FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00FY/HNA/2019/0029**
Property	:	**164a Vernon Road, Nottingham, NG6 0AD**
Applicant	:	**AFS UK LIMITED**
Representative	:	**Mr. T. and Ms. N. Murtough**
Respondent	:	**Nottingham City Council**
Representative	:	**Mrs. C. Green**
Type of application	:	**Appeal against a financial penalty under section 249A Housing Act 2004**
Tribunal members	:	**Judge Andrew McNamara & Mr. A. Lavender**
Venue	:	**Nottingham Justice Centre, Carrington Street, Nottingham**
Date of Decision	:	**11 June 2020**

DECISION

Introduction

1. This is an appeal against the imposition of a financial penalty of £15, 369.20 on 4 September 2019 pursuant to section 249A Housing Act 2004. The appeal notice was dated 1 October 2019.
2. By reason of recent developments the Respondent, Nottingham City Council, now seek less than one third of that sum, namely £4800.
3. As the Tribunal understand the Applicant's updated position, in an email dated 29 May 2020, it sustains its appeal to the extent that it questions the sum rather than the right of the Respondent to impose the financial penalty. Put simply the Applicant believes the figure of £4800 is still too much.
4. The Applicant is a company based at an address in Nottingham and is the freehold owner of 164a Vernon Road, Basford, Nottingham, NG6 0AD, including the flat at 164a which is the subject property (the property).
5. The property is a two storey flat occupying the top two floors of 164 and is accessed by a steel staircase to the rear elevation. There are two rooms and a bathroom at entrance level and two bedrooms in the upper storey.
6. The Respondent is the housing authority for the purposes of enforcement under the Housing Act 2004.

The background to the appeal

7. On 7 March 2017, the Respondent received a complaint from the tenant of the property regarding an allegedly broken boiler.
8. On 8 March 2017, the Respondent inspected the property and, as a result, identified a number of items that may have amounted to hazards pursuant to the Housing Health and Safety Rating System (HHSRS).

9. Following the service of appropriate notices under section 239 of the Housing Act of 2004, the Respondent undertook a formal inspection of the property on 26 June 2019.
10. Two category 1 hazards and five category 2 hazards were identified (set out below).
11. As a result, on 14 September 2017, pursuant to sections 11 and 12 of the Act of 2004, the Respondent served an improvement notice upon the Applicant in respect of two category 1 hazards and five category 2 hazards, namely:
    a. Falling on stairs (Category 1);
    b. Excess cold (Category 1);
    c. Fire (Category 2);
    d. Falling between levels (Category 2);
    e. Electrical hazards (Category 2);
    f. Collision and entrapment (Category 2); and
    g. Damp and mould (Category 2).
12. Various remedial steps were particularised but, in the interests of proportionality, they are not recited in this decision.
13. The start date for the works was set at 14 October 2017 and the finish date set at 18 November 2017.
14. At that stage the Respondent's interests were represented by a Declan O'Riordan. The Applicant was and is represented by Nicole Murtough.
15. On 8 December 2017, Mr. O'Riordan wrote to Ms. Murtough following a meeting that had taken place at the property on 30 November 2017. The implication from that email is that the whole of the specified works in the notice had yet to be completed. Mr. O'Riordan suggested that the completion date for all works to be completed ought to be capable of agreement between

the parties, but did not specify that date. He suggested to Ms. Murtough that she should '*detail what works are to be carried out and when [she] would expect to have them completed*'. Once that was done, Mr. O'Riordan suggested that he would '*look to carry out a revisit after the end of the revised completion date to check compliance…*'.

16. The correspondence then moves to 27 September 2018 when the Respondent informed the Applicant that it planned to re-inspect the property to check upon the progress of matters pertaining to the notice from 14 September 2017. The Respondent's interests were now represented by Mr. Mark Thomas: the letter stressed that it was an opportunity for the Applicant to work with the Respondent on an informal basis, but that contact must be made before the visit (planned for 3 October 2018) to deal with outstanding matters on pain of enforcement.

