FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

HMCTS code (audio, video, paper)		**V: CVPREMOTE**
Case reference	**:**	**CAM/33UF/HNA/2022/0005**
Property	**:**	**Flat 2, Cliff Brow Cromer Norfolk NR27 9HP.**
Applicant	**:**	**Peter Borrie**
Representative	**:**	**In person**
Respondent	**:**	**North Norfolk District Council**
Representative	**:**	**Mr Oliver Fuller of Counsel**
Date of Application	**:**	**13 May 2022**
Type of application	**:**	**Appeal against financial penalty, pursuant to s.249A and Sch.13A to the Housing Act 2004,**
The Tribunal	**:**	**Tribunal Judge S Evans Mr Christopher Gowman BSc MCIEH**
Date/ place of hearing	**:**	**28 September 2022, By cloud video platform**
Date of decision	**:**	**21 October 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which was not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents before us were in an Applicant's bundle of 34 pages, a Respondent's bundle of approx. 124 pages, and emails from the parties dated 9 September 2022 and 6 and 13 October 2022.

DECISION

The Applicant's appeal is dismissed.

REASONS

Introduction

1. By his application, the Applicant appeals against the imposition of a financial penalty of £16,000 imposed by the Respondent in respect of an alleged offence under s.30(1) of the Housing Act 2004, namely failing to comply with an Improvement Notice.

Background

2. The salient facts we find to be as follows:

3. On 18 June 2015 the Applicant was registered with freehold title to the Property.

4. On 28 December 2019 Ms Coral Smith and Mr Jake Ketteringham began renting the Property as tenants.

5. The Applicant says that he paid for partial redecoration of the Property after a leak from above in October 2020, and commissioned an EICR in November 2020, as well as paying for certain repairs in December 2020.

6. On or about 7 December 2020 the tenants complained to the Respondent about broken windows, mould and leaks in the Property.

7. On 13 January 2021 the Respondent wrote to the Applicants then managing agents concerning the allegations of water penetration, mould growth, and electrical issues.

8. On or around 15 January 2021 the Applicant paid contractors to fit Perspex on the windows in the Property, and shortly thereafter he paid a contractor for a renewal of the bathroom ceiling.

9. On 22nd January 2021 the Applicant managing agents wrote to the Respondent to say that Perspex had been fitted, and that handmade windows would be fitted in mid Spring. They added that an electrician was due to carry out some repairs on a light fitting in the bathroom, which should have been completed.

10. The Respondent's reply on 25 January 2021 noted the Applicant's assertions regarding the windows, and it asked for confirmation from the Applicant's electrician that the bathroom light fitting was "safe" given the recent water penetration.

11. There is no response in the bundle before us from the Applicant or his agents.

12. On 23 February 2021 and 12 March 2021 the Respondent requested an update from the Agents, threatening enforcement action if none was given.

13. On 12 March 2021 the managing agents replied. They repeated that windows would be fitted in Spring. They enclosed an EICR.

14. In June 2021 and July 2021 the Respondent chased the managing agents for the Applicant, pointing out that the tenants were now complaining of excess heat, with Perspex still in situ.

15. The Applicant contends that on 29 June 2021 he paid a contractor for the removal of the Perspex.

16. On 23 July 2021 the Respondent served Notices of entry on the Applicant and the managing agents, with a view to inspecting the Property on 11 August 2021.

17. We have evidenced from the council's witness and photographs of this inspection, when a full HHSRS calculation was undertaken. The photos show in the bathroom a dangling bathroom ceiling fitting, with blue and red wires freely exposed. They also show single glazed sash windows, north-facing, with views of the beach in close proximity, which are poorly maintained and bearing some mould, being exposed to the elements, and symptomatic of poor thermal efficiency.

18. Following the inspection, on 23 August 2021 the Respondent served an Improvement Notice on the Applicant and the managing agent. This Notice cited within Schedule 1 a category 1 hazard, being excess cold resulting from inadequate insulation and draughts. It also cited a category 2 hazard, being some electrical faults, in particular the existence of exposed electrical wires to the bathroom light, in close proximity to damp. By schedule 2 of the Notice, the Respondent required the Applicant to fit either secondary glazing or replace the windows with modern equivalent units in order to address the category 1 hazard, and in relation to the

category 2 hazard, to supply a suitable fitting and to ensure no wires were left exposed.

