FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/33UF/HNA/2022/0009**
Property	**:**	**79 St. Anns Road, Southend-on-Sea Essex SS2 5AT.**
Applicant	**:**	**Westpoint Property Ltd**
Representative	**:**	**Mr Webb, consultant**
Respondent	**:**	**Southend-on-Sea City Council**
Representative	**:**	**Mr Jones of Counsel**
Date of Application	**:**	**2 May 2023**
Type of application	**:**	**Appeal against financial penalty, pursuant to s.249A and Sch.13A to the Housing Act 2004,**
The Tribunal	**:**	**Tribunal Judge S Evans** **Mr Roland Thomas**
Date/ place of hearing	**:**	**7 February 2024,** **Southend Magistrates Court**
Date of decision	**:**	**28 March 2024**

DECISION

DECISION

(1) The Applicant's appeal is allowed in part, to the extent that the Tribunal determines the appropriate financial penalty in all the circumstances should be £5000;

(2) The Respondent shall pay 50% of the application and hearing fees, in the sum of £150, to the Applicant.

REASONS

Relevant Law

1. The statute law applicable to this matter is set out in the Appendix attached.

2. The Tribunal is mindful of the cases of *Sutton v Norwich CC* [2020] UKUT 90 (LC) and *London Borough of Waltham Forest v Marshall* [2020] UKUT 0035 (LC), in which the Upper Tribunal emphasised that the First Tier Tribunal should give due deference to the Council's decision, and not depart from a local authority's Policy in determining the amount of a financial penalty, except in certain circumstances (e.g. where the Policy was applied too rigidly), albeit that the Tribunal's task is not simply a matter of reviewing whether a penalty imposed was reasonable: it must make its own determination as to the appropriate amount of the penalty, having regard to all the available evidence.

3. The Tribunal also bears in mind *Opara v Olasemo* [2020] UKUT 0096 (LC) at paragraph 46, in which the Upper Tribunal warned that, when applying the criminal standard to their fact finding, Tribunals should avoid being overcautious about making inferences from evidence. It observed that, for a matter to be proved to the criminal standard, it must be proved beyond all reasonable doubt; it does not have to be proved beyond all doubt at all.

4. The Tribunal also bears in mind *IR Management Services v Salford City Council* [2020] UKUT 0081 (LC) where on appeal, the Upper Tribunal confirmed that, whilst a Tribunal must be satisfied beyond reasonable doubt that each element of the relevant offence had been established on the facts, an appellant who pleads a statutory defence must then prove on the balance of probabilities that the defence applies.

5. Regarding procedural compliance, the Tribunal referred the parties to *Waltham Forest LBC v Younis* [2019] UKUT 362 (LC); [2020] HLR 17. This case is discussed later below.

Background

6. On 17 July 1987 the ground floor flat at 79 St. Anns Rd, SS2 5AT ("the Property") was let on a long lease. The Property is a semi-detached house dating from before 1920.

7. On 26 July 2004 the Applicant became the freehold proprietor of the Property.

8. On 2 July 2015 an Assured Shorthold Tenancy of the Property was granted by the Applicant to Ms April Harding. The Managing Agent was Griffin Residential. The written tenancy agreement includes an access clause (4.3.10) on 24 hours' notice to the tenant in writing; and if access is not granted, clause 4.3.11 expressly allows the landlord to enter the Property using keys.

9. On 6 April 2022 Ms Harding made a complaint to the Respondent Council about the state of the condition of the Property.

10. On 21 and 29 April 2022 the Respondent attempted contact with the Applicant by telephone and email, without response.

11. On 4 May 2022 the Respondent gave notice under s.239 of the Housing Act 2004 of a proposed inspection of the Property on 13 May 2022.

12. This inspection duly went ahead, and was conducted by Ms Jasmine Zawadski of the Respondent, an EHO. A HHSRS assessment was undertaken. Ms Harding was noted to be in occupation with 3 children. The Applicant did not attend the inspection.

13. On 19 May 2022 the Respondent wrote to the Applicant and interested parties about the state of the Property. Correspondence ensued, which included the Applicant sending the Respondent a EICR and Gas Safety Certificate for the Property.

14. At this time, the director of the Applicant, Mr Neale, was being investigated for some medical issues.

15. On 7 June 2022 the Applicant complained to the Respondent by email that Ms Harding had too many personal belongings in the Property, and was overcrowding it.

16. On 8 June 2022 the Applicant complained to the Respondent by email that Ms Harding had refused to give access within the previous 14 days.

