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Case No: LC-2023-566

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: CH1/18UH/HNA/2022/0025

Royal Courts of Justice

15 December 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – financial penalty imposed on freeholder of building divided into three flats let on long leases – failure to comply with improvement notice requiring repair of fire alarm in one of the flats and failure to keep communal means of escape clear of obstructions – leaseholder refusing access and restoring obstructions – whether defence of reasonable excuse properly considered – additional penalty for previous good behaviour – consideration of respondent's policy – ss.30(4), 249A, Housing Act 2004 – appeal allowed

BETWEEN:

PARK GREEN INVESTMENTS LIMITED

Appellant

-and-

TEIGNBRIDGE DISTRICT COUNCIL

Respondent

27 Fore Street,
Teignmouth,
Devon TQ14 8DZ

Martin Rodger KC, Deputy Chamber President

5 December 2023

Stephen Thompson, company director, for the appellant
Jonathan Ward, instructed by Teignbridge District Council, for the respondent

The following cases are referred to in this decision:

I R Management Services Ltd v Salford City Council [2020] UKUT 81 (LC)
Kazi v Bradford Metropolitan District Council [2023] UKUT 263 (LC)
London Borough of Waltham Forest v Marshall [2020] UKUT 35 (LC)
R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33
Sutton v Norwich City Council [2021] EWCA Civ 20

Introduction

1. This appeal is against a decision of the First-tier Tribunal (Property Chamber) (the FTT) to reduce a financial penalty imposed under section 249A, Housing Act 2004, from £10,000 to £5,000. The penalty was imposed by the respondent, Teignbridge District Council (the Council), on the appellant, Park Green Investments Ltd, on account of its failure to comply with an improvement notice requiring remedial action to be taken in respect of hazards existing at a building at 27 Fore Street in Teignmouth.

2. An unusual feature of the appeal is that, although all three of the flats in the building are let on long leases, the remedial action required by the Council's improvement notice included action to repair a fire alarm in one of those flats, Flat 2, and action to ensure that the common parts of the building were keep free of obstruction placed there by the leaseholders. Rather than choosing to serve the improvement notice on the leaseholders concerned, the Council elected to serve it only on the appellant, as freeholder.

3. The main issues in the appeal concern the way the FTT took account of the lack of cooperation experienced by the appellant when it tried to comply with the improvement notice. Its case is that it did everything that it reasonably could in the circumstances to comply but was repeatedly refused access to repair the fire alarm, and when it arranged for items to be removed from the common parts these were quickly returned by the same recalcitrant leaseholder.

4. Mr Stephen Thompson, who is a director of the appellant, represented it at the hearing of the appeal, as he had before the FTT. The Council was represented by Mr Jonathan Ward. I am grateful to them both for their assistance. The appeal was originally brought in Mr Thompson's own name but at the start of the hearing I directed that the company be substituted as appellant since the financial penalty was imposed on it rather than on Mr Thompson personally.

The relevant statutory background

5. The statutory provisions concerning improvement notices are contained in Part 1 and Schedule 1 of the Housing Act 2004 (2004 Act). The power to impose civil financial penalties is conferred on local housing authorities by section 249A, 2004 Act.

Improvement notices

6. Part 1 of the 2004 Act contains a scheme for the enforcement of housing standards by reference to the existence of hazards and an assessment by local housing authorities of their seriousness. Section 5, 2004 Act provides that if a local housing authority considers that a category 1 hazard (the most serious type of hazard) exists on any residential premises it must take appropriate enforcement action. Where a less serious, category 2, hazard is found section 7 confers a power on the authority to take enforcement action, but no obligation to do so. One of the forms of enforcement action available is the service of an improvement notice.

7. Sections 11 to 19 and Schedule 1, 2004 Act contain provisions about improvement notices; notices relating to category 1 hazards are described in section 11, while section 12 is concerned with notices relating to hazards in category 2.

8. An improvement notice is a notice requiring the person on whom the notice is served to take such "remedial action" in respect of the hazard concerned as is specified in the notice (section 11(2)). "Remedial action" in this context, means action (whether in the form of carrying out works or otherwise) which in the opinion of the authority, will remove or reduce the hazard (section 11(8)).

9. Section 13 is concerned with the contents of an improvement notice. A notice must specify the nature of the hazard and the premises on which it exists and the premises in relation to which the remedial action is to be taken, and it must state what remedial action is required, by when that action must commence and when it must be completed. Section 8 additionally requires an authority which has decided to take enforcement action to prepare a statement of its reasons for taking that action and (in the case of an improvement notice) to serve a copy of it with the relevant notice.

10. Section 18 and paragraphs 1 to 5 of Schedule 1 deal with the service of improvement notices, including identifying the person on whom a notice may be served. Four distinct situations are catered for, each of which identifies the proper recipient of a notice by reference to the characteristics of the premises in relation to which remedial action is to be taken, referred to in section 13(5) as the "specified premises".

11. In this case the specified premises in relation to the fire hazard represented by the defective alarm in Flat 2 was Flat 2 itself, because that is where fault was said to be and where the remedial action is required. Paragraph 3 of Schedule 1 provides that where the premises in relation to which remedial action is to be taken are a flat which is not subject to HMO licensing under Part 2 of the 2004 Act or subject to a selective licensing scheme under Part 3, the authority must serve the improvement notice either on the person managing the flat, or on a person who is both an owner of the flat, and, in the authority's opinion, ought to take the action specified in the notice.

12. The "owner" in relation to any premises is defined in section 262(7). It always includes the owner of the freehold interest and thus in this case it includes the appellant. It also includes any person holding a lease of which the unexpired term exceeds 3 years. In this case it therefore includes the leaseholders of the individual flats.

