UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 263 (LC) **UTLC Case Number: LC-2023-190**
Leeds Employment Tribunal

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)

HOUSING – CIVIL PENALTY – mitigation – totality - landlord having accommodated difficult tenants at the local authority's request – local authority's policy on mitigation – fettering of discretion – policy that landlord must not benefit from non-compliance – total penalty reduced from over £49,000 to £26,500

BETWEEN:

MR HASAN KAZI

Appellant

-and-

BRADFORD METROPOLITAN DISTRICT COUNCIL

Respondent

Re: 2 Laisteridge Lane,
Bradford,
BD7 1RD

Upper Tribunal Judge Elizabeth Cooke
9 October 2023
Decision Date: 30 October

Mr Nick Peterken of NP Legal Service for the appellant

The following cases are referred to in this decision:

London Borough of Waltham Forest v Marshall [2020] UKUT 35 (LC)

R v Port of London Authority ex p Kynoch [1919] 1 KB 176

Sutton v Norwich City Council [2020] UKUT 90 (LC)

Sutton v Norwich City Council [2021] EWCA Civ 20

1.

Introduction

1. This is an appeal from a decision of the First-tier Tribunal on a landlord's appeal from civil penalties imposed by the local housing authority for offences relating to the condition of his property. It raises some interesting questions about mitigation, totality, and the principle that civil penalties for housing offences should be set at a level that ensures the landlord does not profit from his crime.

2. I heard the appeal in Leeds on 9 October 2023. Mr Kazi, the appellant landlord, was represented by Mr Peterken of NP Legal Service. The respondent local authority provided an unsigned skeleton argument but chose not to participate in the hearing.

The legal background

3. The legal background to this appeal is found in the provisions of the Housing Act 2004 relating to two housing offences and to the provisions about civil penalties for such offences.

Failure to comply with an improvement notice

4. Part 1 of the 2004 Act provides for a system of assessing the condition of residential premises and for the enforcement of housing standards by reference to hazards. A hazard is defined in section 2(1) as "any risk of harm to the health or safety of an actual or potential occupier of a dwelling which arises from a deficiency in the dwelling (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)." Provision is made for category 1 and category 2 hazards to be defined in regulations, category 1 being the more serious, the regulations being the Housing Health and Safety Rating System (England) Regulations 2005.

5. Section 5 of the 2004 Act provides that if a local housing authority considers that a category 1 hazard exists on any residential premises it must take the appropriate enforcement action, from a number of possible actions ranging from an improvement notice to a demolition order. Section 2 gives the local authority a power to take enforcement action in relation to category 2 hazards (contrast the duty created by section 5 in relation to category 1).

6. Sections 11 and following make provision about improvement notices, which are to specify the hazard to which they relate, to state what remedial action is required, and to say by when the work must commence and by when it must be completed.

7. Section 30(1) provides that a person upon whom an improvement notice was served commits an offence if he fails to comply with it, and section 30(5) says that in proceedings against such a person it is a defence that he had a reasonable excuse for failing to comply with the notice. Section 30(6) says "The obligation to take any remedial action specified in the notice … continues despite the fact that the period for completion of the action has expired."

Failure to comply with HMO regulations

8. Regulations made under section 234 of the 2004 Act include the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007, of which regulation 5 requires the person managing a house in multiple occupation (an "HMO") to put in place certain safety measures, regulation 8 is about the maintenance of the common parts and regulation 9 is about the maintenance of living accommodation. Section 234 provides that it is an offence to fail to comply with a regulation made under that section, and section 234(4) provides a defence of reasonable excuse for failure to comply.

Financial penalties

9. Section 249A of the Housing Act 2004 enables a local housing authority to impose a financial penalty, often referred to as a civil penalty", upon a person if they are satisfied beyond reasonable doubt that he or she has committed any of the housing offences listed in that section, as an alternative to prosecution. Among the offences listed are the offence under section 30 of the 2004 Act of failure to comply with an improvement notice, and the offence under section 234 of the 2004 Act of failure to comply with HMO regulations. The maximum amount of a single civil penalty is £30,000, but an individual may be subject to more than one penalty amounting in aggregate to more than the maximum (*Sutton v Norwich City Council* [2020] UKUT 90 (LC)). Paragraph 12 of schedule 13A to the 2004 Act states that the local housing authority must have regard to any guidance given by the Secretary of State about civil penalties; such guidance was issued in 2018, entitled *Civil penalties under the Housing and Planning Act 2016, Guidance for Local Housing Authorities*.

