Neutral Citation Number: [2024] UKUT 24 (LC)

Case No: LC-2023-223

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: CAM/26UL/HNA/2022/0003

Royal Courts of Justice,
Strand, London WC2A

29 January 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – validity of notice of intent to impose financial penalty – adequacy of statement of reasons – whether failure to give sufficient reasons invalidated penalty or was cured by other material from which reasons were apparent – section 249A, Housing Act 2004 – Management of Houses in Multiple Occupation (England) Regulations 2006 – appeal allowed

BETWEEN:

WELWYN HATFIELD BOROUGH COUNCIL

Appellant

-and-

HONGMEI WANG

Respondent

132 Aldykes,
Roe Green, Hatfield

Martin Rodger KC, Deputy Chamber President

16 January 2024

Tara O'Leary, instructed by Welwyn Hatfield Borough Council for the Appellant
The respondent did not attend the hearing and was not represented

The following cases are referred to in this decision:

Director of Public Prosecutions v McFarlane [2020] 1 Cr. App. R. 4

Maharaj v Liverpool City Council [2022] UKUT 140 (LC)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd [1997] AC 749

Nash v Birmingham Crown Court [2005] EWHC 338

Newbold v Coal Authority [2014] 1 WLR 1288

R v Home Sec., Ex p Jeyeanthan [2000] 1 WLR 354

Waltham Forest LBC v Younis [2019] UKUT 362 (LC)

Introduction

1. This appeal is concerned with the validity of two notices of intent to impose financial penalties under section 249A, Housing Act 2004 (the 2024 Act) given by the appellant, Welwyn Hatfield Borough Council to the respondent, Mrs Hongmei Wang. The notices informed Mrs Wang of the Council's proposal to impose financial penalties and invited her to make representations. Mrs Wang made no representations and the Council proceeded to impose penalties of £21,000. The First-tier Tribunal (Property Chamber) (the FTT) subsequently allowed Mrs Wang's respondent's appeal against those penalties on the grounds that the information given in the notices of intent had been insufficient to enable her to make meaningful representations and that the notices were therefore invalid.

2. With the permission of this Tribunal the Council now appeals against that decision.

3. The appeal raises two issues concerning the requirement in paragraph 3(b) of Schedule 13A, 2004 Act that a notice of intent to impose a financial penalty under section 249A must "set out … the reasons for proposing to impose the financial penalty".

4. The first issue concerns the information which must be set out in a notice of intent for it to satisfy the statutory requirement, and whether it was satisfied in this case. It is suggested by the appellant that on the first part of that issue the Tribunal has previously given inconsistent guidance.

5. The second issue is whether the effect of providing an inadequate statement of reasons in a notice of intent is that the notice and any subsequent final penalty notice are void, or whether the consequences of serving such a notice must be determined having regard to the circumstances as a whole, including whether an authority's reasons for proposing the financial penalty are clear enough from other material and whether the appellant has had a proper opportunity to respond to them.

6. At the hearing of the appeal the Council was represented by Ms Tara O'Leary, to whom I am grateful. The respondent had been represented by solicitors before the FTT but represented herself in the appeal proceedings. She notified the Tribunal on the morning of the hearing that she would not be attending.

The relevant statutory provisions

7. Section 234, 2004 Act authorises the Secretary of State to make regulations for the purpose of ensuring that every house in multiple occupation (HMO) is satisfactorily managed. Such regulations may, in particular, impose duties on the person managing an HMO in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it (section 234(2)(a)). By section 234(3) a person commits an offence if they fail to comply with regulations made under the section, but that offence is subject to a reasonable excuse defence (section 234(4)).

8. Regulations made under section 234 include the Management of Houses in Multiple Occupation (England) Regulations 2006 (the 2006 Regulations). Regulations 4 and 7 of the 2006 Regulations are relevant to this appeal.

9. Regulation 4 requires the manager of an HMO to ensure that all means of escape from fire are kept free from obstruction and maintained in good order and repair, and that all fire fighting equipment and fire alarms are maintained in good working order.

10. Regulation 7 imposes duties on the manager of an HMO to ensure that all common parts are maintained in good and clean decorative repair and in a safe and working condition and that they are kept reasonably free from obstruction. In performing that duty the manager must, in particular, ensure that handrails and banisters are kept in good repair (regulation 7(2)(a)).

11. Section 249A, 2004 Act authorises a local housing authority in England to impose financial penalties on a person if it is satisfied beyond reasonable doubt that the person's conduct amounts to a "relevant housing offence". Relevant housing offences are those listed in section 249A(2). The offence of failing to comply with regulations made under section 234 is one such offence.

12. Schedule 13A, 2004 Act, deals with the procedure for imposing financial penalties, and with appeals. By paragraph 1, before imposing a financial penalty an authority must first give the person on whom the penalty is intended to be imposed notice of its proposal to do so. Such a notice is referred to as a "notice of intent". By paragraph 2, a notice of intent must be given within six months of the authority having sufficient evidence of the conduct to which the intended financial penalty relates.

13. The content of a notice of intent is prescribed by paragraph 3 of Schedule 13A, as follows:

> "3. The notice of intent must set out –
>
> (a) the amount of the proposed financial penalty,
>
> (b) the reasons for proposing to impose the financial penalty, and
>
> (c) information about the right to make representations under paragraph 4."

14. By paragraph 4, a person who is given a notice of intent may make written representations to the authority about the proposal to impose a penalty within 28 days of the date on which the notice of intent was given. After the end of the period for representations the authority must decide whether to impose a financial penalty and, if so, the amount of the penalty.

15. If the authority decides to impose a financial penalty it must give the person on whom it served the notice of intent a further notice imposing the penalty, referred to in paragraph 6 as a "final notice". The final notice must state the amount of the financial penalty, and the authority's reasons for imposing it (paragraph 8).

