FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/31UE/HNA/2020/0014**
HMCTS (Paper, Video, Audio)	**:**	**V: SKYPEREMOTE**
Properties	**:**	**Flats 4, 5 & 6, Co-Op Flats, Malt Mill Bank, Barwell, Leicester, Leicestershire, LE9 8GS**
Applicant	**:**	**Mr Robert Draper**
Respondent	**:**	**Hinckley & Bosworth Borough Council**
Type of Application	**:**	**An appeal against a Financial Penalty under section 249A of the Housing Act 2004**
Tribunal Members	**:**	**Judge M K Gandham** **Mr D Satchwell FRICS** **Mr P J Wilson BSc (Hons) LLB MCIEH MRICS**
Date of Hearing	**:**	**30th July 2020**
Date of Decision	**:**	**4th September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing which had been consented to by the parties. The form of remote hearing was Video (V: SKYPEREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing/on paper. The documents referred to were contained within the parties' bundles, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal, the Tribunal directed that the hearing be held in private. The Tribunal had directed that the proceedings were to be conducted wholly as video proceedings; it was not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who were not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction was necessary to secure the proper administration of justice.

Decision

1. The Tribunal determines that the Final Notice dated 7th April 2020 given to Mr Robert Draper be cancelled.

Reasons for Decision

Introduction

2. By an Application, received by the Tribunal on 5th May 2020, Mr Robert Draper ('the Applicant') applied for an appeal against a decision to impose a financial penalty and the amount of that penalty, under section 249A and paragraph 10 of Schedule 13A to the Housing Act 2004 ('the Act'). The financial penalty had been imposed on him by Hinckley and Bosworth Borough Council ('the Respondent') in respect of his failure to comply with two improvement notices and a suspended improvement notice in respect of the properties known as Flats 4, 5 and 6, Co-Op Flats, Malt Mill Bank, Barwell, Leicester, Leicestershire, LE9 8GS ('the Properties').

3. The Respondent had, on 2nd August 2019, given the Applicant three separate notices of their intention to impose a financial penalty ('the Notices of Intent') in respect of each improvement notice and, on 7th April 2020, the Respondent gave the Applicant a single Final Notice in respect of the collective offence of failing to comply with all three improvement notices against the Properties ('the Final Notice').

4. The Tribunal issued Directions on 29th May 2020. In accordance with those Directions, the Tribunal received a statement and bundle of documents from the Respondent on 19th June 2020 and a statement and bundle of documents from the Applicant on 10th July 2020.

5. Further directions were issued on 15th June 2020 confirming that, due to the Covid-19 pandemic, an oral hearing would be held via remote video conferencing and that the Tribunal would not be inspecting the Properties.

The Law

6. Under section 249A of the Act, a local housing authority may impose a financial penalty on a person if satisfied beyond reasonable doubt that the person's conduct amounts to a '*relevant housing offence'*. Section 249(A)(2) defines the relevant housing offences, which include a failure to comply with an improvement notice (Section 249(A)(2)(a)). The imposition of the penalty is an alternative to prosecution for a relevant housing offence.

7. Where an improvement notice becomes operative, the person on whom the notice was served commits an offence if that person fails to comply with it. Under section 30(4) of the Act, it is a defence that the person upon whom an improvement notice was served had a reasonable excuse for failure to comply with the said notice.

8. Section 249A(3) of the Act confirms that only one financial penalty can be imposed on any person in respect of the same conduct and section 249A(4) confirms that the amount of any financial penalty cannot exceed £30,000.

9. Paragraphs 1 to 6 of Schedule 13A to the Act set out the procedure for imposing financial penalties as follows:

> *"Notice of Intent*
>
> *1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").*
>
> *2 (1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.*
> *(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—*
> *(a) at any time when the conduct is continuing, or*
> *(b) within the period of 6 months beginning with the last day on which the conduct occurs.*

(3) For the purposes of this paragraph a person's conduct includes a failure to act.

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.