10. Paragraph 10 of Schedule 13A to the 2004 Act makes provision for appeal to the First-tier Tribunal against the decision to impose a civil penalty and the amount of that penalty. The appeal is a re-hearing and the FTT is to make its own decision whether to impose a penalty and about the amount of the penalty.

11. In making that decision the FTT must give special regard to the local housing authority's enforcement policy and will normally follow it. But it is not bound by that policy. In *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC) the Tribunal discussed the relevant authorities and said:

> "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.
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> 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.""

12. That guidance was approved by the Court of Appeal in *Sutton v Norwich City Council* [2021] EWCA Civ 20.

13. It is a principle of administrative law that a public body may not adopt a policy that has the effect of "fettering its discretion"; that means, in the present context, that it must not adopt a rigid policy that deprives it of the ability to consider the merits of the case and reflect them in its decision. The classic authority is *R v Port of London Authority ex p Kynoch* [1919] 1 KB 176. The FTT is likely to depart from a local housing authority's policy if it has that effect.

The facts, and the decision in the FTT

14. Mr Kazi is an experienced landlord; in his statement to the FTT he said that he owns numerous large properties in Bradford and has been a landlord for about 50 years (being now over 70 years of age). One of those properties is 2 Laisteridge Lane, Bradford; it is a large four-storey house converted (without planning permission) into 8 self-contained flats. It is an HMO because the conversion to flats did not comply with the relevant building regulations (paragraph 31 of the FTT's decision). Mr Kazi has housed there a number of tenants in difficult circumstances; in the bundle before the FTT was a letter from an officer at the Wyfi Project, Bradford explaining that Mr Kai had accommodated four clients of the project who would otherwise have been homeless.

15. On 22 September 2020 Mr Kazi received a letter from Sue O'Brien of the respondent's Housing department. She thanked Mr Kazi for meeting with her and allowing her to look at Flat 4 as a prospective home for a Mr Douglas who was then homeless. She said "… with the colder weather drawing in, it would be great to get a roof over his head as soon as we can" and referred to Mr Kazi's offer to get the flat ready "by Friday". She set out a number of certificates that he would need to provide, including an EPC certificate and an electrical condition report, offered to prepare a tenancy agreement, and listed what he needed to do to "make the property habitable and safe to use" on the basis of her inspection. That list included pulling and securing a loose carpet, new lino in the bathroom, cleaning (especially the kitchen and bathroom areas) and a new toilet seat. She concluded "My suggestions above do not constitute a formal Housing Standards inspection so this is not an exhaustive list".

16. Following that letter, Ms O'Brien prepared a tenancy agreement and Mr Douglas moved in; it can be inferred that Ms O'Brien was satisfied that her requirements had been met.

17. In June 2021 after a complaint from one of the tenants, Mr Wayne Gray, one of the respondent's environmental health officers, inspected the property; after further

investigation on 6 August 2021 the respondent served on Mr Kazi eight improvement notices specifying a number of category 1 and category 2 hazards in respect of each of flats 1 to 7, and an improvement notice specifying a number of category 2 hazards in respect of the common parts. The notices required work to be started by 8 September 2021 and completed by 20 September 2021. Mr Kazi did not appeal any of the notices.

18. The notice relating to flat 1 required:

    i. the installation of a proper heating system for the flat in place of the electric panel heater in the living area,

    ii. replacement or repair of loose floorboards and finishing the edges of the carpet to eliminate trip hazards,

    iii. a new kitchen,

    iv. six items of work in the bathroom including fixing the basin securely to the wall, replacing the water closet and providing a new floor covering,

    v. the repair of the fuse box,

    vi. elimination of rats, cockroaches and bedbugs and

    vii. fixing window catches or restraints to the main living room window.

19. The notice relating to flat 4 required:

    i. A new main entrance door to the flat to prevent entry by intruders,

    ii. a new heating system as in flat 1,

    iii. a new kitchen,

    iv. fixing the smoke detector to the ceiling in the living room,

    v. treating and resolving mould growth in the living room

    vi. fitting a window restrictor as in flat 1,

    vii. cleaning the water closet and ensuring it was adequately connected to the drainage system, and

    viii. elimination of electrical hazards by securing wiring behind appropriate trunking.

20. In respect of each flat the first two items in the list were described as category 1 hazards, the rest as category 2.

