**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2022] UKUT 044 (LC)**
**UTLC Case Number: LC-2021-89**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***HOUSING – CIVIL PENALTY – emergency prohibition notices - evidence – landlord committing the offence of failing to comply with the Management of Houses in Multiple Occupation (England) Regulations 2006 - application by the First-tier Tribunal of the local housing authority's policy for the level of penalties - reasons given by the First-tier Tribunal for its assessment of harm***

**AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

**BETWEEN:**

**MRS LYSTRA DORVAL**

**Appellant**

**-and-**

**TENDRING DISTRICT COUNCIL**

**Respondent**

**Re: 7 & 9 Hayes Road,**
**Clacton-on-Sea,**
**Essex,**
**CO15 1TX**

**Upper Tribunal Judge Elizabeth Cooke**
**Determination under written representations**

Mr Richard Hanstock for the respondent, instructed by the respondent's legal department

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The following cases are referred to in this decision:

*London Borough of Waltham Forest v Marshall* [2020] UKUT 035 (LC)
*Sutton v Norwich City Council* [2020] UKUT 90 (LC)

## Introduction

1. This is Mrs Dorval's appeal from the decision of the First-tier Tribunal about civil penalties imposed upon her by the respondent in respect of ten offences of failing to meet the requirements of the Management of Houses in Multiple Occupation (England) Regulations 2006 in two houses for which she held an HMO licence, 7 and 9 Hayes Road, Clacton-on-Sea.

2. The appeal was listed for a hearing in November 2021 and then in January 2022, but following a number of requests by the appellant for the adjournment of the hearing the Tribunal decided to conduct the appeal under its written representations procedure, as suggested by the respondent. Accordingly, although directions were originally given for an appeal by way of review with a view to re-hearing, only a review of the FTT's decision has been possible.

3. The appellant was represented by solicitors earlier in the proceedings but is now unrepresented. Written representations were provided for the respondent by Mr Richard Hanstock of counsel in response to Mrs Dorval's application for permission to appeal, and Mr Hanstock also provided a skeleton argument in anticipation of a hearing.

## The legal and factual background

4. The licensing regime for houses in multiple occupation (HMOs) was created by the Housing Act 2004, and it requires the landlords of certain properties – typically, but not exclusively, those occupied by a number of tenants in two or more households who share facilities – to hold a licence and to comply with regulations about the condition of the property.

5. Such regulations have been made under section 234 of the Housing Act 2004, which provides that failure to comply with a regulation is a criminal offence. The Management of Houses in Multiple Occupation (England) Regulations 2006 ("the HMO regulations") relate to fire safety, gas and electrical safety, the decoration and cleanliness of the property, rubbish disposal and so on. Instead of prosecuting a landlord for the offence of failing to comply with the regulations, a local housing authority may impose a financial penalty on the landlord under section 249A of the Housing Act 2004, up to a maximum of £30,000 for each offence.

6. Mrs Dorval and her husband are joint registered proprietors of 7 Hayes Road, and Mr Dorval is the freeholder of 9 Hayes Road. In 2017 Mrs Dorval applied for and obtained HMO licences for these adjacent houses; the licence for 7 Hayes Road permitted up to eight occupants and that for 9 Hayes Road permitted up to six. In 2018 Mrs Dorval appointed managing agents to look after both properties. In the course of 2019 officers of the respondent local housing authority visited on a number of occasions, and sent Mrs Dorval schedules of work that needed to be done. The police also visited following complaints about anti-social behaviour by the tenants. On 12 August 2019 both houses were closed following service of Emergency Prohibition Orders under section 43 of the Housing Act 2004.

7. The respondent imposed financial penalties on Mrs Dorval, amounting to £90,000 altogether, on the basis that she had committed five separate offences in respect of each property. Mrs Dorval appealed the final financial penalty notices to the FTT.