19. This Improvement Notice required the Applicant to commence works by 24 September 2021, and complete by 1 December 2021. The Applicant therefore had one month to organise a contractor or contractors, and 9 weeks to undertake the works.

20. On 29 November 2021 the Respondent wrote to the Applicant, yet again serving Notices of entry for an inspection.

21. The inspection duly took place on 1 December 2021, and is the date of the alleged offence of failing to comply with an Improvement Notice. The Respondent found all the window and electrical works were outstanding.

22. On 12 January 2022 the Applicant's builder emailed the Applicant and the Respondent to indicate window contractors would be on site on 31 March 2022.

23. On or around 8 February 2022 that Respondent undertook financial penalty calculations, then served a Notice of Intent to issue a financial penalty on the Applicant on or about 14 February 2022. This action was approved by the Assistant Director of Environment and Leisure of the Respondent Council. The penalty sum required was £16,000. The Notice invited representations.

24. The only representations received from the Applicant were contained in an email dated 22 February 2022, in which he stated that “we thought we had complied with everything”.

25. On 14 April 2022 the Applicant’s builder emailed him to state that the sash window work had been completed.

26. On 20 April 2022 the Respondents served on the Applicant a final Notice to impose a financial penalty, again in the sum of £16,000.

27. On 21 April 2022 the tenants informed the Respondent that the sash windows had been completed, but not the electrical repairs.

28. On 29 April 2022 the Respondent served its third set of Notices of entry, this time for an inspection on 4 May 2022.

29. On 4 May 2022 the Respondent found that both the window work and the electrical lighting work had been completed.

The Application

30. The Applicant filed his appeal on 13 May 2022.

31. The accompanying grounds of appeal are lengthy, and for sake of conciseness we do not set the same out now. However, the essence of the Applicant's appeal is as follows:

32. The Applicant states that he genuinely believes that either the penalty is excessive or that, under all the circumstances, there should be no penalty.

33. The circumstances he sets out include the fact that the flat is let at a very reasonable rent; that the tenants have made no complaints to him; that he commissioned works following a leak from above, and an EICR; that he had instructed at all material times responsible managing agents to deal with the Property, given that he lived 300 miles away in North Yorkshire, and his brother was living in South Africa; that the letter in January 2021 from the Respondent was not very specific; that he fitted Perspex quickly after the letter; that he paid contractors to attend to supply and fit new windows in either February or March 2021; that he paid for the removal of the Perspex in June 2021, but the window contractors did not quote further, and his builder could not get any other quote due to COVID-19; that from 26/27 November 2011 onwards he had bronchitis; that his builder wrote on 12 January 2022 to say the window company would be on site for 2 days commencing 31 March 2022; that the Notice of Intent came as a devastating shock, since he "did everything possible under the circumstances and could not have done more; and that the electrical issue was caused by interference by the tenants or a person at their behest, given that the EICR had been passed in November 2020.

34. In his witness statement, the Applicant says (amongst other things) that "events that occurred have been caused by many issues of miscommunication, and for this we have great regret" and that "Countrywide were fully responsible and paid by us to manage this sort of situation for us.". In addition he cites severe difficulties caused by COVID, and rapid staff turnover at Countrywide, and the lack of specialist window contractors (again due to COVID). He also states that his profits are minimal, given that many of the tenants treat their flats extremely badly.

35. The Applicant further writes to accept that he has missed some deadlines, but it has never been because of holidays, blindness or culpability, simply a catalogue of personal bereavements, and Storm Arwen at the end of November 2021. As regards the electrical defects, he honestly thought that this matter had been dealt with, but there was confusion between the builder, electrician, the agents and him; that he thought it was a light switch issue, and as soon as he was aware of what it was, and that it had not been done, it was fixed within a couple of days.

The Hearing

36. At a point shortly before 12 September 2022, the Applicant informed the Tribunal procedural chair that he was intending to join the hearing by video from France. Pursuant to the guidance which had been given in *Agbabiaka (evidence from abroad); Nare guidance)* [2021] UKUT 286 (IAC), the Tribunal procedural chair wrote to the Applicant and the Respondent to state that, on the understanding that there was no dispute about what works were/were not carried out, and because the Applicant would be abroad in France on the date previously notified for the hearing,

the Tribunal did not propose to inspect the Property and had arranged a remote video hearing; that it appeared that the Applicant would attend the remote hearing only to observe and make submissions (legal arguments) and rely on written witness statements/documents, which the Tribunal could permit, albeit the Applicant was outside the UK.