21. The notice relating to the common parts required:

    i. new main entrance doors to flats 2, 4 and 5 to address fire hazards,

    ii. securing of the carpet on the stairs,

    iii. levelling the ground outside the property,

    iv. repair or replacement of the handle and locking system on the main entrance door to the building,

    v. dealing with water penetration from the roof window and removal of vegetation from the guttering,

    vi. removal of strip lights without bulbs and

    vii. elimination of pests.

22. Mr Gray visited the property again on 11 October 2021. He found that flats 2, 3 and 5 were unoccupied; access could not be gained to flat 6; work to flat 7 had been completed; and that the two notices relating to flats 1 and 4 had been partially complied with but that new kitchens and heating systems had not been installed.

23. On 10 December 2021 the respondent issued three notices of intention to issue a financial penalty. These are the notices required to be served when the respondent is satisfied that any of the offences listed in section 249A has been committed in order to give the landlord the opportunity to make representations. The notices related to (1) failure to comply with the improvement notice in relation to flat 1 by failing to provide a new kitchen and adequate heating; (2) the same in relation to flat 4; and (3) failure to comply with HMO regulations 5, 8 and 9.

24. The penalties proposed were £14,250 in respect of each of flats 1 and 4, and £18,790 in respect of the failure to comply with HMO regulations. Mr Kazi made representations in response. Final notices were issued on 17 February 2022 in the amounts proposed in the notices of intent.

25. Mr Kazi appealed the penalties to the FTT. He was not represented in the FTT.

26. The FTT noted that Mr Kazi had had previous improvement notices served on him and had had a number of previous prosecutions. It rejected his defence that there were no category 1 hazards present in flats 1 and 4 and recorded that it was satisfied to the criminal standard of proof that Mr Kazi had committed the offences of failure to comply with an

improvement notice. The FTT was likewise satisfied about the breach of HMO regulations.

27. As to the amount of the penalty, the FTT started, correctly, with the respondent's policy. As is usual for such policies it sets out a harm/culpability matrix. Each can be high, medium, or low, and the policy provides criteria for each level. For example, there will be a high level of culpability when a landlord has "intentionally, recklessly or wilfully disregarded the law". The level of harm will be high if there is a "serious effect on individual(s) or widespread impact, harm to a vulnerable individual, or a high risk of an adverse effect on an individual." The matrix does not distinguish between total failure to comply with an improvement notice and partial failure, although in a situation where category 2 hazards have been fixed and category 1 hazards remain in place that may affect the level of harm.

28. For the section 30 offences of failing to comply with the improvement notice the FTT agreed that the level of culpability was high because Mr Kazi is an experiences landlord with a large number of properties who has not complied in the past with enforcement action, and who intentionally or recklessly breached the requirements of the notices by refusing to accept the need to carry out the works. Harm was regarded as medium since there was no imminent risk to either tenant but there could not be said to be little risk of harm. The matrix determined that for each of these two offences the starting point was therefore £15,000.

29. The FTT applied a 5% discount for mitigation on the basis that Mr Kazi had carried out some works, but not all that was required, thus reaching £14,250 for each offence. The figure of 5% derived from the respondent's policy which stated that a discount of no more than 5% could be applied for individual items of aggravation or mitigation. The FTT did not accept as mitigation the argument that these flats had been approved by Ms O'Brien in September 2020 as suitable for referrals, because that approval came from a different section of the local authority and from a person who was not a trained environmental health officer. And it rejected the argument that the tenants themselves had contributed to the problems because the tenants were not to blame for the type of heating provided or the quality of the kitchen.

30. Turning to the breach of the HMO regulations, the FTT reached the same conclusion, again therefore starting from £15,000 but this time applying a discount of 5% for Mr Kazi's having commenced work, and a further 5% for the fact that some of the problems were caused by the tenants, in particular the need for cleaning, thus reaching a figure of £13,500.

31. Then the FTT said:

> "44. However, tucked away at the back of the enforcement policy is a requirement that any financial penalty is not less than the costs of compliance with the breach. To this extent, Annex 36 of the bundle includes a schedule setting out the costs of carrying out the necessary works to bring the property up to the standard necessary to comply with the HMO regulations. When this part of the policy is read in line with the first paragraph on page 29, the result seems to

be that the level of financial gain will be set as the penalty (i.e. in this instance the cost of carrying out the works) together with an additional £2000 or 10% of that amount (whichever is the greater). The policy could reasonably be clearer in relation to this aspect. "Financial gain" is not necessarily synonymous with the costs of the works and rent receipts, for example, and neither is it necessarily the case that these factors demonstrate that the level of the civil penalty might be "less than what it would have cost the landlord to comply with the legislation in the first place."