**The decision in the FTT**

8. The financial penalties were imposed on the basis that Mrs Dorval had committed offences at each property under the following paragraphs of the HMO regulations:

    a. Regulation 4(2), which requires the manager of the HMO to ensure that firefighting equipment and alarms are in good working order;

    b. Regulation 6(1) and (3) which relate to the testing of gas appliances and electrical installations;

    c. Regulation 7 which imposes a number of requirements about the cleanliness and decoration of the property, and the condition of handrails, banisters, stair coverings, ventilation and of any garden and boundary fences;

    d. Regulation 8 which requires the accommodation and any furniture supplied with it to be and to be kept clean and safe; and

    e. Regulation 9 which requires adequate arrangements for disposing of rubbish.

9. Witness statements were made in the FTT proceedings by four local authority officers and by two police officers, The FTT in its decision said that the respondent's witnesses were called and cross-examined, but said nothing about the content of their witness statements. The bundle included 158 photographs, which indicate that the two properties were indeed in miserable condition, but there is no labelling to indicate which photographs refer to which offences. It appears that for this reason Mr Fenton-Jones, an officer of the respondent who represented it in the FTT, was invited to give an explanation. His explanations were set out in tabular form over five pages of the decision with cross references to the photographs.

10. Mrs Dorval also made a witness statement and gave evidence, to which the FTT referred briefly; her case was that the condition of the property was the responsibility of the managing agents and also that considerable damage was done by the tenants. A witness statement by a director of the managing agents is also in the bundle but there is no reference to it in the decision. The FTT explained that there was a conflict between the agents and Mrs Dorval as to who was responsible for arranging repairs found that she was primarily culpable under the HMO regulations. Her defence of reasonable excuse failed.

11. The FTT said that it was satisfied beyond reasonable doubt that Mrs Dorval had committed all the offences alleged, although a few instances of breaches of regulations 7 and 8 were found not to have been proven. The FTT set out its findings about each instance of breach in tabular form at its paragraph 47. There is no appeal from those findings.

12. The FTT then went on to consider the level of penalty to be imposed. The FTT was required to make its own decision about the penalties, not to review the respondent's decision, as it observed at its paragraph 31; and it was required to give due deference to the respondent's policy for the level of financial penalties (*Sutton v Norwich City Council* [2020] UKUT 90 (LC) and to *London Borough of Waltham Forest v Marshall* [2020] UKUT 035 (LC)).

13. The FTT explained that the respondent has a policy which ranks each breach on a scale of culpability from 1 to 5, and on a scale of harm in three categories; the scores are put together in a table which yields a further number and a penalty range. "By way of illustration", said the FTT at paragraph 56, "a very high severity/culpability score, when combined with a category 1 harm score, will result in a numerical score of 6, leading to a penalty range of £17,000 to £30,000", with the decision-maker having a discretion within that range.

14. That was all the FTT said about the policy. It did not indicate what the different levels of culpability were, nor what the levels of harm were; the respondent's policy provides a verbal description of each. Very high culpability means "a serious breach of legislation", high culpability means "History of failing to comply with legislation", medium culpability means either "A breach of legislation with capacity to cause a more severe harm outcome if left unattended" or "Insufficient effort made to comply", while low culpability indicates "Minor offence in isolation." As to harm, category 1 is "serious adverse effect on individual or high risk of serious adverse effect. Vulnerable people taken into account"; category 2 means "Adverse effect but less than above. Medium risk of adverse effect or low risk of serious effect", while category 3 means "Low risk of adverse effect". None of these descriptions is mentioned in the FTT's decision.

15. The FTT then set out in tabular form at its paragraph 62 its assessment of culpability, harm, numerical score, penalty range and penalty imposed for each offence. I give just one example as all the assessments in the table are in identical form.

16. For each offence the relevant problem was described in the earlier table, where the FTT at its paragraph 47 set out its findings about whether an offence had been committed. The offence under regulation 4(2), relating to the fire alarms and fire-fighting equipment for 7 Hayes Road, was described in the earlier table as "Fire alarm not in good working order. Fault displayed." In the later table at paragraph 62 the entries for this offence are:

| Regulation | R's Assessment | Tribunal Finding |
|---|---|---|
| 4(2) | Severity High<br>Harm category 1<br>Numerical score 5<br>Range £7001 to £17000<br>Penalty of £12,000 as mid-range offence | Severity High<br>Harm category 1<br>Numerical score 5<br>Range £7001 to £17000<br>Penalty of £12,000 as mid-range offence |

17. In every case the FTT's assessment of severity/culpability matches that of the respondent. The FTT differed from the respondent in imposing no separate penalty under regulation 4(2) for number 9 Hayes Road because the one fire alarm serves both properties, and in making a differing assessment of harm and so reducing the penalty for the breach of regulation 8 at number 7 and for breach of regulations 7 and 8 at number 9, leading to a total reduction of £19,500 and a final total penalty of £70,500.

