FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CQ/HNA/2019/0015 - 17**
Property	**:**	**159 Stoney Stanton Road, Coventry, CV1 4FW**
Applicants	**:**	**Faizul Aqtab Siddiqi & Noorul Aqtab Siddiqi**
Respondents	**:**	**Coventry City Council**
Date of Application	**:**	**22nd July 2019 (Received 25th July 2019)**
Type of Application	**:**	**Appeal against a Financial Penalty under section 249(a) of the Housing Act 2004**
Tribunal	**:**	**Mr V Ward BSc Hons FRICS** **Judge JR Morris** **Judge D Barlow**
Date & Venue of Hearing	**:**	**20th February 2020 at Coventry Magistrates Court**
Date of Decision	**:**	**14th May 2020**

DECISION

Decision

1. The Tribunal decides that the Financial Penalty Notices were not defective.

2. The Tribunal confirms the Financial Penalty in respect of the Common Parts of 159 Stoney Stanton Road, Coventry CV1 4FW of £624.50 to be paid by Faizul Aqtab Siddiqi and of £624.50 to be paid by Noorul Aqtab Siddiqi.

3. The Tribunal confirms the Financial Penalty in respect of Flat 1, 159 Stoney Stanton Road, Coventry CV1 4FW of £624.50 to be paid by Faizul Aqtab Siddiqi and of £624.50 to be paid by Noorul Aqtab Siddiqi.

4. The Tribunal confirms the Financial Penalty in respect of the Flat 3, 159 Stoney Stanton Road, Coventry CV1 4FW of £3,687.00 to be paid by Faizul Aqtab Siddiqi and of £3,687.00 to be paid by Noorul Aqtab Siddiqi.

Reasons

Background

5. On 2nd May 2018, Coventry City Council ("the Respondent") served improvement notices under sections 11 and 12 of the Housing Act 2004 ("the Act") on Faizul Aqtab Siddiqi & Noorul Aqtab Siddiqi ("the Applicants"), the Secretary of the Jamia Islamia Islamic Centre Trust ("the Trust") and on the 10 Trustees forming the Trust Board. The Schedule 1 of the Improvement Notices stated that Category 1 and 2 hazards exist at the premises, as follows:

159 Stoney Stanton Road - Common Parts

Deficiencies	**Hazards**
Disrepair to roofs Inadequate rainwater goods	Damp and mould growth
Inadequate insulation to roofs walls and floors	Excess cold
Malfunctioning lighting to courtyard Inappropriate siting to hallway switch on first floor	Lighting
Lack of earthing to electrical system Defective detection system	Electrical hazards
Gaps in fire separation	Fire
Entry gate closes forcefully especially in windy weather	Entrapment or collision

Flat 1 159 Stoney Stanton Road

Deficiencies	**Hazards**
Leak to ceiling	Damp and mould growth
Electric heaters not working	Excess cold
Bedroom light does not work effectively	Lighting

Water comes up into the shower tray when the washing machineis on	Personal hygiene, sanitation & drainage
No protective bonding to the flat	
Regular power cuts	
Use of trailing cables due to insufficient sockets	Electrical hazards
Redundant light fittings	
No thumb-turn lock to front-door	Fire
Pronounced cracking and movement to plaster on the ceiling of the internal room	Structural collapse and failing elements

Flat 3 159 Stoney Stanton Road

Deficiencies	**Hazards**
Broken shower surround	Damp and mould growth
Inadequately sized heater to bedroom	Excess Cold
Non-working lights	Lighting
Broken shower surround	Personal hygiene
Broken light in bathroom	Falls associated with baths etc
Trailing cables and broken sockets	Electrical hazards
No thumbturn to flat door	Fire

6. Schedule 2 of the Improvement notices specified the remedial works to be carried out. The Notice stated that, although there was no obligation to commence the remedial works until after 28 days of service of the Notice, they were to be carried out within 60 days of service of the Notice.

7. The Improvement Notice was not complied with and therefore an offence under section 30 of the Act was committed in respect of which a Financial Penalty may be imposed.

8. On 20th December 2018, the Respondent served notices of the intention to impose Financial Penalties upon the Applicants as follows:

159 Stoney Stanton Road	£6,049
Flat 1 159 Stoney Stanton Road	£5,849
Flat 3 159 Stoney Stanton Road	£18,849

9. Following representations from the Applicants, on 25th June 2019, the Respondent served the following Financial Penalty Notices on the Applicants:

159 Stoney Stanton Road	£624.50
Flat 1 159 Stoney Stanton Road	£624.50
Flat 3 159 Stoney Stanton Road	£3,687

It is important to note that a penalty notice for each element of the Property was served on each Applicant. Therefore, the total of the penalties levied was £9,872.00.

10. By way of applications received on 25th July 2019, the Applicants appealed against the financial penalties. The appeals were heard at Coventry Magistrates Court on 20th February 2020. Both parties provided a bundle of documents for the hearing and with the Tribunal's consent were allowed to make representations on certain points in writing after the hearing.

11. Statutory Guidance has been issued by the Department for Communities and Local Government dated April 2018 which was included in the Respondents bundle. Also included was a policy adopted by the Respondent for determining financial penalties in their area.

Background to the imposition of the penalties.

12. The first contact between the parties was in February 2017, following a complaint by the tenant of Flat 3 which lead to an inspection in March 2017 by Ms Taylor, following which the Respondent issued a schedule of works to the Applicants on 21st March 2017. The Applicants stated that after receiving this schedule, they co-operated fully with the Respondent and after further visits, Ms Taylor noted that some works had been carried out.

13. However, after the visit of 26th July 2017, the schedule was updated with further works covering items that had been raised by the tenants. A further visit was carried out on 13th September 2017 and a further updated schedule sent to the Applicants.

14. On 3 November 2017, the Respondent sent an email to the Applicants that no confirmation of works (or certificates as appropriate) had been received and a period of 7 days was given in compliance. On 13 November 2017, a schedule of works was sent to the Applicants requesting that all remaining works be carried out within one calendar month and advising that a further inspection would be carried out on 19 December 2017.

15. This inspection was carried out and a note of outstanding works taken.

16. On 8th January 2018, a schedule of works was sent to Mr Siddiqui. This stated that the Respondent did not intend to take formal action at this time but detailed outstanding works and documents required. It also advised that a further visit would take place on 7th February 2018 and if satisfactory progress had not been made then the Respondent would be obliged to carry out a full assessment under the Housing Health and Safety Rating Scheme. Depending on the severity of risks noted, enforcement action which may include the service of notices and or prosecution.

17. This visit was postponed until 11th April 2018. Outstanding works from the schedule and any others that apparent, were noted.

18. On 2nd May 2018, the Improvement Notices, were served. No appeal was received.

19. On 12th July 2018, a further inspection was carried out with any issues noted.

20. On 20th December 2018, the Respondent served the notices of the Intention to Impose Financial Penalties as follows upon the Applicants.

21. Following representations from the Applicants, on 25th June 2019, the Respondent served the Financial Penalty Notices on the Applicants.

22. On 25th July 2019, the Applicants appealed against the financial penalties.

Inspection

23. The inspection took place on the morning of the hearing. Present at the inspection and hearing were the following:

For the Applicants
Mohammed Haroon – Applicants' Representative
Zakia Mohabbat – Applicants' Letting Agent
Shafiek Masram – Property Maintenance Manager
Farzana Hannan – Trustee of Jamia Islamia Islamic Centre Trust (Hearing Only)

For the Respondent:
Claire Taylor – Housing Enforcement Officer
Adrian Chowns - Property Licencing Manager
Madeline Edwards – Observer

24. The Property is a terraced, two storey building on Stoney Stanton Road, approximately one mile to the north of the city centre. The Tribunal were advised that in total the Property contains seven residential units and one storage/office unit used by the Trust. To the front elevation, the Property is surmounted of a pitched roof whilst the rear elements are under a flat roof.