45. That said, in a relatively straightforward calculation as presented by the respondent at Annex 36, we feel obliged to utilise this aspect of the policy in our determination. Accordingly, and utilising our expertise we agree with the respondent that the costs of the works are as set out in the schedule and in some respects, for example the refit of the kitchen, is towards the lower end of what might be expected. The total cost of works is therefore £16790.31 together with the additional £2000 (which is more than 10%) gives a fine in the sum of £18,790.31.

32. Finally the FTT considered the totality principle and said:

> "46. Finally, and considering the issue of the totality principle, set out in the policy and raised by the appellant, we are satisfied that there is no "double counting" and that each offence is a separate offence which gives rise to a separate breach and a separate financial penalty. We are also satisfied, taking account of the factors set out above that the total penalties cumulatively are just and proportionate. Whilst they all arise out of the same property and concern the same landlord, given the nature of the offences and by reference to the aggravating and mitigating factors set out above, we saw no reason why they might be reduced. If anything, in relation to the HMO regulations breaches, these in themselves might have given rise to separate penalties and so it is right that they are included together."

33. Accordingly the total payable by Mr Kazi was £49,290.31 (being £14,250 x 2, + £18,790.31).

The appeal

34. Mr Kazi appeals that decision with permission from this Tribunal on two grounds. A third ground, raised after permission on the first two had been given, was heard on a "rolled up" basis along with the first two, on the basis that permission and, if permission was granted, the substantive appeal would be determined together.

35. All the grounds relate to the amount of the civil penalties imposed, and I therefore bear closely in mind what the Court of Appeal said in in *Sutton v Norwich City Council*:

> "30. Where the decision of a lower Court or Tribunal involved evaluation or the exercise of a discretion, an appellate Court or Tribunal is not entitled to interfere merely because it might have come to a different conclusion. In *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, Lord Fraser said at 652 that an appellate Court should interfere with an exercise of discretion only if it considers that the judge of first instance "has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible". …
>
> 31. A Tribunal's decision as to what civil penalty it should impose for either a breach of the 2007 Regulations or failure to comply with an improvement notice involves, as I see it, both evaluation and discretion. An appellate Court/Tribunal is not, accordingly, entitled to overturn a penalty just because it thinks it would have imposed a different one. To interfere, the Court/Tribunal must conclude that the decision under appeal was an unreasonable one or is wrong because of "an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".

Ground 1: mitigation arising from the respondent's approval of the premises for Mr Douglas

36. Mr Kazi's grounds of appeal were, I think, drafted before he had legal advice and the Tribunal in granting permission paraphrased his arguments so as to describe this ground as the question:

> "whether the fact that, after carrying out an inspection, a local housing authority has placed vulnerable individuals or families which it has a responsibility to house in accommodation which it later adjudges to be below an acceptable standard is capable of providing mitigation when a penalty is imposed on the owner of the property."

37. Mr Peterken asked the Tribunal to note that this was not being raised as a defence of reasonable excuse for nor complying with the improvement notice, but as mitigation so far as the level of the penalty is concerned. He presented three arguments about this ground.

38. The first is that the respondent was operating double standards and thereby confused Mr Kazi. Ms O'Brien saw flat 4, set out what needed to be done to make it "habitable and safe to use" and in particular did not regard either the heating or the kitchen as inadequate. Therefore Mr Kazi did not comply with the improvement notices because he did not agree that the work was required. Ms O'Brien's approval was bound to have an effect on Mr Kazi's view of the condition of the property, despite her disclaimer that she had not made a formal Housing Standards inspection; the fact that two departments of the respondent were pulling in opposite directions should therefore afford him some mitigation. The same mitigation should apply in relation to flat 1 where the kitchen and heating are in the same condition as in flat 4. And Ms O'Brien must have seen the common parts when she visited and so the point is said to be relevant to the management regulation offence too.

