FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CG/HNA/2023/0011**
Property	**:**	**105 Hartley Brook Avenue, Sheffield**
Applicants	**:**	**(1) Mohammed Nawaz** **(2) Nazam Mohammed**
Respondent	**:**	**Sheffield City Council**
Type of Application	**:**	**Appeal against financial penalty: section 249A and Schedule 13A, Housing Act 2004**
Tribunal Members	**:**	**Tribunal Judge A M Davies** **Tribunal Member S Kendall, MRICS**
Date of Decision	**:**	**3rd July 2024**

DECISION

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1. The Final Notice Imposing a Financial Penalty issued by the Respondent to each of the Applicants on 20 December 2022 in relation to 105 Hartley Brook Avenue, Sheffield is cancelled.

2. The Respondent has leave to appeal to the Upper Tribunal.

REASONS

BACKGROUND

1. The Applicants jointly own a semi-detached 2 bedroomed house at 105 Hartley Brook Avenue, Sheffield. Since 2015 the house has been let. Of the two Applicants, Mr Nawaz is responsible for managing the property.

2. In January 2022 the tenant at 105 Hartley Brook Avenue complained to the Respondent Council that the property was in disrepair. Mr Tomlinson, a Senior Private Housing Standards Officer employed by the Respondent, visited the property and on 2nd February 2022 issued an informal notice to the Applicants, setting out the work which was required in order to ameliorate the effects of damp in the house. The urgent work was to be completed by 2nd April 2022.

3. No work was undertaken. Following a further inspection on 6th May 2022 Mr Tomlinson served an Improvement Notice on both Applicants, being the persons having control of the house. The Notice was served under section 11 of the Housing Act 2004 ("the Act") and specified a Category 1 Hazard – damp and mould - which was to be remedied by undertaking the work set out in Schedule 2 to the Notice. The Notice was sent by first class post to each of the Applicants at their respective home addresses before 11 am on 13 May 2022. Neither of the Applicants lodged an appeal against the Improvement Notice. The Respondent claimed £532.40 costs of the Improvement Notice and this sum was paid by Mr Nawaz in August 2022.

4. The Improvement Notice required work to start no later than 13 June 2022. In the event, remedial work started at the property on or about 11th August 2022. Repairs to the roof started on or about 12th September 2022. In a statement to the Tribunal Mr Nawaz said that he had been let down by contractors and had not been able to find anyone to start work on the property any earlier.

5. On 16th August the Respondent issued a Notice of Intent to impose a Financial Penalty of £5000 payable by the Applicants jointly. Following receipt of representations by the Applicants, the penalty was reduced to £4000 and a Final Notice was issued on 20th December 2022.

6. Having taken legal advice, the Applicants appealed against the Financial Penalty on the ground that the Improvement Notice was defective and invalid. Further grounds of appeal related to the amount of the penalty.

THE LAW

7. Section 249A(2)(a) of the Act creates a relevant housing offence where a person fails to comply with an Improvement Notice.

8. Section 249A of the Act provides an alternative to prosecution as follows: "*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*." The level of proof required before a financial penalty can be imposed is similar to the proof required for a criminal conviction. The maximum penalty for each offence is £30,000.

9. On an appeal against a financial penalty, this tribunal is required to make its own finding as to the imposition and/or amount of a financial penalty and may take into account matters which were unknown to the Respondent housing authority when the Final Notice of Penalty was issued.

10. Section 13(1) of the Act reads "*An improvement notice under section 11 or 12 must comply with the following provisions of this section*. Section 13(3) provides: "*The notice may not require any remedial action to be started earlier than the 28th day after that on which the notice is served.*"

THE HEARING

11. The application was heard in Sheffield Magistrates Court on 3 July 2024. The Respondent was represented by Ms Ferguson, its in-house solicitor. Mr Mohammed did not attend and was not represented. Mr Nawaz attended with his counsel, Ms Shields.

12. The Tribunal agreed to deal with the validity of the Improvement Notice as a preliminary issue. Ms Ferguson had produced a Skeleton Argument and copy authorities. At outset of the hearing Ms Shields supplied the Tribunal with a copy of the judgement in *Southend-on-Sea Borough Council v Odeniran [2013] EWHC 3888 (Admin)*.

THE DATE OF SERVICE

13. The Queen's Bench Practice Direction [1985] 1 ALL ER 889 provides a gloss on section 7 of the Interpretation Act 1978. The Practice Direction provides that, for the avoidance of doubt, a document posted by first class mail is to be deemed delivered on the second working day after posting unless there is evidence to the contrary.

Saturday is not a working day for this purpose. The Respondent has no evidence as to the date on which the Improvement Notice was actually received by either Applicant. It follows that the Improvement Notice dated Friday 13 May 2022 and sent by first class post is deemed to have been served on Tuesday 17 May. The 28th day after that is 14th June, not 13th June as stated in the Notice. Ms Ferguson and Ms Shields were agreed on this point.

14. Ms Shields argued that this error was fatal to the Improvement Notice which was therefore a nullity, rendering the imposition of a financial penalty also invalid. Ms Ferguson accepted that the date 13th June 2022 given in the Notice as the latest date on which remedial work was to start was incorrect but argued that the defect was not sufficiently material to invalidate the Notice and subsequent enforcement action.

