UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 129 (LC)

UTLC No: LC-2022-501

**Royal Courts of Justice, Strand,
London WC2A**

7 June 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING – CIVIL PENALTY – HMO licensing offence – FTT reducing penalty set by local housing authority – whether evidence established only that offence had been committed on a single day – FTT decision set aside – redetermination of penalty – assessment of harm – relevance of licence fee avoided – relevance of local authority costs – s.249A and Sch 13A, Housing Act 2004

BETWEEN

LEICESTER CITY COUNCIL

Appellant

-and-

MS NIKITA MORJARIA

Respondent

**Re: 100 Bluegates Road,
Leicester LE4 1AB**

Martin Rodger KC, Deputy Chamber President

2 May 2023

Mr Justin Bates, instructed by Leicester City Council, for the appellant
Mr Archie Maddan, instructed directly for the respondent

The following cases are referred to in this decision:

Haringey LBC v Ahmed [2017] EWCA Civ 1861

Marshall v Waltham Forest LBC [2020] 1 WLR 3187

Point West GR Limited v Bassi [2020] EWCA Civ 795

Sutton v Norwich City Council [2021] EWCA Civ 20

Woolmington v DPP [1935] A.C. 462

Introduction

1. This is an appeal by a local housing authority, Leicester City Council, against the decision of the First-Tier Tribunal (Property Chamber) (the FTT), to reduce a civil financial penalty imposed on Ms Nikita Morjaria for the offence of being in control of an unlicensed HMO, contrary to section 72, Housing Act 2004. The penalty of £29,817 originally imposed by the Council had been calculated by reference to its own policy. The FTT criticised that policy and declined to follow it, instead substituting a penalty of £3,900.

2. The FTT was satisfied that the facts constituting the offence had been proven to the required criminal standard in respect of only a single day. Thus, although it found that the property concerned was an HMO because it had been occupied by five people living in more than two households on the day on which the Council's officers conducted an unannounced inspection and witnessed those facts, it was not prepared to reach the same conclusion in relation to any earlier time.

3. Although permission to appeal was given by this Tribunal on four separate grounds, the essential question is whether the FTT's assessment of the evidence was so flawed that it must be set aside and whether a different finding of fact can be substituted.

4. At the hearing of the appeal the appellant was represented by Mr Justin Bates and the respondent by Mr Archie Maddan. I am grateful to them both for their assistance.

Background

5. 100 Bluegates Road in Leicester is a two-storey mid-terrace house built in the 1980s. The FTT inspected it and described it as relatively modern and in a generally satisfactory condition. It has five habitable rooms, two on the ground floor and three on the upper floor. There is no dispute that four of those rooms were let at the material time as bed-sitting rooms, and that the fifth room, referred to in the evidence as Room 5, is too small lawfully to be let as a bedroom other than for occupation by a child under the age of ten.

6. The house was acquired by Ms Morjaria in 2014 and she immediately began letting the four larger rooms on written agreements creating assured shorthold tenancies. There is no evidence that Room 5 has ever been let on a written tenancy agreement.

7. On 1 October 2018 the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 came into force. For the first time two-storey houses were required to be licensed as HMO's if they were occupied by five or more people living in two or more households. Ms Morjaria did not apply for a licence. It has always been her case that she did not need one because only four people lived in the house and Room 5 was not occupied as living accommodation.

The Council's investigation

8. Two of the appellants' housing officers carried out an unannounced inspection of the property on the morning of 11 August 2021. They were able to inspect two rooms but were refused access by the occupant of a third and obtained no response from the

remaining two rooms, including Room 5. The officers observed that a power cable ran under the door of Room 5 to an electric socket on the landing. A cupboard and a small fridge were also observed on the landing, and on leaving the house the officers noticed that the window to Room 5 was open. The officers pushed notices under the doors of the inaccessible rooms, informing the occupants that they required access later the same day.

9. That afternoon the officers received a telephone call from one of the occupants of the house, Mr Charles Sona, to whom they had spoken during their visit. He informed them that the person who lived in Room 5 had just been moved out of the property by Ms Morjaria.

10. The officers called again at the house after that telephone call and spoke to Mr Sona in person. He confirmed that Ms Morjaria had come to the house that afternoon and taken the tenant of Room 5 away, but he declined to make a formal statement. The officers noticed that the window of Room 5 was now closed and that the power cable could no longer be seen running under the door.

11. The officers returned to the house for a third time on 12 August 2021, but they were unable to gain access to Room 5. Mr Sona informed them that he had been asked by Ms Morjaria not to allow Council representatives into the property without arranging an appointment with her. He showed the officers a text message from her to that effect. A second tenant refused the officers access to his room and showed them a similar text message.

