FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/00BN/HNA/2023/0019**
Property	**:**	**67 Vine Street, Manchester, M11 1LH**
Applicant	**:**	**Theophilus Ogbu**
Respondent	**:**	**Manchester City Council**
Representative	**:**	**Mr Paul Whatley (counsel) Mr Paul Scott (solicitor)**
Type of application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A of the Housing Act 2004**
Tribunal member(s)	**:**	**Judge J White** **John Elliot (Valuer)**
Venue	**:**	**Northern residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2Piccadilly Plaza, Manchester, M1 4AH**
Date of hearing	**:**	**17 November 2023**

DECISION

The Order

The financial penalty of £23,500 in respect of the offence under section 234 of the Housing Act 2004 is reduced to £7,104.75.

The Applications

1. Mr Theophilus Ogbu is the owner and landlord of, 67 Vine Street, Manchester, M11 1LH the "Property". He has made an application against a financial penalty issued by Manchester City Council (the Council) made under section 249A of the Housing Act 2004 (the 2004 Act).

2. The financial penalty notice for £23,5000, dated 6 December 2022 was in relation to breach of management regulations at the Property. Specifically, on 22 June 2022, the smoke alarm was not working and this was an offence

3. On 16 May 2022 Directions were issued. In compliance with Directions both parties submitted bundles of documents as set out below.

The Hearing

4. This Tribunal convened on 17 November 2023 to hear the matter at the Northern Regional Tribunal Service. The Applicant appeared in person. The Respondent was represented by Counsel Paul Whatley. The Respondent's witnesses David Allwood, Neighbourhood Compliance Officer, and Andrew Richardson, were in attendance and provided evidence as set out below.

Law and Guidance

5. In summary section 249A of the Housing Act 2004 ("2004 Act") inserted by the Housing and Planning Act 2016, enables a local housing authority to 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.

6. Relevant housing offences are listed in section 249A(2). The relevant offence here is Breach of Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2006 ("Management Regulations"), contrary to Section 234(1) of the 2004 Act. Breach of the Management Regulation 4 Duty of manager to take safety measures. Regulation 4 includes (1) that the manager must ensure that all means of escape from fire in the HMO are (a) kept free from obstruction; and (b) maintained in good order and repair; and (2) The manager must ensure that any firefighting equipment and fire alarms are maintained in good working order.

7. Schedule 13A to the 2004 Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent. Unless the

conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct. That person may make written representations within 28 days. After the end of the period the Local Authority must decide whether to impose a financial penalty, and if a penalty is imposed the amount.

8. In accordance with paragraph 10 of Schedule 13A the appeal is by way of a re-hearing of the local housing authority's decision as opposed to a review of their decision making. We are required to remake the decision and reach our own conclusions.

9. The Tribunal may confirm, vary, or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed, which is a maximum of £30,000.

The Applicants Case

10. The Applicant's oral and written submissions are summarised as follows:

    (a) Mr Theophilus Ogbu did not dispute that the fire alarm was not working at the date of inspection.

    (b) He relied upon the defence set out in section 234(4) of the 2004 Act that he had a reasonable excuse because he had been told by the Council that he did not need a licence, when he purchased the Property and relied on an agent who specialised in HMOs. He also relied on a live-in caretaker. He has cooperated with the Council, throughout and replaced the fire alarm the same day.

    (c) The penalty was not proportionate taking into account the factors set out below, including his age and financial difficulties.

The Respondents case

11. The Respondent relies on a bundle containing a response, witness statements by Housing Compliance officers together with all documents relied upon. Oral submissions were made at the hearing by Paul Whatley. Their witnesses confirmed their statements and gave oral evidence.

12. Paul Whatley submitted that the issues were extremely clear. At first blush, £23,500 for not having a working fire alarm for one day was

excessive. However, not having a working fire alarm must always mean a high risk of harm, and ignorance of requirements and lack of systems must always lead to high culpability. Applying the Councils policy, Mr Theophilus Ogbu had not established a case for any reduction of the starting point of £23,500.