Right to make representations

4 (1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.
(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

Final Notice

5 After the end of the period for representations the local housing authority must—
(a) decide whether to impose a financial penalty on the person, and
(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty."

As such, prior to imposing a financial penalty, the local housing authority must give an initial notice of intent and, following receipt of any representations, must decide whether to impose a financial penalty and the amount of that penalty prior to issuing a final notice.

10. Paragraph 12 of Schedule 13A to the Act provides that a local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions to impose financial penalties. In this regard the Secretary of State has issued "Guidance for Local Housing Authorities: Civil penalties under the Housing and Planning Act 2016 (April 2018)" ('the Guidance'). Paragraph 3.5 of the Guidance sets out a list of factors which local housing authorities should consider when assessing the level of any penalty, these being:

- the severity of the offence;
- the culpability and track record of the offender;
- the harm caused to the tenant;
- the punishment of the offender;

- to deter the offender from repeating the offence;
- to deter others from committing similar offences; and
- to remove any financial benefit the offender may have obtained as a result of committing the offence.

11. The person upon whom a final notice is given may appeal to the First-tier Tribunal (Property Chamber), under paragraph 10 of Schedule 13A to the Act, against the decision to impose the penalty or the amount of the penalty. The appeal is to be a rehearing of the local housing authority's decision but may be determined having regard to matters of which the authority was unaware. Paragraph 10(4) confirms that the Tribunal may confirm, vary or cancel the final notice.

Properties

12. No physical inspection was carried out by the Tribunal but information from the statements of cases provided by both parties, along with online street view information, shows that the Properties are located on the second floor of a mixed occupancy building ('the Building'), which is a three storey property built, probably, in the late 1950s or 1960s.

13. The Building is located off Stapleton Lane in the centre of Barwell. The ground floor of the Building contains a retail unit, currently used as a Co-operative supermarket, and the first and second floors comprise six residential flats which are located via an external staircase at the rear of the Building. Flats 1 to 3 are located on the first floor of the building, the external staircase giving access to an open roof terrace, and, on the second floor, the staircase gives access to an open external balcony which leads to the Properties. Information from the case bundles of both parties indicates that the Building is of concrete framed construction with a cast concrete roof. There are cavity brick infills to the rear, left hand and right hand elevations with single skin brickwork/curtain walling to the front elevation.

14. The Heart of England Co-operative Society Limited ('the Freeholder') is the proprietor of the freehold of the Building. The Applicant holds a lease of Flats 1 to 6, under a lease dated 7th March 2003 and made between (1) the Freeholder and (2) the Applicant for a term of 99 years from 1st February 2003 ('the Lease'). Clause 2.3 of the Lease confirms that the property comprised under the Lease includes the first and second floors of the Building, including the ceiling joists and roof space above. The terms of the Lease also confirm that the Applicant is responsible, amongst other obligations, for paying a service charge towards the repairs of the roof, outside, main structure and foundations of the Building.

Hearing

15. An oral hearing was held via Skype on 30th July 2020. The Applicant attended the hearing. Mr Steven Connor (an Environmental Health Officer for the Respondent's Private Sector Housing Team) and Mr Neil

Chadaway (a Building Surveyor for the Respondent's Private Sector Housing Team) attended the hearing on behalf of the Respondent.

The Applicant's submissions

16. The Applicant provided a bundle of documents which included: his written response to the Respondent's Interview by letter in relation to the alleged failure to comply with the three improvement notices ('the Applicant's Interview Response'), the Applicant's written submissions to the Respondent after they had issued the Notices of Intent ('the Written Representations'), a witness statement as to the Applicant's character by the Applicant's friend, Ms Carter, and a final statement by the Applicant to the Tribunal ('the Applicant's Final Statement').

17. At the hearing, the Applicant confirmed that he had tried his best to ensure that the works that the Respondent had asked him to carry out had been completed. He also confirmed that all of the works to the roof and thermal insulation had been completed by the time the Respondent issued their Final Notice, at a cost to him of over £17,000. He stated that, prior to the issuing of the Notices of Intent, he had already completed the works required by the Respondent to the walkway and to alleviate the Respondent's fire safety concerns, at cost to him of over £35,000.