25. The Common Parts comprise a passage way from the front elevation leads to a yard off which are four of the residential units, numbers 4, 5, 6 and 7 with the remainder on the first floor served by a communal stairway and landing. Heating to the residential units is provided by electric heaters.

26. The accommodation offered by Flats 1 and 3 is as follows:

<u>Flat 1</u>
Entrance hall
Shower room with WC
Kitchen
Two bedrooms

Flat 3
Entrance hall
Shower room with WC
Kitchen
One bedroom

27. The Tribunal noted all the items on the Improvement Notice and found that they had been remedied.

Submissions of the Parties

28. The grounds for the appeal advanced by the Applicants were as follows:

1. The Final Penalty Notices were defective.
2. The actions of the tenants prevented compliance with the Improvement Notices.

3. The penalties levied took no account of the loss of rent and legal costs incurred in respect of flat 1 and flat 3.

29. With regard to **Ground 1** the Applicants submitted a statement of case and made oral submissions at the Hearing. The Respondent submitted a written outline legal argument prior to the hearing. At the hearing the Respondent's Representative made an oral submission setting out the legal reasoning for serving the Improvement Notice and the Financial Penalty Notices upon the Applicants in detail. In response to which the Applicants' Representative, Mr Haroon, produced an email from the Charity Commission dated 19th September 2019 to him.

30. As neither the argument nor the email was included in the Bundle the parties were directed to make additional written submissions as follows:

The Respondent was to set out in writing the argument presented orally at the hearing and in so doing address the points raised in the email from the Charity Commission to the Applicants' Representative by 1st April 2020**.**

The Applicants or their Representative were to make a reply, if they wished, by 17th April 2020.

31. These Directions were complied with.

32. With regard to **Ground 2** the Applicants submitted a statement of case and made oral submissions at the hearing. The Respondent's Representative made oral submissions stating the reasons for arriving at the initial penalty amounts and for reducing these amounts having regard to the representations made by the Applicants.

33. As all the information regarding the submissions made by the Respondent's Representative were not provided in the Bundle the parties were invited to make written submissions as follows:

34. The Respondent was to provide copies of the penalty matrices relating to the reduced penalty amounts (i.e. the amounts that were indicated on the final notices) and the method by which these sums were arrived at from the amounts shown in the notices in accordance with its Policy by 1st April 2020.

35. Following the recent Upper Tribunal (Lands Chamber) cases of:
London Borough of Waltham Forest and Allan Marshall. Re 17 Horner Court South Birbeck Road London E11 4HY
London Borough of Waltham Forest and Huseyin Ustek. Re 6 Flempton Road Leyton London E10 7NH
UT Neutral Citation number: [2020] UKUT 0035 (LC)
the Tribunal must have particular regard to the Local Housing Authority's Policy in respect of Financial Penalty Notices.

36. These were recent cases and the Tribunal considered it in the interest of justice that the Applicants or their Representative should make submissions as to the method by which the penalty amounts were arrived at from the amounts shown in the notices in accordance with the Respondent's Policy by 17th April 2020.

37. These Directions were complied with.

38. With regard to **Ground 3** both parties submitted a statement of case and made oral submissions at the hearing.

Ground 1 The Financial Penalty Notices were defective

39. The Applicants submit that the Financial Penalty Notices were defective in that they were not served on the correct persons in that they were only served on the Applicants.

40. No appeal was made in respect of the Improvement Notices and no issue was raised to say that the Financial Penalty Notices were defective because the Improvement Notice was served incorrectly. However, from the Applicants' case it appears that they were of the opinion that the Financial Penalty Notices should have been served on the same persons as the Improvement Notice i.e. all members of the Trust Board and not just the Applicants. The law in respect of service of these two Notices is therefore set out here.

41. Improvement Notices are required to be served pursuant to Schedule 1 of the Housing Act 2004 which states:

Paragraph 3(3) regarding Flats
In the case of an HMO which is a flat, the local housing authority must serve the notice either on a person who—
(a) is an owner of the flat, and
(b) in the authority's opinion ought to take the action specified in the notice, or on the person managing the flat.

Paragraph 4 regarding Common Parts

(1) This paragraph applies where any specified premises in the case of an improvement notice are—
(a)common parts of a building containing one or more flats;
(b)... (not relevant)

(2) The local housing authority must serve the notice on a person who—
(a) is an owner of the specified premises concerned, and
(b) in the authority's opinion ought to take the action specified in the notice.

(3) For the purposes of this paragraph a person is an owner of any common parts of a building if he is an owner of the building or part of the building concerned, or (in the case of external common parts) of the particular premises in which the common parts are comprised.

Paragraph 5 regarding Copies

(1) In addition to serving an improvement notice in accordance with any of paragraphs 1 to 4, the local housing authority must serve a copy of the notice on every other person who, to their knowledge—
(a) has a relevant interest in any specified premises, or
(b) is an occupier of any such premises.

(2) A "relevant interest" means an interest as freeholder, mortgagee or lessee.

(3) For the purposes of this paragraph a person has a relevant interest in any common parts of a building if he has a relevant interest in the building or part of the building concerned, or (in the case of external common parts) in the particular premises in which the common parts are comprised.

(4) The copies required to be served under sub-paragraph (1) must be served within the period of seven days beginning with the day on which the notice is served.

42. Financial Penalty Notices are required to be served pursuant to the following provision of the Housing Act 2004:

Section 249A Financial Penalty Notices 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),

Section 246 Service of Documents:

(1) *Subsection (2) applies where the local housing authority is, by virtue of any provision of Parts 1 to 4 or this Part, under a duty to serve a document on a person who, to the knowledge of the authority, is—*
(a) a person having control of premises,
(b) a person managing premises, or
(c) a person having an estate or interest in premises

(2) The local housing authority must take reasonable steps to identify the person or persons falling within the description in that provision.

Section 262 Meaning of "lease", "tenancy", "occupier" and "owner" etc.
(*1) – (6) … (not relevant)*
(7) In this Act "owner", in relation to premises—
(a) means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion; and
(b) includes also a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceeds 3 years.

Section 263 Meaning of "person having control" and "person managing" etc.
(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—
(a) receives (whether directly or through an agent or trustee) rents or other payments from—
(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

43. With regard to the service of the Improvement Notice the Respondent appears to have served the Applicants as "owners" under Schedule 1 paragraphs 3(3) and 4 and the Trust Board as person entitled to copies under paragraph 5. The Applicants appear to be of the opinion that all were in effect served as "owners" under paragraph 3(3). Therefore, the Applicants submit that all should also have been served as "owners" under section 263 in respect of the Financial Penalties.

Applicant's Submissions in the Statement of Case and at the Hearing

44. The Applicant's ground for appeal was that:

The Financial Penalty Notices in respect of the Common Parts and Flats 1 and 3 were defective in that they made Faiz Aqtab Siddiqi and Noor Aqtab Siddiqi (the Applicants) personally liable as the owners of the Property.

45. The submissions made in the statement of case and in an oral submission are précised and paraphrased as follows:

46. Mr Haroon referred to the Section 249A, Section 246 and 263 of the Housing Act 2004.

47. He said that the Respondent states that:

The Applicants have both been named on HM Land Registry and it is entirely reasonable to consider them as owners.

48. Therefore, the Respondents contend that the Applicants are persons upon whose conduct amounts the failure to comply with an Improvement Notice and persons upon whom the Financial Penalty may be served.

