Neutral citation number: [2024] UKFTT 444 (GRC)

First-tier Tribunal
(General Regulatory Chamber
Professional Regulation

Appeal Reference: PR/2023/0072

Decided at a hearing held by CVP
On 21 March 2024

Decision given on: 30 May 2024

Before

JUDGE ANTHONY SNELSON

Between

CRAIG REDMOND

Appellant

and

CHERWELL DISTRICT COUNCIL

Respondent

DECISION

On hearing Ms J Burden, lay representative, for the Appellant and Ms K Staunton, counsel, for the Respondent, the Tribunal determines that the appeal is allowed and the penalty notice issued by the Respondent dated 25 July 2023 is varied to the extent that the amount of the penalty charge is reduced to £2,500.

REASONS

1. The Appellant, to whom I will refer by name, is a professional landlord with a portfolio of five properties which he lets to tenants for reward, one of which is known as and located at 27 Ferriston, Banbury, Oxfordshire, OX16 1QT (' the property').

2. The Respondent, which I will call the Council, is a local authority and the local housing authority with responsibility for the part of Oxfordshire which includes Banbury. Its statutory duties include, among many others, the enforcement of the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 as amended ('the 2015 Regulations').

3. By this appeal, Mr Redmond challenges a Penalty Notice issued by the Council on 25 July 2023 ('the PN') under the 2015 Regulations, reg 8(1) requiring him to pay a penalty charge of £5,000 on the stated ground that he was in breach of a Remedial Notice issued to him under the 2015 Regulations, reg 5(1), by failing on or before the due date to install two smoke alarms and one carbon monoxide alarm at the property.

4. The appeal came before me for final determination in the form of a video hearing by CVP, with one hour allocated. I was satisfied that it was just to proceed in that way. Ms Burden a lay representative, appeared on behalf of Mr Redmond, who did not participate directly in the hearing (I was told that he was in poor health). Ms Staunton, counsel, represented the Council. An agreed bundle was produced. In addition to reading the documents to which I was referred, I heard evidence from two witnesses on behalf of the Council, Mr David North and Ms Carolyn Arnold. Both had served witness statements in accordance with standard case management directions. They were briefly cross-examined. Ms Burden then applied for permission to call a witness on behalf of Mr Redmond, Mr Barry Courtenay. With some misgivings, I granted the application and Mr Courtenay gave brief evidence. I then heard closing argument on both sides and, in view of the fact that we had substantially exceeded the time allocation, reserved judgment.

The statutory framework

5. As their name suggests, the main objective of the 2015 Regulations is to protect occupiers of properties to which they apply by providing for the compulsory installation of smoke and carbon monoxide alarms. The following matters were not in question. (1) The 2015 Regulations applied to premises let under residential leasehold tenancies. (2) The property was let under one such tenancy. (3) The property lay within the territory for which the Council was the local housing authority.

6. The scheme of the 2015 Regulations, in bare summary, is as follows. Under reg 4, a landlord of any relevant property is under the duty (a) to provide a smoke alarm on each story of the premises on which there is a room used wholly or partly as living accommodation and a carbon monoxide alarm in any room which is used wholly or partly as living accommodation and contains a fixed combustion appliance other than a gas cooker; and (b) to ensure that each relevant alarm is in proper working order at

the start of the tenancy and repaired or replaced as necessary in the event of any defect being reported during the course of the tenancy.

7. By reg 5, a local housing authority has a duty to serve a Remedial Notice upon the landlord of any premises within its area where it has reasonable grounds to believe that he/she is in breach of any duty under reg 4.

8. By reg 6 the landlord is under a duty to take the remedial action specified in any Remedial Notice by the date specified in that notice.

9. By reg 7, where the local housing authority is satisfied that a landlord has failed to comply with a Remedial Notice, it must, within 28 days, ensure that the necessary remedial action is taken.

10. By reg 8, where the local housing authority is satisfied that a landlord has failed to comply with a Remedial Notice, it may serve a PN on the landlord requiring him/her to pay a penalty charge in a sum not exceeding £5,000.

11. Under reg 11(1) and (2), a landlord may appeal to the Tribunal against a PN on one or more of four specified grounds, namely that: (a) the issue of the PN was based on an error of fact; (b) the issue of the PN was based on an error of law; (c) the amount of the penalty charge was unreasonable; and (d) the local housing authority's action was unreasonable for any other reason. On the appeal the Tribunal may quash, confirm or vary the PN, although any variation can only be downwards (reg 11(4)).

12. In the usual way, the Tribunal treats the appeal as a rehearing. It must simply make its own decision on the evidence before it (which may well differ from that before the enforcement authority at the time of the decision under challenge). This said, the Tribunal must accord 'great respect' and 'considerable weight' to any public authority's policy on financial penalties (see *Waltham Forest LBC v Marshall and Ustek* [2020] UKUT 0035).

The key facts

13. The material facts can be summarised as follows.

13.1 At inspections on 3 and 10 May 2023 the Council found that the property contained no smoke alarm and no carbon monoxide alarm.
13.2 On 16 May 2023 the Council served a Remedial Notice on Mr Redmond.
13.3 No representation was submitted to the Council in response to the issuing of the Remedial Notice.
13.4 At a further inspection of the property on 20 June 2023, the Council found that it still contained no smoke alarm and no carbon monoxide alarm.
13.5 The Council issued the PN on 25 July 2023, requiring Mr Redmond to pay a penalty charge of £5,000.

13.6 With the PN, the Council delivered a statement setting out grounds for its view that the PN was appropriately set at £5,000.