12. On 17 August 2021 the same officers made a fourth and final visit to the house accompanied on this occasion by Ms Morjaria's father who told them that no one had been living in Room 5. On this occasion they were able to inspect Room 5, which they measured and found to be only 4.7m^2. On the floor of the room one of the officers found a receipt dated 6 August 2021 recording a payment in cash of £150 as rent for Room 5. The name on the receipt was 'Wojech'.

13. The officers formed the view that Room 5 had been occupied and that there had therefore been five tenants living in the house in more than two households. On that basis the house was an HMO and should have been licensed.

14. On 6 September 2021 the officers informed Ms Morjaria by email that they intended to issue a prohibition order, preventing occupation of Room 5 as living accommodation and she responded that she had no objection to such an order. She asked for evidence that Room 5 had been occupied when the officers first visited the property.

15. On the same day, Ms Morjaria served notices on each of the tenants in the house, terminating their tenancies and seeking possession of their rooms. Mr Sona left the house on 15 September, and he subsequently agreed to provide a witness statement to the Council. In it he confirmed that the house had been occupied by five tenants and that the last tenant of Room 5 had been there for 4 months before he was moved out by Ms Morjaria on the day of the officers' first visit.

16. Ms Morjaria was invited to attend an interview under caution, but her response was again to ask for sight of the evidence gathered by the Council. When she was then sent Mr Sona's witness statement and a copy of the rent receipt for Room 5 she refused to be interviewed or to answer written questions.

17. On 31 January 2021 the Council served notice under paragraph 1 of Schedule 13A, Housing Act 2004 of its intention to impose a civil penalty of £29,817 on Ms Morjaria. The notice included a detailed summary of the grounds on which it was based. It identified 11 August 2021 as the date on which the offence had been committed but stated that the appointed officer considered that the property had been operating as a licensable HMO since 1 October 2018 (the date on which the 2018 Order came into effect).

18. Ms Morjaria responded to the notice of intent on 15 February 2022. She denied that the house had ever been occupied by more than four tenants and denied having moved the tenant of Room 5 out on 11 August. She supplied handwritten statements from two tenants, both of whom said that no one had been living in Room 5. One of those tenants, a Mr Mursa, said that he had used the room for storage. Ms Morjaria also supplied an email from a gas service engineer who claimed to have visited the house on 19 July 2021 when he had been unable to carry out checks in Room 5 because it was full of heavy furniture and boxed goods.

The penalty

19. These representations did not dissuade the Council from issuing a final penalty notice in the full sum of £29,817 on 7 March 2022. The reasons given again asserted the appointed officer's belief that the property had been operating as a licensable HMO from 1 October 2018 until 11 August 2021. The notice also explained that the quantum of the penalty had been determined according to the Council's own Civil Penalty Policy.

20. The Council's Policy stated that decisions on the appropriate penalty would be made "on a case by case basis" but it directed that the offence of operating an unlicenced HMO was "considered to be a very serious offence in every case even where the current occupants are not suffering harm or exposed to potential harm". Two reasons were given for this assessment. First, because "HMOs by their nature pose enhanced risks to the health and safety of occupants and required high standards in the condition and management of the properties", and secondly because a failure to licence "undermines the Council's ability to carry out its statutory duties".

21. The amount of the penalty was also explained in the notice of intent. Consistently with the Policy, the level of harm caused by the offence was assessed as very high and the two reasons given in the Policy were quoted. Additionally, it was said that the five occupants of the HMO had been put at serious risk because the fire detection system was inadequate, and that Room 5 was too small to be considered safe for an adult. It was noted that Ms Morjaria had confirmed that she was aware of the licensing regime, and it was therefore considered that she had deliberately chosen to ignore her responsibilities. Moreover, she had attempted to deceive the Council's officers by moving the tenant of Room 5 out of the building. The officers therefore concluded that the penalty should be fixed by reference to the highest level of culpability. Cross-referencing very high harm and the highest level of

culpability on the Policy's penalty matrix, yielded a default penalty of £27,500 to which was added £900, that being the licence fee which had been avoided, and a further £1,417 to cover the Council's costs of investigating the offence.