17. On 9 June 2022 the Applicant complained to the Respondent by email that the Property was not suitable for 5 occupants, and that condensation dampness was being caused as a result. The Applicant also complained that she was not ventilating the Property, and that there was no evidence of rising damp (despite a later report opining that there was).

18. On 30 June 2022 it is alleged that Ms Harding had said she would not allow the Applicant access to the Property with keys during her absence.

19. An appointment with Ms Harding for 10 August 2022 was rebooked; and it is alleged that on 17 August 2022 there was no answer at the door to the Applicant's contractors.

20. On 22 August 2022 an Improvement Notice was served on the Applicant. This required works to commence by 22 September 2022 and be completed by 22 November 2022 in relation to hazards of excess cold (Category 1), damp and mould (Category 2) and entry by intruder (Category 2).

21. The hazards were alleged to arise from the following: excess cold, damp and mould, and entry by intruder.

22. The works to remedy the hazards were stated to be (in summary):

Excess cold:

(1) New glazing to the casement windows of the ground floor front bedroom, renew any defective seals, leaving sound and weather tight;

(2) Overhaul defective external frame to ground floor middle bedroom casement window, leaving sound and weathertight.

Damp and Mould:

(3) Investigate cause of leak affecting ground floor front bedroom and execute all necessary works; remove wallpaper damage and redecorate.

(4) Hack off water damaged plaster to the ground floor mid lounge walls and ceiling. Ensure areas dry and replastered to a smooth finish. Paint.

(5) Remove defective mould sealant in and around shower cubicle, shower tray and wash hand basin. Re-seal.

(6) Remove mould from walls and ceilings of kitchen, bathroom, ground floor middle bedroom, and ground floor front bedroom using mould wash.

(7) Assess condition of gutters to front and rear remove any build up as necessary;

(8) Overhaul or replace ground floor bathroom shower room mechanical ventilation. Ensure 20 minutes overrun.

Entry by intruder

(9) Provide suitable proprietary restrictors to limit window openings to ground floor front bedroom windows.

(10) Provide and fit a mortice lock in addition to the existing night latch to the internal front door, with an internal thumb turn for keyless egress in the event of a fire.

23. By 25 October 2022, it would appear that some window and door works had been undertaken, i.e. items (1) and (2) above. An invoice dated 2 November 2022 refers.

24. On 24 November 2022, a revisit by the Respondent revealed that the ground floor front bedroom window works had been completed, as well as the ground floor mid bedroom casement. However, it was said that there were some outstanding works, and others had been executed to a poor standard. For example, the front entrance door mortice had not been fitted correctly, and the bathroom extractor fan poorly installed. The back bedroom window frame repair was outstanding. The fan had been fitted but poorly. The leak had not been investigated.

25. Accordingly, on 7 December 2022 the Respondent sent a letter of alleged offence to the Applicant, advising of the Respondent's findings on the visit of 24 November 2022. The Applicant was given 7 days to respond.

26. Emails were exchanged on the same day, with the Respondent informing the Applicant that the tenant was complaining of the fan not working in the bathroom, and of mould growth.

27. On 8 December 2022 Mr Knowles of Griffin Residential inspected the Property. He then exchanged emails with the Respondent.

28. On 14 December 2022 the Respondent emailed Mr Knowles to allege the lock was still not working on the flat door, nor was the extractor fan.

29. In December 2022 the kitchen was painted, so was the shower room, as well as part of the living room and bedroom.

30. On 28 December 2022 Mr Knowles emailed the Respondent to say that the door lock had been fixed, and a new extractor fan fitted in the shower room; and that the kitchen and part of the living room had been decorated.

31. On 7 February 2023 Ms Harding contacted the Respondent complaining of an increase in damp and mould in the Property.

32. A revisit was undertaken by Ms Zawadski on 9 February 2023. She found excess black mould in some areas, and saturated damp readings.

33. At a peer review meeting on 14 February 2023, the Respondent made a decision to serve a Notice of Intent to impose a Financial Penalty on the Applicant.

34. On 16 February 2023 a Notice of Intent to impose a Financial Penalty was served by the Respondent on the Applicant.

35. On 27 February 2023 Mr Knowles informed the Respondent that a damp specialist had been in communication with Ms Harding, but was yet to attend.

36. On 7 March 2023, Essex Damp Proofing carried out a damp survey. On the next day, they prepared a report. This recommended a new DPC was required to the Property. They opined there was condensation dampness and rising dampness in the Property. They recommended a passive vent and a cavity membrane system be installed. Ideally the tenant would need decanting during the period of works, they added.

37. The report was provided to the Respondent on 15 March 2023.

38. On the same day, representations were made by a Mr Webb, consultant engaged by the Applicant in relation to the Notice of Intent, to the Respondent.