17. The Tribunal has a hand-written note of the re-inspection from 3 October 2018. To quote from the Revocation of Improvement Notice which followed, sent under cover of a letter dated 7 November 2018, it transpired that:

> *…most of the works had been completed. However, a significant category 1 hazard remained and it was found that further category 1 and category 2 hazards existed on the premises…*

18. A further Improvement Notice, dated 15 November 2018, was served upon the Applicant identifying two category 1 and 2 category 2 hazards:

    a. Excess cold (cat 1);
    b. Collision from low headroom (cat 1);
    c. Falling on level surfaces (due to inadequate illumination) (cat 2); and
    d. Damp and mould growth(cat 2).

19. The Appellant did not exercise their right of appeal.
20. The Respondent re-inspected the property on 30 January 2019 and again on 5 February 2019.
21. Following that the Respondent concluded that insufficient steps towards compliance had not been made and, on 5 February 2019, served upon the Applicant a Notice to take action without agreement. That is, the Respondent was to exercise its statutory power pursuant to Schedule 3, Part 2, section 3 of the Act of 2004 to enter and undertake the works itself.
22. On 12 July 2019, in the light of the Applicant's failure to comply with the Improvement Notices, the Respondent formed the view that the Applicant had committed an offence under section 30(1) of the Act of 2004 and imposed a civil penalty of £15,369.20.
23. A notice of intention to impose a financial penalty, dated 24 July 2019, was sent to the appellant. The notice provided the appellant with an opportunity to make written representations within 28 days. No such representations were made.
24. A final Notice to impose a financial penalty under Section 249A of the Housing Act 2004, was sent to the appellant on 4 September 2019, setting a financial penalty of £15,369.20
25. As set out above in the introduction to this decision, the Respondent now takes the view that the appropriate financial penalty should, instead, be £4800.

The nature of the appeal

26. It is fair to say that the history above takes little account of the Applicant's efforts in relation to compliance with the Improvement Notices.

27. In the document prepared by Ms Murtough which introduced the Applicant's bundle of documents she pointed out that the Applicant company owned numerous properties in Nottingham which it had successfully let for 35 years.
28. In 2016 her Father, the owner of the Applicant company, became ill and Ms. Murtough took on the management of the business from a standing start.
29. It is right to say that the tenant of the Property was, and remains, in arrears. The Applicant was asked to put in place a payment plan. As a result, Ms. Murtough is suspicious of the tenant's motives in highlighting matters related to issues of repair.
30. Ms. Murtough was also concerned that a change in personnel at the Respondent local authority seemed to delineate a move from a conciliatory to a confrontational approach.
31. Further, when the Applicant made efforts to rectify the hazards identified by the local authority, the tenant was unhelpful in accommodating contractors.

The hearing on 28 February 2020 & subsequently

32. At the hearing, the Tribunal heard from both parties. The Applicant's case ultimately amounted to a challenge to the size rather than the legitimacy of the financial penalty.
33. The Respondent took the view that, in the light of the Applicant's, albeit belated, engagement in the process that it wished to revise downwards the financial penalty.
34. Directions were issued in order to permit time for the Applicant to submit financial information and for the Respondent to reflect upon that additional information.

35. The Tribunal received the additional information from the Applicant on 16 April 2020; and revised written submissions from the Respondent dated 7 May 2020.
36. The Respondent now takes the view that the appropriate financial penalty should be £4800. This is in the light of the prevailing health emergency and by removing the 'financial benefit' component of £230.75 previously attributable to the notion that the Applicant gained from relevant rental income.
37. The Respondent has also reflected the existence of arrears in coming to its revised conclusion.
38. Having had time to reflect upon the actions of the local authority, the position of the Applicant has shifted and, most recently, is set out in the email from Ms. Murtough sent to the Tribunal and the Respondent on 29 May 2020. It is set out below almost in full:

> *We would like to ask for the figure to be reduced further.*
>
> *We appreciate you have already given us a reduction of the penalty whilst taking certain circumstances into consideration. However, we would please ask for this to be looked at further.*
> *The rent arrears for this property are still very high and we believe if we had received the rent we would be in a better position to pay the penalty.*
> *Paying this penalty would make it extremely difficult for us to move forwards with current works. We have repairs ready to commence across 4 flats. We also are due to upgrade our electrical installations*

across the whole portfolio of rented properties. In the current climate it has already been difficult for us to raise funds for works to run smoothly.