22. The final penalty of £29,817 was only £183 less than the maximum permitted by the statute.

23. Ms Morjaria appealed to the FTT. A supporting statement prepared by an organisation styling itself London Property Licensing asserted that the house had been let on a single room basis for seven years and that the occupancy level had always been lower than the HMO licensing threshold of five persons. Room 5 had never been used as living accommodation but had been used by Mr Mursa for storage, and the rent receipt recorded payment by him for that purpose. As far as quantum was concerned, the penalty was said to be disproportionate; reference was made to civil penalties imposed by tribunals for similar offences, of between £1,500 and £17,000.

The evidence

24. The FTT conducted a video-hearing at which oral evidence was given by the two Council officers who had visited the property, and by the two former tenants, Mr Sona and Mr Mursa. In its decision of 1 August 2022 the FTT recited the written evidence at some length, together with answers given to questions it had put to the witnesses. The officers gave details of their investigations and the following is a summary of the critical parts of the evidence of other witnesses.

25. Mr Sona confirmed to the FTT that Room 5 had always been occupied while he lived at the property. He named the two tenants as 'Jech' who had lived there for 3 months before being moved out on the day of the first inspection, and 'Mark', who moved out after between one and two years because the room was too small. He was unable to describe either of them in any detail.

26. Ms Morjaria did not attend the hearing but submitted a statement in which she maintained that Room 5 had never been rented out, other than to Mr Mursa to use as storage. She said this arrangement had begun in 2020 when a sum of £150 a month was agreed as additional rent. She had attended the property to collect that sum in person on 6 August but Mr Mursa had not been present. Instead, she found a friend of Mr Mursa's in his room (Room 1) who handed over £150 to her in cash in return for a receipt. Ms Morjaria denied having visited the property on 11 August or having moved anyone out of Room 5.

27. Mr Mursa had been the tenant of Room 1 and had returned to live in the house by the time he made his witness statement. In it he confirmed the informal arrangement to pay £150 a month to use Room 5 to store goods he bought and sold at online auctions. He said he had run an extension cable from the landing so that he could plug a lamp in when he was using the room as there was no charge on the key meter. He had cleared the room and provided a mattress to enable his friend 'Jech' or 'Wojech', to stay for a few days, and he had paid the rent of £150 to Ms Morjaria on Mr Mursa's behalf when she called to collect it. Jech had then moved out and returned to Poland.

28. In response to questions from the FTT Mr Mursa said he had used Room 5 "off and on" at various times since 2019 but could not provide dates. He had met Jech at a party in 2019 and when he needed somewhere to stay for his job Mr Mursa had allowed him to use Room 5. He could not say what Lech's job was. Mr Mursa thought he had stayed for been two or three weeks, and he had not informed Ms Morjaria. Mr Mursa gave two accounts of how the rent for Room 5 was paid. First, he explained that he usually paid the rent by bank transfer and had paid in cash for Room 5 on only one occasion. He could not explain why his name did not appear on the receipt given by Ms Morjaria. He then said that he had only ever paid rent for Room 5 once, after he had informed Ms Morjaria that he had allowed a friend to stay, which had caused her to become angry.

29. The FTT also referred to a statement submitted by an electrician who said he had carried out an annual fire alarm safety check at the property in 2020 and 2021. He had tested the smoke alarm in Room 5 on both occasions and had seen no evidence of anyone living there. The maker of the statement did not attend the hearing.

The FTT's decision

30. The FTT referred to the notice of intention and the final notice and explained that the offence to which each referred was the offence of being in control of an unlicensed HMO contrary to section 72 of the 2004 Act. It did not mention the period during which that offence was alleged to have been committed. Having described the evidence and submissions it had received it then approached its task by considering first whether it was satisfied beyond reasonable doubt that a relevant housing offence had been committed.

31. Having noted Mr Mursa's conflicting evidence about the use of Room 5, the FTT said that the evidence of Mr Sona and the text message he had received from Ms Morjaria asking him not to allow access to the Council's officers (to which the FTT gave "substantial weight") both pointed strongly to Ms Morjaria having attempted to cover up a letting of Room 5 by removing the occupier. The rent receipt clearly indicated rent had been paid for Room 5, and the FTT considered it likely that the person liable to pay that rent was the 'Wojech' named on the receipt. Mr Mursa's responses to questions had been "not credible" in relation to the use of Room 5, and the FTT could not understand why the additional sum would not simply have been added to the rent he paid by bank transfer. It did not accept that Ms Morjaria could have visited the property between 2019 and 2020 and not noticed that the room was in use. Mr Mursa's account of Ms Morjaria getting angry when she discovered that Wojech had been staying in Room 5 had not been mentioned by her and was inconsistent with her evidence that the room had been used only for storage. His description of Wojech needing somewhere to stay suggested he had nowhere else and that Room 5 was his only or main residence (with the result that the house was an HMO while he resided there). Weight was also placed on an email from Ms Morjaria as implying that Room 5 had been let in the past.