13. The "person managing" premises is defined in section 263 and has no application where the specified premises comprise a flat.

14. It follows therefore that where the premises in which remedial action is required to be taken are a flat which is let for a term with more than 3 years remaining, an authority may serve an improvement notice either on the freeholder or on the leaseholder of the flat, whichever in its opinion ought to take the action specified in the notice.

15. In respect of hazards requiring remedial action to be taken in the common parts of a building containing one or more flats paragraph 4 of Schedule 1 provides that the

authority must serve the improvement notice on a person who is "an owner of the specified premises" i.e. the common parts, and who, in the authority's opinion, ought to take the action specified in the notice.

16. For this purpose an "owner" of common parts is an owner of the building or part of the building in which the common parts are comprised (paragraph 4(3)). As before, "owner" includes a holder of a lease with more than 3 years remaining. In this case, therefore, both the appellant, as owner of the freehold of the building, and the leaseholders, each as owners of part of that building, are owners of the common parts and could properly be recipients of an improvement notice requiring remedial action to be taken.

17. By section 30(1) it is a criminal offence for a person on whom an improvement notice is served to fail to comply with it; it is a defence that such a person had a reasonable excuse for failing to comply with the notice (section 30(4)).

18. Part 3 of Schedule 1 creates a right of appeal to the FTT against an improvement notice. One of the grounds of appeal is that someone other than the appellant, who is also an owner of the specified premises, ought to take the remedial action concerned (paragraph 11(1), Schedule 1). When a tribunal considers an appeal on that ground it is required to take account of three matters specified in paragraph 16(3). Those are: (a) the relevant interests in the premises of the appellant and the other owner (considering both the nature of the interests and the rights and obligations arising under or by virtue of them); (b) the relative responsibility for the state of the premises which gives rise to the need for the taking of the action concerned; and, (c) the relative degree of benefit to be derived from the taking of the action concerned.

19. Although paragraph 16(3) is concerned with decision making by a tribunal on an appeal, the factors identified in it are also plainly relevant to an authority's own consideration of which of two or more owners ought to take the remedial action required to overcome a particular hazard.

Financial penalties

20. Section 249A, 2004 Act enables a local housing authority as an alternative to prosecution to impose a financial penalty of up to £30,000 on a person whom they are satisfied beyond reasonable doubt has committed any of the housing offences listed in that section. Among those offences is the offence under section 30 of failing to comply with an improvement notice.

21. Schedule 13A, 2004 Act contains detailed provisions about financial penalties. Amongst these, paragraph 12 states that a local housing authority must have regard to any guidance given by the Secretary of State about civil penalties when it exercises its functions. Relevant guidance was issued by the Secretary of State in 2018, entitled Civil penalties under the Housing and Planning Act 2016, Guidance for Local Housing Authorities ("the Government Guidance").

22. Paragraph 10 of Schedule 13A creates a right of appeal to the FTT against an authority's decision to impose a financial penalty and against the amount of that penalty. The appeal

takes the form of a re-hearing and the FTT is to make its own decision whether to impose a penalty and, if so, in what amount.

23. In determining an appeal under paragraph 10, the FTT must pay particular attention to any enforcement policy adopted by the authority, and will normally follow it; but it is not bound by the policy. The proper approach for a tribunal to take towards a local authority's policy was reviewed by the Tribunal (Judge Cooke) in *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC). The following statement in that case was subsequently approved by the Court of Appeal *in Sutton v Norwich City Council* [2021] EWCA Civ 20:

> "54… The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.
>
> 55. Nothing in these cases, or in the present appeals, detracts from the court's or a tribunal's ability to set aside a decision that was inconsistent with the decision-maker's own policy. Nor have the above cases said anything to cast doubt upon the ability of a court or tribunal on appeal to substitute its own decision for the appealed decision but without departing from the policy … It goes without saying that if a court or tribunal on appeal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or which of which it took insufficient account, it can substitute its own decision on that basis."

24. The Tribunal has recently revisited this topic in *Kazi v Bradford Metropolitan District Council* [2023] UKUT 263 (LC), where Judge Cooke added the following to what she had said in *Marshall*:

> "13. It is a principle of administrative law that a public body may not adopt a policy that has the effect of "fettering its discretion"; that means, in the present context, that it must not adopt a rigid policy that deprives it of the ability to consider the merits of the case and reflect them in its decision. The classic authority is *R v Port of London Authority ex p Kynoch* [1919] 1 KB 176. The FTT is likely to depart from a local housing authority's policy if it has that effect."

25. With the relevant legal context in mind it is now possible to turn in more detail to the facts of this appeal.

The facts

26. 27 Fore Street was constructed in the 19th century and comprises a basement coal cellar, ground floor commercial premises and three flats arranged on the first, second and attic floors. Access to the ground floor commercial unit is from the front of the building and a

separate entrance at the side serves the flats on the upper floors. A single, straight flight of stairs leads from a small ground floor hallway to a wider first floor landing; the front doors of each of the flats open onto the first floor landing. A separate set of steps, behind a fire door, leads from the ground floor down to the cellar.

27. The building is fitted with an integrated fire alarm system with smoke detectors in each flat and in the common parts all linked to a single control panel. If a fire was detected in any part of the building the occupiers of the flats should all be alerted.

28. The appellant has owned the freehold of the building since the 1990s and it was responsible for converting the residential upper floors into self-contained accommodation. Mr Thompson explained that the integrated alarm system pre-dated the conversion works and had been inherited by the appellant.