16. A person to whom a final notice is given may appeal to the FTT against the decision to impose the penalty, or against the amount (paragraph 10(1), Schedule 13A)). Such an appeal is to be a re-hearing of the authority's decision (paragraph 10(3)(a)). On an appeal the FTT may confirm, vary or cancel a final notice.

17. It is clear from paragraph 1 of Schedule 13A that the service of a notice of intent is an essential pre-condition to the imposition of a financial penalty under section 249A.

Defects in compliance with statutory procedures

18. This appeal is about compliance with statutory procedures and the consequences of non-compliance. In the twentieth century courts and tribunals would often classify procedural steps as either mandatory or directory and would treat a failure to follow a mandatory step as fatal to the validity of subsequent proceedings, whereas neglecting to follow a directory step would not have that consequence. Since the decision of the Court of Appeal in *R v Home Sec., Ex p Jeyeanthan* [2000] 1 WLR 354, the modern approach to compliance with procedures laid down by statute and the effect of non-compliance on the validity of subsequent proceedings is quite different. It was summarised by Males LJ in *Director of Public Prosecutions v McFarlane* [2020] 1 Cr. App. R. 4, at [25], as follows:

> "That approach is, broadly speaking, that the effect of procedural defects does not depend upon whether the requirements in question should be classified as mandatory or directory but on what Parliament intended to be the consequences of non-compliance. Parliament should not be taken to have intended that the consequences of non-compliance will be to render the proceedings a nullity, except in clear cases, and, in particular, should not be taken to have so intended when that would defeat the purpose of the legislation in question and when the non-compliance has caused no injustice to the defendant."

19. These principles are of wide application: *Jeyeanthan* was an immigration case while *McFarlane* concerned the procedure under section 29, Criminal Justice Act 2003 for instituting criminal proceedings. For more than twenty years the same approach has been adopted in civil and public law proceedings where the consequences of procedural defects have had to be considered.

20. In *Newbold v Coal Authority* [2014] 1 WLR 1288, an appeal from a decision of this Tribunal in a mining subsidence compensation case, the *Jeyeanthan* approach was applied by the Court of Appeal to a notice of claim. Sir Stanley Burton explained, at [70], how a court or tribunal should distinguish between statutory or contractual requirements which require strict compliance as a condition of validity, and requirements which may be satisfied by what he referred to as "adequate compliance" or where even non-compliance may not be fatal. In each case it is a question of interpretation of the relevant requirement:

> "In all such cases, it is necessary to consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation,

> and the parties in the case of a contractual requirement, would have intended a sensible, and in the case of a contract, commercial result."

21. In *Waltham Forest LBC v Younis* [2019] UKUT 362 (LC) (a decision of my own) the same approach was applied by the Tribunal when it considered the sufficiency of an initial notice given by a local housing authority under section 249A, 2004 Act informing a landlord of its intention to impose a financial penalty on him because he had breached conditions in a licence he held under Part 3 of the Act (an offence contrary to section 95, 2004 Act). The authority was satisfied that the premises in question were being used as a gambling den and for the sale of alcohol and take-away food and that, contrary to a condition in his licence, the landlord had failed to take adequate steps to control that anti-social behaviour. After months of correspondence about the problem, and after the authority had obtained a closure order from the magistrates' court, it served a notice of intent on the landlord in which it said that he had committed an offence by failing to comply with the relevant condition, contrary to section 95. No further details of the offence were given in the notice of intent, but copies of witness statements prepared by Council officers for use in the closure order application were served with the notice and these described the conduct complained of in considerable detail. Nor did either the notice of intent or the witness statements identify which of the various steps listed in the licence condition the landlord was said to have failed to take.

22. The FTT allowed the landlord's appeal against the financial penalty. It held that the notice of intent had been invalid because it did not specify which part of the condition was being relied on nor did it state the date on which the offence was said to have been committed. The authority appealed to this Tribunal, which allowed the appeal and held that the notice of intent had been valid; if the notice had been invalid, the Tribunal said it would nevertheless have upheld the financial penalty.

23. The Tribunal first considered the purpose of a notice of intent within the statutory scheme, at [50]:

> "It was not suggested by Mr Underwood that it would be sufficient for an authority to state baldly that it was satisfied that a person's conduct amounted to a particular offence, without providing any further information. The purpose of setting out the authority's reasons is so that the recipient of the notice of intent can respond to it with representations, which must then be taken into account by the authority. The notice must therefore provide a sufficient account of the authority's reasons for proposing a financial penalty to enable the recipient to understand what conduct or omission is being said to amount to the offence which has been identified."

24. The approach taken by the authority of annexing lengthy witness statements to the notice was described as "far from ideal" and "poor technique" but it did not render the notice invalid, as the Tribunal explained at [52].

> "Mr Stancliffe submitted that it was not permissible to set out reasons in separate documents, but in the absence of a prescribed form there is no reason why paragraph 3(b) should be interpreted in such a restrictive way. What is required is that the authority's reasons be set out sufficiently clearly so that they

> can be understood, and it is sufficient if that is done in more than one document. In this case the witness statements are properly treated as forming part of the notice because they accompanied it and were referred to in the authority's explanatory letter as providing details of the offence."