39. On 20 March 2023 the Respondent wrote back.

40. On 15 April 2023 another peer review took place. The Respondent made a decision to serve a Final Notice to impose a Financial Penalty of £12,000.

41. On 3 May 2023 Mr Knowles wrote to the Respondent to inform it that, at Ms Harding's request, works would commence on 30 May 2023.

42. On 27 July 2023 the Respondent wrote to Mr Knowles to say the tenant had alleged a contractor had attended a month before, and the contractor had promised to be in contact, but she had heard nothing.

43. On 7 September 2023 the Respondent wrote to the Applicant (Mr Neale). It notified him of an intention to reinspect, on 11 September 2023.

44. The reinspection duly went ahead. The ground floor front bedroom and living were found to be damp.

45. It would appear that works to the ground floor front bedroom wall and other areas went ahead in the half-term week commencing 23 October 2023.

The Application

46. On 2 May 2023 the Applicant made an application at the FTT to appeal the financial penalty, which is marked as received by the Tribunal on 4 May 2023.

47. On 13 September 2023 the Tribunal gave directions.

48. On 3 October 2023 the Respondent provided statements from Ms Zawadski and a letter from Ms Harding, in which she confessed to have been awkward about giving access to the Property.

49. On 13 October 2023 Ms Harding prepared a witness statement on behalf of the Applicant.

50. On 27 October 2023 Mr Neale made a witness statement, as did Mr Knowles of Griffin Residential.

The inspection

51. The Tribunal inspected the Property before the hearing. It is a 2 bed Ground Floor Flat in a converted bay-fronted semi-detached house of traditional construction with solid brick main walls beneath pitch concrete tile roof and double glazed UPVC windows. The Tribunal was shown the areas under consideration in the case. There was no evidence of damp or mould in the Property.

The Hearing

52. The Applicant was represented by Mr Webb, and called Mr Neale and Mr Knowles. Counsel represented the Respondent, and Ms Zawadski gave evidence.

53. At the outset of the hearing the Respondent made an oral application to strike out the application pursuant to rule 9(3)(a) of the Tribunal Procedure Rules on the grounds that the Applicant had not complied with the directions for evidence, meaning that the Respondent had suffered less time to file its Reply thereto. The Respondent could not explain why this strike-out point had not been taken earlier, by written application or otherwise. The Tribunal considered the application to be opportunistic. We determined that the parties could proceed to a hearing, because the Applicant's failure had not prevented the Respondent from complying with directions and proceeding to a hearing. The application was accordingly refused.

54. The parties agreed that the Respondent would call its evidence first.

55. Ms Zawadski gave evidence for the Council, confirmed her witness statement, and was taken through the photographs. She explained that she had used an Azuno brand moisture meter which had been purchased 4 months prior to her first visit. She could not say if it had been calibrated before her visit. She understood that anything above a 40% reading on would not be acceptable dampness.

56. Without being a comprehensive record of what Ms Zawadski said in relation to each of her photographs, the following is sufficient for present purposes:

13 May 2022:

- Insufficient door security;
- Evidence of leak on lounge ceiling, down wall, and damage to plaster, but dry;
- Black mould on lounge external wall;
- Black mould on bathroom ceiling;
- Black mould on shower tray sealant;
- Mould extensive on bathroom ceiling;
- Paint bubbling at top of wall;
- Gasket defective on ground floor back bedroom;

22 August 2022:

- Fan fitted over vent, no sealant around, and not connected to light switch;
- Bathroom ceiling mould;
- Ground floor front bedroom speckled black mould in right hand corner;
- Front left bedroom stain and paper missing, to left side of window:
- Passive vent ground floor front bedroom;
- Ground floor back bed window frame outstanding;

- No works to front entrance door;

24 November 2002:

- Ground floor front bedroom; discolouration in front left corner, wallpaper replaced, not tested for damp;
- Same area: discolouration;
- Front entrance door: hole drilled for mortice lock; mortice present but no thumb turn;
- Keep for mortice;
- Ground floor front bedroom: right hand corner speckled mould had reduced in severity; no damp readings;
- Ceiling looked remedied, but no redecoration;
- External wall in living room, raised plaster (not smooth), plaster still tacky and had not completely dried. Did not appear to be a plaster repair because it was white (not pink); was not decorated; no damp readings;
- Shower had new sealant on the inside but not externally;
- Fan in bathroom same, but no evidence of lack of functionality;
- Bathroom ceiling attended to, with mould removed;
- Kitchen wall still had areas of some low level mould spotting;
- Ground floor back bedroom window the same;
- Kitchen mould on ceiling above window;

