FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BR/HNB/2020/0015**
Property	**:**	**30 Providence Terrace, Harrogate HG1 5EX**
Applicant	**:**	**Mr Stephen Archer**
Represented by	**:**	**Newtons Solicitors and Seth Kitson, Counsel**
Respondents	**:**	**Harrogate Borough Council**
Represented by	**:**	**Vilma Vodanovic, Counsel**
Type of Application	**:**	**Appeal against a financial penalty Section 249A & Schedule 13A of the Housing Act 2004**
Tribunal Members	**:**	**Tribunal Judge Professor Caroline Hunter** **Tribunal Member Peter Mountain**
Date of Video Hearing	**:**	**7 May 2021**
Date of Decision	**:**	**5 July 2021**

DECISION

Summary Decision

1. The Tribunal allows the appeal in part and substitutes a penalty of £15,000.

Background

2. This is an appeal by the applicant, Mr Stephen Archer, against a financial penalty of £15,750 imposed on him by Harrogate Borough Council ('the Council') under the Housing Act 2004 ('the Act'), s.249A. The penalty arose because of a failure of Mr Archer to comply with the requirements of an improvement notice under section 30 of the Act.

3. The penalty was imposed on 16 April 2020 in relation to 30 Providence Terrace, Harrogate ('the property'). Mr Archer appealed to the Tribunal against the penalty on 12 May 2020.

4. Directions were provided by the Tribunal on 24 August 2020. The property was not inspected by the Tribunal. A video hearing took place on 7 May 2021.

The Law

Housing Act 2004

5. Section 249A (1) of the Act provides that a local authority may impose a financial penalty where there has been "a relevant housing offence".

6. Section 249 (2) sets out what amounts to a housing offence and includes at, section 249(a) an offence under section 30 of the Act, namely a failure to comply with an improvement notice. Section 249 (3)-(4) further provides that only one financial penalty can be imposed for each offence and that cannot exceed £30,000. The imposition of a financial penalty is an alternative to criminal proceedings.

7. Section 30 of the Act provides:

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.

Procedural requirements

8. Schedule 13A of the Act sets out the procedural requirements a local authority must follow when seeking to impose a financial penalty. Before imposing such a penalty the local authority must give a person notice of their intention to do so, by means of a Notice of Intent.

9. A Notice of Intent must be given be given within 6 months of the local authority becoming aware of the offence to which the penalty relates, unless the conduct of the offence is continuing, when other time limits are then relevant.

10. The Notice of Intent must set out:
    - the amount of the proposed financial penalty
    - the reasons for imposing the penalty
    - Information about the right to make representations regarding the penalty

11. If representations are to be made, they must be made within 28 days from the date the Notice of Intent was given. At the end of this period the local authority must then decide whether to impose a financial penalty and, if so, the amount.

12. The Final Notice must set out:
    - the amount of the financial penalty
    - the reasons for imposing the penalty
    - information about how to pay the penalty
    - the period for the payment of the penalty
    - information about rights of appeal
    - the consequences of failure to comply with the notice.

Guidance

13. A local authority must have regard to any guidance issued by the Secretary of State relating to the imposition of financial penalties: 2004 Act, Sched.13, para.12. The Ministry of Housing, Communities and Local Government issued such guidance ('the MHCLG Guidance') in April 2018: *Civil penalties under the Housing and Planning Act 2016 - Guidance for Local Authorities*. This requires a local authority to develop its own policy regarding when or if to prosecute or issue a financial penalty.

14. The MHCLG 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.

15. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, in June 2018 the Council approved a policy for the use of Civil Penalties as an alternate to prosecution in the Housing and Planning Act 2016 ('the Policy'). We make further reference to this Policy later in these reasons.

Appeals

16. A final notice given under Schedule 13A to the 2004 Act 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. However, this is subject to the right of the person to whom a final notice is given to appeal to the Tribunal (under paragraph 10 of Schedule 13A).

17. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.