25. The Tribunal was satisfied that the notice of intent provided the required information and that it was valid. It nevertheless went on to consider a second ground of appeal in which the authority argued that even if the notice of intent had failed to provide the required information, that would not have invalidated the whole of the procedure. The authority relied on *Nash v Birmingham Crown Court* [2005] EWHC 338 as demonstrating that even in a criminal prosecution for a regulatory offence, an information described by the Divisional Court as "wide and vague and insufficient for the purpose of a summons … did not render the proceedings a nullity or any resulting conviction unsafe, provided that the requisite information was given to the appellant in good time for her to be able fairly to meet the case against her." The Tribunal accepted that the same principle should apply to a financial penalty imposed under section 249A, 2004 Act, and rejected the landlord's submission that, in a notice of intent, a failure to include proper particulars of its reasons for proposing the penalty would always be fatal. The Tribunal's reasoning, at [73]-[74], was as follows:

> "73. The purpose of a notice of intent is to inform the recipient of the reasons why the authority is contemplating the imposition of a financial penalty. The notice also performs the important function of limiting the scope of the subsequent procedure. But the notice of intent does not represent the last word on any issue. Not only does the recipient of the notice have the opportunity to respond to it, but the authority also has the obligation to think again before making a final decision. Once that decision has been conveyed in a final notice, the recipient has the right to appeal to the FTT, where they may rely on matters which were not known to the authority.
>
> 74. Those characteristics of the statutory scheme suggest that the reasons given in a notice of intent should be clear enough to enable the recipient to respond, but they also suggest that if those reasons are unclear or ambiguous, Parliament would not have intended that the notice of intent should invariably be treated as a nullity. The seriousness of the offences for which civil penalties can be imposed, the relative shortness of the time available to a local authority to take action, and the availability of a right of appeal on the merits before an independent tribunal, are all features of the statutory scheme which militate against the adoption of an excessively technical approach to procedural compliance.

26. In *Younis* the Tribunal did not say that a defective notice of intent could always be relied on or that it would never be appropriate for the FTT to treat it as a nullity, requiring that any penalty imposed in reliance on it be discharged. As the Divisional Court had ruled in *Nash*, the question in each case will be whether "the requisite information was given to the appellant in good time for her to be able fairly to meet the case against her". A good illustration is provided by the next case in which the Tribunal had to consider the consequences of a defective notice of intent, *Maharaj v Liverpool City Council* [2022] UKUT 140 (LC).

27. In *Maharaj* the Tribunal (HHJ Hodge KC) considered the extent to which particulars were required to be given in a notice of intent. Both parties were represented by counsel, but the Tribunal was not referred to its earlier decision in *Younis*. It has been suggested in this appeal that the approach to procedural compliance taken in *Maharaj* is inconsistent with the approach taken in *Younis.* On consideration, however, it is apparent that there is no such inconsistency.

28. *Maharaj* concerned financial penalties imposed for breaches of a local housing authority's selective licensing scheme. One condition required the licence holder to provide a gas safety certificate to the authority annually, and another required that he carry out inspections of the property every six months. Two notices of intent were served on the landlord by the authority, the first alleging a breach of the gas safety certificate condition and the second a breach of the inspection condition. The first suggested breach was that the landlord has failed to provide an annual certificate in response to a request made by the authority in June 2019; the second was that records of inspections had not been supplied when requested, again in June 2019. Final notices relying on the same breaches were later issued and the landlord appealed to the FTT unsuccessfully. He then appealed to this Tribunal.

29. The FTT had been satisfied that the landlord had committed a breach of the gas safety certificate condition, but it emerged when it was asked for permission to appeal that the breach it found was not the breach alleged in the notice of intent; the breach it found established by the evidence was that the landlord had not supplied a certificate for the year to July 2018 (a year earlier than had been suggested in the notice of intent). It nevertheless directed itself that it was not bound by the statement of reasons in the notice of intent or the final notice and was entitled to confirm the penalty if it was satisfied that there had been a breach, even if not the one described in the notices.

30. The Tribunal allowed the landlord's appeal. It held that the FTT had not been entitled to find an offence proven which was different from the offence described in the notice of intent. Contrary to the argument presented by the authority, the statement of reasons in the notice of intent was not simply "a factual background to the offence" but was required to provide "particulars of the offence".

31. In my judgment any differences in emphasis in the Tribunal's two decisions is the result of the different facts and submissions with which it had to deal. There is nothing in *Maharaj* which is inconsistent with my decision in *Younis.* Thus, I agree with the Tribunal's explanation of the purpose of the notices and what they should contain, at [17]:

> "By paragraph 3(a) of Schedule 13A, the notice of intent must set out "the reasons for proposing to impose the financial penalty". Those reasons must be sufficiently clearly and accurately expressed to enable the recipient landlord to exercise the right conferred by paragraph 4 to "make written representations to the local housing authority about the proposal to impose a financial penalty", thereby enabling it to decide whether to impose a financial penalty on the landlord and, if so, the amount of such penalty (as required by paragraph 5). Similarly, by paragraph 8(b) of schedule 13A, the final notice must set out "the reasons for imposing the penalty". These too must be sufficiently clearly and accurately expressed to enable the recipient landlord to decide whether to exercise the right of appeal to the FTT conferred by paragraph 10 against the

> decision to impose the penalty or the amount of that penalty. In the Tribunal's judgment, those reasons must be directly referable to the condition of the licence in relation to which it is said that there has been a failure to comply on the part of the landlord; and those reasons must identify clearly, and accurately, the particular respects in which it is said that there has been non-compliance on the landlord's part."

32. I also agree with the Tribunal's reminder to local housing authorities of the seriousness of their responsibilities, at [18]:

> "Local housing authorities must bear firmly in mind that the imposition of a financial penalty is an alternative to a criminal prosecution; and it must be treated with the same level of seriousness and transparency."

33. In *Maharaj* the Tribunal was not asked to consider whether the notice of intent could be salvaged, notwithstanding its deficiencies. No submissions were made that a defective notice of intent could be relied on to support a financial penalty and the Tribunal was not referred either to *Younis* or to the *Jeyanthean* line of authorities. There are at least two reasons why such an argument would have been bound to fail in *Maharaj*, which may explain why it was not relied on.