From this whole experience we have thoroughly understood and identified where our weaknesses are and these will not be repeated. This has also been a great lesson for Dad and I. This experience has given my Dad further assurance to trust my judgement about how to manage works etc. after all this he has had an eye opening experience which had shown him his old school ways of running rented accommodation does not work and we must stick to the legislation and processes that the landlords handbook refer to. Ultimately in retrospect we have learnt our lesson had the works been handled by one person although not the only factor but mainly, everything would have been done and finished to order within reasonable time. Having said that this is no excuse merely a big lesson learned and a positive outlook moving forwards.

The Tribunal's decision

39. The Tribunal is satisfied beyond reasonable doubt that the appellant committed an offence under section 30(1) of the Housing 2004, namely failure to comply with an Improvement Notice.

40. The Tribunal takes the email above as amounting to a concession that a penalty is legitimate but that the Respondent's conclusion did not take the Applicant's situation sufficiently into account. It reflects the approach taken by the Applicant at the hearing.

41. The financial information from the Applicant avers that, as at 16 April 2020, unpaid rent for the whole of its estate amounted to £36,046.19.
42. In relation to the subject property the arrears figure is £8,040.75 and that the '*arrears carried forward*' figure (the status of which is not entirely clear) is £6,740.75.
43. As an observation the Tribunal notes that, despite what might be said about health issues and unfamiliarity with the process of property management, the Applicant was slow to act in this case; and, in relation to the conduct of these proceedings, has required prompting to comply with the post-hearing directions. It is clear that the Applicant is still prone to reaction as opposed to action.
44. However, what the Tribunal cannot ignore is that the email from 29 May 2020 is contrite; and the Respondent has clearly indicated, by proposing a reduction of in excess of two thirds from the figure first calculated, that it is happy with the mitigation offered by the Applicant.
45. The question remains whether this is a case in which one could justify the calculation relied upon by the Respondent at the outset and then nuanced in the submissions from 7 May 2020.
46. The Tribunal's task is not simply a matter of reviewing whether the penalty imposed was reasonable: it must make its own determination as to the appropriate amount of the penalty having regard to all the available evidence. In doing so, tribunal should have regard to the seven factors specified in the Government's guidance (Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities: Guidance issued by the Ministry of Housing, Communities and Local Government in 2016 and re-

issued in April 2018) as being relevant to the level at which a financial penalty should be set. Those factors are as follows:

a. Severity of the offence.

b. Culpability and track record of the offender.

c. The harm caused to the tenant.

d. Punishment of the offender.

e. Deterrence of the offender from repeating the offence.

f. Deterrence of others from committing similar offences.

g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.

47. The Government's guidance recommends that Local Housing Authorities should develop and document their own policies on determining the level of financial penalties, and tribunals should have particular regard to any such applicable policy.

48. Nottingham City Council issued their Civil Penalties Enforcement Policy and Guidance Document under the Housing and Planning Act 2016 in or around April 2017, which takes into account the above relevant matters

49. The appellant in their assessment, indicated that they considered the Culpability Level: Medium. Harm Level: A, which resulted in a Penalty Band: 4 between £15,000 and £6,000. The offender's relevant income was also taken into account, The original Penalty was set at £15, 369.20, which was reduced by the Respondent on the day of the hearing to £6,230.75.

50. The Respondent suggests that Harm Level A was appropriate in this case. The description of the harm levels is set out on page 10 of their policy document.

Harm Level A: refers to seriousness of harm causing Class I & II spread of harm. It was accepted by Respondent that a more appropriate description was that of a category 1 hazard.