39. This argument has no prospect of success. I say that not because Ms O'Brien was not an environmental health officer; she spoke for the respondent, whatever her qualifications. But it is not inconsistent for the respondent to ask a landlord to accommodate a homeless person, to approve the property for the tenant's initial entry, and then to serve improvement notices. Such notices do not require that the flat or building cease to be used for residential purposes, unlike prohibition notices which do. In effect the respondent is asking the appellant both to take a tenant and also to improve the condition of the flat. That would have been the case even if the improvement notices had been served back in September 2020 alongside Ms O'Brien's request that Mr Douglas be accommodated, rather than ten months later. There is no inconsistency and no double standard, and I do not believe that Mr Kazi as an experienced landlord would have been confused.

40. The second limb of the argument, however, has more merit. Mr Kazi, in part at the respondent's request, accommodated difficult tenants who damaged the property. They used drugs, they accumulated rubbish, they had visitors who broke in, to give just a few examples. Importantly Mr Kazi said in his witness statement to the FTT that people he sent to carry out repairs were often refused admission by the tenants; on other occasions workmen refused to enter because of the presence of drugs paraphernalia. There is no finding by the FTT that Mr Kazi was not telling the truth. And there is a letter in the bundle from Ms O'Brien in October 2021 explaining to a colleague that people break in to Mr Douglas' flat and use drugs there.

41. The fact that tenants lead chaotic lifestyles does not mean that they are any less entitled to proper standards of health and safety and suitable services. Housing standards are for all tenants. However, if some of the problems were caused or exacerbated by the tenants that will in some cases provide a defence to the offence, and the FTT should be alert to that possibility even if a landlord does not raise it. If it does not provide a defence it must be a very significant item of mitigation, which is what is claimed here.

42. The FTT allowed this mitigation in respect of the common parts, but did not allow it for the two section 30 offences because, it said, the defective kitchens and heating systems were not the fault of the tenants (see paragraph 29 above). But the improvement notices relating to flats 1 and 4 listed more items than just the heating and the kitchen. They included the replacement of the door in flat 4 (Mr Douglas' door, which his visitors had broken into), and they may well have included items where Mr Kazi had had difficulty getting work done because of the tenants' behaviour. The listed items other than the kitchen and heating had been complied with, but in a situation where the notice required a long list of work to be done and the starting point for the penalty was the same whether all or only some parts of the notice have not been complied with (see paragraph 27 above), the mitigation relevant to any of the work should have been applied to that starting point.

43. The FTT, as we saw above, did allow a 5% reduction in the penalty for the breach of the HMO regulations because it accepted that some aspects of the condition of the property were within the control of the tenants, in particular its cleanliness. In doing so the FTT followed the respondent's enforcement policy which states (at its page 33):

> "For each aggravating or mitigating factor which applies to each specific case the level of fine [will] normally be adjusted by 5% of the initial fine… The only exception to this principle will normally be for the number of items of non-

compliance which will be 5% for the first 5 items and 10% for any number of items greater than this level of non-compliance with items on any notice which has not been complied with."

44. I do not know what that last sentence means. But it appears to be the respondent's policy that each aggravating or mitigating actor will adjust the penalty by 5% and by no other amount. Mr Peterken's third argument under this ground of appeal is that is an artificial limit.

45. I agree. The policy fetters the respondent's discretion and I fail to see any purpose in it. The FTT in adopting that aspect of the policy fettered its own discretion.

46. The FTT adopted that policy not only in respect of the mitigation arising from the tenants' contribution to the HMO offences, but also in respect of the mitigation allowed because of the fact that Mr Kazi had done some of the work required. Again, it fettered its discretion and the FTT should not have adopted this policy.

47. I take the view that the FTT exceeded the generous bounds of its discretion by failing to allow mitigation in respect of all three offences on the basis of the tenants' contribution to the state of the property, and in adhering to the respondent's inexplicable 5% limit upon the effect of mitigation.

48. Accordingly all three civil penalties are set aside. The Tribunal will substitute its own decision as to the amount of the penalty, but I consider first the other grounds of appeal.

Ground 2: the "final determinant" and the benefit to the landlord

49. This is the ground on which permission to appeal has not yet been granted. I deal with it now, because the third ground, totality, must necessarily be the final stage in the reasoning of the local authority, or of the FTT, when assessing the quantum of the penalty.

50. Ground 2 is that the FTT erred in adopting the respondent's policy that a civil penalty "must never be less than what it would have cost the landlord to comply with the legislation in the first place" (see paragraph 46 of the FTT's decision set out at paragraph 32 above) in relation to the section 234 offence. I refer to it, as the parties have done, as the "final determinant" because it is expressed an invariable rule as to the minimum level of a penalty, regardless of aggravating and mitigating circumstances; it therefore purports to be the final stage in the decision about the quantum of the penalty. No explanation is given in the FTT's decision as to why this policy was not considered in relation to the two section 30 offences.