34. The first is that the notice of intent was specific about the offence which was being alleged and the facts which were to be relied on to make out the offence (although, in the event, the case put to the landlord in cross examination was based on different facts). In other words, *Maharaj* did not concern an incomplete or ambiguous statement of reasons; it concerned allegations which were not then supported by evidence, and a penalty imposed for an offence which was not the offence described in the relevant notices.

35. The second, and perhaps more fundamental reason why it could not have been suggested on appeal in *Maharaj* that a benign approach to the defective notice of intent might allow the penalty to be upheld, is that the offence which the FTT found to have been committed was based on facts of which the authority had knowledge more than six months before it served the notice of intent. In other words, the only offence the landlord was found by the FTT to have committed was time barred when the notice of intent was served (see *Maharaj*, at [18]). No argument based on the approach to procedural defects illustrated by *Jeyeanthan* could have saved the proceedings in those circumstances.

36. Having set the scene for the issues in this appeal, I can now return to the facts.

The facts

37. 132 Aldykes in Hatfield is a two-storey detached house with a kitchen and two other rooms on the ground floor and a bathroom and three bedrooms on the first floor. It has been owned by the respondent and her husband since 2010. Each of the rooms in the house is let to separate individuals who share the kitchen and bathroom; the house is therefore an HMO. Since 1 October 2018 it has been subject to mandatory licensing under Part 2, 2004 Act.

38. In August 2019, after carrying out works required by the Council, the respondent was granted an HMO licence with effect from 1 October 2018, for a term of 5 years. The licence authorised the occupation of the property by up to five people in five separate households and identified the respondent as the manager and owner.

39. It is the Council's practice to inspect HMOs half-way through the term of a licence but, due to the Covid 19 pandemic and its associated restrictions, the mid-term inspection of 132 Aldykes was not carried out until 27 October 2021. The inspector was Ms Cooper, one of the Council's private sector housing team. The respondent did not attend and later questioned whether Ms Cooper had given proper notice of her visit, but the FTT appears to have been satisfied that she did.

40. Ms Cooper was admitted by one of the tenants who told her that there were six or more people living at the property. Because of Covid restrictions her inspection was limited to the kitchen, bathroom and hallways on the ground and first floors, and she did not inspect any of the bedrooms. She was unable to form a view about the number of people living at the property. While carrying out her inspection she completed a property inspection form and took a number of photographs which provide a contemporaneous record of what she observed.

41. The fire detection installations in the property are powered by mains electricity, but on the first floor Ms Cooper could hear intermittent bleeping from two of the bedrooms indicating that the backup batteries in smoke detectors had run down; she also observed that the emergency lighting did not function when the mains power was disconnected and that two smoke or heat detector heads had been partially removed and disabled (one in the kitchen and one in the ground floor hallway). On inspecting the bathroom she found damp and mould affecting the ceiling and the tiles around the bath.

42. In the hallway Ms Cooper found a sofa completely blocking the door of one of the ground floor rear rooms (the room has another door leading to the rear garden of the property). An internal corridor leading from the kitchen to the rear door was narrowed by other items of furniture and there were boxes and a roll of carpet on the first floor landing. In the kitchen the fire door was wedged open, a fire blanket was missing from its holder on the wall, and an electric extension lead ran along the floor across the entrance from the hallway.

43. Later the same day Ms Cooper telephoned the respondent who explained that she had not visited the property for some time due to the Covid pandemic. Ms Cooper asked her to replace the disabled fire detectors within 24 hours, failing which she would arrange for emergency remedial work to be carried out. When Ms Cooper attended the property the following day, she recorded that the disabled detector heads had already been replaced in response to her instruction.

44. Two days later, on 29 October 2021, Ms Cooper sent a letter to the respondent enclosing a schedule of works which she required to be carried out to the property. The letter was headed with a reference to the 2006 Regulations and stated that the schedule was being served without prejudice to any legal action the Council might subsequently take. Ms Cooper also required the respondent to produce test certificates for appliances and installations and risk assessments.

45. The schedule of works is important because it contained details of matters of concern to the Council which were later omitted from the notices of intent. Eight separate items of work were identified. The first four related to fire safety and required remedial work to be undertaken within seven days: all the fire detection to the property was to be put in full working order and evidence was to be provided; a new fire blanket was to be supplied for the kitchen; the sofa blocking the rear ground floor bedroom door was to be removed; the kitchen door was not to be wedged open.

46. The remaining items in the schedule of works concerned the maintenance of the common parts and required work to be carried out within four weeks. Cables were not to be permitted to trail across the floor and further electrical sockets might be required to avoid this; a spindle missing from the first-floor handrail guarding the stairs was to be replaced; the kitchen extractor fan was not working and was to be repaired; and the bathroom was to be put in a good state of repair which might require it to be refurbished.

47. The FTT later recorded that all of the work required by the schedule of works had been completed by the end of 2021. All but one of the test certificates and risk assessments had also been provided. The one missing certificate, an electrical installation condition report (EICR) valid from the date of expiry of a previous report in May 2020, was not provided within the seven days requested by Ms Cooper's letter but was supplied later.

48. The letter of 29 October and the schedule of works were sent to the respondent by email. Attached to the email were copies of the photographs taken by Ms Cooper on her first visit showing the defects which concerned her.

49. The respondent did not reply to an invitation to attend an interview under caution and did not attend the interview appointment. On the day of the appointment Ms Cooper and her manager decided to initiate financial penalty proceedings by serving a notice of intent. They made a record of their discussion in which they itemised the matters they had taken into account when deciding to serve the notice; these included all of the matters which had been included in the schedule of works as well as the absence of the EICR certificate.