18. The Applicant stated that the works detailed in the three improvement notices had not been carried out earlier due to financial difficulties and the fact that he did not believe that the works were required. He also stated that he did not consider that the timescale given for the works to be completed in the improvement notices – eight weeks – was a reasonable length of time as it was not clear exactly what works needed to be done.

19. The Applicant stated that the initial inspection of the flats, prior to the issuing of the Improvement Notices, was carried out when the weather was particularly bad and that he did not consider that any of his tenants had ever been at any risk, or he would have carried out the work immediately.

20. In relation to the photographic evidence provided by the Respondent, he referred to the fact that the photographs showed that vents in the bathrooms of the Properties had been taped up and that the trickle vents in the window units were also closed. He submitted that the tenants' lifestyle had been the cause of the majority of the condensation issues within the Properties. He further submitted that the works had been complicated and protracted due to having to deal with a number of contractors and because of the poor weather.

21. The Applicant stated that, once works had been completed, the Respondent had still deemed the works unsatisfactory in November 2019, despite not having carried out a physical inspection, and stated that further works were required. After completing those works, and the final inspection having taken place on 9th December 2019, the Applicant stated

he received no contact from the Respondent to confirm that they were satisfied until early April 2020. He stated that waiting for this period, all the time worrying about a prospective penalty of over £34,000, had caused him considerable stress.

22. The Applicant stated that he appreciated that he should have completed all of the works earlier, but that he had done his best, and that the whole process had seriously affected his health.

23. In the Applicant's Final Statement, the Applicant confirmed that he was a retired firefighter and that he had purchased the Properties several years previously. He stated that, at that time, the flats had been uninhabited for several years and were in a derelict state. He stated that, prior to letting the Properties, he had renovated all of the flats to a high standard, installing double glazed units to all windows and cavity wall insulation to all of the walls other than the front elevation of the flats as, due to the construction of the Building, this was not feasible. He submitted that this indicated that he was a responsible landlord.

24. He stated that all works requested by the Respondent had been completed prior to their issuing of the Final Notice, so he was unsure of what criminal offence he had committed. He also stated that his mortgage company had been informed of the Respondent's enforcement action and had been in contact with him on a weekly basis for updates. He confirmed the stress of the waiting had caused his GP to commence him on antidepressant medication. He also stated that he had experienced personal financial hardship, which would continue beyond the outcome of the appeal.

25. The witness statement from Ms Carter stated that she believed the Applicant to be trustworthy person and that his personal integrity had been tarnished by the proceedings. She referred to the mental stress and anxiety caused to him and that the action had caused him undeserved stress and financial hardship.

26. The Written Representations to the Respondent's Notices of Intent, produced by Michael Appleby (a solicitor from Fisher Scoggins Waters LLP) on behalf of the Applicant, confirmed that the Applicant had received an estimate for the insulation of the roof of £14,468 plus VAT and a quote for the installation of the insulated plasterboard to the Properties of £6,750 plus VAT. In addition, it was submitted that the Applicant would have had to pay for redecoration and provide alternative accommodation for the tenants, so the projected costs for the works detailed in the improvement notices were almost £30,000.

27. The Written Representations confirmed that the Applicant had made an application to appeal the works detailed in the improvement notices but that, as the Applicant had failed to comply with a direction of the Tribunal, the appeals had been stuck out, so the issues remained unresolved.