49. In response to that argument Mr Haroon said that the Applicants are both described on the entry for the Property of Title Number WM278076 at HM Land Registry as Trustees of the Jamia Islamia Islamic Centre Trust (the Trust) (Copy provided). He said that the Trust was a charity and therefore to determine the Applicants' status, reference had to be made to the Public Trustee Act 1906, Charity Commission's Guidance and the Charity Commission had been contacted and a copy of the email received, dated 19th September 2019, was provided.

50. This email had not been included in the Bundle but was read out at the Hearing. As stated above, a copy of the e mail was later sent to the Respondent and submission were made in respect of it. The stated as follows:

To confirm the holding /custodian trustee holds the title to all the property of the trust but is not involved in the day to day management of the trust. The title of the property is vested in the holding/custodian trustee in name only. The powers and duties of a holding/custodian trustee are set out in section 4 of the Public Trustee Act 1906.

The managing trustees retain the management of the trust property and the exercise of any powers under the trust. The holding/custodian trustee have a duty to concur in and perform all lawful acts necessary to enable the managing trustees to administer the charity efficiently.

The holding/custodian trustee can also be a managing trustee, if they have been validly appointed to both positions., in accordance with your governing document: Constitution adopted 6th June 2010.

Therefore rte. holding/custodian trustee hold the land on behalf of the charity and do not own the land, as the land does not belong to them. The land is still

held for the charity even though their names maybe on the Land Registry records.

To confirm a holding trustee is another name for a custodian trustee.

51. In his reply to the Directions for the parties to make additional representation after the hearing Mr Haroon provided a further email which he said supported his argument. This was not included in the hearing but the advice given is much the same as the e email of 19th September 2020. The text is stated here for the sake of completeness and transparency:

Thank you for your email it may be helpful if I first clarify that under section 70 of the Charities Act 1970 the Commission does not have jurisdiction to determine the title to property.

What I can give is our view of the role of holding trustees where charity property is concerned. When a charity has no legal personality of its own that it is not incorporated, then it cannot hold title in its own name therefore named individuals or trust corporations such as the Official Custodian must hold the title for them.

As my colleague…informed you holding trustees act on the on the direction of the managing trustees and do not own the property which is held in trust on behalf of the charity. Charity land is subject to the restrictions of secton 117 – 124 Charities Act 2011 and the Land Registry entry for the property should reflect that the property is charity land.

If there is a legal question over the title the trustees should seek their own specific legal advice on the matter.

52. In summary Mr Haroon submitted as follows:

53. The Jamia Islamia Islamic Centre Trust is an unincorporated charitable association and as such is not a single legal body in its own right, but a collection of individuals, and so cannot hold land in the name of the association. Instead land is held on behalf of the association by "holding trustees" appointed by the "managing trustees" under the terms of the charity's constitution.

54. The "holding trustees" may or may not be "managing trustees" as well, but in any event, they cannot act without the agreement of the "managing trustees" under the terms of the charity's constitution. The "holding trustees" do not own the land but hold it for the charity, even though their name is on the Land registry records.

55. Reference was made to the Public Custodian and to Custodian Trustees in the Charity Commission Guidance. The Public Custodian is a public body which holds charitable land on behalf of an unincorporated charitable association and a Custodian Trustee is a company or other corporate body that holds property for a charity. The Tribunal therefore found that neither of these are applicable in this instance as the land is held by "holding trustees".

56. In addition, Mr Haroon referred to the dictionary definition of "owner" as being a person who has *exclusive rights and control over property*.

57. Therefore, Mr Haroon submitted that the Applicants could not be the "owners". In reply to questions he said that the Jamia Islamia Islamic Centre Trust was the "owner", and the Improvement Notice and the Financial penalty Notice should have been addressed to the Trust or at least to the Chairman as representing the Trust. He said that it could not be right that the Applicants should be held personally responsible for the Financial Penalty merely because they were named as the "holding trustees" at HM Land Registry.

58. He said that the Improvement Notice had not been challenged on the basis that it had not been addressed to a person who was not the owner under Schedule 1 Paragraph 11 Housing Act 2004 because the Notice had been served on all the Trustees, "holding" and "management". It was therefore not apparent until the Financial Penalty Notice was received that the Applicants were being held personally liable.

59. Mr Haroon referred to the email of the 19th September 2019 from the Charity Commission which he said confirmed his position.

60. At the Hearing the Tribunal noted that Mr Haroon had not referred to the definition of "owner" in section 262(7) Housing Act 2004. The Tribunal said that their preliminary view subject to the Parties arguments was that the Applicants as "holding trustees" on the Land Registry records could dispose of the fee simple they were "owners" as defined in section 262(7) and so the proper persons to be served with the Financial Penalty.

61. The Tribunal added that when the Charity Commission said in its email that the Applicants were not the "owners", they were taking a general view and did not have in mind the specific statutory definition. The Tribunal asked Mr Haroon whether he had any further oral submissions in reply having heard the Respondent's argument.

62. Mr Haroon said that it appeared contrary to common sense that the "holding trustees" could be treated as the owners and could dispose of the land, at least on the face of it, without any reference to the charitable organisation. It would enable two disreputable persons in that position to defraud the association and, in breach of their trust, sell the property and abscond with the proceeds.

63. The Tribunal agreed that this was potentially possible which is why at least two persons were required for a valid receipt of funds to reduce this possibility (see Restriction 2 on Proprietorship Register Entry WM278076), why it was important to have trusted persons in that position, and why the Land Registry Rules and legislation relating to both charities (Charities Act 2011 sections 117 – 121) and trustees (Trustee Act 1925 and Trusts of Land and Appointment of Trustees Act 1996) contain provisions to reduce this risk e.g. a transfer must contain details about the charity (section 122(2) Charities Act 2011).

64. The Tribunal said that an "owner" is a legal concept in law and its definition depends on the context in which it is used.

65. In the context of land prior to 1925 it was difficult for a purchaser to identify all the people who held an estate or interest in the land. The Law of Property Act 1925 was passed to simplify this situation. It stated at Section 1 that all land could only be held by up to 4 persons under a freehold legal estate in fee simple absolute in possession. This means that the land is held for an indefinite period free of any obligations. The "legal" aspect means that it is the 'best' title and now is registered at HM Land Registry under the Land Registration Act 2002. A purchaser or mortgagee or other person would therefore know who they needed to deal with in respect of the land i.e. the persons named on the Register as having the legal estate. In this case this is the "holding trustees". Persons not named on the Register, which in this case are the other Trustees, have an equitable interest.

66. The importance of this classification for the purposes of this case is that provided a person such as a purchaser deals with the two "holding trustees" who have the legal estate he or she will take free of any of the equitable interests. These are said to be "overreached" under section 2 Law of Property Act 1925. However, the holders of the legal estate will still be liable to the holders of the equitable interests even if the purchaser is not. The "holding trustees" are still bound by the Trust Deed and related legislation.

67. The Tribunal noted that in relation to Ground 1, the Respondent's full legal argument based upon the advice it had been given had not been included in the Bundle but was presented orally only. Therefore, the Tribunal gave Directions, referred to above, for the Respondent to provide this argument to the Applicants to give them an opportunity to consider it in detail and Mr Haroon was required to provide a copy of the email of the 19th September 2020. Mr Haroon's reply on behalf of the Applicants to the Respondent's submission is set out after the Respondent's Case below.

Respondent's Submissions in the Statement of Case, at the hearing and following the hearing

68. The Respondent's submissions in its statement of case, at the hearing and following the hearing are here précised and paraphrased.