50. On 2 February 2022 the Council's officers served three notices of intent on the respondent. Only two of those notices are relevant to the appeal; the third, which concerned the delay in supplying the EICR certificate, was subsequently confirmed by the FTT (but with a reduced penalty) and there has been no appeal from that decision by the respondent.

The notices

51. When drafting the notices of intent it would have been a straightforward matter for officers to transpose the deficiencies recorded in the note of their discussion into the Council's standard notice of intent template, but that was not what they did.

52. The first notice was addressed to the respondent, describing her as the "prospective licence holder, owner and person managing" the property. It informed her that the Council intended to impose a civil penalty of £20,000 under section 249A and Schedule 13A, 2004 Act. Under the heading "Reason" the following explanation was given:

"3. The reasons for proposing to impose a Financial Penalty are failure to comply with the following legal requirement: The Housing Act 2004, Houses in Multiple Occupation Management Regulations 2006 Regulation 4 offences contrary to section 234 of the Housing Act 2004.

Because: during a routine Licenced House of Multiple Occupation inspection on 27 October 2021 numerous fire safety deficiencies were identified at the premises.

4. The Council considers the service of a Financial Penalty as the most appropriate course of action for the following reasons. The Housing and Planning Act 2016 specifies that the amount of penalty imposed is to be determined by the Local Housing Authority but must not be more than £30,000.

5. In determining the amount of penalty to be issued in this instance, the Authority has considered evidence relating to matters of this case and consulted governmental guidance. Specifically, we have taken into account:

- The severity and seriousness of the offence/s.
- The culpability and past history of the offender.
- The harm caused to the tenant/s.
- That the penalty should act as a deterrent to repeating the offence.
- That the penalty should remove any financial benefit obtained as a result of committing the offence.

6. In particular, the Authority has considered:

- You let the property to unrelated tenants and were aware that the property was occupied by five occupants in four unrelated households.
- In order to fall outside of licensing requirements there should be no more than four residents in the property.
- You took no steps to reduce numbers in the property.
- You did not approach the "Council" for a house of multiple occupation exemption for the period the property became licensable."

53. The notice of intent concluded by inviting the respondent to make written representations within 28 days and suggested she might wish to take advice. Attached to the notice were notes setting out the text of section 249A and paragraphs 1 to 4 of Schedule 13A, 2004 Act. The notes did not refer to regulation 4 of the 2006 Regulations, which might have been more useful, but full copies of the Regulations had previously been supplied to the respondent by the Council on a number of occasions, most recently in June 2019.

54. The second of the notices of intent served on 2 February 2022 informed the respondent of the Council's intention to impose a financial penalty of £1,000 for breach of regulation 7 of the 2006 Regulations. The reasons given were in the same form as in paragraph 3 of the

first notice, substituting regulation 7 for the reference to regulation 4, and then providing the following explanation:

> "Because: During a routine Licenced House of Multiple Occupation inspection on 27 October 2021 there was poor management and disrepair, and poorly maintained deficiencies were identified at the premises."

The remainder of the second notice was in identical terms to the first, as quoted above.

55. The respondent did not reply to the notices of intent.

56. On 17 March 2022 the Council served three final notices confirming the financial penalties which had been proposed in the three notices of intent. This time, however, the Council provided considerable detail concerning its reasons for imposing the penalties.

57. The first of the three notices listed the deficiencies in fire precautions which the Council considered to be breaches of regulation 4 of the 2006 Regulations, dividing them into three categories and incorporating the text of the relevant part of the regulation breached in each case. Thus, the first category referred to the missing smoke and heat detector heads, the missing fire blanket and the fact that no valid fire alarm test certificate had been available at the inspection on 27 October 2021, and stated that these were breaches of regulation 4(2) (fire fighting equipment and fire alarms to be maintained in good working order). Next, it was said that a protected fire escape route was obstructed by excess furniture, boxes and a large rolled carpet, all in breach of regulation 4(1)(a) (ensuring means of escape are free from obstruction). Finally, the first floor emergency light did not illuminate when isolated from the lighting circuit and there was no valid emergency lighting test certificate, both of which were said to be breaches of regulation 4(1)(b) (means of escape to be maintained in good repair).

58. The second notice provided similar details concerning alleged breaches of regulation 7. Thus, the manager was said to have failed to maintain the common parts in good clean decorative repair in breach of regulation 7(1)(a) because the first-floor communal bathroom was unclean and in poor decorative repair, with evidence of orange and black mould. The missing spindle on the first-floor stair guard was a breach of regulation 7(2)(a), the requirement to keep handrails and bannisters in good repair.

59. The Council also gave a specific and fuller explanation in the final notices of why it considered a financial penalty was the most appropriate course of action. It referred to the Council's confidence that the offences could be proved beyond reasonable doubt, to the absence of any previous prosecution, to the potential for harm to the occupants of the property, to the fact that the respondent also managed another licenced HMO, and to the fact that she had been supplied with a copy of the 2006 Regulations on a previous occasion.

60. The respondent appealed to the FTT. At that time she was professionally represented. The main grounds of her appeal focussed on the lack of notice of the original inspection, on her prompt completion of all the scheduled work, and on the impact which the Covid 19 pandemic had had on the respondent and her tenants, who were said to have spent much more time at home, causing the property to deteriorate. The respondent also took issue with

the quantum of the financial penalty which, she pointed out, exceeded the total annual rent of the whole property. No complaint was made about the form of the initial notice and it was not suggested that the penalty should be set aside because the respondent had not understood what it was she was being said to have done wrong.