37. The Tribunal in that letter went on to make clear that, as matters stood, witnesses (the parties and others) cannot give oral evidence from abroad unless permission has been obtained from the country they would be giving evidence from; but no general permission has so far been given by France. Accordingly, the parties had to ensure that any witnesses they wish to rely on would be attending the hearing from the UK, or apply to the Tribunal for further directions, such as seeking an adjournment until such persons were in the UK. Otherwise their evidence might be treated with less weight as being hearsay.

38. At the commencement of the hearing, the Tribunal took time to reiterate the above directions, and the parties were expressly asked whether they wished to proceed with the hearing, and if they did, on the basis that no live (oral) evidence would be taken. In particular, in the instant case, the Respondent would not be able to cross examine the Applicant, nor could the Applicant expand his evidence orally beyond the written materials.

39. Both parties confirmed to the Tribunal that they were prepared to proceed with the hearing on the day, and on the basis that the Applicant's evidence could neither expand beyond the written materials, nor be tested by any cross examination.

40. Given that the matter is in effect a rehearing of the Respondent's decision to impose the financial penalty, we heard an opening from counsel for the Respondent, followed by the evidence of Mr Hawes MCIEH, a Senior Environmental Protection Officer. He was asked some questions by the Applicant and the Tribunal. We then heard representations based on the written evidence from the Applicant and his brother Mr Martin Borrie, who was co-located in France.

Relevant Law

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

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

43. The Tribunal also bears in mind *Opara v Olasemo* [2020] UKUT 0096 (LC) at paragraph 46, in which the Upper Tribunal warned that, when

applying the criminal standard to their fact finding, Tribunals should avoid being overcautious about making inferences from evidence. It observed that, for a matter to be proved to the criminal standard, it must be proved beyond all reasonable doubt; it does not have to be proved beyond all doubt at all.

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

Issues

45. The issues are:

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

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

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

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

46. The Tribunal is satisfied beyond reasonable doubt that the requirements of section 30 of the Housing Act 2004 have been made out by the Respondent.

47. Given that the Applicant did not appeal the Improvement Notice, pursuant to section 30 of the Act, he had to complete the work by the date stated in the Notice, namely 1 December 2021.

48. It is common ground the Applicant did not do so. However, his reasons for not doing so might amount to a defence, even if not advanced explicitly as such. The Tribunal is mindful that it is a defence pursuant to section 30(2) of that Act that the Applicant, on balance of probability, had a reasonable excuse for not complying with the Notice.

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

50. The Applicant agreed that he had received all of the relevant Notices from the Respondent. From 13 January 2021 he was therefore aware that there

were allegations of (1) inadequate insulation of the external envelope in the dwelling, including an assertion that the single glazed sash windows had to be serviced, repaired and draught-proofed (e.g. with secondary double glazing) or replaced, and (2) that the electrical installations were non-compliant with current requirements, and should be tested.

51. Even accepting that these assertions were phrased in general terms, on 25 January 2021 the Respondent emailed the Applicant's agents, noting he was promising replacement windows, but the Respondent then expressly mentioned the unsafe bathroom light fitting. Despite this reminder, up to the date of the service of the Improvement Notice, all the Applicant did was to commission contractors to fit Perspex on 3 windows. Promises were made that windows would be fitted in Spring 2021, but this never occurred. Moreover, no steps were taken to undertake any electrical inspection or lighting repair.

52. Of course, the primary focus of this Tribunal is on the actions of the Applicant following service of the Notice on 23 August 2021. The facts prior to this demonstrate that the Applicant was fully aware of at least the general issues which were being alleged.

53. By 23 August 2021, the date of the Improvement Notice itself, the allegations cannot have been more explicit. The Notice expressly referred to there being inadequate insulation of the Property, as a result of large single glazed sash windows to the living room, and draughts therefrom. It expressly referred to exposed electrical wires to the bathroom light, in close proximity to areas of damp. It made clear that those windows affected had to be appropriately draught-proofed or replaced with modern equivalent units, and that there had to be an appropriate light fitting with no exposed electrical wires. Notwithstanding the detail in the Notice, no appeal was brought against the Notice.