Findings:

13. The Applicant is the owner and landlord of the Property.

14. The Applicant lives in North Wales and is 73 years old. He purchased the Property for £64,000 on 27 August 2013 with his wife. He does not own any other tenanted properties, though his wife owns one two-bedroom house manged by Country Wide Estates. It is let to a single household.

15. The Property is a traditional two storey terrace. The three bedrooms upstairs and two living spaces downstairs are bedrooms, let under an assured shorthold tenancy agreement. It has a kitchen, one bathroom upstairs and one shower room under the stairs. It comes within the definition of a House in Multiple Occupation (HMO).

16. The letting side is managed by HMO Estates, which is a letting agency. They manage the lettings to tenants, initial condition checks, deposit protection, and tenancy agreements.

17. The Property was originally let to 3 people. In 2018, they remortgaged with Barclays to do some renovations, including some rewiring and installing a small shower room under the stairs. This enabled him to rent to 5 people. At the time, he checked with the Council that he did not need to obtain a licence.

18. The current rents are £175, £375, £350 and £150. Rent is inclusive of all bills as set out in the handwritten addition to the tenancy agreements. There is one rent free room for a caretaker. The caretaker has been in occupation since Mr Theophilus Ogbu became the owner. The caretaker pays expenses of £250 per month to cover Insurance, council tax, phone. He occupies the smallest room that is under 6 metre squared. He works for the NHS. Rents are paid direct to the Applicant by standing order.

19. On 29 June 2020, following compliance checks, Manchester wrote to the Applicant and advised him of the requirements to be licensed and advised that if they did not contact the office within 14 days they would start enforcement action. The letter did not have a complete address and was not received by Theophilus Ogbu. At the same time a letter was addressed to the occupiers.

20. A Compliance Officer visited the Property on the 20 July 2020, 21 August 2020 and on the 1 September 2020. They did not notify the date and time of the visits. No one was at home.

21. The Council again contacted Theophilus Ogbu. On 2 October 2020 Mr Ogbu contacted Manchester by email explaining that he was having difficulty with the online application process and would someone contact him to offer assistance. Following assistance from Manchester, Mr Theophilus Ogbu made an application in February 2021.

22. On 8 April 2021, the Council emailed Theophilus Ogbu asking him to contact them to arrange a pre-licensing inspection. He responded the same day, saying he was waiting for an engineer to carry out an electrical installation. He was advised the inspection could happen first. On 12 April 2021 Theophilus Ogbu emailed and asked David Allwood to phone the caretaker Emmanuel to arrange an inspection. He had let Emmanual know to expect the call. David Allwood was then off work for 6 months. There is little information about what happened in this period. On around 8 March 2022 David Allwood again contacted Theophilus Ogbu. Despite, David Allwood stating in his witness statement that none of his calls or emails were answered, he admitted in oral evidence that he had made several telephone calls and emails to arrange access. Neither had been able to contact Emmanual during this period. Mr Theophilus Ogbu supplied safety certificates as requested. On 16 June 2022, following correspondence and calls between David Allwood and Theophilus Ogbu, the Council wrote to Theophilus Ogbu and the caretaker advising Theophilus Ogbu if he didn't allow entry on 22 June 2022, he would be charged with obstruction.

23. Following that letter Emanuel telephoned to ask if the visit could be rearranged. The Council refused. On the morning of the inspection David Allwood phoned Theophilus Ogbu and asked him to provide updated copies of the safety certificates (gas, electric, fire), and EPC. The Property had been rated an F.

24. At the inspection, that was also attended by Andrew Richardson, they identified that there was only one battery operated smoke alarm in the hallway at the bottom of the stairs. It was not working. David Allwood advised Emanuel that the Property should have mains wired interlinked smoke detectors in the communal areas and a mains wired, interlinked heat detector in the kitchen. If it wasn't fixed that day the Council would carry out emergency remedial works, which Theophilus Ogbu would be charged for, or they would prohibit the property for use as sleeping accommodation. Emanuel arranged this for 8pm that evening and David Allwood checked the work at 9 am the following morning.

25. There were other issues at the Property, affecting fire safety. The internal doors were not capable of holding back a fire for a minimum of 20 minutes, no thumb turn locks to the front and back, there were polystyrene ceiling tiles to the first-floor hallway. These were deemed a Category 1 hazard. On the 7 July 2022, the Council served an Improvement notice , containing the Category 1 Hazards and Category 2 Hazards, including corwing, electrical hazards. low headroom, damp and mould.