9 February 2023:

- Front entrance door: still no thumb turn, although mortice worked functionally;
- Ground floor front bedroom: raised moisture reading (23.3%);
- External left corner of same bedroom: damp/mould affected;
- Front right corner: black speckled mould;
- Lower level: damp approximately 0.5 meter above floor level. It was confirmed to be above 40% because the meter bleeps when moisture content is at/greater than this percentage;
- Ground floor back bedroom window the same;

- New extractor fan and back plate, in UVPC in bathroom;

11 September 2023:

- Front left corner of ground floor front bedroom: poor condition of wall, but meter not bleeping as much as before;
- No significant change to lounge;
- No substantial mould in bathroom; but ceiling paint cracking shows issue not fixed. No damp reading however; ceiling was redecorated;
- No change to ground floor back bedroom window.

57. Ms Zawadski confirmed she had been involved in the process of calculating the penalty, and she made the decision to impose the Final Penalty, having powers to do so under the Council's scheme of delegation. The decision was reached in collaboration with Victoria Routledge, another RSO of the Respondent.

58. At Appendix 2 to this decision is the Respondent's completed matrix.

59. Ms Zawadski confirmed that she and Ms Routledge had discussed culpability, although it is not expressly mentioned/scored in the matrix. She had taken the view the Applicant had a significant portfolio of properties and Mr Neale was the sole director. She confirmed the Council would always take into account mitigating factors, although this was not expressly covered in the matrix either.

60. Under cross-examination by Mr Webb, she contended that the tenants did not need to be decanted for the works to be done. She anticipated the children would sleep in the other rooms (including living room) while each room was worked upon. She explained that April Harding had not expressed to her that she could not move things around while works were done.

61. Ms Zawadski was then asked some questions about her visit on 22 November 2022. She pointed to the absence of invoices for window works, and as regards the hole that needed to be filled, she said that it should not have been filled if the area was not dried out first.

62. When it was suggested that the majority of items had been undertaken by February 2023, she responded that all should have been completed by November 2022.

63. She said that today's inspection (by the Tribunal and the parties) was the first time she had seen the front entrance door lock completed to the extent required by the Improvement Notice.

64. She accepted that she could not refute what April Harding had said in her witness statement, concerning her being difficult in granting access to the Applicant, but at no point had Ms Harding informed the Respondent.

65. As regards line 1 on the penalty matrix , Ms Zawadski emphasised that there were significant hazards, the Improvement Notice had not been fully complied with, there had been no contact after the Improvement Notice was served, save for 1 email from the Applicant which simply read "Thanks". She confirmed she had not spoken to Mr Knowles once the letter of alleged offence had been served. She did not consider the Applicant to have been very responsive. She said it could not be assumed that the Applicant's other properties in its portfolio were kept to a good standard. As to the contention that some works had been done by the Applicant, Ms Zawadski said that that factor did not weigh significantly, because of the nature of the repairs done – they should have been executed properly in the first instance.

66. As to line 2 on the penalty matrix, she accepted the Applicant had made not made a large profit from its business, once its liabilities were taken into consideration. The threshold for number of properties to be large was over 5, and the Applicant had 41; so to an extent that balanced out the lack of profit made by the Applicant, she said.

67. She was not asked any questions on line 3 of the matrix, save for why the minimum score was not zero instead of 1. Ms Zawadski could not comment on that.

68. As to line 4 on the matrix, it was suggested to her that the damp was caused by Ms Harding's failure to open her windows, and overcrowding of the Property, causing condensation dampness. Ms Zawaski pointed to the fact the Applicant had a professional report which indicated there was rising damp in the Property.

69. In re-examination, Ms Zawadski confirmed the material on the outside of the shower which appeared black spotted was mould affected sealant.

70. The Applicant then called its evidence, starting with Mr Neale, who confirmed his written statement. He was then tendered for cross-examination. He confirmed his position was that the tenant (Ms Harding) had frustrated attempts to carry out works. He accepted the Improvement Notice had been duly served, and he had known works had to be executed by 22 November 2022. He claimed that he had sent an email, aside from the one dated 8 June 2022, saying the tenant was frustrating access, but could not identify any such email in the bundle. He said that the Respondent had adopted an aggressive style; he had received no complaints about his portfolio previously in all of 25 years.