29. In about 2001, after the conversion works, the three flats were let by the appellant on long leases for terms of 125 years. I have only seen extracts from one of those leases, but I assume they are all in the same form. The lease obliges the leaseholder to keep the flat itself in good repair and to pay a service charge to the appellant, which is responsible for repairs to the structure and exterior and the common parts (the service charge appears only to cover the cost of work to the fire alarm in the common parts). The appellant has a right of entry to inspect the state of repair of the flat, and a right to give two months' notice requiring the leaseholder to undertake any necessary works of repair to the flat and, in the event of non-compliance, to enter the flat on giving two months' notice and carry out repairs at the leaseholder's expense.

30. One of the Council's housing officers first inspected the building in March 2021 following a complaint from the leaseholder of the top flat about the time it was taking the appellant to remedy a leaking roof. Thereafter there was informal consultation between officers and Mr Thompson, but on 20 August 2021 the Council served an improvement notice on the appellant requiring it to carry out work to address three separate hazards which had been identified. Those hazards were fire and falls on stairs (both category 1 hazards) and damp and mould growth caused by water penetration (a category 2 hazard).

31. The description of the fire hazard in the notice identified five issues. Some were minor (signage on a meter cupboard door, and a query about a test certificate) but others were more significant. The doors to individual flats were not sufficiently fire resistant. A fault was showing on the control panel indicating that the fire alarm in Flat 2 was not working. The escape route through the common parts was not kept clear as there were items stored on the route which might hinder escape. Photographs taken during the inspection show a number of items on the ground floor, namely, a small cabinet placed at the foot of the stairs, a tall, narrow shelf unit used for post, a plank of wood, and what may be a bicycle. No hazards were identified as being present on the stairs themselves.

32. The second hazard identified was the risk of falls on the stairs leading from the ground floor to the cellar. Items were found to have been stored at the top of those stairs which obstructed access for anyone wishing to read the gas meter or use the cellar for storage. The stairs themselves were unlit and had no handrail.

33. A single improvement notice was served by the Council covering all of the hazards it had identified. In relation to the category 1 fire hazard, it required that a suitably qualified engineer be engaged to identify and remedy the fault shown on the fire control board in zone 2 (Flat 2) and that the escape route be cleared and not used for storage. In relation to the "falls on stairs" hazard, which was also assessed as category 1, the notice specified that the cellar stairs must be cleared of all items, and new lighting and a handrail must be installed.

34. The Council also prepared and served a statement of its reasons for serving the improvement notice. That statement did not explain why it had been decided to serve one notice on the appellant, rather than separate notices on the appellant and the leaseholders in respect of different remedial actions. Nor did any of the Council's officers who prepared witness statements and gave evidence to the FTT, including in a detailed statement of 56 paragraphs by the officer principally concerned and statements by two of her colleagues, explain why the notice had been served on the appellant alone. The inference I draw from the statement of reasons and from the evidence as a whole is that no specific consideration was given by the Council to the question of who ought to take the action specified in the notice, but that it was simply assumed that the appellant was that person.

35. The improvement notice served on 20 August required that the specified works should be begun by 23 September and completed within 2 months of that date. On 20 September Mr Thompson wrote to the authority acknowledging receipt of the notice and stating that the works would be done within the next 2 months. The appellant did not lodge an appeal against the notice.

36. When housing officers returned to inspect the premises on 7 December, they found that most items of work had not been completed. There was no indication that anything had been done to remedy the defective fire alarm in Flat 2 and the escape route was still obstructed by the same items in the same places. Some work to address the risk of falls on the cellar stairs had been undertaken by the installation of a handrail and a new motion sensor light but the light appeared not to be working; items were still stored at the top of the cellar stairs.

37. On 6 May 2022 the Council gave the appellant notice of its intention to issue a financial penalty and on 20 October 2022, after a further inspection of the premises and consideration of representations made by Mr Thompson, a final notice was served imposing a penalty of £10,000. The Council's final inspection shortly before service of the final notice had shown that further matters had been attended to, but there were still obstructions at the top of the cellar stairs and in the hallway, and the control panel was still showing that Flat 2 was disconnected from the alarm system. These modest improvements were not enough to change the Council's assessment of the appropriate penalty.

38. That assessment was made by applying the Council's points based policy on financial penalties. In this case points were imposed for the seriousness of the offence (18 points), the appellant's degree of culpability, which was regarded as "reckless" (18 points), its track record, which attracted a further 10 points because this was a first offence, and for "harm caused to tenants" for which a further 10 points were awarded. The total score

assessed by the Council's officers was 53 which attracted a penalty of £10,000 under the policy.

The appeal to the FTT and its decision

39. The appellant appealed against the imposition of the financial penalty. The basis of the appeal in relation to the defective fire alarm in Flat 2 was that all its efforts to gain access to Flat 2 had been met with a complete lack of cooperation from the leaseholder. Attempts to arrange appointments to service the fire alarm had been ignored and, when an engineer had attended to carry out work, he had been unable to gain access to Flat 2. The basis of the appeal in relation to the items obstructing the cellar staircase and the means of escape was that these belonged to the leaseholder of Flat 2 who had failed to remove them in response to requests and who had retrieved them from the cellar when Mr Thompson and his contractors had put them there. Mr Thompson asserted that realistically there was nothing he could do to ensure that the staircase was permanently kept clear of items which one individual chose repeatedly to return there.

40. Mr Thompson attended the appeal hearing before the FTT and explained that he lived 200 miles from Teignmouth where the appellant owned only two properties. He did not have a key to the building but had an arrangement with one of the leaseholders that they would carry out any necessary maintenance of the common parts. The appellant's only source of funds was the service charge but none of the leaseholders were well off, and the charges were set according to how much they could afford. Collecting it was difficult and the leaseholder of Flat 2 had not paid for three years.