13.7 On 8 August 2023 Mr Redmond sought a review of the PN. Statements tendered in support of the review application were presented on 4 September 2023. One asserted that there had been a carbon monoxide alarm at the property in June 2022. Another said that there had been a carbon monoxide alarm at the property in January 2023. Neither statement said anything about there having been smoke alarms at the property at any material time.

13.8 On 14 September 2023 the Council rejected the review application and confirmed its decision to impose the PN unchanged.

The Council's Housing Standards Enforcement Policy

14. The current edition of the Council's Housing Standards Enforcement Policy dates from 2021. It includes, at Appendix 2B, a protocol for determining the level of financial penalties to which a ceiling of £5,000 applies[1]. By means of a matrix, the protocol identifies two key criteria of equal weight: culpability and harm and, in respect of each, two measures: high and low. A low culpability, low harm case attracts a penalty of 25% of the maximum available. In a high culpability, high harm case, a penalty of 100% of the maximum available is proposed. High culpability, low harm and low culpability, high harm cases are to be met with penalties of 50% of the maximum. The protocol includes the following:

> **Factors affecting culpability:**
> **High: Landlord has a previous history of housing-related statutory non-compliance and/or has failed to comply with requests to comply with these regulations. Knowingly or recklessly breached regulations, obstructive conduct, extended period of non-compliance.**
> **Low: No prior history of non-compliance with housing-related regulatory requirements. Complex issues partially out of control of the landlord have led to non-compliance. Short period of non-compliance. Promptly took steps to remedy deficiencies.**
>
> **Factors affecting harm:**
> **High: Significant level of non-compliance. Vulnerable tenants occupying property. Potential for severe or serious harm. Evidence of actual harm.**
> **Low: Low degree of non-compliance (e.g. only slightly below minimum standard). No vulnerable tenants. Potential for slight or moderate harm. No evidence of actual harm.**
>
> **Further adjustments and representations:**
> **Officers may adjust the penalty level up or down from the level determined in the matrix if there are additional aggravating or mitigating factors …**

The appeal

15. The nub of the appeal was that Mr Redmond was a responsible and fair landlord and the victim of intolerable tenants at the property, who had neglected and

[1] The protocol implements government guidance to local authorities on the Smoke and Carbon Monoxide Alarm (Amendment) Regulations 2022 (last updated 29 July 2022), which advises local authorities to publish a statement of the principles which will be followed in determining the level of civil penalties under the 2015 Regulations.

damaged it in numerous ways including stripping out the smoke and carbon monoxide alarms which he had installed. In short, he maintained that it was wholly unfair of the Council to visit upon him further financial loss in circumstances where any non-compliance with the 2015 Regulations was entirely the fault of the tenants. Moreover, the unfairness was compounded by the decision to pitch the penalty at the very top of the available range.

16. For the Council, Ms Staunton submitted that the evidence of a breach of reg 4 was overwhelming. That had not merely permitted, but obliged, the Council to serve a Remedial Notice. There was no suggestion that the Remedial Notice had not reached its destination and Mr Redmond had had every opportunity to comply with it. Whether or not the tenants had misconducted themselves, the landlord's obligation under the 2015 Regulations was clear and unambiguous. So too was the underlying statutory purpose, namely to protect residential tenants from the risk of serious injury or even death. Ms Staunton further contended that the level of the PN was proper. This was a case of a professional landlord. His obligations were clear, as were the terms of the Remedial Notice. The Tribunal could only proceed on the footing that Mr Redmond had simply decided to disregard what was required of him and knowingly put his tenants at entirely avoidable risk.

Conclusions

17. In my view the Council acted properly in serving a PN on Mr Redmond. The fact that he was struggling to manage his tenants was no answer to his continuing obligations under the 2015 Regulations. Those Regulations do not exist only to protect well-behaved tenants, and it is not for a landlord to decide whether or not to comply with what Parliament, through important safety-driven legislation, has enacted.

18. I am, however, persuaded that the level of penalty here was not reasonable. I fully accept that considerable respect must be given to the Council's policy and that it is not open to me to challenge the policy. But my difficulty with the Council's case is that it seems to me that it has not applied the policy, or at least has not done so in a fair way. On the material presented, it was not shown that Mr Redmond is a repeat offender when it comes to smoke and carbon monoxide alarms. The evidence, such as it was, pointed to there having been a carbon monoxide alarm at the property quite recently and I am prepared to accept his assertion that smoke alarms had been installed too. I further accept his case that the absence of carbon monoxide and smoke alarms at the time of the Council's inspection was attributable to the wrongful acts of the tenants. I am also prepared to accept that Mr Redmond envisaged getting rid of his tenants quite soon after the Remedial Notice was served and that he was not planning to leave their replacements without the protection to which the law entitled them. In these circumstances, the period of the breach was relatively brief and it was not likely that, absent the intervention of the Council, it would have continued for a substantial period into the future. Stepping back, and viewing the matter in the round, I consider that the imposition of a penalty set at 100% of the available sum was unreasonable and impermissibly harsh in disregarding factors which, under the

Council's own protocol, needed to be taken into account, in relation to both culpability and harm (including the period of risk and likely future period of risk).

19. It follows that the appeal must be allowed and the level of the penalty varied. I have reminded myself that the protocol, while deliberately concise and couched in straightforward language, is intended to be an instrument to facilitate fair decision-making, and has built-in flexibility (note in particular the sentence under the heading , 'Further adjustments and representations' from which I have quoted above). It is intended to promote consistency but not to serve as a straitjacket. Doing the best I can, I have concluded that, on a fair application of the Council's criteria, the justice of the case is met by substituting a penalty of £2,500.

Signed Anthony Snelson
Judge of the First-tier Tribunal
Date: 30 April 2024