<u>At the Hearing</u>

69. The Respondent acknowledged that Schedule 1 Paragraph 3(3) Housing Act 2004 states that an Improvement Notice must be served on the owner of the flat. He also acknowledged that alternatively the Notice could be served on the person managing the flat who was defined in Section 263(3) Housing Act 2004 as:

the person who, being an owner or lessee of the premises—
(a) receives (whether directly or through an agent or trustee) rents or other payments from—
(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises;

70. However, he added that, notwithstanding the Charity Commission stating in its email that the Applicants were not the owners, Section 262(7) Housing Act 2004 states that:

In this Act "owner", in relation to premises—
means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion;

71. Taking into account this definition, with regard to the service of the Financial Penalty Notice, Mr Chowns referred to Section 246 Housing Act 2004 which states that:

Service of documents

(1) Subsection (2) applies where the local housing authority is, by virtue of any provision of Parts 1 to 4 or this Part, under a duty to serve a document on a person who, to the knowledge of the authority, is—
(a).....
(b) a person managing premises, or
(c) a person having an estate or interest in premises

72. He therefore submitted on behalf of the Respondent that the Applicants were the "owners" by reason of the definition of *owner* in section 262(7) and so were the correct persons upon whom the Improvement Notice and the Financial Penalty Notice were served.

73. By way of further justification for service of the Financial Penalty Notice, Mr Chowns went on to state the advice that the Respondent had received as to why the Applicants were treated as:

a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises in Section 262(7)(a)
and
a person having an estate or interest in premises in Section 246 (1)(c)

74. He said that pursuant to the Law of Property Act 1925, Trusts of Land Appointment of Trustees Act 1996 and the Charities Act 2011 an unincorporated charitable association cannot hold land in the name of the association (as confirmed by the Charity Commission). Land can only be held for an unincorporated association under a trust of land by between 2 persons (section 27 Law of Property Act 1925) and 4 persons (section 34 Law of Property Act 1925). These persons hold the legal estate in the land and only they have the ability to dispose of it. They are the "holding trustees" referred to by the Charity Commission. In this instance the Applicants are the "holding trustees". As "holding trustees" with the legal estate their names and addresses will appear on the Land Register and so can been easily be identified and contacted. It was supposed that is was why the legislation states that Notices are to be served on the owners as defined in section 262(7) and as identified in section 246(1)(c).

75. Mr Chowns said that the reason for including all the Trustees in the Improvement Notice was due to the requirement under Schedule 1 Paragraph 5 Housing Act 2004 which states that:

> *(1) In addition to serving an improvement notice in accordance with any of paragraphs 1 to 4, the local housing authority must serve a copy of the notice on every other person who, to their knowledge—*
> *(a) has a relevant interest in any specified premises, or*
> *(b) is an occupier of any such premises.*
>
> *(2) A "relevant interest" means an interest as freeholder, mortgagee or lessee.*
>
> *(3) For the purposes of this paragraph a person has a relevant interest in any common parts of a building if he has a relevant interest in the building or part of the building concerned, or (in the case of external common parts) in the particular premises in which the common parts are comprised.*
>
> *(4) The copies required to be served under sub-paragraph (1) must be served within the period of seven days beginning with the day on which the notice is served.*

Following the Hearing

76. In the Respondent's submission made after the hearing the Respondent referred to the email from the Charity Commission which provides advice and guidance about the different types of Trustees involved with the Charity. The Respondent said that because charities may be set up differently the advice may not be relevant to the Applicants' situation.

77. The Respondent pointed out during the hearing that the area relating to this case is extremely complicated noting that the following legislation was relevant:
The Trusts of Land and Appointment of Trustees Act 1996,
The Trustees Act 1925,
The Public Trustee Act 1906,
The Charities Act 2011,
The Law of Property Act 1925
Housing Act 2004.

78. In particular the Respondent stated by reference to supporting legislation that the Jamia Islamia Trust is an unincorporated charity and therefore is not a legal body and cannot hold property or enter into contracts in its own right. The property must therefore be held for the charity by trustees.

79. The Respondent acknowledged that this was not in contention but was an important point when identifying the types of trustee relevant to the case.

80. The Respondent went on to refer to the Government Guidance on Trustees stating that the Applicants were "holding trustees" who are individuals appointed to hold property for the charity. This was a role that was separate from the "charity or managing trustee" who are responsible for management of

the charity. It was added that the Applicants are not "charity (managing) trustees".

81. A "holding trustee" is an individual appointed to hold the legal title to an unincorporated charity's land on trust for the charity's specific purposes. The title to the property is vested to the "holding trustee" and as such their names will appear on the land registry documentation. The Trustee Act 1925 states that there can be only be a maximum of 4 "holding trustees" (a minimum of 2) and essentially the "holding trustees" have the power to dispose of or deal with land. The Applicants are named on the Land Registry as *trustees of land* and *under* section 6 of the Trusts of Land and Appointment of Trustees Act 1996 *have in relation to the land subject to the trust all the powers of an absolute owner.*

82. Under section 1 of the Law of Property Act 1925 the only estates in land which are capable of subsisting or of being conveyed or created at law are—
(a) An estate in fee simple absolute in possession;
(b) A term of years absolute.
All other estates, interests, and charges in or over land take effect as equitable interests.

83. The Applicants can therefore dispose of the fee simple.

84. Section 242 (7) of the Housing Act 2004 provides the definition of an owner in relation to premises as a person," who *is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion".*

85. The Applicants were served Improvement notices for the reasons explained and they have failed to comply. It is submitted that the Applicants are "holding Trustees" and as such they have the right to dispose of the fee simple – in other words sell the property as if they were an owner as defined by the Housing Act 2004.

86. Clearly the penalty must be imposed on the person that has committed the offence and in order to do so they must be a legal entity – i.e. an individual, company or organisation that has legal rights and obligations.

87. It cannot certainly be the situation that no one, whether they be an individual, company or organisation is unaccountable for their failure to act or to comply with legal requirements. In other words, someone cannot be immune from action where an offence has been committed.

88. In any event it is not incumbent for the Council to prove that the applicant are the owners of the flats and communal parts in question. It is for the Council to satisfy itself, beyond reasonable doubt, that the applicant's conduct amounted to a "relevant housing offence" in respect of premises in England (see sections 249A (1) and (2) of the Housing Act 2004).

89. The Council has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty (see section 249A and paragraphs 1 to 8 of Schedule 13A of the 2004 Act);

Applicant's Submissions in Response to the Respondent's case following the Hearing

90. In reply to the suggestion by the Respondent that the advice form the Charity Commission was not relevant to the present situation it was said that The Applicants submitted that as an unincorporated trust with Trust Board with Managing Trustees and "holding Trustees" it was directly relevant to the case.

91. The Applicants said that they had asked the Charity Commission whether the "holding trustees" were owners stating that this matter is being raised not because any trustees or the trust are seeking to sell charity land but whether they are "owners" of the property in law and so can dispose of the fee simple as set out in the 2004 Act. And as such they should be identified as owners of the property for all matters concerning the property.

92. The Applicants referred to the emails from the Charity Commission which stated categorically that the "holding trustees" act on the direction of the managing trustees and do not *own* the property which is held in trust on behalf of the charity.

93. The above advice was put to a Tribunal. However, the judge on the Panel said that it seemed to him that in the present case, the definition of owner has to be taken from the Housing Act 2004, Chapter 34. Part 7, para 7 (a) which states:

94. *In this Act "owner", in relation to premises - (a) means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion...".*

As the holding trustees names are on the Land Registry records, they can dispose of the fee simple and the Land registry would allow the sale as they are the "owners".