28. The Written Representations stated that the Respondent must ensure that it can prove the offence beyond reasonable doubt and that the proceedings were in the public interest. The Applicant submitted that they were not for the following reasons:

- The improvement notices for Flats 4 and 6 were defective, as the Applicant understood from the Freeholder that they had not been served with these notices;
- That, having assessed the Properties in exceptionally cold weather, the Applicant did not agree that the Respondent had proven beyond a reasonable doubt that an Excess Cold Category 1 hazard existed at the Properties, as the assessment of Flats 1 and 2 (which he submitted were essentially the same type of property) were only assessed as Category 2 hazards in respect of Excess Cold;
- That there was a reasonable excuse for the Applicant not to have carried out the works as they would not have been economically feasible, as the simple payback period was greater than 15 years; and
- That the imposition of a penalty was not proportionate as there was no evidence that any person has suffered any ill health, the Applicant had already spent a substantial amount in renovating the Properties and that the Respondent had acknowledged that the premises were, overall, well maintained.

29. In relation to the amount of the financial penalty imposed, the Applicant submitted in the Written Representations:

- That his culpability was not 'High'. He had already completed some works requested by the Respondent, at a substantial cost, and there were genuine issues as to the feasibility and cost of any further works. As such, it was submitted that at Stage 1 the penalty level should have been 2 with a Band starting point of £1,200 and an upper limit of £3,000;
- After reducing the rental income by the agents' fees, mortgage payments, council tax, ground rent and maintenance, the weekly income was £98.07, not the sum of £528.46 that the Respondent had calculated;
- The Applicant did not agree with the multipliers used by the Respondent, in particular the fact that the Respondent had penalised the Applicant for the failure to comply with each of the other improvement notices separately, despite the same issues relating to all three flats. As such, the penalty figure at Stage 3 should have amounted to £1,302.97;
- The figure at Stage 4 for any financial benefit should have related to work which was feasible and would have achieved a payback within 15 years; and
- As the cap for a Civil Penalty is £30,000, it was unjust to have three separate Notices of Intention in relation to the same works which would amount to a figure beyond this cap.

The Respondent's submissions

30. The Respondent provided to the Tribunal a comprehensive bundle which included a Statement of Case produced by Mr Connor together with a witness statement by Mr Chadaway. To the statements were exhibited a number of documents which included copies of the title, photographs taken during various inspections of the Properties and common parts, copies of hazard awareness notices issued in relation to all six flats, copies of various HHSRS assessments, copies of the three improvement notices issued in relation to the Properties, a copy of the written interview under caution and the Applicant's Interview Response, details of Nottingham City Council's Civil Penalties Enforcement Guidance (which had been adopted by the Respondent) together with their Civil Penalty Calculator User Guide, the Respondent's justifications in relation to their intent to impose a civil penalty together with copies of the Notices of Intent, a copy of the Written Representations, correspondence with Mr Glassborow (a Director of Start Architecture Limited), a copy of a Thermal Assessment report by Start Architecture Limited and the justification document for the decision to impose the financial penalty together with the Final Notice.

31. At the hearing, Mr Connor, on behalf of the Respondent, went through the history of the Respondent's dealings with the Applicant in relation to the Properties, which were outlined in the statements given by himself and Mr Chadaway. He confirmed that he became involved with the Properties following a referral from a local councillor, who had concerns regarding problems relating to the cold, damp and mould at Flats 4 and 6. Mr Connor confirmed that an inspection of these two flats was carried out on 13th February 2018, a date on which Mr Connor acknowledged the weather was very cold (high of 5°C, low of -2°C but dry). He confirmed that both flats were found to be excessively cold and suffering from condensation. Mr Connor acknowledged that, in Flat 4 the central heating had only been turned on for an hour during the morning and that the tenant had taped up the air bricks in the bedroom and extractor fan in the bathroom.

32. Following the inspection, hazard awareness notices were served in respect of both flats on 26th February 2018 and a remedial notice served under The Smoke and Carbon Monoxide Alarm (England) Regulations 2015 in respect of the lack of a working smoke alarm in Flat 4. The hazard awareness notice for Flat 4 detailed three category 1 hazards – Fire Safety, Excess cold and Damp and mould and three category 2 hazards - Structural collapse (relating to the balcony in the common parts), Explosions (relating to lack of evidence of a valid gas safety record) and Electrical hazards, regarding various fittings. In relation to Flat 6, one category 1 hazard was identified – Excess cold and three category 2 hazards – Fire safety, Structural collapse (again, relating to the balcony) and Damp and mould.