THE EFFECT OF THE ERROR

15. In *Southend-on-Sea Borough Council v Odeniran* a somewhat similar error had been made. The Improvement Notice served on Mr Odeniran stated that he must begin remedial work "*not later than the 3rd day of May 2011 (being not less than 28 days from the date of this Notice) …"*, the error being that the 28 day period was to run from the date of service rather than the date of the notice. The correct date would have been 5th May 2011. In that case Collins J. stated "*There can be no doubt that this was a defective notice and, accordingly, a prosecution for a failure to comply with it was inappropriate. There is no provision such as applies, for example, to enforcement notices, which requires an appeal to be made in order to challenge the validity of such a notice and prohibits argument as to its validity being taken other than by that process."* For Mr Nawaz, Ms Shields argued that where there has been a breach of the mandatory requirement of section 13(3) of the Act the same approach must be taken by this Tribunal, ie that the Notice was defective and ineffective.

16. Ms Ferguson argued that the law has moved on since 2013, and that a different approach was now to be taken when considering the effect of a defect in the Improvement Notice. She referred to *London Borough of Waltham Forest v Younis [2019] UKUT 0362 (JT17)* in support of the proposition that the principal consideration should be the extent to which, if at all, the recipient of the notice was misled or prejudiced by the error.

17. Ms Ferguson also referred the Tribunal to two First-tier Tribunal cases. While accepting that other First-tier decisions are not binding on this Tribunal, Ms Ferguson argued that these cases demonstrate how the decision in *Younis* has influenced the approach currently to be taken to errors which may be regarded as minor or immaterial.

18. *Tanna v Stockport Metropolitan Borough Council (MAN/00BS/HIN/2019/0043)* concerned a situation where the Council failed to serve a copy of the Improvement Notice on MySpace, the intervening landlord of the premises, as required by paragraph 5(1) of Schedule 1 to the Act. The tribunal held that "*the Respondent's failure to consider the appropriateness or otherwise of taking enforcement action against MySpace does not, in any way, affect the right of the Respondent to take such action against the Applicant, nor does it in any way affect the validity of the Improvement Notice.*"

19. In *Enright v Gateshead Council (MAN/00CH/HNA/2019/0094)* the defect was in the Final Notice of Financial Penalty, which stated that payment of the penalty must be made "*on or before the 28th calendar day from the date of this Notice*". By paragraph 7 of Schedule 13A to the Act, payment must be made on or before the 28th day after the date on which the notice was given. The First-tier Tribunal determined that "*the Applicant was not prejudiced by the statement in the Final Notice regarding the payment period because he had no intention of making any payment*" and held that the notice was valid and enforceable.

DETERMINATION

20. The Tribunal considers that in this case there is no valid reason for departing from the High Court decision in *Odeniran*.

21. Firstly, although it seems likely that there were no arrangements in place to start the required work on the house prior to August 2022 and the incorrect reference in the Notice to one day rather than the following day may have had no effect on their plans or actions, Mr Nawaz has explained the difficulties he was experiencing in finding workmen to start work on the property when they said they would. In the undoubtedly difficult circumstances which existed in the early summer of 2022 due to the Covid pandemic, it is not possible to say with certainty that the incorrect date

in the Notice did not have an effect on the arrangements he might otherwise have made with the contractors.

22. Secondly, information about the correct date was not available to the Applicants elsewhere in papers served by the Respondent. This distinguishes the case from *Younis*, where reasons for the imposition of a financial penalty (missing from the notice itself) were set out in documents which were sent to the recipient of the Notice of Intention at the time when the notice was served. A further distinguishing feature of this case is that in *Younis*, as Martin Rodger QC pointed out at paragraph 73 of his decision, a "*notice of intent does not represent the last word on any issue. Not only does the recipient of the notice have the opportunity to respond to it, but the authority also has the obligation to think again before making a final decision*." But the present case relates to an Improvement Notice which if not challenged by the recipient at the time becomes "set in stone" and unassailable.

23. The Tribunal considers it right to disregard, when considering the effect of the error in the Notice, the fact that the Applicants had had a list of the required remedial work since February 2022 and had not actioned it. Prior to 17th May there was no compulsion to carry out the work, and no legal obligation to start making arrangements to do so.

24. The consequence of failure to comply with an Improvement Notice can be said to be "*draconian*", as per Martin Rodger QC at paragraph 15 of his judgement in *Simon v Denbighshire County Council [2010] UKUT 488 (LC)*. The legislation provides the local housing authority with "*a battery of enforcement powers*". These consequences are taken into account by the Tribunal when considering how to apply the tests set out by Lord Woolf MR in *R v Home Secretary Ex p Jeveanthan [2000] 1WLR 354*, quoted by Martin Rodger QC in *Younis*. Described at paragraph 69 of the *Younis* judgement as "*the basis of the modern approach in public law to the question of non-compliance with the procedural requirements of …. legislation*", these tests are summed up as (1) whether there has been substantial compliance, (2) whether non-compliance is capable of being waived, and (3) what is the consequence of non-compliance? The Tribunal concludes firstly that there has not been substantial compliance with section 13(3) of the Act: an incorrect date is simply incorrect. Secondly, the non-compliance is capable of being waived, but thirdly the consequence

of non-compliance is to endorse an incorrect Improvement Notice which enables the Respondent, among other powers, to prosecute the Applicants or to impose a substantial financial penalty on them.

25. After careful consideration of these matters, the Tribunal finds that the defect in the Improvement Notice may not be overlooked, and renders the Notice invalid. Consequently the Applicants have not committed a relevant housing offence, and are not liable to pay any financial penalty.

26. Ms Ferguson indicated at the hearing that she would apply for leave to appeal this decision, and leave is hereby granted.