71. He accepted he had not shown the Improvement Notice to Ms Harding and emphasised the importance of compliance; he had managing agents to do that. He insisted the Applicant had only got intermittent access to the Property. When it was suggested to him that the Applicant was not proactive in sorting out access, Mr Neale responded by saying the tenant would not allow access to contractors using their own keys. He was taken to clause 4.3.11 by Mr Jones of counsel, but said that access was not done without Ms Harding's cooperation because of "welfare issues". He accepted he had not notified the Respondent of any welfare issues preventing works being completed on time.

72. Mr Neale said that any correspondence to Ms Harding threatening eviction was borne out of frustration. He could not explain why failure to give access had not been mentioned in emails. He said that access was sought over the phone by the workmen directly. He said that he had never been through this situation before, and it was all a bit of a learning curve.

73. He accepted that access was not required for external works, such as the guttering joint outside the front door which was the cause of leakage into the front bedroom. He could not say when this defect was identified or when it was fixed. He was adamant there was no rising dampness in the Property, despite the Essex report, and as such no damp course had been installed. He said he had never met a damp specialist who did not recommend a new damp proof course.

74. He accepted there was no list of dates when workmen had tried to get access but were unable to. He accepted there was no schedule of works in evidence. He accepted he had no receipts for materials in the bundle. It was suggested to Mr Neale that his response was not to take the complaint seriously, but to try to get Ms Harding into a council property, in other words to evict the tenant and the problem would go away. Mr Neale said that they emails suggesting the eviction action would be taken were not serious; that he was never going to evict Ms Harding.

75. Mr. Neale was taken to the photograph of the fan fitted straight over an existing vent. He accepted this was below par standard, and when he saw what had been done, he got electrical contractors in.

76. Mr Neale stated that he did not realise he could make an application to vary the Improvement Notice. He confessed that he had not read it thoroughly.

77. Mr Neale confirmed that he considered that the fine which should be imposed should be no more than £2500.

78. Mr Knowles then gave evidence, confirming his witness statement. He was tendered for questions. He accepted that the Improvement Notice was valid and that works were required. He accepted that he had not engaged in correspondence during the period of the notice being active. When it was suggested to him that his first correspondence with the council was dated 8 December 2022, 16 days after the date the work should have been completed pursuant to the Improvement Notice, his response was “if you say so”. He accepted he had not said at any stage that he was having access difficulties with Ms Harding. He contended that that had been a mistake throughout the process. When it was suggested to him that the Applicant had got access, Mr Knowles said that it was intermittent access, as Mr Neale had stated.

79. When it was suggested to him that he could have gained access without permission using keys, Mr Knowles gave evidence that in mid to late August 2022, the keys no longer worked to the Property.

80. Mr Neale had delegated the Improvement Notice works to him. He said he could not remember contacting the Respondents about the works. He explained that he was not experienced in relation to Improvement Notices, but insisted he believed

he was competent to deal with it. He explained that he managed 250 properties between himself and another person at Griffin Residential. He said that his lack of communication on the matter with the Council was the result of inexperience.

81. Ms Harding then gave evidence on behalf of the Applicant. She confirmed her witness statement. She was tendered for questions. She explained that during the period in question she had a job, and was only available to give access between 9:00 AM and 11:00 AM, and then 2:00 PM to 3:00 PM, because she was at work between 11:00 AM and 2:00 PM. She confirmed that there was no one else to give access on her behalf.

82. She explained that when the Improvement Notice had been served on 23 August 2022, it was the school holidays, and she was going through a very difficult relationship at the time, such that she could not really have anyone in the house. As such, access could not always be given. Ms Harding went into further details about her relationship, but for present purposes it is not necessary to set out the detail.

83. She explained that there wasn't really any organised plan regarding the works; sometimes the contractors didn't come at all. She said she had to voice her concerns about the contractors.

84. She said she had changed the locks only on the advice of the local authority.

85. She explained that Mr Knowles had asked her to write the letter dated 3 October 2023. She explained she had not mentioned the welfare issues in her witness statement, because it was something she had just got over. She said she had not refused access, but accepted she had been difficult in giving access, because she needed more than just an hour's notice. She could not say how often she had been unable to give access. She mentioned that she had been asked to write a witness statement by both parties.

86. In closing submissions, the Respondent emphasised the following:

87. The Applicant accepted the works were required, but did not communicate in the period of the notice. It made no application to vary the Improvement Notice, and did not appeal it. The Applicant had delegated the matter to Mr Knowles, who was not competent to deal with it. The reaction of the Applicant to the notice was to try to move Ms Harding out, rather than applying its resources, of which they were ample. Mr Neale had not even read the Improvement Notice properly. There was evidence that access was given in the period. Mr Knowles did not claim in his emails there was no access. The suggestion that the Council was not specific enough in its requirements for the works was simply wrong. Mr. Knowles did not grapple with the issues. Mr Knowles had not realised he could rely on the clause in the tenancy agreement permitting access without keys, although the applicant itself had realised that. Simply put, the Applicant had not discharged the evidential burden of establishing, on balance of probability, that there was a reasonable excuse for not complying with the notice; there were no receipts, for either materials or invoices for labour. Ms Harding had not said that she needed to be vacated for works to be done. Neither the Applicant nor Ms Harding had said anything about the locks being changed or welfare issues preventing access.