33. Mr Connor confirmed that he revisited the Building on 20th March 2018, in the presence of the Applicant, when Mr Connor stated that the Applicant expressed concern regarding the costs of insulating the flats, the

fact that the works might be impractical and that he would have to evict the tenants to carry out the work. The Applicant requested that the Respondent serve improvement notices against the flats, as he would then have had an opportunity to appeal against the works to the Tribunal.

34. An inspection of Flat 3 and further inspection of Flats 4 and 6 took place on 30th May 2018. During this inspection, Mr Connor and Mr Chadaway noted that fire doors had been installed and electrical works had been completed; however, the properties were still damp and there was no indication that any thermal improvements had been made. In addition, in Flat 4 a battery-powered smoke alarm had been installed rather than a hard-wired interlinked smoke alarm.

35. An inspection of Flats 1 and 2 took place on 25th June 2018 and, on 24th August 2019, the Respondent served formal hazard awareness notices against Flats 1, 2 and 3. The Excess cold hazard in these three flats had been assessed as category 2 hazards, Mr Connor stated that this was likely due to the fact that all three were located on the first floor. As the Respondent understood that hard-wired interlinked smoke alarms had now been installed, no fire safety hazards were included within these notices.

36. On 30th July 2018, improvement notices were served in respect of Flats 4 and 6 in relation to the Excess cold hazards identified. In addition, the Respondent having realised upon obtaining a copy of the Lease that the notices for the common parts should have been served on the freeholder, on 5th July 2018, the Respondent forwarded an improvement notice to the Freeholder in relation to making the balcony safe.

37. Mr Connor stated that an inspection of Flat 5, on 2nd August 2018, provided clear evidence of Excess cold in the second floor flats, because the defects identified showed effects of thermal bridging and there was again evidence of condensation on the party walls and ceiling. As such, Mr Connor did not believe that any condensation in the flats was purely on account of the manner in which a tenant had ventilated the property. As Flat 5 was, at the time, being vacated, the Respondent issued a suspended improvement notice in relation to the hazard identified at Flat 5 on 13th August 2018.

38. Mr Connor stated that the improvement notices did not intentionally specify what works would be required to remedy the defects, as they had left it open for discussion with the Applicant as the Applicant may have been able to achieve the results required to remedy the hazard in an alternative manner. The wording, therefore, simply required the Applicant to provide evidence that the flat roof, ceilings and front elevations achieved a stated acceptable threshold U-value and that, should they fail to achieve this, then works needed to be carried out to improve the thermal efficiency of the ceilings and front elevation walls.

39. On 16th August 2018, the Applicant made an application to appeal against all three improvement notices (Flats 4, 5 and 6) to the First-tier Tribunal; however, the appeal was struck out by the Tribunal on 31st October 2018, and a request for reinstatement was refused on 28th November 2018, as the Applicant had continually failed to supply the necessary documents to enable the Tribunal to deal with the application.

40. On 5th February 2019, Mr Connor again attended the site with Mr Chadaway, and inspected the Properties and the balcony. Although, the Applicant had carried out some works to the balcony and the Properties had been redecorated, no insulation works had been carried out and the Properties were still cold.

41. Following the inspection, and noting that no works had been carried out in respect of the improvement notices, the Respondent decided to interview the Applicant under caution to see if he had any excuse for his failure to comply. The Applicant provided the Applicant's Interview Response, which the Respondent's legal department deemed as evidence that the Applicant had failed to comply with the improvement notices, therefore, had committed offences under the Act. The Respondent considered that there would be a realistic prospect of conviction, as the evidence was admissible, reliable and credible, and considered (taking into account the seriousness of the offence, the foreseeability of the offences and circumstances leading to the offence, the intent of the offender, the history of offending and non-compliance with the statutory notices, as well as the attitude of the offender) that it was in the public interest to prosecute. The Respondent then considered whether to impose a civil penalty as an alternative to prosecution and considered this the most appropriate course of action, as the Freeholder had been given a financial penalty for a similar offence (Mr Connor had confirmed that the Freeholder had failed to comply with the improvement notice of 5th July 2018 and that, despite an extension in time for the works to the balcony having been granted, had failed to complete the works in time so a financial penalty had been imposed on 3rd April 2019).