51. Mr Peterken argued that the principle expressed by the final determinant does not follow from the requirement to remove from the landlord any benefit he has gained from committing the offence. Mr Kazi still has to comply with the improvement notices, and he has not saved any money by failing to comply. Moreover the final determinant renders all mitigation and aggravating factors pointless, in cases like this where the cost of doing the works is higher than the starting point indicated by the policy. And it can lead to absurd

results where there is an even greater discrepancy between cost and starting point, for example where the minimum starting point of £2,000 is applicable in a case of low culpability and low harm if the cost of doing the works is nevertheless much greater.

52. The rule is set out in the respondent's policy as follows:

> "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 must never be less than what it would have cost the landlord to comply with the legislation in the first place.
>
> When determining any gain as a result of the offence the Council will take into account the following issues:
>
> - Cost of the works required to comply with the legislation
> - Any licence fees avoided
> - Rent for the full period of non-compliance
> - Any other factors resulting in a financial benefit – potential cost of rehousing any tenants by the Council
> - As a deterrent, the cost to the Council of the investigation.

53. In response to this ground of appeal the respondent has produced a further statement of case. It refers to the statutory guidance (see paragraph 9 above), to which the respondent is obliged to have regard; that guidance says that one of the factors to be taken into account in setting a penalty must be the following objective:

> "Remove any financial benefit the offender may have obtained as a result of committing the offence. The guiding principle here should be to ensure that the offender does not benefit as a result of committing the offence, i.e. it should not be cheaper to offed than to ensure a property is well maintained and properly managed."

54. The respondent says that its "final determinant" is derived from that guidance and that the FTT, in accordance with *Waltham Forest LBC v Marshall*, was right to apply it.

55. I agree with Mr Peterken that the "final determinant" does not follow from that policy and does not put that policy into effect. It may be that in cases where the landlord no longer has to comply with the notices or with HMO regulations, for example where he has sold the property or it has been demolished, the cost of the works is an appropriate minimum penalty in order to remove a benefit from the landlord. (By analogy, the fee for an HMO licence is not part of the benefit to a landlord who has committed the offence of failing to

have an HMO licence, under section 72 of the Housing Act 2004, except in a case where he now no longer needs to have a licence, for example if he has since sold the house or it has ceased to be an HMO). But it has not been suggested here by the respondent that Mr Kazi no longer needs to comply with the improvement notices. The house remains an HMO and the regulations still apply. At most he has benefited from an improved cash flow or has perhaps saved the cost of borrowing, but there is no evidence about that.

56. The respondent also says that it has not sought to add to the penalty the rent received while the offence was being committed, which it regards itself as entitled to do in line with the policy as quoted above. But the rent is not a benefit derived from the commission of the offence, except in cases where the property should not have been in residential use while the offence was being committed (as would be the case if the offence were the failure to comply with a prohibition notice).

57. The FTT must, as the respondent says, start from the respondent's policy, but it is not bound by it and should depart from it if it is irrational or unjustifiable. In the present case in following the policy of setting the cost of the works as a minimum for the penalty the FTT acted irrationally, because that policy does not achieve the objective it is supposed to achieve, and again unlawfully fettered its discretion. The "final determinant" also rendered pointless any adjustment to the starting made in response to aggravating or mitigating factors.

58. Accordingly permission to appeal is granted on this ground and the appeal succeeds; the policy quoted above. Had I not already set aside the penalty for the breach of the HMO regulations on account of the erroneous treatment of mitigation, I would have set it aside on this ground.

Ground 3: totality

The principle and the arguments

59. The third ground of appeal is that the FTT failed properly to apply the principle of totality, which it considered at paragraph 46 of its decision quoted at paragraph 32 above. Mr Peterken argues that the totality principle requires that since the two offences relating to flats 1 and 4 were identical (because in each case what was missing was a new heating system and a new kitchen) only one penalty should have been imposed.

60. Totality is a concept in the law and practice of criminal sentencing and has to be considered where a defendant is sentenced in criminal proceedings for a number of offences. It is the subject of a Definitive Guideline published by the Sentencing Council; that Guideline focuses on criminal proceedings, but the respondent expressly incorporated it in its enforcement policy because it is relevant and helpful in the context of civil penalties.