41. Mr Thompson also maintained that the fault shown on the fire alarm panel because of the defect in Flat 2 did not compromise the whole fire alarm system which functioned properly in the common parts and in the other two flats. He suggested that the integrated system fitted in the building was not normal for self-contained flats and was not a requirement of building regulations. His evidence concerning remedial works to the fire alarm in Flat 2 was recorded by the FTT as follows:

> "… he had tried his best to comply with the improvement notice by repeatedly trying to arrange with Mr Collett for an engineer to attend the flat and repair that part of the system. Unfortunately the tenant (Mr Collett) had refused to cooperate and had made it impossible to gain access. [Letters exhibited at pages 48, 50, 51]. Mr Thompson said that if he could not get access, even though the lease might give him a power to enter to carry out repairs, there was little more he could do: court action against the tenant could cost up to £10,000 and he could not afford it."

42. In relation to the presence of hazards on the stairs and in the common parts Mr Thompson's evidence was recorded as follows:

> "Mr Thompson stated that the items stored or placed on the staircases – both the main staircase in the common parts and the cellar staircase – were mainly put there by the tenant of flat 2. He claimed that he had cleared the stairs in response to the Improvement Notice but the tenant merely continued to put

> items there, despite written warnings [page 49]. Mr Thompson argued that it was impossible for him to ensure compliance because he lived 200 miles away."

43. The Council's housing officer gave evidence on its behalf. She disputed the suggestion that a fully integrated fire alarm was not required and emphasised the Council's view that as freeholder Mr Thompson was responsible for the overall safety of the building and had sufficient powers under the lease "to require the works to be done". As for the suggestion that the staircase and escape route had been cleared, only for the leaseholder of Flat 2 to block them again, she pointed out that some items appeared to have remained in the same place on each of her visits.

44. In its decision the FTT recited the evidence and submissions it had heard. It did not give itself any specific direction about the elements of the offence under section 30, 2004 Act, and made no reference to the statutory defence provided by section 30(4). Instead it structured its decision making around a list of issues contained in directions given by a procedural judge at an earlier stage of the proceedings.

45. The first of those issues, and the entirety of the FTT's consideration and conclusion on it, appeared in paragraph 47 of the decision, as follows:

> "Whether we are satisfied beyond reasonable doubt that a "relevant housing offence" has been committed (section 249A Housing Act 2004). In this case, despite some efforts to carry out the necessary works, we were satisfied that Mr Thompson had failed to comply with the Improvement Notice fully and/or within the timescale set."

The first sentence was not an incorrect statement of what the FTT had to decide, but it was not a particularly helpful starting point. It was taken from what appears to be a standard form of directions and did not focus on the specific issues in this case, including in particular whether the appellant could establish that it had a reasonable excuse for failing to comply fully with the improvement notice (on that issue, of course, it was for the appellant to satisfy the FTT on the normal civil standard of proof).

46. In this part of its decision the FTT made no specific findings of fact about what the appellant had done (other than the general reference to "some efforts to carry out the necessary works") and said nothing at all about its case that it had been unable to obtain access to carry out the work.

47. After deciding that the Council had complied with the relevant procedures for imposing the financial penalty (which the appellant had not disputed) the FTT next proceeded to consider the amount of the penalty to be imposed and whether it was set at an appropriate level having regard to a list of relevant factors identified in the Council's policy.

48. The relevant factors that the FTT took into account included the severity of the offence. It confirmed the authority's assessment that, as at October 2022, the level of fire hazard was "level 1 – major impact" while the risk of falls on stairs was "level 2 – serious impact" attracting 5 and 3 points respectively in the Council's scoring system.

49. The FTT then considered the culpability of the appellant. It found that Mr Thompson had a casual attitude to statutory management requirements and had effectively abdicated his responsibility for maintenance of the building by not holding a key to the common parts. It acknowledged that he had been willing to address the issue once the improvement notice was served and had taken steps to reduce the risk from fire by purchasing temporary smoke detectors to address any immediate problem. The FTT went on:

> "The evidence as a whole showed that initially the fire hazards may have arisen as a result of Mr Thompson's negligence in failing to visit and ensure compliance with safety requirements, but latterly his genuine efforts to deal with the fire alarm had been foiled by the obstructive tenant in flat 2.
>
> There was also evidence that Mr Thompson had tried to ensure that the tenants had cleared obstructions on the stairways, and that he had not ignored the local authority's concerns in this respect. Similarly, the evidence was that contractors had repeatedly attended the premises and tried to resolve the damp problem from the leaking roof.
>
> Although a number of assurances were given during the relevant period and there were delays and deadlines that were missed, the tribunal found that Mr Thompson's failure to comply with the local authority's requirement was not 'deliberate' or even 'reckless' but was somewhere between 'negligent' and 'low culpability'. The notes as to 'culpability of the offender', …, specifically state that '*low or no culpability' may be found where there is some fault on the part of the landlord but there are other circumstances – for example obstruction by the tenant to allow a contractor access for repairs…'*
>
> The tribunal thus disagrees with the [Council's] categorisation of culpability as 'reckless' with a score of 15 points, and categorised it instead as 'negligent/low culpability', with a score of 6 points."

50. The next topic in the Council's list of relevant considerations was the appellant's "track record and previous offences (if any)". Under the Council's policy the minimum score which can be attributed to this category is 10. The FTT found no evidence of any previous offences and continued:

> "The tribunal could not see the logic of applying an additional '10 points' for an offender who had no track record and no previous offending. It would seem far more logical for a landlord who did have a previous offence to be given a score of 10 points on the next occasion, and 20 points thereafter. Nevertheless the guidance notes appear to confirm that this is the system and the tribunal did not seek to challenge it. There was no suggestion that Mr Thompson had ever offended previously, and therefore the tribunal simply confirmed the arbitrary position for this category of 10 points".

51. The scoring exercise undertaken by the FTT reduced the Council's score of 53 points to 34 points which, applying the Council's policy, attracted a penalty of £5,000.