95. The Judge made it clear at the hearing that this was his preliminary view subject to arguments from both parties.

96. The Applicants set out a number of points with which they agreed with the statements of the Respondent and the authority quoted but disagreed with the interpretation. On each of the points the Applicants submitted that all the powers of ownership were exercised by or with the authority of the Trust Board and not the Applicants. In particular:

97. It was agreed that section 6 (1) of the Trusts of Land and Appointment of Trustees Act 1996 "*that for the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner*" applied. However, the powers of an absolute owner are subject to the trust. The Applicants provided a copy of the Central Jamia (Islamic Studies Centre) Trust Deed Clause 4 of which gives the Trustees the powers referred to in the Act. However, those powers rest with the Trust Board of the charity and not the Applicants.

98. It was agreed that Section 177 of the Charities Act 2011 provides a meaning for *Charity Trustees* as *"those having general control and management of the administration of the Charity"* but this is exercised by the Trust Board not the Applicants.

99. It was agreed that under the Government Guidance for trustees, "*Trustees have independent control over, and legal responsibility for, a charity's management and administration"* but this is exercised by the Trust Board not the Applicants.

100. It was agreed that the property of the Trust is held for the charity by its Trustees, but this is as directed by the Trust Board of the Trust and not the two Applicants.

101. It was agreed that the Property was held by the Applicants as "holding trustees" but they were appointed by the Trust Board and pursuant to section 6 of the Trusts of Land and Appointment of Trustees Act 1996 and hold the Property for the Charity.

102. The Applicants did not agree that they were not "charity (managing) trustees" as suggested by the Respondent. They had been validly appointed as both "managing trustees" and "holding trustees".

103. The Applicants agree that as "holding trustees" for charity property they are not persons who are *for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion* under Section 242 (7) of the Housing Act 2004 and so are not "owners" within that definition upon whom the Financial Penalty Notice should be served.

104. The Applicants cannot legally dispose of the fee simple in common as "holding trustees" without the consent of the Trust Board. Before any sale the "holding trustees" have to provide proof of authority to sell charity land. The Applicants cannot be legal beneficiaries of the disposal of the fee simple in common. If they sought to disposal of the fee simple in common contrary to the requirements of the Deed of Trust of the charity, then they would be committing a fraudulent criminal act. No fraudulent act enables a person to become the "owner" and then be legally entitled to benefit from the sale transaction whether that relates to property or other entity of value.

105. Therefore in conclusion the Applicants submit that they are "holding trustees" of the charity property and are not "owners" within the definition set out in section 242 (7) of the Housing act 2004 as they are not "*entitled to dispose of the fee simple of the premises whether in possession or in reversion". They can only do so under* section 6 (1) of the Trusts of Land and Appointment of Trustees Act 1996 *subject to the trust* which requires the consent of the Trust Board.

106. The Applicants stated that the respondent should not have imposed the Financial Penalty Notice upon the Applicants alone. The Applicants are not saying that no one is accountable. The Applicants say that they are not

accountable individually and personally as argued by the Respondent. That responsibility, if there was one, would lie with the Trust Board.

107. The Applicants submitted that the respondent's statement that it was not incumbent upon it "*to prove that the Applicants are the owners of the flats and communal parts in question. It is for the Council to satisfy itself, beyond reasonable doubt, that the Applicant's conduct amounted to a "relevant housing offence" in respect of premises in England (see sections 249A (1) and (2) of the Housing Act 2004*)" was fresh justification for its actions and shouldn't be now permitted.

108. The Applicants said that contrary to its claim the Respondent had not complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty (see section 249A and paragraphs 1 to 8 of Schedule 13A of the 2004 Act) because it has incorrectly sought to impose fines on the Applicants personally who are not the owners of the property. They have no legal right to sell the fee simple without the consent of the Trust Board.

Decision - Ground 1 The Final Penalty Notices were defective

109. The issue for the Tribunal to consider is whether the Final Penalty Notices were defective as not being served on all the correct persons.

110. Under section 246(1)(b) of the Housing Act 2004, the Financial Penalty Notice must be served on "*a person managing premises"*.

111. Under section 263 that means *the person who, being an* ***owner*** [emphasis added] *or lessee of the premises—*

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) …

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises;

112. Under section 262(7) an *"owner", in relation to premises—*

(a) means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion;

113. The Respondents submitted that the Notices were served on the persons named as the Registered Proprietors of the Property on Title Number WM278076 at HM Land Registry who were described as trustees of the Trust. These persons were the Applicants.

114. It was agreed that the charity was an unincorporated association and that the Applicants were the "holding trustees". There was some dispute by the Respondents as to whether the Applicants were "holding and management

trustees" or just "holding trustees". From the Land Registry Entry and the Trust Deed the Tribunal were satisfied that they were "holding and management trustees" but that the additional role of "management trustee" did not alter their position with regard to the Notice.

115. The Respondents then sought to serve the Notice on the person managing the Property as required by section 246 who is defined as the "owner" of the Property in section 263 as the person "*entitled to dispose of the fee simple of the premises whether in possession or in reversion"*. The Respondent stated that the Applicants are those persons.

116. The Tribunal at the Hearing said that, subject to argument to the contrary, it agreed that the Applicants were the "owners" for the purposes of serving the Financial Penalty Notice under this legislation.

117. Following a written statement by the Respondent of its argument to the Applicants the Applicant provided an argument with a view to changing the Tribunal's opinion.

118. The Applicants stated that the Trust Board i.e. all the Trustees had independent *control over, and legal responsibility for, a charity's management and administration*. This was agreed. From this it was said that although the Applicants "held" the Property, they were not its "owners" as they could not act without the authority of the Trust Board. In particular they were not "*entitled to dispose of the fee simple of the premises whether in possession or in reversion"* without the authority of the Trust Board. If they did so they would be acting illegally.

119. As stated at the Hearing, the Tribunal was of the opinion that the Applicants were "*entitled to dispose of the fee simple of the premises whether in possession or in reversion"*. In terms of a disposal, a purchaser does not have to look any further than the Registered Proprietors as the persons who can make the disposal provided certain provisions are complied with. These provisions are there to reduce the risk of the Registered Proprietors and "holding trustees" acting unlawfully.

120. In this case, these include a Restriction (entered on the Register pursuant to section 44(1) of the Land registration Act 2002 and Rule 95(2)(a) of the Land Registration Rules 2003) which states that the proceeds of sale must be paid to two or more proprietors as required by section 27(2) of the Law of Property Act 1925.

121. Also since the Charities Act 2011 section 123, a Restriction (Rule 176 of the Land Registration Rules 2003) that no disposition by the proprietor of the registered estate to which secton 117-121 or section 124 of the Charities Act 2011 applies is to be registered unless the instrument contains a certificate complying with section 122(3) or section 125(2) of the Act as appropriate. This is a statement in the document making the disposition stating that the Trust has power to do so. This Restriction is not entered on the Register in this case as the Entry was prior to the 2011 Act, but still applicable. This ensures that the disposition is made

subject to the trust as required by section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996

122. A person such as a purchaser will want to make sure these provisions are complied with but will still be dealing with the Registered Proprietors and "holding trustees".

123. Before making a disposition of land there are certain steps that a charity must follow, particularly to ensure it receives the best price, such as obtaining advice from a surveyor, advertising the property and obtaining an order from the Commission or court if it is a sale to a 'connected' person such as a trustee. However, these are matters that concern the charity not a purchaser.

124. As "holding and management trustees" the Applicants would still be bound by to act in accordance with the Trust Board and comply with the constitution of the Jamia Islamia Islamic Centre Trust and other relevant legislative and case law provisions. It is also possible that although the Applicants are the only persons named in the Financial Penalty Notice there may be a provision in the Trust's Constitution for them to be indemnified in respect of the penalties.