61. The Definitive Guideline begins by saying:

> "The principle of totality comprises two elements:

1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects *all* the offending behaviour before it and is just and proportionate …

2. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences."

62. This is of critical importance in the context of custodial sentences because of the choice to be made between concurrent and consecutive sentences, which is obviously not relevant here. But the Definitive Guideline also addresses the situation where the court considers imposing multiple fines for non-imprisonable offences.

63. On its page dedicated to multiple fines, the Definitive Guideline says that the total fine is inevitably cumulative, but that the court should add up the fines for each offence and consider if the aggregate is just and proportionate. If it is not, then there are a number of ways in which justice and proportionality can be achieved. Where offences arise out of the same incident and especially when they are committed against the same person, it will often be appropriate to impose a fine for the most serious offence and impose no separate penalty for the others. Alternatively where the offences arise from different incidents it will often be appropriate to impose separate fines but then to consider reducing each fine proportionately.

64. As a separate point the Guideline goes on to say that the court must be careful to ensure that there is no double counting. Double counting is therefore not the same as totality but is an ingredient within it.

65. As we have seen the FTT added together the three single penalties and said it was satisfied that there was no double counting because each offence was a separate offence which gave rise to a separate breach and a separate financial penalty. It went on to say that the aggregate of the three penalties was just and proportionate, noting that the breaches of the HMO regulations had been subsumed in a single offence.

66. Mr Peterken acknowledged that the principle of totality had been observed in the management regulation offence, but he argued that one of the two penalties of £14,250 for the two flats should have been discarded on the basis that the two offences involved exactly the same behaviour namely the failure to renew a kitchen and to provide a proper heating system. The respondent in its skeleton argument maintained that totality had been sufficiently observed in the decision to amalgamate the breaches of the HMO regulations into one civil penalty and that the FTT had reached the correct decision.

Discussion and conclusion

67. The concept of totality is perhaps of most critical importance in the context of custodial sentencing and in the choice between concurrent and consecutive sentences: will this defendant spend five years or ten years in prison? Two or three medium-length sentences for identical or similar offences when added together may mean that an offender would spend most of the rest of his life in prison, and that will often be obviously inappropriate.

The same stark choice does not arise where the penalty is purely financial, and the local authority or the court is looking at the financial resources of the individual offender, which may be small or great, rather than at the common human life-span. The search for a just and proportionate sentence may lead the local housing authority or the court not to impose separate penalties for two or more separate offences where the total would be disproportionate to the landlord's resources or perhaps to the value of the property, but it has not been suggested that that is the case here. Totality does not in itself require that where there are two or more separate but identical offences only one should attract a civil penalty.

68. A further factor that distinguishes the civil penalty context from the criminal application of the totality principle is that where there are several offences in question they may carry very different sentences. Where the defendant is going to be sentenced to, say, ten years for street dealing in class A drugs there is really no point in adding for example a sentence of a few months for possession of another substance, and the lesser offence can be addressed either by imposing no separate penalty or by a concurrent sentence. That sort of disparity is less likely to arise in the context of housing offences where local housing authority, and the FTT on appeals, will be looking at financial penalties which will often be of similar amounts, none exceeding £30,000, so that there is no single stand-out offence which may well reflect the overall criminality of the landlord. Nevertheless the Tribunal in *Sutton v Norwich City Council* [2020] UKUT 90 (LC) imposed no separate penalty for the offence of failing to display the contact details of the manager in the common parts of the property, where the appropriate penalty would have been £100; the Tribunal took the view that the addition of that sum to the other penalties, together amounting to tens of thousands of pounds, would have been pointless. No such argument is available here.

69. A further difference from the criminal context may be the fact that the local housing authority has a considerable discretion as to how many civil penalties to impose. In the present case one can see the sense in serving separate improvement notices for each flat even though the same work – new kitchen and suitable heating – was required in each, because circumstances may change as regards different flats (as happened here when at least three were vacant by the time the respondent came to assess compliance). The respondent then had a choice as to whether to impose one civil penalty or two, and it chose to impose two. It also had a choice whether to impose one penalty or several for the breaches of HMO regulations; it chose to impose one. So decisions had been made about totality before the respondent, and later the FTT, began to consider the amount of the penalty.