The grounds of appeal

52. The appellant sought permission to appeal in an email from Mr Thompson which raised a number of issues. The FTT divided these into 7 discrete points and gave permission to appeal on only one, while refusing the rest. The appellant requested this Tribunal to grant permission to appeal on the grounds refused by the FTT and I directed that that request, and the appeal on all grounds for which permission was granted, included the one permitted by the FTT, would be considered at a single hearing.

53. The substance of the first and second grounds of appeal was that, as Mr Thompson put it: "The tribunal totally ignored the fact that we could not gain access to repair the alarm in Flat 2". This was relied on both as regards the issue of compliance with the improvement notice and on the assessment of culpability.

54. The FTT had refused permission to appeal on both those aspects of the application, and its reasons, given on 7 July 2023, are informative. As to the suggestion that it had been misguided in finding that the improvement notice had not been complied with, the FTT said this:

> "Despite some mitigation, which was not found to amount to a 'reasonable excuse', the evidence was that the improvement notice expired on 23 November 2021 and the only matter which had been resolved by Ms Dunbar's visit on 7 December 2021 was the fixing of the handrail to the cellar. All other items in the improvement notice therefore remained outstanding, and the applicant had not complied with its requirements 'within the time limit set'.

55. The FTT also rejected the suggestion that they had 'totally ignored' the difficulties of gaining access to Flat 2, saying this:

> "This is incorrect, as the tribunal specifically made allowance for these difficulties in reducing the level of 'culpability' [paragraph 54(c)] and reduced the score from 15 points to 6."

56. The single ground of appeal for which the FTT granted permission concerned what it regarded as "an anomaly in the Government Guidance on Civil Penalties, Point 5.01d – 'Track record of the offender', which states that, where the individual has previous convictions from the same type of offence: - "For 1st offences, a score of 10 points will be added …". The FTT considered that anomaly ought to be reviewed by the Upper Tribunal "because it may have a significant impact on the final score and upon the appropriate bracket for level of penalties."

57. The remaining grounds of appeal expressed the appellant's dissatisfaction with a number of aspects of the FTT's decision. In particular in relation to the penalty points imposed in respect of the "falls on stairs" hazard as to which the appellant complained:

> "… again it is impossible to keep the stairs clear if the occupiers will not cooperate. We have no control over this and cannot be expected to inspect the stairs on a daily basis. The inspector mentions on a final visit to the property that the stairs was clear of obstructions. We are doing our best to keep the

> stairs clear of obstruction, as such the three points awarded for this should be removed."

The FTT refused permission to appeal on this ground, saying that the hazard had not been properly dealt with, neither Mr Thompson nor any agent of his had access to the common parts, and the Council's evidence was that "some obstructions had remained in the same place throughout the proceedings".

58. Although the FTT identified seven issues in the appellant's grounds of appeal the application appeared to me to raise only three questions which need to be determined:

(1) In so far as the appellant failed to carry out the remedial action required by the improvement notice as regards both the fire hazard and the "fall on stairs" hazard, did the FTT deal properly with the statutory defence of reasonable excuse provided by section 30(4), 2004 Act?

(2) If it did, did it understand the Council's policy and give it appropriate weight, in particular when it attributed 10 points for a first offence, despite its view that that addition was illogical and arbitrary.

(3) If the answer to either of these questions is negative, should this Tribunal redetermine the appeal or remit it to the FTT for redetermination and, if redetermining the appeal against the financial penalty, what order should it make?

Issue 1: The FTT's consideration of the reasonable excuse defence

59. Mr Thompson did not refer to section 30(4), 2004 Act in his evidence and submissions to the FTT or in his grounds of appeal. He might have done so, since the Council's final notice stated that the offence in respect of which the financial penalty was being imposed on the appellant was that of failing, without reasonable excuse, to comply with an improvement notice. But the FTT's directions of 7 February 2023 which identified the issues for consideration and to which evidence should be directed did not mention the statutory defence. If those directions are a standard template for these cases then consideration might be given to providing a clearer statement of the relevant housing offence and, where appropriate, drawing attention to the existence of the statutory defence.

60. The fact that Mr Thompson did not refer, in terms, to the defence did not absolve the FTT of the need to consider it. His evidence clearly raised the issue of whether the appellant had a reasonable excuse for its failure to comply fully with the improvement notice in relation to the only matters the Council took into account when imposing the financial penalty. I repeat what I said in *I R Management Services Ltd v Salford City Council* [2020] UKUT 81 (LC), at [31]:

> "I would add, finally, that the issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person managing an HMO

amounts to a reasonable excuse whether or not the appellant refers to the statutory defence."

61. The same issue was also raised in the grounds of appeal when Mr Thompson complained both that the FTT had "totally ignored" the fact that he could not gain access to repair the alarm in Flat 2, and that it was "impossible to keep the stairs clear if the occupiers will not cooperate". Mr Thompson reiterated those points in his oral submissions.

62. In his submissions on behalf of the Council Mr Ward acknowledged that the FTT had made no reference in its decision to the existence of the statutory defence, nor was there any indication in the decision that the availability of the defence had been considered. He nevertheless submitted that the FTT had considered the facts on which the appellant relied when it dealt with the issue of culpability; it said specifically that the evidence showed the Mr Thompson's "genuine efforts to deal with the fire alarm" had been "foiled by the obstructive tenant in Flat 2" and that he had "tried to ensure that the tenants had cleared obstructions from the stairway".