42. Having considered the Respondent's adopted enforcement policy guidance, the Respondent issued the Notices of Intent, which proposed three separate penalties - £16,380.78 for the offence against the failure to comply with the improvement notice for Flat 4; £8,759.63 for the offence against the failure to comply with the improvement notice for Flat 5 and a further £8,759.63 for the offence against the failure to comply with the improvement notice against Flat 6.

43. In relation to the calculation of the penalties, Mr Connor confirmed that they had considered that the Applicant's culpability was 'High', as he had received previous notices, which he had failed to comply with, and there appeared to have been no attempt to comply with the improvement notices at all. In relation to the seriousness of harm, Mr Connor stated that, although there were no vulnerable people occupying the Properties, they were required to assess the penalty under the enforcement guidance

as if there was, giving consideration to the 'worst possible harm outcomes'. As the properties did benefit from central heating and double glazing, they departed from this and instead considered that the 'most likely' harm would be assessed as a class IV, which was 'Level B'. As such, they calculated that the level of fine should be Penalty Level 4, a penalty band of £6,000 to £15,000.

44. Based on the Applicant's income and track record, they did not carry out a full investigation, but as there were six flats in the Building (all of which they considered to be relevant) they considered the income from all six flats, less any ground rent payable under the Lease. The Penalty Level 4 added a multiplier of 250% to the weekly income, giving a total amount of £1,321.15, for the Applicant's income. When considering the Applicant's track record, the Respondent considered that for each offence there had been two other relevant notices served on the Applicant in the previous two years (as there had been three improvement notices in total). The Respondent, therefore, included in their calculation the failure of the Applicant to comply with the other improvement notices, so an additional £300 was added to the Stage 2 figure (5% of the starting amount of the relevant Penalty band, in this case £6,000). At Stage 3, the penalty, therefore, amounted to £7,621.15 (£6,000 + £1,321.15 + £300).

45. At Stage 4, the Respondent added the financial benefit, being the costs that the Applicant had saved by not carrying out the works as per the estimates given by the Applicant in the Applicant's Interview Response, together with £4000 as an estimate for redecoration and alternative accommodation. The Stage 4 figure amounted to a total of £26,278.90 and this was divided between the Properties, which equated to £8,759.63 per flat.

46. Taking in to account the totality principle, where the landlord has committed multiple offences, the Respondent considered it was just and appropriate to impose the Stage 3 penalty on a single flat, with the Stage 4 penalty to be divided between all of the Properties. As such, the proposed penalty for Flat 4 amounted to £16,380.78 and the proposed penalties in relation to each of Flat 5 and Flat 6 was £8,759.63 each.

47. After issuing the Notices of Intent, the Respondent received the Written Representations on 29th August 2019. On the same day, the Respondent also received an email from Mr Glassborow, stating that he had been instructed to act on behalf of the Applicant and the Freeholder. Mr Glassborow stated that the Applicant had come to realise the seriousness of the situation, having received the Notices of Intent, and they were looking at ways to be able to resolve the situation and agree the works required. The Respondent was forwarded a Thermal Assessment Report, completed by Mr Glassborow in September 2019. Mr Connor confirmed that the Thermal Assessment Report was the type of assessment that they considered that the Applicant could have carried out when the improvement notices had initially been issued to him, for him to assess the level of the hazard. He stated that the report did conclude that the

threshold U-values were not acceptable and the Respondent considered that this proved that the works detailed in the improvement notices were required. Mr Connor confirmed that, over the coming months, he entered into correspondence with Mr Glassborow with the intention of the works ultimately being completed.