The FTT's decision

61. After a hearing at which the respondent was represented by her solicitor and which she attended, the FTT handed down its decision on her appeal on 16 November 2022.

62. At the hearing the FTT had first invited submissions on the validity of two of the three notices of intent and had then informed the parties that it considered them to have been invalid. It confined its consideration of other issues to the third notice, which is not the subject of this appeal.

63. In its decision, the FTT explained what it considered was required of a valid notice of intent (which it referred to as an "NOI"). At paragraph 35 it described the legislation as providing for "a criminal penalty" requiring proof of an offence beyond reasonable doubt. Therefore:

> "An appellant is entitled to know *precisely* what allegation is being made against them in the NOI, to enable the representation process to be as effective as possible; clear allegation met by apposite representation; it is akin to counts on an indictment or a charge sheet. To provide specific information is to know the allegation, and it is not adequate to rely on previous correspondence, which might have been had up to six months before, and when the nature of the works and allegations may well (and usually does) evolve over time; had it [the schedule of works] been attached or referred to as the detailed allegations made therein, the matter could have been different."

64. At paragraph 36 the FTT contrasted the "sparse detail" given by the Council in the notices of intent with the final notices and pointed out that no explanation had been suggested for this difference. It was not sufficient to rely on a schedule of works issued at the end of October 2021 as providing particulars of offences in notices of intent issued in February 2022. An appellant was entitled to have clarity over what she was being accused of, which was not achieved by these notices of intent. Although the FTT accepted that the allegations concerning overcrowding had been included in error, they had "muddied the waters". The FTT also criticised the Council for failing to explain properly why it considered that a financial penalty was the most appropriate course of action in this case (there was other formal or informal action the Council could have taken, including prosecution or issuing a warning). The information it had provided in paragraph 4 of the notices of intent did not explain anything. The FTT concluded that the procedure in paragraphs 3 to 8 of Schedule 13A had not been complied with by the Council and that the notices of intent and the final penalty notice were therefore invalid and should be struck out.

65. The remainder of the decision related to the third financial penalty imposed in respect of the delay in supplying an EICR report. The respondent did not dispute that there had been a breach of the relevant regulation and her challenge was to the quantum of the penalty, which the FTT reduced from £2,500 to £500.

The grounds of appeal

66. The respondent had not raised any allegation of procedural non-compliance in her grounds of appeal to the FTT. Although in its standard directions the FTT itself said that it would consider whether the Council had complied with the statutory procedure for imposing a financial penalty, it raised with the Council's lay representative its specific concerns about the validity of the notices of intent only on the morning of the hearing and neither party had come prepared to address that issue. After allowing a short pause, the FTT proceeded to allow the appeal without giving proper time for research and mature consideration.

67. The procedure adopted by the FTT was unfair. It would have been made fair if the FTT had allowed the parties an opportunity, after the hearing, to make any further submissions on the validity of the notices of intent in writing before the FTT reached its decision. That would have delayed the FTT in completing its determination, but it would have been fair to the parties and might have avoided the need for this appeal. One consequence of the approach adopted by the FTT was that it made its decision without its attention having been drawn to the *Jeyeanthan* principle or to the authorities which apply it, including *Younis.* The FTT itself did not refer to any authority on the validity of a notice of intent or on the consequences of relying on an inadequate notice.

68. The Council did not seek to rely on procedural unfairness as a ground of appeal in this case, as it might have done, but sought permission to appeal on the basis that the FTT had applied the wrong approach when it held that the notices of intent were invalid and could not support the financial penalties. In its application for permission it referred to the Tribunal's decision in *Younis*, and in refusing permission to appeal the FTT referred to *Maharaj* which it said had "settled the point".

69. The Council renewed its application for permission to appeal to this Tribunal and suggested that the decisions in *Younis* and *Maharaj* were inconsistent with one another. I granted permission to appeal to enable that proposition to be considered, and I have already explained why I do not consider there is any such inconsistency. The two remaining issues on which permission to appeal was granted were:

    1. Whether the requirement to state reasons in a notice of intent was satisfied in this case.

    2. If not, whether the effect of providing an insufficiently precise statement of reasons in a notice of intent is that the notice of intent and the subsequent final penalty notice are void.

Ground 1: Did the notices of intent comply with the requirement to state the Council's reasons for proposing to impose the financial penalty?

70. In support of the appeal Ms O'Leary first stressed some propositions derived the Tribunal's decision in *Younis*. At [48] the Tribunal stated that appeals against financial penalties are civil proceedings which do not import criminal procedure, notwithstanding that they offer an alternative to prosecution and the facts which amount to the commission of an offence must be proved beyond reasonable doubt. No form of notice had been prescribed, nor would

it be possible to be prescriptive about the contents of the reasons which must be stated, given the variety of circumstances in which civil penalties may be imposed. The purpose of requiring an authority to state its reasons was so that the recipient could respond with their own representations, and what was required of a notice of intent was that it provide a sufficient account of the authority's reasons for proposing the penalty "to enable the recipient to understand what conduct or omission is being said to amount to the offence which has been identified".

71. Pausing there, it should not be thought that, in stressing that these are civil rather than criminal proceedings, the Tribunal was implying that a lax approach to compliance with procedural requirements was acceptable. As the passage from which that observation was taken makes clear when read as a whole, the point which was being made was that financial penalty proceedings are governed by tribunal rules and import the tribunal's overriding objective of dealing with cases fairly and justly. That requires that the recipient of a notice of intent should not be subjected to substantial financial penalties (often much higher than those which would be imposed by a criminal court for the same offence) without being given fair warning of the case against them and a fair opportunity to respond to it. In this respect, civil and criminal practice do not operate by reference to different standards of transparency. Moreover, as the criminal case of *Nash*, referred to in paragraph [24] above, illustrates, while a "wide and vague" statement of a charge will not be sufficient for the purpose of a criminal summons, a summons which is defective in that way will not render the subsequent proceedings a nullity or any resulting conviction unsafe, provided that the requisite information was given to the recipient in good time to enable them to be able fairly to meet the case against them.