32. On that basis the FTT concluded that it was "satisfied beyond reasonable doubt that the alleged offence was committed and that the applicant was the person in control of the property." Once again, at that stage the FTT did not say whether it was satisfied that the offence had been committed from 1 October 2018 to 11 August 2021, which was the period included in the particulars of the offence given in the Council's notices.

33. The FTT then considered whether the penalty imposed by the Council had been set at an appropriate level. It began by saying this, at [110] and [111]:

> "It is clear to the tribunal that in its notice of intent the respondent was influenced by its conclusion that the property had been let as a licensable HMO since the regulations changed on 1 August 2018. However, the tribunal determined that it could only be satisfied to the criminal standard that an offence occurred on 11 August 2021. The tribunal considered that the evidence of Mr Sona, when considered in isolation was not strong enough to substantiate occupation before that date. The tribunal therefore determined that this had to reduce the level of harm because the evidence can only prove that the occupier of Room 5 was exposed to risks for one day.
>
> In terms of harm the tribunal determined that it was necessary to narrow it down to the period for which it can be proved to a criminal standard that the offence was taking place. The tribunal accepts that someone was in the room on 11 August 2021 (and almost certainly from 6 August 2021 given that this is the date on the rent receipt) but determined that there was only limited exposure to the risks."

34. The FTT then made its own assessment of harm and observed that the psychological distress of living in an inadequate space "would only manifest over a period of time", and that the same was true of exposure to harm caused by inadequate fire protection. Because the offence was failing to licence the HMO the FTT considered that "we cannot account for the other four occupiers as they could have resided there legally". It also noted that there was no evidence of "any actual harm being caused" and later suggested that it was "not realistic to assume that a tenant is exposed to a risk simply because there is no licence in place". Referring to the HHSRS system of categorising hazards in residential property, the FTT observed that the fact that the Council's regulatory activity and the businesses of legitimate landlords were both undermined by a failure to licence "could not be considered in the same category as serious category 1 hazards where there are substantial risks of an occupier being killed or injured." To punished a licensing offence by a penalty close to the maximum left no scope for more serious offences and was considerably beyond the level required to achieve deterrence or the fine which would have been imposed on a criminal prosecution. In short, the FTT was not persuaded that the penalty imposed by the Council was "in any way reasonable or reflects the actual failures of the applicant".

35. The FTT arrived at its own penalty by cross referencing on the Council's penalty matrix a low level of harm and deliberate culpability, which produced a starting point of £15,000. This was reduced by 30% as there was no evidence of a previous offence, and by a further 60% because Ms Morjaria's annual income from renting three properties was only £15,000. A further £1,500 (10% of the starting level) was added to reflect Ms Morjaria's admitted knowledge of the HMO regulations together with the £900 licence fee which had been avoided and which was to be deducted as "financial gain". The FTT declined to include any sum to reflect the Council's costs of investigating the offence on the basis that, in principle, these were irrelevant to the quantum of the penalty. This left a total of £3,900 which the FTT substituted for the penalty originally imposed by the Council.

The appeal

36. The Council was granted permission to appeal by this Tribunal on four grounds, as follows:

1. That the FTT's finding that Ms Morjaria's had committed the offence only on 11 August was inconsistent with the evidence and it should have assessed the penalty on the basis that her offence was of long-standing.
2. That the FTT had misunderstood the Council's policy and had failed to give it appropriate weight, particularly with regard to the seriousness with which it treated licensing offences.
3. That the FTT had been wrong to refuse to include in the penalty a sum to reflect the Council's costs of investigating the offence.
4. That the FTT's assessment had given weight to factors for which there was no evidence (Ms Morjaria's means, and the absence of previous offences) and had failed to give weight to aspects of her conduct, including the removal of the occupant of Room 5 in response to the Council's investigation.

Ground 1: The period of the offence

37. Mr Bates submitted that the FTT's primary reason for reducing the penalty imposed by the Council was its conclusion that the evidence was not strong enough to support a finding of an offence on any date other than 11 August 2021. He argued that that conclusion was inconsistent with the evidence I have summarised above and was not one which any properly directed tribunal could have reached.