18. The appeal is by way of a re-hearing of the local housing authority's decision and may be determined by the Tribunal having regard to matters of which the authority was unaware. 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.

19. A number of decisions of the Upper Tribunal have established the questions that should be addressed when considering an appeal against a financial penalty. Those are *London Borough of Waltham Forest v Younis* [2019] UKUT 0362 (LC), *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC), *IR Management Services Ltd v Salford City Council* [2020] UKUT 0081 (LC), *Sutton & Another v Norwich City Council* [2020] UKUT 0090 (LC) and *Thurrock Council v Daoudi* [2020] UKUT 209 (LC).

20. The Tribunal's task is not simply matter of reviewing whether the penalty imposed by the Final Notice was reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In doing so, the Tribunal should have regard to the seven factors specified in the MHCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 14, above).

21. The Tribunal should also have particular regard to council's Policy (see paragraph 15, above). As the Upper Tribunal (Lands Chamber) observed in *Sutton & Another v Norwich City Council* [2020] UKUT 0090 (LC):

> "It is an important feature of the system of civil penalties that they are imposed in the first instance by local housing authorities, and not by courts or tribunals. The local housing authority will be aware of housing conditions in its locality and will know if particular practices or behaviours are prevalent and ought to be deterred."

22. The Upper Tribunal went on to say that the local authority is well placed to formulate its policy and endorsed the view that a tribunal's starting point in any particular case should normally be to apply that policy as though it were standing in the local authority's shoes. It offered the following guidance in this regard:

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

23. Upper Tribunal guidance on the weight which tribunals should attach to a local housing authority's policy (and to decisions taken by the authority hereunder) was also given in another recent decision of the Lands Chamber: *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC). Whilst a tribunal must afford great respect (and thus special weight) to the decision reached by the local housing authority in reliance upon its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review: the tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

24. The decision of the Upper Tribunal in *Sutton & Another v Norwich City Council* was appealed to the Court of Appeal. The Court concluded that the penalties imposed could not be impugned: *Sutton & Another v Norwich City Council* [2021] EWCA Civ 20. The Court (at para. 14) having considered the Upper Tribunal's view on the weight to attach to a policy of the authority in *London Borough of Waltham Forest v Marshall & Another* took the view there were no reasons to dissent from those observations.

Facts

25. Although Mr Archer has not sought to appeal the imposition of the penalty notice, only the amount of penalty, the sequence of the facts are important to the submission of the parties in terms of the timing of action by Mr Archer.

26. As well as the documents in the case, the Tribunal had statements from Mr Archer, Ms Claire Riley the original Area Environmental Health Officer employed by the Council with conduct of the case, Ms Lauren Holden who took over the case in January 2021 after Ms Riley left the employment of the Council, and the tenant of the property at the time the improvement notice was served, Ms Shinn. In addition Mr Archer, Ms Holden and Ms Shinn gave evidence at the hearing.

27. Mr Archer is a chartered surveyor and one of three Directors in the Harrogate property firm Verity Frearson. The main work of Verity Frearson is domestic

property sales and before his retirement, in May 2020, Mr Archer's role in the company was to undertake mortgage surveys for buyers. In addition the company also had a letting arm that manages residential letting for landlords. Mr Archer owns 7 residential properties (4 houses and 3 flats) that he lets out, including 30 Providence Terrance. He has owned the properties for 5-6 years. From his evidence is seems that the letting arm of Verity Frearson supports Mr Archer in managing these properties.

28. In August 2018 Mr Archer had open heart surgery and was off work for 4 months and returned part-time until his retirement.

29. The property is a two bedroom mid-terrace house. It was let to Ms Shinn in August 2016 and occupied by her and her daughter, aged 17 in 2019. We set out here a chronology of core events over the period from the first complaint of disrepair from Ms Shinn to the application to the appeal of the penalty notice.

