.

Culpability

30. Paras 28-30 of the policy describe the three material culpability categories as:

> **"Very High**
> 28. This category applies to offences where the offender has deliberately breached or flagrantly disregarded the law. This category is subject to a 100% culpability premium.
>
> **High**
> 29. This category applies to offences where the offender had foresight of a potential offence, but through wilful blindness, decided not to take appropriate and/or timely action. This category is subject to a 80% culpability premium.

> **Medium**
> 30. This category applies to offences committed through an act or omission that a person exercising reasonable care would not commit. Any person or other legal entity operating as a landlord or agent in the private rented sector is running a business and is expected to be aware of their legal obligations. This category is subject to a 60% culpability premium."

31. The Tribunal agrees with the assessment as "high". The applicant candidly admitted he knew gas safety and electrical safety certificates were necessary for the property. He had plenty of time to obtain them and it seems the purchaser had little difficulty obtaining them after completion and providing them to the respondent. No reasonable landlord would fail to provide copies of commit these two very basic safety certificates in this situation, so it cannot be said to a medium level of culpability. Similarly, the failure to comply with the Improvement Notice showed a high level of culpability. There were serious and widespread breaches of health and safety standards, particularly in respect of the fire safety issues. They needed to be addressed promptly. Despite the applicant's difficulties, there is no evidence he gave sufficient priority to the health and safety of the occupiers of the premises. That indicates high culpability. A reasonable landlord would have given the works the highest possible priority and addressed everything in the notice.

Track record

32. Paras 36-38 of the policy describes the three material track record categories as:

> **Significant**
> 36. Where there is evidence of multiple enforcement interventions by the council's private Sector Housing Team, together with evidence of non- compliance, the significant category will be used. In most cases, this category will also be used for any offender who has been successfully prosecuted for a housing offence or been subject to a housing related-financial
> penalty.

Some
37. This category will be used where the offender is associated with more evidence than would normally be expected of a good landlord or agent having regard to the size and nature of their portfolio. There is likely to be evidence of statutory enforcement action.

None or negligible
38. This category will be used if, following a review of the council's records, there is no relevant evidence associated with the offender. Any unsubstantiated housing condition complaints will be disregarded. The council may also exercise its discretion to disregard any evidence where the issues were minor in nature and there was no reluctance on the part of the landlord or agent to resolve the issues within reasonable timescales.

39. The descriptor "Negligible" has been included to allow for a fair and reasonable review of evidence in respect of landlords and agents with larger portfolios. Therefore, if the evidence is negligible having regard to the size of the portfolio in Thanet, this category will be used.

33. Mr Bray referred to evidence that the applicant had previously been served with an Abatement Notice under s.80 of the Environmental Protection Act 1990 (as amended) (ref.WK1202248221) in relation to Flat 3 at the premises. In relation to the two safety certificates, there was already a default in complying with the Improvement Notice. It cannot trher5efor be said there was "no" previous track record, or that the record could be considered minimal for any of the reasons stated in the policy.

Portfolio size

34. Paras 40-42 of the policy deals with portfolio size. During an interview under caution, the applicant admitted he had a portfolio of 27 properties (plus 4 uninhabited units). This exceeded 20 units and fell within the highest bracket of the policy. The applicant did not dispute this at the hearing.

Risk of harm

35. The final element of this part of the assessment is the risk of harm, which is dealt with in paragraphs 48-55 of the policy. The material levels of harm are described as follows:

> **"Level 1**
>
> 51. This category will be used when the risk of harm does not fall within the Level 2, Level 3 or Level 4 categories.
>
> 52. Any offence associated with the operation of an unlicensed premises under the HMO and selective licensing regimes will usually fall into this category if there is no particular risk of harm associated with the condition or management of the property concerned.
>
> **Level 2**
>
> 53. The use of this category may infer that the offence was associated with an extreme harm outcome, but the likelihood of a harmful event occurring was low. This category may be used when the risk of harm related to a severe harm outcome and the likelihood of a harmful event occurring was medium. This category may also be used when the risk of harm related to a serious harm outcome and the likelihood of a harmful event occurring was high.
>
> **Level 3**
>
> 54. The use of this category may infer that the offence was associated with an extreme harm outcome and the likelihood of a harmful event occurring was medium. This category may also be used when the risk of harm related to a severe harm outcome and the likelihood of a harmful event occurring was high."

36. Starting with the gas safety certificate, it cannot be said the risk of not having a certificate, falls within Level 1. There is clearly a "particular risk of harm associated with the condition or management of the property concerned". The tribunal considers there is plainly an extreme potential level of harm, namely death from carbon monoxide poisoning or gas explosion. But the likelihood of this happening was low. The mere fact there is no certificate does not mean the gas installations in the premises

were unsafe. Indeed, the purchaser seems to have had little difficulty obtaining a certificate shortly afterwards. The risk can therefore properly be characterised as Level 3.

37. The same can said about the electrical certificate. The outcome from electrocution was probably less likely to result in extreme harm, but poorly wired systems might more frequently lead to accidents. Overall, the risk can properly be characterised as Level 3.

38. As to the Improvement Notice, some guidance can be given by the HHSRS rating system scoring referred to in the notice itself. There are category 1 and five category 2 hazards within the premises. The category 1 fire hazard could result in "extreme" harm (death from fire or smoke inhalation), but the likelihood of a significant fire is low. Falling injuries might cause less harm, but the likelihood of harm from deficient handrails is rather higher. Overall, an appropriate risk level is Level 3.

Penalty level

39. Applying the above to the penalty tables in the policy produces a penlty of £14,000 for each offence.

Mitigating and aggravating features

40. The mitigating and aggravating features in paras 57-65 of the policy are just that – examples.

41. In this case, the main mitigating feature suggested is hardship. One difficulty with this argument is that although the applicant addressed the tribunal about his perilous financial state, he did not complete a statement of means (as directed to by the tribunal). There was an account of bankruptcy proceedings and unsuccessful litigation, but little specific documentation about means. The tribunal would ordinarily expect to see full financial information before embarking on any significant discount in the level of penalty for these potentially serious offences. However,

the tribunal accepts that there will be significant difficulty paying these penalties. The respondent made an allowance of 50% - the maximum permitted under it s policy – and although the tribunal is not constrained by this threshold, it considers this is an appropriate mitigation in this case.

42. Finally, there is the totality principle. Having reduced the penalties by 50% at the mitigation stage, the overall penalties are £21,000. This is a significant figure, and it will undoubtedly place a heavy financial burden on the applicant. But he is (or was) a professional landlord, with a large portfolio and significant rental stream, and there were multiple discrete offences. The tribunal is satisfied that the total reduced level of penalties properly reflect all of the offending behaviour and they are just and proportionate in all the circumstances. In short, it cannot be said a penalty of £21,000 is wholly disproportionate.

Conclusions

43. The tribunal therefore confirms the penalties of £7,000 in each case, amounting to a total of £21,000.

Judge Mark Loveday
6 June 2024

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.