26. Between July 2022 and October 2022 there were many emails exchanged between David Allwood and Theophilus Ogbu regarding the Property including updates on the works required by the improvement notice and requests for certification showing the condition of the electrical installation.

27. On 7 November 2022, the Council emailed PACE questions. On the 9 November 2022 Theophilus Ogbu emailed his response. He admitted the offence. He provided reasons as set out below. He said some work had been undertaken and work would be completed shortly. Following a case conference, on 6 December 2022, the Council served a Civil Penalties Notice of Intent.

28. The proposed penalty was £23,500. On 8 December 2022 Theophilus Ogbu responded as set out below. On 19 January 2023, following consideration of the submissions, Manchester served a Final Notice. The amount remained the same.

29. On 13 March 2023 Manchester sent a Notice of Intension to grant a licence.

Determination

Overall Factors

30. The Tribunal found that Theophilus Ogbu's evidence was vague, and not supported by specifics, particularly as many of his arguments were not supported by documentary evidence. He was ill prepared and often struggled to recollect, and evidence was at times contradictory. We took into account Theophilus Ogbu's age in this regard and his statement that he can get overwhelmed by too much information at once. We took breaks during the hearing to allow Theophilus Ogbu to gather his thoughts and rest. He was clearly ignorant of the licencing requirements and mistakenly relied on HMO estates to advise him, though they were not contracted to do so, and Emmanual as caretaker to identify and organise day to day repairs. Despite the Respondents efforts, there was little reason to doubt that Theophilus Ogbu was an inexperienced landlord, living on a low income.

31. The Respondents case was largely cogent, credible, and substantiated by other evidence, though they were bullish in their approach and had lost sight of the Guidance, and overall factors. They had not fully particularised Theophilus Ogbu's contact with the Council or recognised his particular circumstances and not factored this into their reasons, preferring to label him as uncooperative and paint a picture of a dishonest person.

32. As this is a rehearing, we had the benefit of evidence and submissions from Theophilus Ogbu. We could take this into account when deciding the level of penalty and these factors went some way to reducing the penalties.

The Offence:

33. It is beyond reasonable doubt that on 22 June 2022 Theophilus Ogbu as an owner, landlord, and person managing the Property was in breach of S234(3) of the 2004 Act and Regulation 4(2) of the Management Regulations, due to a defective smoke alarm.

Reasons:

34. It is not in dispute that Theophilus Ogbu was the owner and landlord. Though he contended that HMO Estates was managing the Property, he agreed that he was receiving rents direct from the tenants. A "person managing" in accordance with section 263(3) of the Act, is the person committing the offence and includes an owner receiving the rents (whether directly or through an agent or trustee).

35. The 2006 Management Regulations apply to any HMO in England whether licenced or not. It is a Criminal offence under section 234(3) if a person managing an HMO property fails to comply with management regulations.

36. The Council has chosen to issue a penalty in relation to the broken fire alarm only, citing breach of the Management Regulation 4 *(2)" The manager must ensure that any … fire alarms are maintained in good working order".*

37. We do not then need to consider the alternative offence under 4(4) *"The manager must take all such measures as are required to protect the occupiers of the HMO from injury, having regard to—(a)the design of the HMO; (b)the structural conditions in the HMO; and (c)the number of occupiers in the HMO."*

38. We do not need to consider the lack of interconnecting fire alarm as part of this offence, though Mr Whatley contended that this should also come within 4(2) in the same was a failure to repair, in s11 of the Landlord and Tenant Act 1985, includes a failure to provide. However, Regulation 4's scope is split into various duties (in a way that S11 repairing obligations are not) and the Council had a choice whether to include the wider 4(4) as part of the offence and has not done so.

39. We remind ourselves that the Upper Tribunal held in *I R Management Services Limited v Salford City Council [2020] UKUT 81 (LC),* at [27], that "*the offence of failing to comply with the relevant regulation is one of strict liability, subject only to the statutory defence*."