54. Looking at both the grounds of appeal and the Applicant's witness statement, there is little evidence that the Applicant addressed the Improvement Notice with any seriousness. We do not consider that the circumstances of the COVID pandemic between 23 August 2021 and 1 December 2021 provide a reasonable excuse. The country was not in national lockdown. Most inhibitions on social contact had been removed on 14 July 2021, and even closed sectors of the economy had been reopened (e.g. nightclubs). It was not until 8 December 2021 that the Government imposed its so-called Plan B measures to militate against the Omicron variant, but none of those measures in isolation or cumulatively were such as to prevent any landlord in principle from undertaking emergency steps to address Category 1 and 2 hazards.

55. It is not a reasonable excuse to seek to blame, directly or indirectly, the managing agents. The Notices were addressed to and received by the Applicant, and he had personal responsibility to ensure they were complied with. He simply did not exercise sufficient supervision. Even in evidence the Applicant volunteered "Perhaps I failed in chasing", and later, "I've just failed to chase them.". We note that there was a change in personnel at Countrywide, but this did not occur until in or about June 2021, some 2 months before the Improvement Notice was served. The

person then dealing with the matter at Countrywide went on leave, but she was due to return on 16 August 2021. Difficulties or misunderstandings with agents before 23 August 2021 might be an explanation; it is certainly not a reasonable excuse at any time after that date.

56. The evidence that the Applicant could not source appropriate window contractors is underwhelming. We note that the Applicant had a suitable contractor seemingly lined up for March 2021. They were called North Norfolk Plastics. There does not appear to be any explanation as to why the windows were not repaired then, nor as to why that contractor did not (or could not) re-quote after Spring 2021.

57. We note Mr Siggins the builder's email dated 14 February 2022, in terms that a window contractor had been booked in for 31 March 2022, with his assertion "not sure how things could of [sic] been done any earlier than that, with lead times of the company doing the work." However, there is no direct evidence (by witness statement) from Mr Siggins, and no details as to what attempts (if any) were made from 23 August 2021 onwards to source contractors other than the ones who eventually did the job. We note that on 24 August 2021 Mr Siggins had stated that he was continuing to try and source a company to take on the job at a reasonable cost, but with everyone being so busy, it would not be a quick process. But we find it telling that on 25 August 2021 the Respondent sent the Applicant and his agents the names and contact details of 3 firms which concentrated on secondary double-glazing systems in heritage settings. We have received no evidence that the Applicant or any of his contractors or agents contacted any of those 3 firms.

58. Instead, the facts reveal that it was not until after the deadline for works on 1 December 2021 that the Applicant would appear to have arranged the works, by a different company. An e-mail from "Sash Window Preservation" dated 3 December 2021 refers to a telephone call from Mr Siggins and the receipt of a deposit, and advising that one of their staff were able to measure up on 20 December 2021, with a view to works commencing in Spring 2022.

59. As the Improvement Notice stated on p.5, if the Applicant had difficulty in finding the builder to take remedial action, or if he had any other problems in arranging the action, he could ask the Respondent if they would take the action themselves and charge him with the cost. The Applicant did not avail himself of this opportunity either.

60. Whilst we are very sympathetic to the Applicant for his physical health issues following Storm Arwen, this occurred only 4 days before the end of the period for compliance with the Notice, and therefore does not provide a reasonable excuse for non-compliance; the works should have been organised and commenced long before then. There is no independent evidence of any mental health issue within the relevant period, and we cannot be satisfied of a reasonable excuse in that regard. Moreover, the Applicant never even asked for an extension of time to do the works, and we find his explanation (as a landlord of 26 properties) that he did not know he could ask for one, to lack credibility.

61. We do not consider that the Applicant could sensibly have believed that the electrical issue was a simple light switch problem, given the express wording of the Improvement Notice, which he did not appeal. We find there was no reasonable excuse for not arranging the works to address exposed electrical wiring in a tenanted Property. We note the e-mail dated 24 August 2021 from the Applicant's builder Mr Siggins to the Respondent and the Applicant which claims that, as a priority, an electrician would be attending the Property the following afternoon to correct any faulty bathroom light / wiring. It is common ground the light was not remedied until late April 2022/early May 2022. No explanation has been provided to the Tribunal as to why that repair did not take place on 25 August 2021.