63. I agree that the FTT seems to have accepted Mr Thompson's evidence about the steps he took; in giving its account of the appellant's case it recorded his repeated written communications with the leaseholder of Flat 2 about access and about items stored in the common parts and it did not say that it disbelieved his evidence. But what the FTT did not do was to ask itself specifically whether the denial of access by the leaseholder of Flat 2, his refusal to remove objects from the common parts when asked to do so, and his restoring of those same objects to their original position when they had been removed by the appellant, amounted to a reasonable excuse for not having achieved full compliance with the improvement notice by 7 December 2021, that being the date specified in the financial penalty notice as the date of the offence.

64. Only when it refused permission to appeal did the FTT refer to the issue of reasonable excuse, saying that there was "some mitigation, which was not found to amount to a 'reasonable excuse'". There are a number of difficulties in treating that reference as sufficient consideration of the statutory defence. It appeared in the refusal of permission to appeal for the first time and was not part of the FTT's original reasons, nor was it included by way of further explanation of something in the original reasons. It did not state, in clear terms, that 'reasonable excuse' had been considered as a defence. It did not say what facts provided mitigation without amounting to a reasonable excuse and it did not explain why those facts did not provide a defence. Its only reference to specific facts was in answer to the complaint that it had 'totally ignored' the difficulties of gaining access to Flat 2, and it rebutted that accusation by saying that it had taken account of those difficulties by reducing the level of culpability; it did not say that it had taken account of them for the purpose of considering whether they provided a complete defence.

65. Even taking account of the terms in which the FTT refused permission to appeal, it is not possible for the appellant, or the Tribunal, to be confident that proper consideration was given to its reasonable excuse defence in relation either to the fire hazard or to the fall on stairs hazard. If the FTT did consider and reject the defence on either of those limbs of the improvement notice, it gave no reasons explaining its thinking.

66. Mr Ward submitted that even if the difficulties of gaining access to Flat 2 were capable of amounting to a reasonable excuse which ought to have been dealt with specifically by the FTT, the other remedial action required by the improvement notice was to be taken in the common parts of the building, by removing the items stored on the escape route and at the top of the cellar stairs. The required condition had not been achieved and the FTT was therefore right to find that an offence had been committed by the appellant. But in my judgment that conclusion would only be justified if, assuming the relevant facts in the appellant's favour (since the FTT made no specific findings of fact) those facts are incapable of amounting to a reasonable excuse for the presence of the items in the hallway and at the top of the cellar stairs. I do not think it is possible to reach that conclusion.

67. The evidence was that the items stored in the common parts had been removed to the cellar and instructions had been given to all of the leaseholders not to return them, but that those instructions had been ignored by the leaseholder of Flat 2. Mr Ward submitted that compliance with the improvement notice required the appellant to make regular inspections (at the leaseholders' expense) to remove any items which had been returned and, if necessary, that it should have sought an injunction (again at the leaseholders' expense) to prohibit the leaseholder of Flat 2 from doing so again. He acknowledged that those steps were not listed in the improvement notice and, if required, could not have been completed within the time allowed by the notice, or by 7 December, the date on which the offence was said to have been committed. Whether it was reasonable for the appellant not to take those steps, and whether the behaviour of the leaseholder provided a reasonable excuse for non-compliance, are matters of judgment which depend on the context and which are not obviously capable of only a negative answer.

68. I therefore reject Mr Ward's submission and I find that the FTT's failure to give proper consideration to the defence of reasonable excuse requires that the appeal must be allowed and its decision set aside.

Issue 2: The FTT's understanding of the Council's policy

69. The second ground of appeal does not now arise but the underlying issue would have to be addressed if a penalty is to be imposed on a redetermination (whether by this Tribunal or on remission to the FTT) so it is convenient to consider it at this stage.

70. The Council adopted a policy on financial penalties as an addendum to its existing Housing Enforcement policy ("the Policy"). In it the Council referred to the Government Guidance.

71. Paragraph 3.5 of the Government Guidance requires local housing authorities to develop and document their own policy on determining the appropriate level of financial penalties. It is not prescriptive about what such a policy should contain but instead addresses the question: "what factors should a local housing authority take into account when deciding on the level of civil penalty?" In answer to that question the document suggests, amongst other things, that the penalty in any particular case "should reflect the severity of the offence as well as taking account of the landlord's previous record of offending". A list of relevant factors is then provided, including "culpability and track record of the offender".

72. In the Policy each of the factors identified in the Guidance is referred to and attributed a numerical score, with the final penalty being determined by reference to the aggregate score after all factors have been taken into account.

73. The part of the Policy which caused difficulty for the FTT is under the heading "track record of the offender" and is as follows:

> "First offence
>
> - No previous conviction of civil penalty for the same type of offence in the previous 4 years irrespective of the locality to which the offence relates.
> - For first offences a score of 10 would be added.
>
> Second subsequent offence by same person/company
>
> - Any conviction or civil penalty in position for the same type of offence within 4 years of the first offence, irrespective of the locality of which the initial offence relates.
> - For second offences a score of 20 will be added".

74. Mr Thompson argued that the fact that the appellant had no previous track record of offending behaviour ought to have counted in its favour and ought not to have led to the addition of 10 points. The scoring chart in the Policy is banded in units of 10, with the lowest penalty of £1,000 being imposed for a score of between 1 and 10, £2,000 for a score of between 11 and 20, and so on with increasing increments up to £30,000. The automatic addition of 10 to the score of any landlord with a good record would render the lowest band redundant and push the penalty into the band above, resulting in an additional penalty of up to £5,000. That, Mr Thompson suggested, was irrational.

75. In its statement of case in response to the appeal (although not in Mr Ward's submissions) the Council suggested that the FTT's decision to add 10 penalty points was "unimpeachable" because it was required by the Government Guidance. Far from being an "anomaly" as the FTT had suggested, the FTT had been obliged to follow it and this Tribunal had "no jurisdiction to disturb this determination".