Early 2018	Ms Shinn complaints of damp and cold to Verity Frearson and Mr Archer.
Early 2018	Mr Archer decides to monitor the damp and then instructed a damp contractor to attend but no works were commissioned.
15 February 2019	Complaint from Ms Shinn to the council of the following disrepair: no heating in bathroom or kitchen, extractor in kitchen does not work, no extractor in bathroom, cannot open window or people can see in from outside, bathroom and kitchen get very cold only up to 9°C if heating on all day and mould present on staircase and plaster is coming away
3 May 2019	The Council inspects the property
9 June 2019	Ms Shinn notified the Council that the damp in the kitchen has been rectified but no other works have been undertaken
19 June 2019	The Improvement Notice is served. It specified 31 separate items of work.
16 September 2019	Mr Archer notifies the Council that he is doing the works but he is having problems getting the heating into the bathroom (the bathroom had underfloor heating that was not working).
5 November 2019	Ms Shinn advices the Council that she had asked Mr Archer to install the double windows whilst she was on holiday in the last 2 weeks of November
20 November 2019	Date by which works to be complete set in the Improvement Notice.
22/25/27 November 2019	Mr Archer contacts the Council requesting extension of time to complete the works. He also informs the Council that Ms Shinn had advised him moving out and that it would be better if the works were undertaken after Ms Shinn moved out.
2 December 2019	The Council visit the property to inspect. Only one of the items (re the locking mechanism for the front door) on the Improvement Notice has been completed
2 December 2019	Mr Archer emails the Council seeking an extension for the works.
17 December 2019	Mr Archer emails the Council indicating that Ms Shinn had given notice to vacate the property in January 2020 and that he planned to undertake the works when the property was empty.
9 January 2020	Ms Shinn vacated the property

January/February/March 2020	Some works completed to windows, electrics, plumbing and damp.
24 February 2020	The Council issued a Notice of Intention to Impose a Financial Penalty of £15,750 on Mr Archer.
23 March 2020	Mr Archer acknowledged the Notice and made representations. In email to the Council stated 'To be honest, I was somewhat daunted by the lengthy list of items and found it rather challenging to get the work sorted. In the past I have found it difficult to get reliable tradesmen to attend…'.
2 April 2020	Mr Archer emailed the Council advising them that was Covid shielding and would not be able to attend the property.
16 April 2020	The Council served a Final Notice of a Financial Penalty at the amount set in the Notice of Intention.
12 May 2020	Mr Appeal appeals against the Final Notice.
7 April 2021	The Council inspect the property with Mr Archer. 5 items had not been completed and 2 has been rectified although not as specified in the Improvement Notice.

30. In his evidence Mr Archer acknowledged that after the original complaint by Ms Shinn, he had taken his 'eye off the ball.' In response to Ms Vodanovic's cross-examination as to the works done, it was very unclear whether Mr Archer commissioned the works or Verity Frearson staff did.

31. As noted, Mr Archer appealed against the amount of the penalty not against the levying on the penalty. The basis of the amount is set out in the Council's Civil Penalty Decision Record and Calculation (the Record), dated 21 February 2020. The Record documents how the penalty of £15,750 was calculated in the light of the Council's Policy. The Policy requires the Council to undertake three steps:
    a. Step 1: determines an initial penalty based on the culpability of the offender and the level of harm to the tenant;
    b. Step 2: adjusts the initial determination of the having regard to:
        i. Any aggravating or mitigating circumstances;
        ii. The totality of that level;
        iii. That the level is fair and proportionate but in all instances acts as a deterrent and removes any gain;
    c. Step 3: adjusts the final determination should the offender provide written information/proof to demonstrate the impact of the level fine would be unfair and disproportionate.

32. In accordance with the Policy the first element was to assess the levels of culpability and harm. In this case the Council assessed the culpability as 'high' and the harm as 'medium'. On this basis the initial penalty was £15,000. The next step was to assess aggravating and mitigation factors and for each factor the penalty is to be increased or decreased by 5%. The Council added 15% for aggravating factors (+£2250) and found 2 mitigating factors (10%; -£1500) – net extra penalty of £750. The final element of the Policy applied was under Step 2(iii) was to add £300.30 for the cost of the investigation, although the final amount of £15,750 does not seem to include this.