62. As for the assertion that the tenants were themselves to blame for the state of the light, we are not prepared to draw that inference in the absence of more cogent evidence; in any event it would not be a reasonable excuse for the Applicant's non-compliance with the Notice, given there was a still a Category 2 hazard, and the landlord would have had the ability to recharge the tenants the cost of the remedial works, on the grounds of failing to use the premises in a tenant like manner or some other breach of covenant, if they had indeed caused the problem.

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

63. The Tribunal accepts the Respondent's evidence that it sent the requisite statutory Notices to the Applicant. Indeed, the Applicant accepted that he had received all relevant Notices.

64. There was no assertion by the Applicant that any of the relevant Notices failed to comply with the requirements of Housing Act 2004, Schedule 13A, paras 3 and 8. We note the statutory requisites for such Notices, and find the Respondent's Notices in this case to have been compliant.

65. The Notice of Intent invited representations, and the Applicant made some by email. We find that the Respondent had regard to the same.

66. We therefore do not find that there was no procedural error by the Respondent in this matter.

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

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

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

68. As noted above, the Respondent does have such a Policy, dated March 2018, to which the Tribunal must give due deference. Mr Hawes explained that this Policy was drafted in partnership with other local authorities.

69. In the Tribunal's determination, punishment of the offender, deterrence of the offender repeating the offence, and deterrence of others from committing similar offences speak for themselves in all cases. These are, in effect, a given. As to the 4th bullet point above, there is no assertion that the Applicant has derived any financial benefit from committing the offence.

70. As to severity of offence, culpability and harm, we look firstly at the Respondent's Policy. The Policy makes clear that the Council will consider whether the imposition of a financial penalty is in the public interest, and if it does, the amount of the financial penalty will reflect the seriousness of the offence, and will be determined in a consistent and transparent way.

71. This Tribunal has no reason to go behind the Policy, nor the Respondent's decision to impose a penalty, rather than a prosecution. Mr Hawes explained that a financial penalty should not be a tool to get work done, and the council had to take enforcement action otherwise other landlords would not comply. In other words he relied particularly on the punishment and deterrence effects of action on the Applicant. He went on to explain that if steps had been taken prior to the deadline, then the Respondent would have looked again or decided not to go ahead. However this was not the Applicant's situation. We find the decision to impose a financial penalty in these circumstances to have been a legitimate approach.

72. As regards determining the penalty, the Respondent's Policy sets out those matters contained the national guidance, set out above. Then, at paragraph 7 of the Policy, the Council explains how it imposes a penalty band based on a judgment of culpability and harm, applying the following matrix:

	Very High Culpability	High Culpability	Medium Culpability	Low Culpability
Harm				
High	6	5	4	3
Medium	5	4	3	2
Low	2	1c	1b	1a

73. The Bands lead to a penalty range:

Band	Financial penalty range/£	Assumed starting point/ £	Adjustment increment/ £
1a	100	-	-
1b	150	-	-
1c	200	-	-
2	200-800	400	200
3	1000-4000	2000	1000
4	6000-12000	8000	2000
5	14000-20000	16000	2000
6	22500-30000	25000	2500

74. As the Policy then explains, the penalty may be adjusted by an incremental value, to reflect the level of cooperation experienced following identification of the offence:

Full cooperation from an identification of offence	Reduced from starting point by 1 increment
Minimal further input required by the council to achieve compliance	No adjustment
Significant involvement by the council required to achieve compliance	Plus one increment
A significant lack of cooperation and or obstruction leading to significant further enforcement activity (e.g. works in default)	Plus 2 increments

75. The Policy goes on to consider the relevance of a landlord's finances, noting that the Council will invite representations, to include evidence of

the person's ability to pay the penalty, and that if no representations are received, the presumption will be the person is able to pay the full amount.