The Applicant and Mr Knowles had found all of this somewhat of a learning curve, when it was in fact a very serious matter. Ms Harding had not been able to be specific on times and dates when she did not give access; whilst it was not being suggested that she was not telling the truth about failing to give access, the Tribunal could not be satisfied how many times it had happened, and it was in any event not a reasonable excuse, because the landlord had other remedies.

88. Mr Webb in closing representations said this was not a case where the landlord should be expected to have used the terms of the tenancy against a single woman with 3 young children and with welfare issues. Mr Neale and Mr Knowles had done what they could. There was a reasonable excuse for not complying with the Improvement Notice, given Ms Harding's personal difficulties leading to lack of access, which she readily admits. The last of the works (the front bedroom works) could not be done until the room was cleared, which was not until the October 2023 half term week.

Issues

89. The issues are:

(1) Whether the Local Housing Authority has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty;

(2) Whether the Tribunal is satisfied, beyond reasonable doubt, that the Applicant's conduct amounts to a "relevant housing offence" in respect of the Property;

(3) Whether the financial penalties are set at an appropriate level having regard to all relevant factors.

(1) Whether the Local Housing Authority has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty;

90. The Applicant confirmed at the hearing it took no point on procedure, in relation to Notices or otherwise.

(2) Whether the Tribunal is satisfied, beyond reasonable doubt, that the Applicant's conduct amounts to a "relevant housing offence" in respect of the Property

91. The Tribunal is satisfied beyond reasonable doubt that the requirements of section 30 of the Housing Act 2004 have been made out by the Respondent, in so far as they have proved that the Applicants failed to comply with the Improvement Notice. Given that the Applicant did not appeal the Notice, pursuant to section 30 of the Act, it had to complete the work by the date stated in the Notice. It did not do so. It undertook some works, but not all. The

photographic evidence referred to in paragraph 56 above reveals the breaches as of 24 November 2022, and the slow progression of works even after this date.

92. However, the reasons for not doing are alleged to amount to a defence (pursuant to section 30(4) of the Housing Act 2004), in that the Applicant alleges, on balance of probability, it had a reasonable excuse for not complying with the Notice. The reasonable excuse advanced is that the Applicant was unable to get access to the Property on a sufficient number of occasions to effect the total works.

93. We have considered everything carefully which the Applicant says about the circumstances of this case. However we do not consider that any of the actions of the Applicant amount to a reasonable excuse, for the following reasons.

94. Whilst there is some evidence that, before the Improvement Notice was served, the Applicant had complained to the Respondent that Ms Harding was not giving full access, there is little concrete evidence of such a problem during the period of the Improvement Notice, i.e. between August 2022 and November 2022. We agree with the Respondent that the Applicant has not discharged the evidential burden of establishing on balance of probability that there was a reasonable excuse for not complying with the Notice because Ms Harding was not giving full access. The Applicant is unable to evidence that it has complied with the terms of the tenancy as regards access, namely 24 hours' notice in writing to the tenant, followed by a failure by the tenant to give access on the date notified. But even if we accept that the Applicant and Ms Harding were prepared to proceed on the basis that oral notice was sufficient, neither Ms Harding nor the Applicant could provide any details of the dates on which access was not given. There was also a significant lack of documentation evidencing the dates on which access was obtained and works partially completed, there being few invoices.

95. Whilst it is clear that Ms Harding was difficult regarding access, and she could not give access except at limited times, because of her job, we are left with the impression that a concerted effort was not made by the Applicant or its Agents to get all works done by the deadline of November 2022, or to overcome their difficulties by other means. Although Mr Neale said in evidence he did not know the Applicant could seek an extension of time from the Respondent for compliance, it seems to us that was an exercise in pure common sense. Mr Neale did not read the Notice fully; otherwise he would have known that he could appeal it to this Tribunal.

96. In addition, at least some of the works, which resulted from external water leakage, did not require access internally. The Schedule to the Improvement Notice required investigation of the cause of the leak affecting the ground floor front bedroom and to execute all necessary works. It would appear that the Applicant did not ascertain the cause of that dampness until it was too late. The issue was a guttering joint outside the front door. The Applicant's witnesses could not condescend to any detail as to when the defect was identified or when it was fixed. However it is clear from the evidence of the Respondent that this room was still being affected by damp and mould as late as February 2023, if not September 2023.