76. The FTT clearly had difficulty with the addition of 10 points to the score of an offender who had no track record of offending. It described that approach as "arbitrary" and, in its refusal of permission to appeal, as "an anomaly in the Government's Guidance on Civil Penalties". The reason it gave for following that arbitrary and anomalous approach was that "the guidance notes appear to confirm that this is the system."

77. Both the FTT in its decision and the Council in its statement of case were mistaken about the contents of the Government Guidance. The FTT was also mistaken about the weight it was required to give to policy, whether in the form of the Government Guidance or the Council's own Policy, if it took the view that the policy was arbitrary and anomalous.

78. The first mistake was that the requirement to increase the penalty imposed on an offender with a previously good track record is not found in the Government Guidance at all. It appears only in the Council's Policy.

79. It is apparent from the FTT's decision and from its refusal of permission to appeal that it thought it had been provided with the text of the Government Guidance, but in their witness statements the Council's witnesses were quite specific about the document they had exhibited and were referring to in their evidence. That document was the Council's own Policy.

80. It is possible that the FTT overlooked that evidence or (and perhaps this is the more likely explanation) that confusion was caused by the Policy itself, which gives the impression that it is quoting the text of the Government Guidance when it is not. The Policy includes a statement that "The guidance document issued by DCLG provides the following considerations when determining the level of civil penalty". That statement is followed by a page of text which combines the relevant considerations identified in paragraph 3.5 of the Government Guidance with the Council's own scoring system attributable to each of those factors. The original text taken from the Government Guidance and the text added as Council Policy are not distinguished from each other and the introductory words quoted above might quite reasonably be taken to imply that the whole of the text was taken from the Government Guidance when it was not.

81. The FTT's first error was therefore that, for whatever reason, it misunderstood the source of the guidance it was applying when it made its own determination of the appropriate penalty. That misunderstanding appears to have been the cause of its second and more significant error.

82. The FTT's second error was that it failed to appreciate that guidance, even the Government Guidance, is only guidance. A decision maker is not obliged to follow guidance or policy which it has been persuaded is arbitrary and anomalous; on the contrary, as the Tribunal explained in *Marshall* and *Kazi* (see paragraphs 23 and 24 above) the decision maker is required to make its own decision, starting from the policy but exercising its own discretion and departing from the policy where it is persuaded that it is right to do so.

83. When the FTT said that "the guidance notes appear to confirm that this is the system" and proceeded to apply the Policy despite its own view that in this respect "the system" was illogical, arbitrary and anomalous, the FTT was misdirecting itself and fettering its own discretion in the manner explained in *Kazi*. It was treating the Policy as a rule and failing to observe the important distinction explained by Lord Clarke in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, at [120]:

> "Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome. By contrast a rule is mandatory in nature; it compels the decision maker to reach a particular result.".

84. Mr Ward submitted that the FTT's misunderstanding of the source of the Policy and its treatment of it as binding rather than advisory (neither of which he sought to defend) did not provide grounds on which this Tribunal could interfere with its decision. His contention was that the FTT had been obliged to start from the Policy and that there were no valid reasons to depart from it, so the correct result was, as the FTT determined, that an additional 10 points should be added to the appellant's score. He disputed the FTT's

suggestion that punishing a first offender was arbitrary or anomalous, as they had committed an offence, and suggested that if one part of the scoring system was omitted the whole scheme would have to be recalibrated to increase the penalty imposed on first offenders and to achieve the outcome which the makers of the Policy had intended in those cases.

85. I do not accept Mr Ward's submission. Where a decision maker has made a significant error in the course of exercising a discretion, an appellate tribunal would only be justified in leaving the decision undisturbed if it was confident that, on a proper exercise of the discretion, the decision maker would have reached the same conclusion. In the context of judicial review of the decisions of public authorities that principle finds expression in section 31(2A), Senior Courts Act 1981: if a claimant is successful in judicial review proceedings, but the Court considers that it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred, then the Court must refuse to grant any form of relief. If the FTT had directed itself properly and had not fettered its discretion by treating the Policy as something from which it could not depart, notwithstanding that it considered it arbitrary and anomalous, it seems very likely that it would have omitted the additional score of 10, which it would have been entitled to do. Even if all other components of the score remained the same that would have reduced the score to 24 points which would have reduced the penalty by £2,000.

86. As I have already decided that the appeal succeeds on ground 1 and the FTT's decision is set aside, it is not necessary to consider Mr Ward's defence of the substance of the Policy in its treatment of offenders with no previous track record of offending. The important point is that tribunals should give proper weight to local authority policies when they make their own decision on the level of a penalty and should provide their reasons for departing from a policy if that is what they decide to do.

Issue 3: Redetermination

87. Mr Thompson wanted these proceedings to come to an end as soon as possible. Mr Ward was without instructions on the course the Council would prefer if the FTT's decision was set aside. Since the FTT appears to have accepted the evidence given by Mr Thompson there does not seem to me to be necessary to remit the original appeal to it for further consideration. The convenience of the parties and the need to allocate a proportionate share of judicial resources, and no more, to this matter, both point strongly in favour of redetermination by this Tribunal. That is what I will do.

88. The offence in respect of which the financial penalty was imposed was that, contrary to section 30(1), 2004 Act the appellant failed to comply with an improvement notice which had been served on it. That requires consideration of what remedial action the improvement notice required, whether that remedial action was taken within the time allowed by the notice, and whether, to the extent that it was not, the appellant had any reasonable excuse for that failure.

89. I make three further preliminary points.

90. First, this is not an appeal against the improvement notice itself and it is not open to the appellant to contest the remedial action specified in the notice (as he seeks to do by asserting that an integrated fire alarm was unnecessary) or to suggest that the notice should have been served on someone else; it is too late to challenge the content of the improvement notice.