125. Therefore, the Tribunal finds after consideration of all the submissions that notwithstanding that the Applicants are only "holding trustees" and would need to comply with the Restrictions on the Register they are still *entitled to dispose of the fee simple of the premises* in Section 262(7)(a) and so come within the definition of "owner".

126. The Tribunal decides that the Financial Penalty Notices were not defective.

Ground 2 - The actions of the tenants prevented compliance with the Improvement Notices – Applicant's Case

127. The Applicants' asserted that the Respondent had given insufficient weight to the actions and misbehaviour of the tenants, particularly of Flat 3 but also of Flat 1. These tenants, according to the Applicants, deliberately damaged the property then complained to the Respondent about the condition of the same and then refused and or hindered the repair efforts. The end result was that repairs could not be done and the same was used as justification for not paying the rent which resulted in a significant loss to the Trust.

128. The Applicants presented evidence in the form of copies of emails between themselves (in the form of their representatives) and Coventry Law Centre (a provider of free legal advice) who were representing the tenant of Flat 3. These detail a history of the difficulties between the Trust and this tenant on many issues but relevant to this matter, issues concerning access to Flat 3 and the communal areas to carry out repairs and to attend to general maintenance. Ms Taylor was copied into some of these emails by the Applicants to demonstrate the fact that they were endeavouring to carry out the necessary works.

129. On this point, the Tribunal heard evidence from Mr Shafiek Masram who was employed by the Trust as the property maintenance manager for the Property. Whilst trying to carry out maintenance at the Property he had been obstructed

in his duties and also subject to a physical assault of the tenant of flat 3 which was the subject of a complaint to the Police. Contractors became reluctant to carry repairs to Flat 3 or the communal areas for fear of encountering the tenant of flat 3. At the hearing, Mr Masram said that a firearm was found at the Property which had originated in flat 1 and been passed to flat 3, again a Police report was filed.

130. A witness statement was also provided by Mr Tommy Ryan the tenant of flat 2 of which the salient point was that he states that the tenant of flat 3 tried to encourage tenants of the Property to make false complaints which he was not in agreement with as he had always found the Trust responsive when repairs were required.

131. Mr Haroon said that if it was the case that it was only one crafts person that was having difficulty in carry out the repair work then there may be some doubt as to the Trust's claim of obstruction but as it was many different crafts people who were obstructed from the outset from carrying out the work.

132. Mr Haroon said that the Trust sought to evict the tenants from Flats 1 and 3 since 2017 by serving section 21 and section 8 notices. The Tribunal enquired when the tenants of flats 1 and 3, referred to above, vacated and this was given as December 2019 and March 2019 respectively.

133. The Applicants are of the opinion that the works on the latter schedules were not necessarily required by the Respondent but were based on items that the tenants wanted doing. The tenant of Flat 3 made it a habit to contact the Housing Officer directly to report repairs in order to cause problems for the Trust.

134. With regard specifically to the Penalty it was submitted that in relation to Flat 3 it is disproportionate and does not take account of the extent of the effort by the Trust to carry out the required work. Nor does it reflect the intention, and overwhelming efforts of the tenant in Flat 3, to make sure that the work was not done so she could remain in the Flat and pay not rent, nor does it take into account the thousands of pounds of costs incurred by the Trust in wasted professional worker time because the tenant would not allow the workmen to do the work.

135. In response on this ground, Mr Chowns stated that once a complaint was received, the Respondent, as the local housing authority, had a duty to act. In respect of category one hazards, the Respondent must take action whilst in respect of category two hazards, it has discretion.

136. The Respondent was aware that the situation with the tenants was complex and therefore effectively allowed 14 months to pass before formal action was taken with the service of the Improvement Notices which themselves allowed 60 days for works to be completed. If a tenant was obstructing repairs efforts then the Applicants had opportunity to take formal action by either an injunction or eviction.

137. As a final point on this ground, Mr Haroon stated that works were required to other flats at the Property which were carried out. It was only where the tenants were problematic i.e. particularly in the case of flat 3 and to a lesser extent flat 1 where the repairs were not carried out. This, in the opinion of the Applicants, demonstrated a willingness to cooperate with the Respondent and get the necessary works done.

Ground 3 - The penalties levied took no account of the loss of rent and legal costs incurred in respect of flat 1 and flat 3 – Applicant's Case

138. The third ground advanced by the Applicants is that the Respondent took no account of the losses incurred the Applicants in respect of the actions of the tenant of flat 3. These were detailed as follows:

Non-payment of rent	£6,086.00
Cost of wasted labour	£1,500.00
Cost if extra EOCR (?)	£1,600.00
Cost of Court Cases	£3,500.00
Cost to repair damage to flat	£4,750.00
TOTAL	£17,436.00

139. Continuing the Applicants consider that it could not be just and fair that in addition to these costs, the Applicants should be fined a further £7,374.00 resulting in total losses of £24,810.00.

140. The Respondent stated that the penalty was reflective of the amount of works unfinished as at the visit of 12th July 2018. The amount was further greatly reduced following the representations received following the service of the notices of intention.

Grounds 2 and 3 - Respondent's Justification of the Amount of the Financial Penalty

141. In response to Grounds 2 and 3 in which the Applicant's submitted that the Financial Penalty was disproportionate considering the actions of the Tenants in preventing compliance with the Improvement Notice and the loss of rent and costs incurred in respect of Flats 1 and 3 the Respondent's stated as follows.

142. To the Respondent submitted that the Financial Penalty was set at an appropriate level, having regard to any relevant factors, including:

(i) the offender's means;

(ii) the severity of the offence;

(iii) the culpability and track record of the offender;

(iv) the harm (if any) caused to a tenant of the premises;

(v) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or

(vi) the need to remove any financial benefit the offender may have obtained as a result of committing the offence.

143. The Council's policy in respect of civil penalties incorporates a matrix approach to civil penalties in order to aid transparency and consistency in any imposed penalty. The matrix is divided into 6 different equal bands and is used to assist Officer's in arriving at appropriate levels whilst having account of the Guidance provided by Government.

144. Representations were received in response to the notices of intent to issue a civil penalty. Although these representations were made outside of the 28-day period the Council accepted these because it considered that the Applicants representative dealing with these at the time, Ms Hannan, may not have fully appreciated the process for submitting such representations.

145. These were reviewed using the matrix referred to above (a copy of which was provided) and a response was sent to Mr Haroon prior to issuing the Decision Notices. This included the following:

1. That an offence had been committed by both trustees by failing to comply with Improvement Notices under Section 30 of the Housing Act 2004 and neither of them had brought an appeal against those notices;

2. The severity of the offence – the failure to comply with an Improvement Notice is a serious matter which should be reflected in the penalty level.

3. The culpability and track record of the offender – the ultimate consideration here is that landlords (charitable or not) are running a business and should be expected to be aware of their legal obligations. The Landlords in this case had the ability to address these matters informally and pursue action in the courts to gain access to these properties prior to the service of the notices. They also had considerable time to take steps to gain access following the service of the notices. The Council is of the opinion that these matters could have been resolved much sooner without the need for formal notices to be served and through positive action by the Landlords to ensure that progress was being made to comply with the notices following their service and before expiry.

4. The harm caused to the tenants – this is a very important factor which is reflected in the level of penalty and can include the potential for harm (as perceived by the tenant). Clearly the tenant perceived the harm to be high in these cases otherwise they would not have reported the matters to the Council. The Council assessed that there were Category 1 hazards present despite the fact that considerable works had been carried out. Category 1 hazards are considered to be the most serious in terms of the potential for harm and as a result the Council determined that an Improvement Notice was the most appropriate course of action.