76. There follow in the Policy some paragraphs concerning representations and appeals and recovery, which are not directly relevant for these purposes. An appendix to the Policy sets out in tabular form how the Council assesses both culpability and harm:

Culpability

Band	Description	Examples
Very High	offender has intentionally breached or flagrantly disregarded the law	• the offender has a track record of failure to comply • there is evidence that the offender has deliberately delayed compliance, for example to prevent a complainant from benefiting from improvements • an opportunity to comply was deliberately avoided, for example, by moving a new tenant into the Property before a known hazard or breach has been remedied • deliberate avoidance of significant costs through non-compliance
High	actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken	• offender had knowledge of the breach, for example through a complaint, but has not responded • a clear requirement by the council has been ignored. This would include an Improvement Notice that has not been complied with, or the failure to respond to a letter requesting action to address a management failure • the offender is a member of a professional body which makes clear requirements that have not been followed, leading to the breach

		• offender had not started the works by the Notice expiry date and had not made a reasonable case for an extension of time
Medium		• a failure to carry out regular inspections, for example, of the common parts of a house in multiple occupation (HMO) • failure to have adequate systems in place to avoid the offence, for example, an emergency contact or regular maintenance contract for gas appliances or fire alarm systems • the offender did not provide sufficient contact information to the tenant to enable the problem to be addressed • offender has failed to comply with Notice start by date but, nevertheless, completed the works satisfactorily within time
Low	Offence committed with little fault, for example because: • significant efforts were made to address the risk although they were inadequate on this occasion • there was no warning circumstance indicating a breach • failings were minor and occurred as an isolated incident	• failure to comply with the licence conditions aimed at lessening the impact of the use of the Property on the community of the local area (e.g. keeping yards and gardens in reasonable condition) where there is no ongoing history of similar breaches • failure to display an information Notice where required to do so

Harm

Band	Description	Examples
High	• Serious adverse effect(s) on individual(s) and/or having a widespread impact • High risk of an adverse effect on individual(s)	• failure to comply with an Improvement Notice served under section 11 of the Housing Act 2004 (category one hazard) • failing to maintain fire precautions
Medium	• Adverse effect on individual(s) • Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect • Legitimate industry substantially undermined by offenders activities	• failure to comply with an Improvement Notice served under section 12 of the Housing Act 2004 (category two hazard) • failure to maintain facilities or to clean common parts in houses in multiple occupation (HMO) • unfair competition with landlords who do not commit offences e.g. by overcrowding
Low	Low risk of an adverse effect on the individual(s)	• failure to display an information Notice in the house in multiple occupation (HMO) where the tenants possessed that information through other means • minor inconvenience either to tenants or local residents through a failure to comply with licence conditions

77. In the instant case, the Respondent categorised the culpability as high, citing the 1st, 2nd and 4th bullet points against that category in the Table above. The Respondent relied on the fact that there had been initial letter as early as January 2021; that there had been a short-term measure of

Perspex, but the contractor who eventually did the works was not commissioned until after the deadline of 1 December 2021.

78. As to harm, the Respondent considered that it was high. When questioned by the Tribunal, Mr Hawes gave evidence that's the Council's categorisation was based on the HHSRS and an assessment of serious adverse effect on the tenants. He gave evidence that the tenants had complained of excess cold; that the EPC for the Property recommended that the heat efficiency be improved; and that the tenants had told him they had been unable to use the sitting room when it was particularly cold.

79. Using the matrix set out above, the Respondent had determined that this was a Band 5 case with a starting point of £16,000. It had not adjusted that figure, on the ground that the Council had only needed to exercise minimal further input in order to achieve compliance (presumably on the basis of the email exchanges, and that shortly after the offence date, the Applicant finally set in motion works to address the excess cold).

80. The Applicant refuted that the culpability was to be judged as high. He considered this a medium culpability, if not low. We note the written representations by the Applicant that "Life is not easy, and that private landlords are essential due to the lack of housing stock and we are good honest people who are seriously considering selling the flats to eg Weatherspoons, for hotel/ business purposes. We can then pay off our debts and sadly Cromer will lose housing stock that we have provided over many years." As to harm he considered that the case was one of low risk, phrasing the risk as "almost negligible".

81. In the Tribunal's assessment, the Respondent was right to categorise this as a **high** culpability case. We agree that this was not a case of intentional breach, so as to fall within the "very high" category. Nonetheless, we consider that there was actual foresight of, or wilful blindness to, the risk of offending but the risk was nonetheless taken. The examples on the right of the column in the Table are but examples; however, we consider that the 3 bullet points relied on by the Respondent were applicable to the Applicant.

82. We do not consider this to be medium culpability on the basis simply that this was an offence committed through an act or omission which a person exercising reasonable care would not commit. This was more than just a lack of care. Nor do any of the illustrative examples fit easily with the Applicant's situation. Nor was this low culpability, which is reserved for offences committed with little fault.