72. Ms O'Leary submitted that the FTT had been wrong to regard the notices of intent as inadequate, and it should have found that they provided a sufficient statement of the Council's reasons. Both notices identified the property concerned, the name of the intended recipient, her relevant capacity (licence holder, owner and person managing), the particular regulation which was said to have been breached in each case (regulations 4 and 7), the statutory provision which made it an offence to commit that breach (section 234), the provision under which the financial penalty was proposed as an alternative to prosecution (section 249A), and the amount of the proposed penalty. In each case the statement of the offence was sufficient to identify the conduct or omission said to amount to the relevant offence and to identify the date on which it was said to have been committed, 27 October 2021. There was therefore substantial or adequate compliance with the requirement to state the Council's reasons and the notices of intent were valid.

73. The FTT had erred, Ms O'Leary suggested, when it said that a notice of intent must state the allegation "precisely" so that the recipient's representations could be "as effective as possible".

74. I do not believe it is productive to compare the terms used by different decision makers to describe the requirements of a sufficient notice of intent. What is important is that the notice should equip the recipient with the information they require to enable them to answer the charge against them. In my judgment the only important distinction is between a notice which achieves that purpose and one which does not.

75. How precise or particular the contents of a notice must be to achieve that requirement will depend on the circumstances of the case which may include the recipient's knowledge of other facts. As Lord Steyn explained in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd* [1997] AC 749, at 767D, the validity of a notice is to be assessed objectively, by asking how a reasonable recipient would have understood it. In considering that question the reasonable recipient is taken to be aware of what Lord Steyn called "the relevant objective contextual scene". That scene will include matters known to the actual recipient which would influence their understanding of the notice. Those matters are taken to be within the knowledge of the notional reasonable recipient.

76. Thus, if a notice of intent contains a mistake, such as a reference to the wrong address for an HMO or an incorrect date for an inspection at which offences were observed, the mistake may be sufficient to confuse some recipients but not others. It may be obvious to a reasonable person who manages only one HMO or who was in attendance at the inspection and knows the date it took place what information the notice is intended to convey. The manager of a large estate of HMOs may not find it so easy to understand what is being alleged against them by an inaccurate notice of intent. An obvious mistake which does not mislead the intended recipient of a notice which otherwise provides a sufficient statement of the reasons it has been served will not render the notice a nullity.

77. In this case the notices of intent were not inaccurate in the information they conveyed. They suffered from a different defect, namely that they were vague and did not clearly identify the facts which amounted to the offence being alleged. Both pinpointed the offence and the location and date at which it was alleged to have been committed, but the only description of the regulation 4 offence was that "numerous fire safety deficiencies were identified at the premises", while the regulation 7 offence was described only as "poor management and disrepair, and poorly maintained deficiencies".

78. If notices in this form had been the only material available to the recipient, I would have had no doubt that they were incapable of informing her in sufficient detail of what it was that was being alleged against her, and the requirements of paragraph 3 of Schedule 13A that a notice of intent must set out the authority's reasons for proposing a financial penalty would not have been met. Regulation 4 covers a range of subjects from ensuring all means of escape are free from obstruction and maintained in good order and repair, maintaining fire alarms and fire fighting equipment, ensuring notices are displayed, taking all measures reasonably required to protect occupiers from injury, preventing access to unsafe roofs or balconies, and barring windows. A notice alleging "numerous fire safety deficiencies" could cover any or all of those matters and, without clarification, the recipient would be left guessing which deficiencies the Council was referring to (although they might appreciate that the complaint was specifically about something to do with fire safety). Similarly, regulation 7 covers maintaining common parts in repair, and in safe working condition and free from obstruction, and extends to a catalogue of specific features including handrails and bannisters, stair coverings, means of ventilation, light fittings, common appliances, outbuildings, yards, gardens, boundary walls and fences. To be told that the Council had observed "poor management and disrepair" would leave the recipient in ignorance of the case against them, a state which would not be relieved by trying to work out what "poorly maintained deficiencies" could possibly mean.

79. The description of the facts of the alleged offence contained in each of the notices added little if anything to the identification in the notices of intent of the statutory provisions which were alleged to have been breached. Viewed in isolation, that would not be good enough to enable the recipient to know what they were being accused of, or to enable them to seek advice and make an informed response.

80. But the notices of intent did not contain the only information available to the respondent. She had spoken to Ms Cooper on the day of her inspection, 27 October, and had been informed what Ms Cooper had observed. She had also been told to replace the missing detector heads within 24 hours, which she appears to have done. On 29 October she received Ms Cooper's letter of that date by email enclosing the schedule of works and the photographs of each of the defects. The letter was headed with a reference to the 2004 Act and to the 2006 Regulations and began with a reference to Ms Cooper's inspection on 27 October and a statement that "at the time of the inspection the property did not meet the standards prescribed by the above legislation".

81. The schedule of works served with the letter of 29 October began with a statement that "the deficiencies listed are considered as legal requirements" and required that the remedial measures identified should be undertaken within the stipulated time. The first part of the list was headed "Fire safety" while the second was titled "Regulation 7 maintain common parts". Each defect was then clearly identified and remedial action specified.