Harm Level B: refers to seriousness of harm causing Class III & IV spread of harm. It was accepted by Respondent that a more appropriate description was that of a category 2 hazard

51. The Improvement Notice, dated 15 November 2018, identifying two category 1 and 2 category 2 hazards:
    a. Excess cold (cat 1);
    b. Collision from low headroom (cat 1);
    c. Falling on level surfaces (due to inadequate illumination)(cat 2); and
    d. Damp and mould growth(cat 2).
52. The Tribunal accepts that the hazards relating to Falls on Level Surfaces (due to lack of illumination) and Damp and Mould Growth were category 2 hazards
53. Having regards to the assessment in relation to Excess Cold, the main reasons for being classed as a category 1 hazard (Rating Score 1023.00 – Band C) related to gaps around the main entrance door and the level of the insulation to the property, which was unknown.
54. The property was a mix of solid wall construction to the main part, with the extension being of a cavity construction. It could not be established if there was any cavity wall insulation installed during construction of the extension. The applicants confirmed that the property was converted with appropriate planning permission and complied with Building Regulations at the time it was converted in 1991/1992. The property had double glazing throughout (some older style) and had full gas central heating throughout.

55. On further investigation, when the ceiling was taken down it was found that there was approximately 55mm of insulation to the roof, which is below current Building Regulations of 270mm.

56. However, it is the Tribunal view that considering the matters identified in the HHSRS Operating Guidance, with particular reference to the construction type, level and type of heating, window type and insulation level, that the hazard was more correctly assessed as a category 2 hazard.

57. Having regards to the assessment in relation to Collision from low headroom (Collision and Entrapment) the reason for the category 1 hazard (Rating Score 1,630.00 – Band C) was the low ceiling joist (beam) within the second floor front bedroom. The ceiling joist was particularly low (1.37M) to one side of the bedroom. The Officer assessed the likelihood as being in a 1:3, spread of harm: Class I (0%), Class II (1% increased from national average of 0.5%), Class III (10%) and Class IV (89%) Rating Score 1,630.00 – Band C.

58. However, it should be noted that this same hazard was previously assessed by an Officer as part of the original Improvement Notice dated 14 September 2017. This officer assessed the likelihood as being in a 1:56 based on the Collison and Entrapment table – pre 1919 flats. Spread of Harm: Class I (0%). Class II (0%) Class III (4.6%) and Class IV (95.4%) – no change to national average. Rating Score 42.00 – Band H.

59. When ask about the disparity, it was suggested that a lack of experience may have been the cause of the low rating score in the first instance.

60. It is the Tribunal view that considering the matters identified in the HHSRS Operating Guidance, that there was an increased likelihood of a member of the vulnerable age group suffering some harm. However, the travel distance between the door and the low beam is minimal and therefore any injury

caused would be minimal. Therefore, on balance we would assess this as a category 2 hazard.

61. Accordingly, applying the Respondent's approach, the Tribunal concludes that in a case of '*medium culpability*' but a Level B degree of seriousness (Category 2 hazards), this is a case in which the Penalty Level ought to have been in the £3000-£6000 bracket from the outset - Penalty Band 3).

62. The Respondent now takes the view that the appropriate financial penalty should be £4800. This is in the light of the prevailing health emergency and by removing the 'financial benefit' component of £230.75 previously attributable to the notion that the Applicant gained from relevant rental income.

63. Bearing in mind all of the above, the Tribunal concludes that the Respondent came close to a reasonable figure in its submissions from 7 May 2020.

64. Although the Tribunal takes some account of the Applicant's financial status, it cannot ignore that the Applicant was slow to act and had something of a late realisation that the imposition of the financial penalty was justified whatever it felt about the tenant's motives.

65. In the circumstances the Tribunal concludes that a financial penalty of £4500 is appropriate in this case and, to that extent, the Applicant's appeal is allowed.

66. The Tribunal notes that, at §9 of the Respondent's submissions is what appears to be a wholly sensible suggestion that the penalty may be the subject of separate agreement between the parties regarding an appropriate and affordable payment plan.

Right of Appeal

67. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge Andrew McNamara

Mr. Andrew Lavender

5.6.20