38. Mr Maddan referred to Viscount Sankey LC's famous reference in *Woolmington v DPP* [1935] A.C. 462, 481 to the "golden thread" running through the "web of English criminal law", namely that "it is the duty of the prosecution to prove the prisoner's guilt". In this case the FTT had analysed the evidence over nine pages before concluding that it was not satisfied to the criminal standard of proof that Room 5 had been occupied by Wojech on any day other than 11 August. It had been scrupulous in ensuring that the criminal standard of proof was met and stopped short of finding an offence had been committed, even on dates when it thought it was likely. That conclusion had reasonably been open to it on the evidence and was one with which this Tribunal should not interfere.

39. As Mr Bates acknowledged, an appellate court or tribunal will only be justified in interfering with a factual finding by a first instance tribunal "where a critical finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached" (see *Haringey LBC v Ahmed* [2017] EWCA Civ 1861, at [29]-[31]). Mr Maddan also referred me to *Point West GR Limited v Bassi* [2020] EWCA Civ 795, in which Lewison LJ, discussing the FTT's power to review its own decisions where there had been an error of law, said at [47]: "In this context an "error of law" would undoubtedly include a case in which the FTT had reached a factual conclusion which had no evidence to support it; or which was contrary to the only reasonable conclusion on the evidence."

40. Financial penalty proceedings under section 249A, 2004 Act are civil proceedings, but they are unlike most civil proceedings in that proof is required to the criminal standard.

The FTT was therefore required to be satisfied beyond reasonable doubt of the facts constituting the relevant offence.

41. It was not suggested by either counsel that this unusual feature of financial penalty cases requires a different approach by this Tribunal when considering a challenge to the FTT's conclusion on the evidence. I was not shown any authority dealing with the proper appellate approach where it is said a first instance court or tribunal wrongly failed to find facts proven to the criminal standard. That may be because other contexts in which such a proposition could be advanced do not come easily to mind; in criminal cases there is of course generally no appeal against an acquittal.

42. The only other authority to which reference was made was the decision of the Court of Appeal in *Sutton v Norwich City Council* [2021] EWCA Civ 20. That was an appeal against a decision of this Tribunal, sitting as the first instance decision maker following the transfer of the case from the FTT, on a landlord's appeal against financial penalties imposed under section 249A. But this Tribunal had found the offences on which the penalties were based to have been proven, and the appeal against its decision was by the landlord. The Court of Appeal's guidance on the approach of an appellate court or tribunal (at [30]-[31]) does not address the peculiar question which arises in this case.

43. There does seem to me to be a difference between challenging an affirmative finding of fact that some event occurred, or some state of affairs existed and challenging a conclusion that evidence is not sufficient to prove a case beyond reasonable doubt. A conclusion of the second type is not a "finding of fact" or "factual conclusion" in the sense in which those expressions are used in the cases to which I was referred. Nor is it relevant to ask whether the conclusion was or was not supported by evidence, since the issue is whether the FTT should have been persuaded, not whether it could have been.

44. It does not seem to me to be possible for an appellate tribunal to set aside a first-tier tribunal's conclusion that proof to the required criminal standard had not been provided unless it can be sure that some fundamental error of principle or approach entirely undermines the original decision. I am inclined to think that the relevant question must concern the integrity or coherence of the decision-making process, rather than simply an evaluation of the evidence, which may be sufficient to satisfy one decision maker to the necessary standard but not another. The approach taken where the Tribunal is asked to set aside an evaluative or discretionary decision may be a relevant guide, namely to consider whether the decision is wrong because of "an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see *Sutton v Norwich City Council*, at [31]). But that alone would not justify an appellate tribunal substituting a conclusion that the relevant facts had been proven. It would additionally be necessary for it to be satisfied that the decision was contrary to the only reasonable conclusion possible on the evidence; that was the basis on which Mr Bates made his submissions.

45. The particular flaw in reasoning on which Mr Bates relied was the FTT's statement, at [110], that "the evidence of Mr Sona, when considered in isolation was not strong enough to substantiate occupation before that date" i.e. 11 August 2021. That statement was not followed by any explanation, nor did the decision include any evaluation of Mr Sona as a

witness or any examination of his evidence to identify flaws or inconsistencies which might call it into question. The statement indicates clearly that the FTT considered the evidence of Mr Sona "in isolation", and concluded that, viewed in that way, it did not establish that Room 5 had been occupied in such a way that the premises were an HMO on any date other than 11 August. But there was no reason to treat Mr Sona's evidence as if it had been given "in isolation", and by approaching it in that way the FTT denied itself the opportunity of assessing the evidence as a whole.