40. *Adil Catering v City of Westminster Council [2022] UKUT 238 (LC)* held that Regulation 4 and 7 required the achievement of an outcome or the bringing about of a state of affairs rather than the implementation of policies and the First-tier Tribunal had been entitled to find that, in the absence of a reasonable excuse, the existence of defects within the HMO in question had been sufficient to prove breaches of the Regulations.

41. It is agreed that the fire alarm was not working on the day of inspection. Though Theophilus Ogbu thought that the checks made by HMO Estates prior to a new tenant included the checking of alarms, he seemed unsure exactly what they checked and did not have a contract with them. He agreed that they did not do regular checks. He did not pay them, or employ anyone else to do so. Nor did he arrange for Emmanual to do so. Any ongoing contract with an agent would normally necessitate rent being paid to the agent. It is consequently clear that *he has not ensured that any … fire alarms were maintained in good working order*.

Reasonable excuse

42. Theophilus Ogbu set out a number of factors that could be said to relate to a reasonable excuse:
    (a) He was advised when he purchased the Property, and when he remortgaged in 2018, that he did not require a licence. As soon as he was advised to do so he started the application process.
    (b) He was ignorant of the fact that he required connecting smoke alarms and the fact that he relied on a managing agent and care taker, to fix issues. He has a contract with British Gas who do annual gas and electricity safety checks. He engages Idirisa for DIY jobs.
    (c) Since he became the owner, he has engaged the services of an estate agent, who specialises in HMO properties. He uses them to get new tenants, draw up contracts, receive deposits and advice on various issues. He says they obviously have not done a good job for not advising him adequately, if they had, he wouldn't be in this situation. The caretaker lives there rent free and looks after the welfare of tenants.
    (d) Neither the agent, nor Emmanual advised him that there were no batteries in the smoke alarm. As the alarm had been installed with batteries, someone must have tampered with the alarm.
    (e) An electrician inspected the Property and provided a safety certificate.
    (f) He has cooperated fully. The delays in arranging the inspection was not his fault. He responded to all calls and correspondence from the Council. There was a delay in arranging the inspection as Emmanual's phone was broken when David Allwood returned from sick leave. He couldn't get hold of Emmanual. He didn't have an email address for him.
    (g) The batteries were replaced the same day and a new compliant alarm system fitted the following day. All other works were completed as soon as his handyman had time.

Our Findings

43. Relying on the advice of a managing agent may equate to reasonable excuse in certain circumstances but following the principles of *IR Management Services v Salford City Council [2020] 81 (LC)* it is for

Theophilus Ogbu to establish an arguable reasonable excuse and he has not done so.

44. As was said at 51 in *Adil Catering v City of Westminster Council [2022] UKUT 238 (LC)*. *"It can therefore be seen that, to provide a defence, the 'reasonable excuse' must relate to the offence in question. The defence is construed broadly since, absent a reasonable excuse, the offence is one of strict liability*." and at 57 …. "*It was for the appellant to inform itself sufficiently of the condition of the premises to enable it to take timely remedial action. The evidence was that it had failed to do so…. appellant's ignorance of the defects was not a reasonable excuse because it had failed to take proper steps to inform itself*". Finally, relevant to this case at 59…*"the manager's responsibility to ensure safety cannot be delegated*"

45. It is also clear from *The Borough Council of Gateshead V City Estate Holdings Ltd [2023] UKUT 35 (LC)* that as ignorance is no defence, neither is completely relying on an agent. He had a responsibility to find out what the position was.

46. Though, at one stage in the oral hearing Theophilus Ogbu said that he had started to research the requirements, he had not said this earlier and it was clear he did not realise that the requirements in relation to Management Regulations apply to all HMOs, and not just those that require a licence. He had done nothing to take active steps in relation to this offence and could not say when the alarms were last checked, though thought it was before the last tenant in October 2021. He relied on an agent, though had not contracted with them to manage the Property. He relied on Emmanual, though he had an unclearly defined role which did not include regular compliance checks. He has not shown that he had a reasonable excuse.