97. We do not, however, consider that the Applicant should have taken formal steps such as an injunction against Ms Harding to get access, given the welfare issues of which we have heard sufficient detail.

98. It was not suggested at any time that Mr Neale's health issues amounted to a reasonable excuse. Indeed, on the evidence, the medical issues/investigations were before the date for starting and finishing the works; and Mr Neale had delegated the works to Mr Knowles in any event. We do not accept that the Applicants kept the Respondent informed of all material matters. Mr Knowles did not communicate with the Respondent until December 2022.

99. In conclusion on this issue, we are not satisfied on balance of probability the Applicant has a reasonable excuse for non-compliance with the deadline in the Improvement Notice.

(3) Whether the financial penalties are set at an appropriate level having regard to all relevant factors.

100. In considering this issue, the Tribunal has had regard to the Government Guidance for Local Authorities issued under paragraph 12 of Schedule 13A to the 2004 Act. The Guidance encourages each Local Authority to develop their own Policy for determining the appropriate level of penalty. The maximum amount (£30,000) should be reserved for the worse offenders. The amount should reflect the severity of the offence as well as taking into account the landlord's previous record of offending, if any. Relevant factors include:

- Punishment of the offender
- Deter the offender from repeating the offence
- Deter others from committing similar offences
- Remove any financial benefit the offender may have obtained as a result of committing the offence
- Severity of the offence
- Culpability and track record of the offender
- The harm caused to the tenant

101. As noted above, the Respondent does have such a Policy, to which the Tribunal must give due regard.

102. This Tribunal has no reason to go behind the Respondent's decision to impose a penalty, rather than a prosecution. The Applicants did not contend otherwise. We find the decision to impose a financial penalty in these circumstances to have been a legitimate approach.

103. As regards determining the penalty, the Respondent's Policy sets out some of the matters contained the national guidance, set out above. But the Tribunal is concerned that neither level of culpability (as opposed to severity of offence) nor mitigating factors are drawn to the decision-maker's attention in express terms in the policy or matrix. We are also concerned that the matrix claims to justify the doubling of the score in relation to "harm to tenants" on the basis this is "in line with Statutory Guidance." The statutory guidance referred to in paragraph 100 above says no more than harm "is a very important factor when determining the level of penalty."

104. For these reasons, there is an element of rigidity to the Council's approach which leads us to depart from the Council's score of 51 in this case.

105. As regards line 1, deterrence and prevention, the Council scored this with 10 points, on the grounds that it had low confidence that a financial penalty would deter repeat offending. The justification given in the right hand column was that the Applicant failed to act on initial informal correspondence, and throughout the Applicant has not made any attempts to update the Council, nor engaged in conversations in respect of outstanding works; in particular there was no response to the letter of alleged offence, despite the Applicant being a large portfolio landlord.

106. The Tribunal takes the view that this was scored too harshly. We accept there was a lack of engagement which legitimately led the Council to act. Mr Knowles, it seems, was appointed in May 2022 and was a property manager of some 15 years' experience, yet he did not correspond with the Council until after the deadline for works. He maintained that he had had oral communications with the Council, but we cannot be satisfied of that. There was indeed no response to the letter of offence. We do not consider the fact that the landlord is a large or small portfolio landlord to be of much relevance in terms of prevention and deterrence. We do, however, take into account that some works were done, which the Respondent did not; and that there was an element of mitigation because there was not total unconditional and unrestricted access given by Ms Harding. We understand why the Applicant did not take strict action with the tenant, given her welfare issues. All that mitigation was not considered by the Respondent under "justification". We also take into account that the landlord had no previous record for the past 25 years. The Tribunal determines, having heard all the Applicant's evidence, that there should be medium confidence that a financial penalty will deter repeat offending by the Applicant, and that only minor informal publicity is required to achieve mild deterrence in the landlord community. Weighing all factors, we score 5 on this scale.

107. As regards line 2, removal of financial incentive, the Respondent scored the Applicant the maximum 20 on this. Its justification was that the director of the company is Mr Neale, who is also a director of the managing agent Griffin Residential; and that the financial statement for the applicant showed net assets of £5.8 million, with a freehold asset value in 2022 of £13 million. The evidence in this case, however, has shown that to be only part of the picture. The

Respondent did not take into account, as we consider it should have, the operating profit of the Applicant, as shown by the accounts in the bundle. It cannot be said that the Applicant made a large profit in 2022. Nonetheless, we consider that the size of the portfolio (41 properties) is such as to render the omission made by the Respondent less important than it might be in another case. We also score 20 on this line.