46. It is striking that the part of the FTT's decision in which it reached this conclusion came well after its determination that it was satisfied beyond reasonable doubt that the alleged offence had been committed. It occurred when the FTT considered the issue of harm to the occupiers of the HMO in the context of its assessment of the quantum of the penalty. It is not clear why the matter was approached in that way. Although the penalty notice stated the date of the offence as 11 August 2021, the particulars of the offence which followed in the same document asserted that the same state of affairs had continued since October 2018. Mr Sona's evidence concerned the whole period of the offence and it was not Ms Morjaria's case that the Room 5 had been let for only a single day – she maintained that it had not been let at all, and the FTT was satisfied beyond reasonable doubt that that was not true.

47. I am satisfied that, by looking at Mr Sona's evidence in isolation, the FTT did make a fundamental mistake. It should have considered the evidence in context. The relevant context included its conclusion that the case was made out in respect of 11 August; the receipt in the name of Wojech showing that rent was being paid by 6 August at the latest; Mr Mursa's evidence that Wojech had been allowed to stay "maybe for a few weeks"; Ms Morjaria's evidence that she had been receiving rent for Room 6 since 2020; its own conclusion that Mr Mursa's evidence was "conflicting" and "not credible", and the fact that he was the only witness who gave oral evidence contradicting Mr Sona's account that Room 5 had been continuously occupied for three years; its conclusion that Ms Morjaria had engaged in a cover-up of the letting of Room 5 and its acceptance of Mr Sona's evidence that she had removed the tenant of Room 5. The FTT appears to have taken none of these matters into account when it considered how long the house had been an HMO but instead considered only Mr Sona's evidence "in isolation". That was not an appropriate or reliable way in which to make a decision and it led to a decision which defies logic; the receipt and Mr Mursa's evidence alone establish that the room had been occupied by Wojech as his sole residence at least for a few weeks.

48. I do not accept Mr Maddan's submission that viewing Mr Sona's evidence together with the other evidence in the case still leaves it short of establishing the offence to the criminal standard in respect of any day other than 11 August. The conflicting evidence from Mr Mursa was found by the FTT to be "not credible", a conclusion which was impossible to avoid when he had changed his account of how often he had paid for Room 5. The electrician who made a statement that on two visits to Room 5, in 2020 and 2021, "the room was empty with no sign of anyone living in there", did not attend for cross examination; the FTT did not say what it made of his evidence, but it cannot reasonably be thought to undermine Mr Sona's evidence about the duration or quality of the residential occupation of Room 5. Ms Morjaria's denial that the room had ever been let was irreconcilable with the FTT's acceptance that she had attended following the Council's first visit to remove the occupant, and equally irreconcilable with the evidence of Mr

Mursa. Against that, it does not appear to have been suggested to Mr Sona that his evidence was tainted by animosity towards his former landlord, nor did the FTT suggest any reason why it was not worthy of acceptance in full. I am satisfied that the only conclusion reasonably open to a tribunal which properly directed itself with regard to the whole of the evidence was that Mr Sona was a truthful witness and that the property had been controlled by Ms Morjaria as an unlicensed HMO for considerably longer than the FTT allowed and probably from the inception of the licensing requirement in October 2018.

49. Since the FTT was itself satisfied that an offence had been committed, my conclusion does not involve replacing a complete acquittal with a finding that an offence had been committed, which would be an even bolder determination for an appellate tribunal. The consequence of my conclusion is more limited; it is that the FTT made its assessment of the appropriate penalty on the basis of an incomplete appreciation of the duration and seriousness of Ms Morjaria's offence. That was an omission to have regard to a material consideration and it justifies this Tribunal in setting aside the FTT's decision on the quantum of the penalty and substituting its own.

Ground 2 - Failure to give appropriate weight to the Council's policy

50. I do not accept Mr Bates' submission that the FTT failed to understand or give appropriate weight to the Council's Policy.

51. In *Sutton*, at [13]-[14] the Court of Appeal endorsed guidance given by this Tribunal (Judge Cooke) in *Marshall v Waltham Forest LBC* [2020] 1 WLR 3187, at [54] and [62], which explained that the FTT should start from the policy of the local housing authority and consider whether the objects of the policy will be met if it is not followed, but that if, having afforded the policy considerable weight, the FTT disagreed with the authority's conclusions it is entitled to vary the penalty indicated by the policy.

52. The misunderstanding suggested by Mr Bates concerned the distinction between harm to an individual tenant and harm to occupiers of HMOs in general if the Council's supervision and enforcement functions were undermined by a failure to licence HMOs. The FTT had that distinction well in mind and specifically disagreed with the Council that the risks of harm which were the consequence of licensing avoidance were as serious as the risks to individuals of category 1 hazards liable to cause death or serious injury (see the decision at [118]). It also considered whether the objects of the policy (punishment, deterrence and the removal of financial gains) could be achieved if the penalty was set at a significantly lower level and concluded that they could (see [118]-[120]). Having reached those conclusions the FTT was entitled to impose a different penalty from the one produced by an unamended application of the policy.