The Notices

47. The Tribunal was satisfied that, in respect of the Notices of Intent and the Final Notices, the Respondent had complied with the following procedural requirements as required under Schedule 13A to the Act:
    (a) the offence on 22 June 2022 was within 6 months of the Notice of Intent dated 6 December 2022. It was not continuing at the date of the Notices of Intent.
    (b) the Notice of Intent and the Final Notices contained the information as required under paragraphs 3 and 8 of Schedule 13A to the Act; and,
    (c) the Notices of Intent contained information about the right to make representations.

The Penalty

Local Housing Authority Policy on Civil Penalties

48. The Council must follow Government Guidance and adopt a Civil Penalties Policy ("the Policy"). The Guidance also sets out the following list of factors which local housing authorities should consider to help ensure that financial penalties are set at an appropriate level:
    (a) Severity of the offence.
    (b) Culpability and track record of the offender.
    (c) The harm caused to the tenant.
    (d) Punishment of the offender.
    (e) Deterrence of the offender from repeating the offence.
    (f) Deterrence of others from committing similar offences.
    (g) Removal of any financial benefit the offender may have obtained as a result of committing the offence.

49. The Tribunal can set aside a penalty which is inconsistent with the decision maker's own Policy, but it must do so without departing from the Policy, excepting any part of that Policy that does not comply with the Guidance.

50. *In* London Borough of Waltham Forest v Marshall [2020] UKUT 35 (LC) the Tribunal provided some guidance, (approved by the Court of Appeal in *Sutton v Norwich City Council*[2021] EWCA Civ 20):

    "54… *The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.*
    55. Nothing in these cases, or in the present appeals, detracts from the court's or a tribunal's ability to set aside a decision that was inconsistent with the decision-maker's own policy. Nor have the above cases said anything to cast doubt upon the ability of a court or tribunal on appeal to substitute its own decision for the appealed decision but without departing from the policy … It goes without saying that if a court or tribunal on appeal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or which of which it took insufficient account, it can substitute its own decision on that basis."

51. As this is a rehearing, we had the benefit of evidence and submissions from Theophilus Ogbu. We could take this into account when deciding the level of penalty. However, we are looking at circumstances at the date of decision. We should also give due deference to the Council's decision, the extent of the deference is dependent on whether we have new evidence, not available to the Council. We must consider if the decision was wrong at the time it was taken (*LB Waltham Forest v Hussain and others* [2023] EWCA Civ 733).

52. As The Upper Tribunal reminded us, in *Kazi v Bradford MDC* [2023] UKUT 263 (LC), when reaching our decision we must not be bound by part of a policy that fetters our discretion.

53. In this case there were a number of shortcomings, in the Policy and the way it was applied by the Council. They did not appear to consider wider factors, outside the level of harm and culpability, which only covers two of the seven factors that require consideration as set out in the guidance.

The nature and severity of the offence and risk of harm:

54. In considering the penalty the Tribunal has to have regard to the seriousness of the offence in accordance with *Hussain v Sheffield* at 46: -

"…An assessment of the seriousness of the offence should therefore focus on the circumstances of the offence itself and should take into account matters as they were at the date of the offence. 47. That is not to say that matters which occur after the offence has been committed are necessarily irrelevant to its seriousness. The longer an offence continues the more serious it may become, and the decision maker, whether the authority or the FTT, may take into account what has happened between the time the offence was first committed and the date of the decision. But an offence of long duration does not become less serious by being remedied; it does not get any more serious, but nor does it become less serious."

55. The Policy states that in order to ensure that the civil penalty is set at an appropriate level the factors set out in the Guidance will be considered. It then goes on to consider Harm caused and Culpability.

Harm Caused:

56. The policy sets out this relates to harm caused to the person, community and wider types of harm. They set out 3 levels of harm, high, medium and low. Each has examples of harm set out as a risk of harm.

57. The Council states the offence exposed potential victims to high levels of harm as fire alarms were not working. They state *"High levels of harm is defined as Housing defect giving rise to the offence poses a serious and substantial risk of harm to the occupants and/or visitors, for example, danger of electrocution, carbon monoxide poisoning, or serious fire safety risk. (Where no actual harm has resulted from the offence, the Local Housing Authority will consider the relative danger that persons have been exposed to as a result of the offender's conduct, the likelihood of harm occurring and the gravity of harm that could have resulted.)"* .