108. The parties are agreed that line 3 was correctly scored at 1, this being a single low level offence with no previous enforcement history. The Tribunal also scores 1 for the same reasons.

109. As for line 4, we are not prepared to depart from the policy of doubling the score in relation to harm to tenants, because although this is not expressly referred to in such terms by the statutory guidance, (risk of) harm is arguably the most important factor. It was not irrational of the council to take this approach.

110. The Respondent awarded 10 points, doubled to 20, on the grounds there was likely moderate level health/harm risks to the occupant, with vulnerable occupants potentially exposed. The justification box on the matrix states that result of the incomplete works was that the tenant and young children were exposed to damp and mould, exacerbated by a suspected unidentified leak enabling water ingress, that in turn led to high volume of mould spores in the sleeping area. The presence of mould spores has a direct link with respiratory illnesses have been found with the recent tragic case of Awaab Ishaak.

111. The Tribunal agrees that there was a risk of harm occasioned to Ms Harding and her family, potentially exposing vulnerable occupiers (her children) to mould spores, although we could not go far as to say, without specific evidence, that there was a high level of mould spores in the sleeping area. There was also little evidence of actual harm to Ms Harding or her children. She provided no witness evidence of any impact on her. In addition, we have to consider a small element of conduct on her part in not allowing access on all occasions, which led to a exposure of risk for which the Applicant could not be responsible. We therefore score 5 (doubled to 10).

112. In summary, the Tribunal's total score is 36. That score leads to a penalty range in the Policy:

Score range across al 4 dimensions	**Fee (£)**
1-5	1000
6-10	1500
11-20	2500

21-30	3500
31-40	5000
41-50	8000
51-60	12000
61-70	16000
71-80	20000
81-90	25000
91-1000	30000

113. We conclude, therefore, by finding that the penalty should be set at an appropriate level of £5000 for a score of 36, and that it is payable by the Applicant. We allow the appeal in part, accordingly.

114. Given that the Applicants succeeded in part on the appeal, the Tribunal considers it just that they recover half of their application and hearing fees (£150).

115. We conclude by thanking the parties for their helpful representations and approach to this case.

Name: Tribunal Judge S Evans **Date**: 28 March 2024.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the Property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix 1

Housing Act 2004

30 *Offence of failing to comply with Improvement Notice*

(1)Where an Improvement Notice has become operative, the person on whom the Notice was served commits an offence if he fails to comply with it.

(2)For the purposes of this Chapter compliance with an Improvement Notice means, in relation to each hazard, beginning and completing any remedial action specified in the Notice—

> (a)(if no appeal is brought against the Notice) not later than the date specified under section 13(2)(e) and within the period specified under section 13(2)(f);
>
> (b)(if an appeal is brought against the Notice and is not withdrawn) not later than such date and within such period as may be fixed by the Tribunal determining the appeal; and
>
> (c)(if an appeal brought against the Notice is withdrawn) not later than the 21st day after the date on which the Notice becomes operative and within the period (beginning on that 21st day) specified in the Notice under section 13(2)(f).

(3)A person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(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.

(5)The obligation to take any remedial action specified in the Notice in relation to a hazard continues despite the fact that the period for completion of the action has expired.

(6)In this section any reference to any remedial action specified in a Notice includes a reference to any part of any remedial action which is required to be completed within a particular period specified in the Notice.

(7)See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(8)If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

S.249A Financial penalties for certain housing offences in England

(1) 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.

(2) In this section *"relevant housing offence" means* an offence 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).

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a) the person has been convicted of the offence in respect of that conduct, or

(b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6) Schedule 13A deals with—

(a) the procedure for imposing financial penalties,

(b) appeals against financial penalties,

(c) enforcement of financial penalties, and

(d) guidance in respect of financial penalties.

(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

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

Schedule 13A

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.

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").

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.

9 (1) A local housing authority may at any time—

(a) withdraw a Notice of Intent or final Notice, or

(b) reduce the amount specified in a Notice of Intent or final Notice.

(2) The power in sub-paragraph (1) is to be exercised by giving Notice in writing to the person to whom the Notice was given.

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.

11 (1) This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2) The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a) signed by the chief finance officer of the local housing authority which imposed

the penalty, and

(b) states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5) In this paragraph *"chief finance officer"* has the same meaning as in section 5 of the Local Government and Housing Act 1989.

12 A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A.

Appendix 2