Submissions

33. For the appellant, Mr Kitson challenged the Record on a number of ways.

Step 1 - Culpability

34. Mr Kitson accepted that the harm was correctly assessed at medium. However he submitted that the culpability had been wrongly assessed at 'high'. In argued that in the light of the Council's Policy Mr Archer did not meet the criteria of the 'high' culpability. In particular he pointed to:
    a. There was no history of non-compliance. Although Mr Archer has not completed the works, but since Ms Shinn moved out he has not attempted to let the property, as he knows he has to complete the work before he can.
    b. Mr Archer had co-operated entirely with the investigation;
    c. there was no significant risk to individuals, the risk was assessed as 'medium' by the Council and the tenant was not vulnerable;
    d. No mention of any accreditation scheme was relied upon;
    e. No evidence that Mr Archer was an experienced landlord was cited;
    f. Mr Archer is not a 'public figure';
    g. This was not a systematic failure to comply with legal duties – rather, it was a first offence.

35. Mr Kitson also referred to elements of the case that in his view suggested that the culpability was 'medium' under the Council's Policy. They were:
    a. This was a first offence;
    b. There was no significant risk to individuals;
    c. Mr Archer did contact tradesmen etc to resolve the issues, but was let down by them as explained in his email. The evidence of the tenant was there was a system to report disrepair via an 'app' run by Verity Frearson. The process had broken down, that that was not be same as saying there has not system as all.

36. For the Council, Ms Vodanovic, pointed to the Council's Policy. To find a person highly culpable they must have been intentionally or recklessly in breach or willfully disregard the law. Taking that starting point she submitted that Council's Record shows why the actions of Mr Archer were high culpability. Further the medium level was not appropriate as Mr Archer has not demonstrated he had 'systems in place to manage risk or comply with his legal duties…'.

37. The damp issues had been reported to Mr Archer in early 2018, but no action was taken. It is only after the Council's inspection that any action is taken. The overall the evidence of Mr Archer showed a failure to take action at the appropriate times despite many opportunities to do so. Further the failure to address the Category 1 hazards, particularly the lack of heating in the bathroom, did demonstrate significant risk to individuals. Ms Shinn gave evidence that both her and her daughter could not use it for showers and used a gym instead.

38. Turning to Mr Kitson's points d. to f. on high culpability, Ms Vodanovic submitted that it demonstrates that the Policy of the Council looks to differentiate landlords with one property and those with higher standing in the community such as Mr Archer. Mr Archer is an experienced landlord and a surveyor who is member of the Royal Institution of Chartered Surveyors. Further he was a the relevant time a director of a firm that had a letting arm. Verity Frearson is a member of the Guild of Professional Estates Agents.

Step 2(i) - Mitigating and aggravating factors

39. On this issue Mr Kitson took the Tribunal the Policy and suggested that five of the mitigating factors in the Policy were present:
    a. Mr Archer co-operated entirely with the Council's investigation;
    b. He accepted guilt and responsibility for the situation;
    c. Mr Archer had significant health problems, had undergone open-heard surgery and was working only part-time as he recovered from this – he subsequently was forced to retire;
    d. He had no previous convictions or breaches of this nature;
    e. He is of good character and has no previous criminal convictions.

40. On the aggravating factors only one was relevant – number of items of non-compliance. There was no record of poor management. Accordingly the net reduction should be 20%.

41. Ms Vodanovic sought to upheld the Council's view that there were 15% aggravating matters – 10% for the number of items of non-compliance and 5% the record of poor management. Indeed she suggested that in fact a further 5% should be added for 'motivated by financial gain.'