58. We do not accept Mr Whatley's contention that a smoke detector not working for a single day is just as serious as one not working for a long duration and all fire safety risks, by their nature, exposes people to serious and substantial risk of harm. The nature and extent of the fire risk is clearly a material factor to its seriousness as is envisaged by Regulation 4

and LACORS. LACORS identifies that there can be various levels of fire safety risk. We have to take into account the severity of harm as well as likelihood. There are some fire safety defects that create higher risks and this is dependent on a number of factors. Clearly, the longer there is no working smoke detector the higher the risk. We do not know how long the fire detector was not working, as there were no regular checks. It was highly likely to be longer than just the day of inspection. Theophilus Ogbu could not say with any certainty when it was last checked or known to be working. We do know that it was fixed on the day of inspection. The dwelling is a two storey house with five rooms, and two exits. The small size of the house reduced the risk.

59. However the seriousness and high risk is compounded by other factors. There was not an interconnecting fire alarm, no heat detector in the kitchen, no fire safety doors, no thumb locks on either exits, polystyrene ceiling in the hall, and tenants who work shifts so may be sleeping and cooking at different times throughout the day and night. These other factors together mean there is a serious and substantial risk of harm to tenants and neighbours. Consequently, the Harm is high.

Culpability:

60. The Policy sets out four levels of culpability These are deliberate (Very High), reckless (High), Negligent (Medium) Low or no culpability(Low). The Council says it was a Reckless act as defined as *"Serious or systemic failings, actual foresight of or wilful blindness to risk of offending but risks nevertheless taken by the landlord or property agent, e.g., failure to comply with HMO Management Regulations"*. In oral evidence they appear to have turned a blind eye to any factors that may reduce the culpability. We also had the benefit of further evidence from Theophilus Ogbu

61. We determine that the level of culpability for this offence is medium reduced from high for the following reasons:

(a) History of noncompliance and compliance: There is no evidence of previous offences. Though he didn't have a licence and was served with an Improvement Notice, Mr Theophilus Ogbu complied once notified, as he did with this offence.

(b) Knowledge: The Applicant said that he was ignorant and had relied on the caretaker, to report issues, and HMO Estates to advise. He had new fire alarm installed and a new rewire. He has other regular safety checks done by British Gas. He complied the same day he was made aware.

(c) Experience of the landlord: Though the Applicant had been the owner since 2013, he owned a single dwelling for the purpose of investment for his young children. Prior to 2018, there were only 3 occupiers.

(d) Lack of checks and systems This clearly amounted to a failure to take reasonable care to put in place or enforce proper systems as set out in the policy and so culpability is not low.

Correlation between Harm and Culpability:

62. The Policy uses a matrix, that they say determines the seriousness of the offence. The high level of harm and medium level of culpability is in Band 5 giving a range of £18,000-£20,999.

63. As was said in *Leicester CC V Morjaria* [2023] UKUT 129 (LC) where a similar matrix of harm and culpability provided a band the deputy president said at 54. …"*The conflation of harm and seriousness may be dictated by a desire to fit the relevant considerations into a grid with two axes. The attraction of a grid to aid decision makers is understandable, but in this Policy it may have resulted in insufficient consideration being given to the seriousness of the offence. As a result, offences with strikingly different consequences to which one would expect different degrees of seriousness and penalties should attach, have been deemed worthy of the same penalty. That was the approach which the FTT found difficult to accept, and I share its concern."*

64. To pay due deference to the Policy whilst remedying this shortfall, we have therefore assessed the seriousness of the offence where it fits into the existing policy as set out below.

The level of Penalty to be imposed:

65. The Policy states that in determining the penalty, there should be further considerations;

(a) Subject to a maximum of £30,000, the Council shall have regard to the banding levels.

(b) It should be fair and proportionate given the circumstances of the case but in all cases should act as a deterrent and remove any gain as a result of the offence.

(c) The starting point will be the mid-point of the band and is based upon the assumption that no aggravating/mitigating factors apply to the offence.

(d) An offender will be assumed to be able to pay a penalty up the maximum amount unless they can demonstrate otherwise.