83. In terms of harm, we consider that the Applicant seriously underestimated the actual effects on the tenants, in terms of the excess cold from the windows, and what we judge to be the high risk of an adverse effect on them from the exposed electrical wires in the bathroom. We do therefore consider that this is a **high** category harm case. Moreover, the illustrative example of a high harm case is a failure to comply with an Improvement Notice citing a category 1 hazard, just as here. Although the HHSRS assessment was not in evidence, the Applicant did not dispute the categorisation of the windows as a Category 1 hazard.

84. It is not a medium harm category case, because the harm is truly serious in effect, not just having an adverse effect. The illustrative example applies here, because there is a category 2 hazard, but to apply it in isolation would be to overlook the addition of the category 1 hazard of excess cold.

85. Lastly, we consider 2 further matters. Firstly whether any adjustment could be made on the basis of alleged full co-operation from the Applicant, which might then give an incremental adjustment, so as to lower the penalty. In the Tribunal's determination, no such adjustment should be made, and the Respondent was right not to do so. The Applicant was very slow to effect the bathroom light repair, and his representations dated 22 February 2022 (nearly 3 months after the offence) reveal that he was still not on top of the case, in so far as he asserted that he thought he had complied with everything, adding "seems…that a few things are outstanding and that Martin [Siggins] is dealing with them, reliant on other contractors."

86. Secondly, we consider the issue of the Applicant's finances. The Notice of Intent asked him to put forward evidence of his assets and income and ability to pay. He did not do so then, and did not do so within his documentary evidence in support of his case at the hearing. The Respondent rightly considered that the Applicant had the means to pay, in so far as he had legal proprietary interests (either personally or as a company director) in 25 flats and 1 house in Cromer. We have received no evidence that the Applicant's beneficial interests in these properties is so low as to lead us to believe he cannot pay the penalty fine, whatever his true profits may be from running these businesses.

87. We conclude, therefore, by finding that the penalty was set at an appropriate level and that it is payable by the Applicant. We dismiss the appeal accordingly.

Name: Tribunal Judge S Evans **Date**: 21 October 2022.

Rights of appeal

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

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

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

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such

reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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

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

Appendix

Housing Act 2004

30 *Offence of failing to comply with Improvement Notice*

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

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

(a)(if no appeal is brought against the Notice) not later than the date specified under section 13(2)(e) and within the period specified under section 13(2)(f);

(b)(if an appeal is brought against the Notice and is not withdrawn) not later than such date and within such period as may be fixed by the Tribunal determining the appeal; and

(c)(if an appeal brought against the Notice is withdrawn) not later than the 21st day after the date on which the Notice becomes operative and within the period (beginning on that 21st day) specified in the Notice under section 13(2)(f).

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

(4)In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the Notice.

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

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

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

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

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

(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

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

(a) section 30 (failure to comply with Improvement Notice),

(b) section 72 (licensing of HMOs),

(c) section 95 (licensing of houses under Part 3),

(d) section 139(7) (failure to comply with overcrowding Notice), or

(e) section 234 (management regulations in respect of HMOs).

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

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

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

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

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

(6) Schedule 13A deals with—

(a) the procedure for imposing financial penalties,

(b) appeals against financial penalties,

(c) enforcement of financial penalties, and

(d) guidance in respect of financial penalties.

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

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

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

Schedule 13A

1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person Notice of the authority's proposal to do so (a "Notice of Intent").

2 (1) The Notice of Intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the Notice of Intent may be given—

(a) at any time when the conduct is continuing, or

(b) within the period of 6 months beginning with the last day on which the conduct occurs.

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

3 The Notice of Intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

4 (1) A person who is given a Notice of Intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the Notice was given ("the period for representations").

5 After the end of the period for representations the local housing authority must—

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a Notice (a "final Notice") imposing that penalty.

7 The final Notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the Notice was given.

8 The final Notice must set out—

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the Notice.

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

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

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

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

10 (1) A person to whom a final Notice is given may appeal to the First tier Tribunal against—

(a) the decision to impose the penalty, or

(b) the amount of the penalty.

(2) If a person appeals under this paragraph, the final Notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph—

(a) is to be a re-hearing of the local housing authority's decision, but

(b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final Notice.

(5) The final Notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

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

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

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

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

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

is conclusive evidence of that fact.

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

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

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