42. The Council accepted that Mr Archer had co-operated and had no previous convictions. In her evidence Ms Holden did agree that Mr Archer had accepted responsibility for the situation, so that could be added to the mitigating factors. Ms Vodanovic did not accept that health reasons were in play as any had to be relevant to the non-compliance. There was no evidence that had any bearing on the failure to respond to the Improvement Notice and Mr Archer could have sought more help from the letting staff at Verity Frearson. On 'good character', Ms Vodanovic submitted that is was not enough for Mr Archer to say that he generally of good character and has no convictions any form of criminal activity. Rather the landlord has to demonstrate 'exemplary' conduct, for example providing alternative housing while works are undertaken. Waiting for the tenant to move out permanently before taking action as had happened in this case was not the action of a landlord of good character.

Step 2(ii) and (iii) - Fair and proportionate

43. Mr Kitson's next attack on the Council's penalty in based of the requirement in the Policy that any figure must be 'fair and proportionate'. The Policy this requires the Council to consider the cost of the works. He pointed to the amounts that Mr Archer had already spend to comply with the Improvement Notice.

44. In looking at whether any figure is fair and proportionate, Ms Vodanovic submitted was not just a matter of the amount that Mr Archer has spent on the works. Rather as the Council's Policy, based on the MHCLG Guidance, states:
    > The statutory guidance states that a guiding principle of civil penalties is that they should remove any financial benefit that the landlord may have obtained as a result of committing the offence. This means that the amount of the civil penalty imposed most never be less than what it would have cost the landlord to comply with the legislation in the first place.

45. Thus this is a cross-checking exercise to ensure that penalty is not less that the amount level of gain.

Step 3 - impacts unfair and disproportionate to the offender

46. Finally, Mr Kitson submitted that the Policy requires the Council to take account of the impact of the offender at Step 3. He pointed to the fact that Mr Archer had been forced to retire early due to his ill heath and as such, is less able to meet the cost of a financial penalty than he otherwise would have been.

47. Ms Vodanovic acknowledged that Mr Archer's means was relevant to this Step. But she submitted that there was no evidence before the Tribunal as to Mr Archer's income since retirement, but the evidence is that he is a landlord of seven properties.

Decision

48. We remind ourselves that our task is not simply matter of reviewing whether the penalty imposed by the Council by the Final Notice was reasonable: we must make our own determination as to the appropriate amount of the financial penalty having regard to all the available evidence before us.

49. For make a major change to the penalty, Mr Kitson has to convince us that the culpability on Mr Archer should be assessed at 'medium'. While we agree that there are elements of medium culpability in his acts, looking across all the evidence that the high level of culpability is appropriate. In particular we are of the view that the system for ensure that works were completed was not suitable. Either Mr Archer needed to properly delegate this to the letting staff at Verity Fearson or for him to take it on. The hybrid arrangement did not work. Secondly. we agree with Ms Vodanovic that the Council's Policy is looking to differentiate landlords with one property and those with higher standing in the community. Mr Archer is in the second category. He is an experienced landlord and a surveyor who is member of the Royal Institution of Chartered Surveyors. Further he was a the relevant time a director of a firm that has a letting arm.

50. Accordingly the starting amount of the penalty is £15,000.

51. Turning to the mitigating and aggravating factors in the Council's Policy, we agree that there are three aggravating factors. We do not find that there is any evidence that Mr Archer was motivated by financial gain and we not add any extra aggravating factors. We agree with the concession made by Ms Holden that a further mitigating factor of responsibility should be added. However we were not convinced by Mr Kitson's argument that two further elements of mitigation should be added, ie health and good character. On this element we preferred the argument of Ms Vodanovic.

52. The elements of mitigating and aggravating once netted off leave the penalty at £15,000.

53. For the reasons set out in Ms Vodanovic submissions, we agree that Steps 2(ii) and (iii) does not require us to make a reduction for the basis that the figure 'fair and proportionate'. Similarly we reject Mr Kitson's submissions that a further £1500 should be removed from the penalty under Step 3. There was no evidence before us that Mr Archer could not pay the penalty.

54. We substitute a penalty of £15,000.

Rights of appeal

55. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

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

57. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

58. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Tribunal Judge Professor Caroline Hunter
5 July 2021