66. The mid point for the band is £19,499.5. However, the Respondent does not specifically address the requirements of the Government Guidance to assess separately the seriousness of the Offence, including that the maximum level is £30,000. As this offence is that the battery was not working in the smoke detector we have started at below mid-point. This accounts for a cheap, easily rectifiable defect, with little financial gain. We

therefore consider that although the risk of harm is high, the other factors reduce the serious of the offence and the starting point should be £18,499.5. This is still within the Band 5 range. Alternatively, we could have added this as a mitigating factor as set out below.

Aggravating or mitigating factors:

67. The Policy only allows for adjustments for aggravating and mitigating factors and each either increases or decreases the level by £1000. No further guidance is given. We note that a similar policy setting a fixed amount has been held in *Kazi v Bradford MDC* to fetter the Council's and Tribunals discretion.

68. The Council said that as the fire detection system was installed promptly it is agreed that this should be classed as a mitigating factor therefore leading to a decrease in the amount by £1000. On the other side they have added £1000 as they state that Theophilus Ogbu has failed to cooperate, he did not submit a mandatory HMO licence application until the property was identified as a HMO following a report from their Homelessness Team, and by the time of the final notice had not completed all works in the Improvement Notice. They have added on £2000, taking the penalty to £23,500. It is unclear why they didn't account for the mitigating factor identified. Both their aggravating factors related to other offences.

69. We need to consider these and other factors not accepted as amounting to a reasonable excuse. We consider that mitigating factors are
    (a) It is not suggested that Theophilus Ogbu has been prosecuted or convicted of other offences and none of his tenants had made any complaints. He has taken action when asked to do so.
    (b) Theophilus Ogbu accepted responsibility and cooperate with the enquires relating the offence. He has responded to calls and emails, followed advise and provided the caretakers details for access.
    (c) Theophilus Ogbu is not a professional landlord. He has one property.
    (d) Theophilus Ogbu 's age and his admittance that "he cannot cope".
    (e) The lack of ability to travel during Covid to enable personal access.
    (f) When arranging his remortgage in 2018, to undertake some improvements, he had mistakenly confused the requirements of needing a licence and the management regulations. He had taken advice at that time and was not aware the law had changed.

70. On the other hand:
    (a) Theophilus Ogbu has made no attempt to research or find out the rules in relation to HMOs. If he had done so he would have been aware of additional requirements in relation to HMO standards.
    (b) Theophilus Ogbu did not properly establish a system of checks and areas of responsibility. He blamed those he had not properly

authorised to be responsible for compliance with any requirements.

71. As there are two aggravating factors and six mitigating factors this gives a further £4000 deduction. We do not consider that any factor necessitates a greater or less amount than £1000 for each factor. This reduces the penalty to £14,499.5

Reduction in Penalty:

72. The Local Housing Authority may reduce the penalty imposed where corrective action is taken in respect of the offence committed in a timely and appropriate manner in circumstances where the Local Housing Authority have assessed the category of culpability as being low or medium. Such reduction will only be applied where the corrective action has been taken prior to the service of the Final Notice. The maximum level of reduction to be applied will be 30% of the penalty amount and each case will be considered on its own merits.

73. As the fire alarm was installed the same day and almost 6 months before the Notice of Intent then the full 30% reduction is appropriate.

74. This results in a penalty of £10,149.65.

Financial Circumstances:

75. Government Guidance and the Policy above require us to consider Theophilus Ogbu‘s ability to pay and we this must consider whether the penalty is fair and proportionate given the circumstances of the case but in all cases should act as a deterrent. Though stated in the Policy, it is not clearly an additional step in the process.

76. When asked, David Allwood, stated in oral evidence that he had not considered anything beyond, Harm, Culpability, mitigating and aggravating factors. Mr Whatley attempted to undermine Theophilus Ogbu ’s credibility in relation to his stated financial position. In fact, he went further, and suggested that Theophilus Ogbu had fraudulently submitted inaccurate tax returns. There was little, if any, basis for this supposition. Theophilus Ogbu had submitted a tax return calculation and had said this was usually enough to provide proof of income. Despite Mr Whatley asking questions relating to dormant companies, and a position of incredulity as to why Theophilus Ogbu had not submitted bank and mortgage statements, there was little to support his contentions.