82. The FTT had no complaint about the information supplied in the schedule of works and it considered that the notices of intent might have been valid if the schedule had been referred to in them ("had it been attached or referred to as the detailed allegations made therein, the matter could have been different"). I agree that that would have been a compliant approach. But I do not agree that the notices were rendered defective because they did not repeat or refer to the detailed information supplied on 29 October. While it is true that almost four months elapsed between the schedule of condition and the notices of intent, it can hardly be suggested that the respondent would have forgotten about the schedule. She took prompt steps to carry out the scheduled work and completed it by the end of the year. She knew that the Council wished to interview her under caution about the condition of the property. When she received the notices of intent, she was informed that the offences were said to have been committed on 27 October.

83. Any reasonable person with the knowledge available to the respondent would, in my judgment, have been in no doubt that the fire safety deficiencies observed by the Council's officer on 27 October and referred to in the regulation 4 notice were the same deficiencies as had been listed in the first part of the schedule of works of 29 October. Similarly any reasonable person would have understood that the issues concerning poor management and disrepair referred to in the regulation 7 notice were those identified in the second part of the schedule of works.

84. Nor is there any evidence that the respondent did not understand that that was what the notices of intent were referring to. I am left in no doubt that she would have been in a position to identify the defects and, had she wished to do so, to respond effectively to them on the basis of the information in the notices of intent and the material sent to her on 29 October. In her expanded grounds of appeal addressed to the FTT she later admitted that "deficiencies were found at the property". By that time, of course, she had received the final

notices which contained much more detail, but that detail was the same detail as had been provided in the schedule of work.

85. In my judgment, therefore, the notices of intent were not invalid and complied with the requirement that they set out the Council's reasons for proposing the financial penalties. They depended for their validity on the detailed information contained in the schedule of work and the selection of photographs served earlier but, in the circumstances of this case, I do not consider that the lapse of time made any difference or that the notices lacked clarity by reason of it.

86. The FTT considered that the Council should have explained why it had decided to propose a financial penalty rather than a different course of action, such as a prosecution or an informal disposal. I do not think it is necessary to provide that information, although it might be sensible to do so if there is some particular reason which influenced the Council's thinking and on which it would wish a tribunal considering an appeal to place particular weight.

Ground 2: whether the effect of providing an insufficiently precise statement of reasons in a notice of intent is that the notice of intent and the subsequent final penalty notice are void

87. As I have found that the notices of intent were not insufficiently precise, in view of the previous communications between the parties, the second ground of appeal does not arise.

88. The answer to the question of principle is supplied by *Younis*. A notice of intent is not necessarily void if it provides an insufficiently clear or precise statement of the reasons for proposing the financial penalty. If the only information supplied by the Council had been the statements in the notices themselves, and if the schedule of work and photographs of the defects had not been provided, it is likely that I would have concluded that the notices were of no effect and that the penalties should be discharged because it would not have been possible for the respondent to mount an informed defence before the Council took its decision to confirm the penalties by serving final notices. In the event, the respondent had the information she required but chose not to make representations.

89. I leave one point open. That is whether the effect of a notice of intent must be determined on the basis of the material available to the recipient before the time for making representations against it expires, or whether an invalid notice can be cured by information supplied with a final notice, or in the context of an appeal to the FTT. The hearing of an appeal by the FTT takes the form of a rehearing, so it might be said that information supplied at that stage puts the recipient in a position to mount an effective defence. On the other hand, it might be argued that there is prejudice to the recipient of a defective notice, sufficient to justify treating a defective notice as a nullity, if they have to persuade the FTT to take a different view from that taken by the authority. I prefer to say nothing about that point and to leave it for decision on another occasion if it arises.

Disposal

90. For the reasons given above in relation to ground 1, I allow the appeal.

91. It was suggested by Ms O'Leary that the matter should now be remitted to the FTT for it to determine the respondent's original appeal against the penalties imposed on her for breaches of regulations 4 and 7.

92. It would not be fair to the respondent to determine her appeal against the outstanding penalties without allowing her to give evidence about the management of the property and in support of her case that Covid 19 restrictions and the more intensive use of the property by her tenants provides either a reasonable excuse for some of the defects or at least material which should be considered in mitigation of the penalty. I therefore agree with Ms O'Leary that the appeal against the two final notices should be remitted to a differently constituted panel of the FTT for determination.

93. When it considers the appeal against the final notice relating to fire safety deficiencies, the FTT should have regard to the matters identified in paragraph 1(a), (b) and (d|) of the schedule of works as particulars of the alleged offence. In her evidence (at paragraph 38) Ms Cooper states that the Council did not have regard to the wedged open kitchen door (item 1(c)) when it decided to impose the penalty. The FTT should also note that the allegation in paragraph 1(a) is confined to the intermittent bleeping from the fire detection installation (which, in her evidence, Ms Cooper attributed to the backup batteries in a mains powered fire detection system having run out). The schedule of work does not refer to the disabled detector heads which were discussed by Ms Cooper with the respondent on the telephone and then remedied, and I do not consider that they can properly be regarded as falling within the scope of the allegation on which any penalty can be based. Similarly, the FTT should consider whether the fire escape route from the room whose door was blocked by a sofa can reasonably be said to have been through the blocked door, rather than through the room's second door which led to the garden.

94. When it considers the allegations which relate to the regulation 7 final notice, the FTT should treat the matters identified in paragraph 2(b) and (d) of the schedule of works as the relevant particulars of the offence. In her evidence Ms Cooper states that the items in paragraph 2(a) and (c) were not relied on when the penalties were assessed. Ms Cooper relied additionally on a failure to provide test certificates in a timely manner as an offence. That allegation should be disregarded as regulations 4 and 7 do not require a manager to produce test certificates.

95. On that basis I remit the appeals to the FTT for determination by a differently constituted panel.

Martin Rodger KC,

Deputy Chamber President

29 January 2024

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.