53. I would add that the Council's policy appears to conflate distinct considerations, namely, the seriousness of the offence and the harm caused by its commission. The policy requires officers to follow a series of eight steps in arriving at a penalty, the first two of which are to determine the level of harm caused by the offence and the culpability of the offender. Step three is then to identify a default penalty by cross referencing harm and culpability on a grid or matrix; in that way the default penalty is arrived at without separate consideration

of the seriousness of the offence. The default penalty may then be adjusted by up to £2,500 to reflect aggravating or mitigating considerations.

54. The approach adopted by the policy is in contrast to the Guidance on Civil Penalties published by the Ministry of Housing, Communities and Local Government in April 2018, which identifies the severity of the offence, the culpability and track record of the offender and the harm caused to the tenant as distinct considerations. The conflation of harm and seriousness may be dictated by a desire to fit the relevant considerations into a grid with two axes. The attraction of a grid to aid decision makers is understandable, but in this Policy it may have resulted in insufficient consideration being given to the seriousness of the offence. As a result, offences with strikingly different consequences to which one would expect different degrees of seriousness and penalties should attach, have been deemed worthy of the same penalty. That was the approach which the FTT found difficult to accept, and I share its concern.

55. It is for each local housing authority to adopt its own policy, and it is not the function of this Tribunal provide a model. But in principle it would seem to me that a better approach would be for the seriousness of each relevant housing offence to be reflected in either a starting level or in a maximum (and possibly a minimum) penalty. Around that starting point or within that range the actual or potential harm to tenants, the culpability of the offender and any mitigation could then be taken into account to determine the appropriate penalty for the particular offence being considered. That might require a different grid to be devised to reflect different offences, but it might avoid some of the difficulties identified in this case.

Ground 3 – Should the Council's costs of investigating the offence be added to the penalty?

56. The Policy specifically requires officers to adjust (i.e. increase) the default penalty to include costs incurred by the Council in investigating the offence. When it determined the original penalty the Council added the sum of £1417 specifically to cover those costs. The FTT considered that surcharge was inappropriate and refused to include it. Mr Bates challenged that refusal and submitted that such costs were properly include in the assessment of an appropriate penalty.

57. In support of this ground of appeal Mr Bates referred to policy papers predating the introduction of the financial penalty regime which indicated that the "polluter pays" principle should apply so that "the cost of enforcement should fall primarily on rogue landlords rather than on good landlords or the general tax payer". That does not seem to me to justify the addition of costs as a separate component of a civil penalty. By regulation 4 of the Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017 an authority may use the whole of the financial penalties it collects to meet the costs and expenses (whether administrative or legal) incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector. That is how the "polluter pays" principle is reflected in the rogue landlord regime. As the whole of the penalty is available as a contribution to the costs of enforcement it would savour of double counting to use the "polluter pays" principle to justify the addition of a specific sum for that purpose.

58. Next Mr Bates pointed out that there was nothing in section 249A, 2004 Act to prohibit the addition of enforcement costs, and referred to the fact that if, rather than imposing a financial penalty, the Council had chosen to prosecute, it would usually be allowed its costs of the investigation. Neither of those points seems to me to support Mr Bates' argument, since in the criminal context there is specific statutory authority for a separate award of costs in favour of a prosecuting authority (section 18, Prosecution of Offences Act 1985).

59. In my judgment the FTT was entitled to ignore the Council's policy of adding the cost of investigation to the financial penalty arrived at after consideration of all relevant factors. There is no reference to such a surcharge in the Guidance to which authorities are required to have regard and there is no specific statutory sanction for it. That is in contrast to the express powers given by section 49, 2004 Act allowing authorities to make reasonable charges to recover the cost of enforcement action and providing for national authorities to impose a cap on such charges. Had it been intended that the cost of investigating offences leading to financial penalties should be recoverable separately a reference to section 249A could have been included in section 49(1) when the rogue landlord regime was introduced in 2016. The fact that it was not suggests that there is no power to collect such a contribution through the penalty charge itself.

The appropriate penalty

60. The fourth ground of appeal identified a number of factors which it was said had been overlooked by the FTT in setting its revised penalty. It is not necessary to consider that complaint as I have already decided that the FTT's assessment cannot stand because it treated the offence as having been committed on a single day. What remains to be done is to determine the appropriate penalty in this case.