**The appeal**

18. Mrs Dorval has permission, granted by this Tribunal, to appeal on the ground that the FTT either did not have, or did not give a reasoned justification for its assessments of harm in its calculation of the penalties. She says that the FTT simply adopted the respondent's assessment rather than making one of its own.

19. In the bundle before the FTT were the HHSRS assessments made by the respondent in respect of each property. The housing health and safety rating system (HHSRS) is a tool used by local housing authorities to identify hazards. Mrs Dorval argues in her grounds of appeal that the HHSRS forms are incomprehensible and that the FTT should not have followed them. There is no mention of the HHSRS forms in the FTT's decision. The grounds of appeal state: "The respondent's explanation of its "harm" analysis came as a surprise on the day of the hearing", so it may be that Mr Fenton-Jones gave an explanation which referred to the HHSRS forms. In its refusal of permission to appeal the FTT said "The Tribunal's assessment of harm was based on its experience and knowledge as an expert Tribunal. It did not place great reliance on the Respondent's HHSRS Assessment Forms."

20. Certainly the HHSRS forms are incomprehensible. They contain numerical tables without verbal explanation, and give unexplained numerical results. To take just one example, one of the forms relates to . It gives a "likelihood" of 0.03125, and a final assessment as "Class IV (ie 100- (CI+CII+CIII) 42.3". I have no idea what either figure means. I do not doubt the usefulness of the forms to local authority housing officers but if the FTT placed the slightest reliance upon them it should have said so in its decision rather than as an afterthought in its refusal of permission to appeal, and should have heard and recorded in its decision evidence about what the forms mean.

21. Mr Hancock asserts that the FTT "properly and rigorously applied the assessment framework in arriving at its own decisions as to the levels of the fines to be set in each case". I have to disagree.

22. As can be seen from the description given above at paragraph 15, the FTT's decision about the level of the penalties is bereft of reasoning. Having stated that it would follow the respondent's policy, it gave only the sketchiest description of that policy. It then set out, without explanation, the level of culpability and harm for each offence, in tabular form. The basis of those assessments remains a mystery, and the FTT's later explanation of them as "based on its experience and knowledge as an expert Tribunal" adds nothing.

23. The FTT's decision as to the level of the penalties for each of the offences that it found had been committed is set aside.

24. I have given careful consideration to whether I can substitute the Tribunal's own decision about the appropriate level of penalty. I cannot do so because a re-hearing has not been possible and I do not have access to the whole of the evidence that was before the FTT - much or perhaps most of which appears to have been given orally at the hearing. The respondent has provided to this Tribunal what it describes as "an additional document that fully explains how the Council arrived at its decision to serve the financial penalties. This did not form part of the original hearing, but it has been included to explain fully the reasons why and how the level of penalty was set." No witness statement was provided to verify that document and in any event the respondent does not have permission to adduce fresh evidence on appeal. It is difficult to see how such permission could have been given, in the absence of any reason why the document was not produced in evidence to the FTT, so that it appears that the criteria in *Ladd v Marshall* [1954] EWCA Civ 1 are not met.

25. Mrs Dorval's appeal to the FTT from the financial penalty notices is remitted to the FTT insofar as it relates to the level of the penalties; the FTT's finding that she committed the ten offences has not been appealed and is not set aside. If Mrs Dorval wishes to pursue her appeal she is to ask the FTT for directions within 28 days of the date of this decision. If either party wishes to adduce fresh evidence for the re-hearing they must seek permission from the FTT. I direct that the re-hearing be conducted by a different panel of the FTT, so that there can be no suggestion later that the re-made decision was based upon or influenced by evidence that the original panel heard but did not record.

**Upper Tribunal Judge Elizabeth Cooke**

**18 February 2022**

**Right of appeal**

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