91. Secondly, it is not an answer to the defence of reasonable excuse that the same facts could have been relied on in an appeal against the enforcement notice. Thus, the practical difficulties of gaining access to Flat 2 are relevant to the defence of reasonable excuse and may be relied on, even though they could also have provided the basis for an appeal against the enforcement notice.

92. Thirdly, the appeal is against the Council's decision to impose the financial penalty. It is apparent that the Council took account of remedial action by the appellant to comply with the improvement notice after 7 December 2021, the date by which it was satisfied the offence had been committed, and it imposed no penalty in respect of matters which had been resolved by October 2022. Weight should be given to the Council's view on which matters merited a penalty and which did not. I will therefore consider only those matters which the Council relied on when it determined that a penalty should be imposed.

93. The relevant remedial action required in respect of fire hazards was in two parts: to identify and remedy the fault in zone 2 of the fire detection system, meaning Flat 2; and, apart from the retention of small set of shelves for post, "the escape route must be kept clear at all times and not used for storage". In each case the action was to be begun by 23 September 2021 and completed within two months of that date.

94. The remedial action required in response to the "fall on stairs" hazard was simply "clear the cellar stairs of all items".

95. I am satisfied that the appellant had a reasonable excuse for its failure to comply with the notice in respect of the work required within Flat 2. It made repeated attempts to arrange access and sent its contractor to the premises on at least one occasion after giving notice to the leaseholder. It received no response to any of its approaches and was unable to get in to do the work. Assuming it was reasonable to expect the appellant to commence proceedings to obtain an injunction (which was not action specified in the notice) the two months allowed by the notice was insufficient to enable that to be done (as Mr Ward acknowledged). The appellant's contractual power of entry on reasonable notice was for inspection only. If it wanted to do work within Flat 2 it needed first to give two months' notice. Even if it had given that notice and then gone to Court to obtain an injunction it could not have done so by 23 November and would not have been able to carry out the work by 7 December.

96. I take the same view of the failure to keep the escape route clear at all times. The appellant arranged for the hallway to be cleared on a number of occasions (the main stairs themselves were not obstructed, only those to the cellar which are not on the escape route). This is a small building and the cost of employing someone to attend regularly to remove obstructions would be disproportionate. The items stored in the hallway did not prevent the residents from coming and going, and the risk being guarded against was that

their escape from the building might be obstructed when they were trying to leave quickly, possibly in the dark, and possibly while there was smoke in the common parts. I take those matters into account. I bear in mind also that by the time someone reached the obstruction they would already be on the ground floor and close to the main door of the building.

97. As for the fall on stairs hazard, which was concerned only with the stairs down to the cellar, accessed by residents and others for storage and to read gas metres, the evidence is that the notice was complied with by the removal of the obstructing items, but that these were later returned. The notice did not specify as remedial action that the stairs must be kept clear at all times (unlike the action in respect of the escape route). The statement in an improvement notice of the action required to be taken is important because it informs the recipient what they must do to avoid committing a criminal offence and it establishes what the Council must prove beyond reasonable doubt has not been done if it wishes to prosecute or impose a financial penalty. It follows that, in this respect, the appellant did not commit the offence of failing to comply with the improvement notice.

98. Even if the improvement notice is to be understood as including an implied requirement to keep the cellar stairs clear of trip hazards, I would be satisfied that the appellant had a reasonable excuse for non-compliance.

99. In my judgment the refusal of cooperation by the leaseholder of Flat 2, and his persistence in returning items removed from the escape route, and from the cellar stairs, provides a reasonable excuse for non-compliance with both limbs of the notice in the circumstances of this case. I am satisfied that the appellant was not obliged to commence proceedings in order to comply with the improvement notice and that its inability to achieve compliance without proceedings contributes significantly to its defence. In considering whether the excuse relied on by the appellant is a reasonable one I take the following into account. The notice required "works" and did not refer to legal proceedings. The appellant tried repeatedly but unsuccessfully to obtain access and to keep the escape route and cellar stairs free of obstruction without resorting to proceedings. The building was equipped with a functioning integrated alarm system serving the common parts, the cellar, and two of the three flats (that did not eliminate the hazard in the event of fire, but it must have reduced it substantially). The residents of the building were not in any vulnerable category and the escape route was by means of a single flight of stairs. The escape route was narrowed by the presence of items in the hallway at the bottom of the stairs which were returned to the same position when removed by the appellant. The requirement of access to the cellar was infrequent, the cellar was now lit and a new handrail had been fitted. The occupiers were themselves long leaseholders and had responsibilities to provide access and not to block the means of escape or common parts. The cost of litigation would have been passed on by the appellant to the three leaseholders, who already had difficulty in paying the regular service charges.

Conclusion

100. For these reasons I allow the appeal and set aside the financial penalty notice.

101. If the Council is of the view that category 1 hazards still exist in the building, despite the improvement notice having been complied with to the extent that it has now been, it will remain under a duty to take enforcement action. How it chooses to comply with that duty is a matter for it but it may wish to consider whether further improvement notices addressed to the leaseholders, so far as the common parts are concerned, and to the leaseholder of Flat 2, as far as the fire alarm in his flat is concerned, would be appropriate steps. In that connection it may wish to consider the matters identified in paragraph 16(3), Schedule 13A, 2004 Act (see paragraph 18 above) and have regard to the fact that the leaseholders are entitled to possession of their own flats which they have covenanted to repair; they control access to their flats and can prevent work being done within them; they have the use of the common parts, which they have covenanted not to obstruct; items stored in the common parts belong to them; their own safety is put at risk by any remaining hazards and remediation is primarily for their benefit; it is in their interest for the service charge not to be inflated by the cost of regular inspections or expensive litigation.

Martin Rodger KC,

Deputy Chamber President

15 December 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.