70. In the light of what I have said above it is difficult to see how there could be an argument that only one penalty should be imposed in respect of the two section 30 offences. They were different offences in respect of different flats and therefore in respect of different tenants. The argument would be obviously very weak had the two flats been in separate buildings and they are equally weak in reality where two identical offences were committed in respect of two flats in the same building. It is worth noting that it was pretty much by chance that the same work was required in each flat; the argument would have been obviously hopeless had the work left undone in each flat been different.

71. This ground of appeal therefore fails.

The Tribunal's substituted decision

72. Grounds 1 and 2 succeed and I have set aside all three civil penalties. Rather than remit the matter to the FTT I substitute the Tribunal's own decision since there is enough material before me to do so. I remind myself that the Tribunal can make any decision that would have been open to the FTT to make, and that an appeal under paragraph 10 of Schedule 13A, Housing Act 2004 takes the form of a re-hearing. The Tribunal must make its own determination of the appropriate penalty to be imposed, and must exercise its own discretion about mitigating factors and totality – albeit untrammelled either by the respondent's rule that any mitigating factor may only make a difference of 5% or by the "final determinant" discussed under ground 2.

The section 30 offences

73. There is no appeal from the FTT's agreement with the respondent that culpability in respect of each of these offences was high and the risk of harm was medium. I note that while the absence of proper heating in each flat was a category 1 hazard, the problem was that the heating was inadequate rather than that it was dangerous in itself; the kitchen was regarded by the local authority as a category 2 hazard. I agree with the assessment of harm as medium. Accordingly the starting point for each offence is £15,000.

74. For the reasons I explained above each penalty should be mitigated by the fact that Mr Kazi had done some of the works required by the improvement notices. How much mitigation is appropriate must depend not only upon the amount of work done but also upon the importance of the items left undone. In each case one of the category 1 hazards has been addressed (a trip hazard in flat 1; the external door in flat 4) but one remains, and a number of category 2 hazards have been addressed. The items left undone would probably have been the most expensive. I apply a discount of 25% to each penalty.

75. In addition, for the reasons explained, each penalty should be mitigated by the role the tenants played in either causing the disrepair or making it difficult to do the work. I apply a further discount of 20% (of the £15,000) to each penalty.

76. There is no further step to be taken to ensure that Mr Kazi does not profit from the offences as he still has to do the work. There is no double-counting because these are two separate flats and two separate offences.

77. Accordingly the penalty for each of the two the section 30 offences stands at £8,250; I go on to consider the section 234 offence and then to look at the application of the totality principle in respect of all three.

The section 234 offence

78. Again the starting point is £15,000 as there has been no suggestion that that starting point is incorrect.

79. It is more difficult to assess the level of discount to be allowed on the basis that some of the work has been done than it was in the case of the two flats and the section 30 offences. My sense is that rather less of the work had been done; but the whole is unknown because the respondent was not able to gain access to all the flats. It is also difficult to assess the extent to which the tenants were responsible for the disrepair to the common parts.

80. Moreover there is or may be in the case of this offence an element of double-counting, because in its schedule of the work required to be done to remedy this offence (referred to by the FTT at its paragraphs 44 and 45) the respondent included the renewal of the kitchens in all the flats and a new door for flat 4 – all of which has already been penalised in the section 30 offences as far as flats 1 and 4 are concerned. I say "is or may be" because the notice of intention and the final notice in respect of the section 234 offence did not specify exactly what was to be done, but it appears that the respondent regarded that offence as being comprised of the matters referred to in the improvement notice in respect of the common parts together with some at least of the work required in the individual flats.

81. There is no readily calculable answer; taking into account some double-counting and the elements of mitigation referred to above I impose a penalty of £10,000 in respect of the section 234 offence.

Totality

82. So as things stand there are three penalties to be paid, of £8,250 for the two section 30 offences and £10,000 in respect of the section 234 offence, making a total of £26,500.

83. Where mitigation is given proper weight, and where care has already been taken to avoid double counting there is less scope for argument that the whole is unjust or disproportionate. The FTT does not appear to have been presented with evidence of Mr Kazi's means, and I take it from his own statement that he owns numerous properties that his means are considerable. None of the offences is trivial by comparison with the others; and there is no reason to regard the total as a disproportionate penalty for the very bad state of this property. Accordingly I make no further adjustment in the operation of the totality principle.

Conclusion

84. The appeal succeeds, and I have substituted the Tribunal's own determination of the three civil penalties: £8,250 for each of the two section 30 offences and £10,000 for the section 234 offence and the Tribunal will make an order accordingly.

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Upper Tribunal Judge Elizabeth Cooke

30 October 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.