77. On the other hand Theophilus Ogbu did not help himself in this regard. For example, he at first refused to answer whether he was a qualified accountant. It was unclear why he hadn’t submitted bank and mortgage statements and he was vague as to the equity in the Property, indicating that he owed the same as the value.

78. We accept that he submitted documents in relation to his wife's income, as this was specially addressed in the response to the PACE questions and the Final Notice.

79. Theophilus Ogbu contends that at 73 years old with 3 young children, a small income and debts, he cannot afford to pay the penalty. The property rental value is small as bills are included, and the caretaker does not pay rent. He has provided some evidence to support his claim. Manchester contends there is no evidence presented of financial hardship.

80. Theophilus Ogbu enclosed his tax calculation for 2022. This shows income as £19,390. Theophilus Ogbu has a small pension of £11,990 and runs a small book-keeping and accountancy services business from home to supplement his pension. Since covid 19, the business has not been doing very well. In 2022, he earned £2,400.

81. The rental income is £1050 per month, giving an annual turnover of £12,600. He pays all the bills, including fuel, council tax, water. He has provided copies of the Tenancy Agreements supporting this. In addition, his expenses include repairs, HMO Estates, a contract with British Gas. His income from this is £2,500 and his wife's income from this Property is the same. He states the profit is split equally with his wife. Mr Whatley was incredulous of his stated rental income. However, the stated profits accords with our calculations of likely deductions and is credible. It is improbable that his tax returns are not correct. In addition, he pays a mortgage of £677 on the Property.

82. He gets dividends of £2,500 per year. This demonstrates some additional investments. Other registered companies appear to be dormant.

83. He has other debts, including a joint £83,000 mortgage on his own home. He has 10 years left and the fixed rated ends in February 2024. His current mortgage payments are £722.24 per month and is supported by a statement. He had a government backed bounce back loan with a current balance of about £14,191. He took 6 months leave to pay because he could not keep up payment. This ended in June 2023. He was in arrears for several months but has just brought it up to date. In addition, he has an outstanding cumulative tax bill of over £5,615,07, and a credit card outstanding balance of over £3,391. He borrowed from a friend called Mani Shoker £7000 which he invested in crypto Currency but Mr Theophilus Ogbu says it turned out to be a scam.

84. He would also be entitled to a state pension, with current value of £10,600.

85. His wife. Geraldine Ogbu runs a small export business from home, on second-hand house whole goods. Called GNO Enterprises ltd. End of year accounts were provided. Theophilus Ogbu States since Covid 19 her business has taken a nosedive. The high shipping cost that has tripled, escalating handling cost, sluggish economy, high inflation, and falling demand, has made trading unprofitable. The Accounts show the Net Profit

in 2021 was £1,341 and 2022 £1,117-208 with Operating losses of £2,330 and £68. They borrowed £25,000 from AA loan company and £25000 from the government bounce back loan to try to prop up the business. They had to ask for 6 months leave to pay because we were having difficulty keeping up monthly payment.

86. She also has in her sole name, a two bed mid-terrace house, single dwelling. Address is 20 Coronation Street Manchester in Gorton. She currently has a Buy to Let mortgage with Lloyd Bank Pls. It is rented out and it is fully managed by the countrywide estate agents Manchester. She also has a credit card outstanding balance of £2500 with Barclays bank.

87. As £10,149.65, is around a third of Mr Theophilus Ogbu's personal annual income, his earning and remortgage ability is greatly reduced due to his age, he has debts, and there is unlikely to be substantial equity in the Property, the penalty should be reduced by a further 30%. A penalty of £7,104.75 is still high enough to be a punishment, a deterrent to him and others, removes any financial benefit and is proportionate in the circumstances. It may be payable through a combination of equity and assets release and income.

Conclusion

88. The offence has been committed beyond reasonable doubt.

89. The procedural requirements have been followed.

90. Taking into account the Guidance and following the Respondents own Policy where it complies with the Guidance, the Tribunal determines the level of the penalty as £7,104.75.

91. The Applicant must pay the penalty within 28 days of service of this determination.

Judge J White
26 November 2023

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.