5. The punishment of the offender(s) – The Council considers that the penalty should not be considered as a lesser option to prosecution. This matter was

not considered serious enough to warrant prosecution but the failure to comply with the notices required a punitive outcome. The penalties have been set to have a real economic impact on the offender(s) and demonstrate the consequences of not complying with their responsibilities.

6. Deter the offender from repeating the offence – it is hoped that by issuing the civil penalties it will deter the Trust from offending again and ensure that they fully comply with their responsibilities in the future. Prosecution could have been more serious for the Trust and a greater deterrent, but it was not considered appropriate on this occasion.

7. Deter others from committing similar offences – clearly the Council is not proposing to publish the full details of this matter in the public domain if it is concluded at this stage, however if the Trust were to appeal it should be borne in mind that this would be a matter of public record and as such there will be a realisation by all landlords in Coventry that the Council is proactive in levying civil penalties and that the penalty will be set at a high enough level to both punish offenders and deter repeat offender. The Council does not wish to use the Trust as an example of how it will deal with such situations, but it does consider this to be an important message to landlords who do not comply with their responsibilities.

8. Remove any financial benefit the offender may have obtained as a result of the offence – as this suggests the offender should not benefit (financially) from offending. It is clear from the information that you have provided that this is a key consideration for the Council which has been reflected in the revised penalty levels.

146. The Council also considered the totality of the offences – not that there are multiple offences but that because of the nature of the ownership the Council was required to serve two notices (one on each of the Trustees) for the same offence and, as a result of the non-compliance two penalties for the same offence.

147. As a result, it applied a 50% reduction and arrived at the total amount for each Trustee (applicant) of £4,936.00. This was broken down as follows:
Flat 1 - £1,249
Flat 3 - £7,374
Communal - £1,249
Total £9,872
Totality reduction of 50% (each applicant) - £4,936

148. At the hearing, Mr Chowns asked if the Tribunal would take into account a recent Upper Tribunal decision in respect of financial penalties. This referred to a recent decision in respect of appeals by a Local Authority against decisions of this Tribunal (the First-tier Tribunal "the FtT"). The two cases which were consolidated were as follows:

London Borough of Waltham Forest and Allan Marshall
London Borough of Waltham Forest and Huseyin Ustek

Both were noted under the UT Neutral Citation Number: [2020] UKUT 0035 (LC)

149. This decision had only been published a few days before the hearing so the Tribunal gave the parties the opportunity to make written representations about the decision afterwards.

150. Neither party made further submissions in the light of the decision other than Mr Chown's request.

Decision - Grounds 2 and 3 - Amount of the Financial Penalty

151. Essentially Grounds 2 and 3 of the Applicant's case related to the amount of the Financial penalty. In particular the Applicants' submitted that the Financial Penalty was disproportionate considering the actions of the Tenants in preventing compliance with the Improvement Notice and the loss of rent and costs incurred in respect of Flats 1 and 3 representations.

152. Schedule 13A of the Housing Act 2004 sets out the provision s relating to Financial Penalties. There being no issue taken with the procedure for imposing the penalty the procedure the relevant provision is paragraph 10:4

> *(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.*

153. In applying this provision, the Tribunal had regard to the decision in *London Borough of Waltham Forest and Allan Marshall & London Borough of Waltham Forest and Huseyin Ustek* [2020] UKUT 0035

154. In this decision, Judge Elizabeth Cooke referred to the Guidance of the Secretary of State issued in 2016 and again in 2018 with regard to Financial Penalties. At paragraphs 1.2 and 6.3 of the Guidance both local authorities and tribunals are to have regard to the guidance. At paragraph 3.5 the guidance says that local authorities should develop and document their own policy on determining the appropriate level of civil penalty in a particular case; it adds that "the actual amount levied in any particular case should reflect the severity

of the offence as well as taking account of the landlord's previous record of offending". The paragraph goes on the set out the matters that a local authority "should consider" to "help ensure that the civil penalty is set as an appropriate level". These are:
Severity of the offence,
Culpability and track record of the offender,
The harm caused to the Tenant,
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.

155. The learned judge went on the state that given a policy neither the local authority nor a tribunal must fetter its discretion but "must be willing to listen to anyone with something new to say" (as per Lord Reid in *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at page 625) and "must not apply to the policy so rigidly as to reject an applicant without hearing what he has to say" (per Lord Denning MR in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614 page 626).

156. In referring to the approach a tribunal should take in applying a policy, Judge Cooke referred to *R (Westminster City Council) v Middlesex Crown Court, Chorion plc and Fred Proud* [2002] EWHC 1104 (Admin) as being particularly apt. In that case a local authority sought a review of the decision of the Crown Court which allowed an appeal by rehearing of the decision of the authority to refuse an entertainment licence in accordance with policy. Scott Baker J said at paragraph 21:

"How should a Crown Court (or a Magistrates Court) [or in this case presumably a tribunal] approach an appeal where the council has a policy? In my judgement it must accept the policy and apply it as if it was standing in the shoes of the council considering the application."

157. However, it is added that the cases confirm that accepting the policy does not mean the tribunal may not depart from it provided it gives reasons taking into the objective of the policy; the onus being on the Applicant to argue such departure.

158. Judge Cooke then considered what weight should be given to the local authority's decision under its policy. The justification for giving weight to a local authority's policy is, as expressed in Sagnata *Investments Ltd v Norwich Corporation* [1971] 2 QB 614, because it is an elected body and therefore its decisions deserves respect.

159. It was submitted that case law supported a view that a tribunal should not depart from the decision of the local authority unless it is "wrong". Judge Cooke made it clear that this did not mean wrong in law (what might be termed "illegal"). A tribunal is not "reviewing" the local authority's decision but "rehearing" it. It is entitled to substitute its own reasoned decision, perhaps

having information not available to the local authority when it made its decision or in exercise of the tribunal's own specialist knowledge.

160. The Tribunal therefore applied the policy via the matrix with particular reference to the effect if any the actions of the Tenants in preventing compliance with the Improvement Notice and the loss of rent and costs incurred in respect of Flats 1 and 3 should have on the Financial Penalty imposed. In doing so it considered whether there was any reason for departing from the matrix.

161. In looking at the initial amount of the Penalty the Tribunal noted that because of the nature of the ownership the Respondent was required to serve two notices (one on each of the Trustees) for the same offence and, as a result of the non-compliance two penalties for the same offence.

162. The Tribunal considered the policy with its matrix which was in the form of definitions and tables. The following is an overview of the policy and matrix although the policy itself is a detailed document. The maximum penalty is £30,000. The Starting point is the mid-point of a band.

163. The decision to taken action in respect of an offence is dependent on a points system. Negative points reflect deficiencies and the seriousness of the offence. The more minus points the more severe the action.

Band	Score	Recommended Action
1	Positive to minus 10	Informal of advisory action
2	Minus 11 to minus 20	Revocation of licences, accreditations
3	Minus 31 to minus 40	Formal investigation Prosecution or civil penalty
4	Greater than minus 41	Prosecution or civil penalty

164. The deficiencies are based on a combination of high, medium or low culpability and high, medium or low harm. Depending on the combination, the acts of the offender will fall within a band numbered 1 – 6 with related financial penalties.

165. Culpability is graded as follows:
High culpability is a deliberate or reckless act,
Medium culpability is a negligent act,
Low culpability is an act with little or no fault.

166. Harm is graded as follows:
High harm is where defects give rise to serious and substantial risk of harm to occupants or visitors e.g. danger of electrocution, carbon monoxide poisoning or fire safety risk;
Medium harm is where defects give rise to serious risks of harm to occupants or visitors e.g. falls and excess cold;
Low harm is where defects give rise to occupants or visitors such a localised damp and mould or entry by intruders.