61. For the reasons I have already given, I am not prepared to follow the Council's Policy. By treating all HMO licensing offences as being worthy of a penalty at the top end of the available scale, the penalty is set at a level which is disproportionate to the seriousness of the offence and to the seriousness of the other offences with which it is equated. The Policy produces a penalty which is greater than is required to achieve the objectives of appropriate punishment and deterrence and which I consider to be excessive and unjust.

62. In declining to adopt the Council's policy I take into account its democratic mandate and the vital importance of its role as local housing authority with responsibility for housing standards in Leicester. In determining the appropriate penalty I nevertheless have regard to two of the three specific factors which the policy identified as justification for treating licensing offences as meriting the most stringent penalties. Those are: first, that by their nature, HMOs represent enhanced risks to the health and safety of their occupants and require high standards of management; and secondly, that operating an HMO without a licence undermines the Council's ability to carry out its statutory duties. The third factor relied on is in the nature of a statement of principle which proposes that a failure to licence an HMO is a very serious offence in every case even where the current occupants are not suffering harm or exposed to potential harm. In my judgment that proposition overstates the seriousness of the offence of being in control of or managing an unlicensed HMO. The first two reasons provide solid grounds for treating licensing offences as serious, but their seriousness should not be exaggerated. In *Ekweozoh v LB Redbridge* [2021] UKUT

0180 (LC), at [50], I referred to a licensing offence a being of "moderate seriousness" and I adhere to that view. The level of harm to which occupants have actually been exposed also seems to me to be a factor of greater significance than the policy recognises.

63. Where the FTT's assessment is not conditioned by the erroneous conclusion that the offence had been committed on a single day I will also take it into account.

64. Having regard to the matters identified in the Council's policy an offence of failing to licence an HMO should, in my judgment, be treated as one of moderate seriousness for which the appropriate penalty will begin at between £8,000 and £12,000. That figure is consistent with other cases in which this Tribunal has determined for itself the appropriate sanction in a licensing case (in which final penalties of £5,000, £6,000 and £12,000 have been imposed). Bearing in mind the seriousness with which the Council takes this offence it is appropriate to start at the top of that range.

65. The evidence in this case supports the conclusion that specific harm was caused to two occupiers of Room 5 for a period of up to thirty months. That harm was the result of occupying a room which was too small to provide acceptable living accommodation and which Ms Morjaria eventually agreed should be the subject of a prohibition order. To reflect that specific harm I adjust the penalty upwards by £3,000.

66. Ms Morjaria acknowledged that she was aware of the need to licence any HMO of which she was in control, and I agree with the FTT's conclusion that her offence must therefore have been committed deliberately. She also took active steps to cover up the presence of the fifth tenant and failed to cooperate with the Council's investigation. To reflect her high level of culpability and these aggravating factors I add a further £3,000.

67. In my judgment there is no reason to strip Ms Morjaria of a further sum of up to £4,500, being 30 months income at the rate of £150 a month. The penalty of £18,000 already exceeds that figure by a substantial margin and fully achieves the objective of depriving the wrongdoer of what the Council's Policy describes as the "unjust economic benefits" of the offence.

68. For the same reason it would it be inappropriate to increase the penalty by the amount of an unpaid licence fee. Additionally, if a licence had been applied for it would have been refused and it is likely that a prohibition order would have been made in respect of Room 5.

69. There is no adequate evidence of Ms Morjaria's means or outgoings, despite her having had the opportunity to provide it. At the hearing before the FTT it may have been asserted on her behalf by her representative that her only source of income was from letting three properties, but she did not say so in her written evidence and she did not attend the hearing to answer questions. In the Council's own calculation of the original penalty it referred to accounts of her letting business in the year to April 2021 which showed a profit of £15,952. There is no evidence that her letting properties are her only source of income nor of the value of property or other assets she may own. There is therefore insufficient material on which to justify any deduction to reflect her ability to pay the penalty.

70. For the reasons I have already given I make no addition for the costs of the Council's investigation.

Disposal

71. For the reasons I have given I allow the appeal against the quantum of the penalty set by the FTT. The penalty I impose is one of £18,000, which I consider to be at the top end of the range of penalties appropriate for a licensing offence. It reflects Ms Morjaria's high degree of culpability and other serious aggravating factors together with evidence of real harm to tenants over a protracted period which would have been avoided if she had complied with her obligation.

Martin Rodger KC

Deputy Chamber President

7 June 2023

Right of appeal

Any party 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.