167. Having assessed what action to take the relative culpability and harm is determined and the penalty assessed.

Band 1= £0 to £4,999 Starting point of £2,500	Low Culpability/Low Harm
Band 2 = £5,000 to £9,999 Starting Point £7,500	Medium Culpability/Low harm
Band 3 = £10,000 to £14,999 Starting Point £12,500	Low Culpability/Medium Harm or High Culpability/Low Harm
Band 4 = £15,000 to £19,999 Starting Point £17,500	Low Culpability/High Harm or Medium Culpability/Medium Harm
Band 5 = £20,000 to £24,000 Starting point £22,500	Medium Culpability/High Harm or High Culpability/Medium Harm
Band 6 = £25,000 to £30,000 Starting Point £27,500	High Culpability/High Harm

168. From the Starting Point the Aggravating or Mitigating Factors are determined resulting in an increase or decrease of £1,000 to the penalty up to the maximum allowed. Example Factors are listed in the Policy.

169. The Penalty is then subject to a financial assessment to take account of financial benefit in committing the offence.

170. The Respondent's assessment dated 13th December 2018, stated that of the works which were to be completed 25 to 49% of the works were outstanding giving a minus score of 15, in particular fire safety work was outstanding which gave a further minus score of 20, totalling -35. The action to be taken therefore fell into band 3 with a recommended action of prosecution or civil penalty. The Respondent considered a civil penalty was appropriate i.e. a Financial Penalty.

171. The failure to comply with the improvement Notice with regard to the Common Parts was classed as a Band 2 and a starting point of £4,999.50 (rounded to £5,000) was assessed. This was reduced by £4,000 for mitigating circumstances of:
No previous convictions
High level of co-operation
Voluntary action taken to address problem
Good or exemplary character.
Totalling a penalty of £999.50.

172. Applying the financial assessment, the penalty was increased by taking account of other income = £49.98, Rental income = £49.98 and not being in receipt of benefit = £99.95 capital value addition = £49.98 (the property was of low capital value). This made a total fine of £1,249.39 rounded to £1,249.00 (£624.00 for each Applicant).

173. The Tribunal took into account the deficiencies identified in the Improvement Notice and the percentage and type of works outstanding and determined that the Financial Penalty was in accordance with the policy. In the absence of

evidence to the contrary the Tribunal was no reason to increase or decrease the Penalty in respect of the common parts.

174. The failure to comply with the improvement Notice with regard to Flat 1 classed as a Band 2 a starting point of £4,999.50 (rounded to £5,000) was assessed. This was reduced by £4,000 for mitigating circumstances of:
No previous convictions
High level of co-operation
Voluntary action taken to address problem
Good or exemplary character.
Totalling a penalty of £999.50.

175. Applying the financial assessment, the penalty was increased by taking account of other income = £49.98, Rental income = £49.98 and not being in receipt of benefit = £99.95 capital value addition = £49.98 (the property was of low capital value). This made a total fine of £1,249.39 rounded to £1,249.00 (£624.00 for each Applicant).

176. The Tribunal took into account the deficiencies identified in the Improvement Notice and the percentage and type of works outstanding and determined that the Financial Penalty was in accordance with the policy.

177. The Tribunal noted the Applicants' submission that the Respondent stated that the penalty was reflective of the works unfinished as at the visit of 12th July 2018 and that further works were carried out after the representations following the service of the notices of intention. The Tribunal found that the Respondent was not obliged to reduce the penalty for works carried out after the expiry of the Improvement Notice much less after the service of the Notice of Intention to Serve a Financial Penalty.

178. The Tribunal also considered the Applicants' submission that the Financial Penalty was disproportionate considering the actions of the Tenants in preventing compliance with the Improvement Notice and the loss of rent and costs incurred in respect of Flat 1. The Tribunal is of the opinion that the onus lies with the Applicants as landlords to ensure that Tenants comply with the tenancy agreement and that works are carried out in accordance with an improvement notice.

179. The Respondent took account of the Applicants efforts in seeking to comply with the Improvement Notice in the reductions made under the mitigating circumstances. The Tribunal found that these amounts were appropriate and proportionate and took account of any obstructive conduct by the Tenant of Flat 1.

180. The Tribunal found that it would only be appropriate to take account of any loss of rent under the financial assessment. Again, the onus is on the Applicants as landlords to ensure that the rent potential is realised i.e. that tenants pay the rent. In the absence of evidence to the contrary the Tribunal saw no reason to increase or decrease the Penalty in respect of Flat 1.

181. The failure to comply with the improvement Notice with regard to Flat 3 classed as a Band 3 and a starting point of £9,899.34 (rounded to £9,899.00) was assessed. This was reduced by £4,000 for mitigating circumstances of:
No previous convictions
High level of co-operation
Voluntary action taken to address problem
Good or exemplary character.
Totalling a penalty of £5,899.34.

182. Applying the financial assessment, the penalty was increased by taking account of other income = £294.97, Not in receipt of benefit £589.93, Rental income = £294.97, capital value addition = £294.97 (property was of low capital value). This made a total fine of £7,374.18 rounded to £7,374.00 (£3,687.00 for each Applicant).

183. The Tribunal took into account the deficiencies identified in the Improvement Notice and the percentage and type of works outstanding and determined that the Financial Penalty was in accordance with the policy.

184. As with Flat 1, the Tribunal noted the Applicants' submission that the Respondent stated that the penalty was reflective of the works unfinished as at the visit of 12th July 2018 and that further works were carried out after the representations following the service of the notices of intention. The Tribunal found that the Respondent was not obliged to reduce the penalty for works carried out after the expiry of the Improvement Notice much less after the service of the Notice of Intention to Serve a Financial Penalty.

185. The Tribunal also considered the Applicants' submission that the Financial Penalty was disproportionate considering the actions of the Tenants in preventing compliance with the Improvement Notice and the loss of rent and costs incurred in respect of Flat 3. As with Flat 1, the Tribunal is of the opinion that the onus lies with the Applicants as landlords to ensure that Tenants comply with the tenancy agreement and that works are carried out in accordance with an improvement notice.

186. The Respondent took account of the Applicants efforts in seeking to comply with the Improvement Notice in the reductions made under the mitigating circumstances. The Tribunal found that these amounts were appropriate and proportionate and took account of any obstructive conduct by the Tenant of Flat 3.

187. The Tribunal found that it would only be appropriate to take account of any loss of rent under the financial assessment. Again, the onus is on the Applicants as landlords to ensure that the rent potential is realised i.e. that tenants pay the rent. In the absence of evidence to the contrary the Tribunal saw no reason to increase or decrease the Penalty in respect of Flat 3.

188. Therefore, in relation to Grounds 2 and 3:

1. The Tribunal confirms the Financial Penalty in respect of the Common Parts of 159 Stoney Stanton Road, Coventry CV1 4FW of £624.50 to be paid by Faizul Aqtab Siddiqi and of £624.50 to be paid by Noorul Aqtab Siddiqi.

2. The Tribunal confirms the Financial Penalty in respect of Flat 1, 159 Stoney Stanton Road, Coventry CV1 4FW of £624.50 to be paid by Faizul Aqtab Siddiqi and of £624.50 to be paid by Noorul Aqtab Siddiqi.

3. The Tribunal confirms the Financial Penalty in respect of the Flat 3, 159 Stoney Stanton Road, Coventry CV1 4FW of £3,687.00 to be paid by Faizul Aqtab Siddiqi and of £3,687.00 to be paid by Noorul Aqtab Siddiqi.

Judge JR Morris

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.