48. On 2nd December 2019, Mr Glassborow inspected the Properties and informed the Respondent of this; however, there was a dispute as to some outstanding works which Mr Connor stated were still required to the kitchen and bathrooms. On 16th January 2020, Mr Connor received an email from Mr Glassborow confirming that the Applicant had been completing the works over the Christmas break and he had been advised that all of the works would be completed by 31st January 2020. Consequently, a final inspection was carried out on 11th February 2020, when the Respondent was able to confirm that the works had been completed to a satisfactory standard.

49. Mr Connor stated that, although Mr Glassborow had been informed of the outcome of the inspection on 11th February 2020, and that he had confirmed this by email to him on 19th February 2020, he had not contacted the Applicant to confirm that the works had been completed as he had presumed that Mr Glassborow would have done this.

50. Following the completion of the works, a decision was made by the Respondent that it was appropriate for a financial penalty to be imposed on the Applicant but that any penalty should be substantially reduced as the works had been completed.

51. The Respondent considered the cases afresh and the Written Representations. The Respondent took into account that at no point prior to the Notices of Intent had the Applicant provided any evidence that the works were not required nor did he appear to have made any plan to actually start the works. The Respondent also noted that the Applicant had failed to pay any of the Demands for Payment that had been served upon in him in relation to various improvement notices and hazard awareness notices against the flats and that the Respondent had incurred considerable expenses in seeking to ensure that the premises were safe. The Respondent did acknowledge that the Applicant had cooperated with the investigation, that he had no known previous housing related convictions, that he had addressed the fire safety hazards in relation to all six flats and that he had completed works at significant expense. The culpability was, therefore, still assessed as 'High' rather than 'Very high' and the penalty level was still considered Penalty Level 4. At Stage 2; however, the Respondent only took into account the incomes received from the Properties (as opposed to all six flats) and calculated the rental income from the Written Representations, taking in to account Applicant's outgoings detailed therein. In relation to the multiplier, these remained at 250% and 5%, but the adjusted Stage 3 figure totalled £7,035.60. Since the works had been completed, the Respondent did not consider that there was any Stage 4 financial benefit and, considering the

totality principle, one final notice was issued against the Properties rather than three separate notices.

52. Mr Connor acknowledged that the date between the Notices of Intent (2nd August 2019) and the issuing of the Final Notice (7th April 2020) had been a long period of time and that this delay may have caused the Applicant distress; he also commented that some of the delay may have been as a result of the lockdown. However, he submitted that the Act did not lay out a timescale for the period between a local housing authority receiving written representations and deciding whether to impose a financial penalty.

53. Mr Connor stated that in all of their dealing with the Applicant, the Respondent had tried to be as fair, proportionate and as reasonable as they could but that they did not consider that the Applicant would have completed the works had the Notices of Intent not been issued and that they did not wish to jeopardise the completion of the works, as the primary goal was to remove the category 1 hazards at the Properties.

The Tribunal's Deliberations

54. In reaching its determination the Tribunal considered the relevant law and all of the evidence submitted, written and oral, briefly summarised above.

55. The Tribunal, under paragraph 10 of schedule 13A to the Act, may confirm, vary or cancel a final notice, determining the matter as a re-hearing of the local housing authority's decision. As such, the Tribunal must firstly be satisfied, beyond reasonable doubt, that the Applicant committed a relevant housing offence.

56. In the Written Representations, the Applicant submitted that the service of the improvement notices for Flats 4 and 6 was defective. The Respondent stated that notices had been served on the Freeholder and a copy of their verification of service in respect of both flats was included within the evidence provided by the Respondent in their bundle. In the absence of any evidence to the contrary, other than the Applicant's assertion that this was not done, the Tribunal is satisfied that the notices were served correctly.

57. The Applicant also submitted, in the Written Representations, that the Respondent had not proven beyond reasonable doubt that a category 1 hazard in respect of Excess cold existed at the Properties, as Flats 4 and 6 had been assessed when the weather had been exceptionally cold. In addition, the Applicant submitted that there was a reasonable excuse for the works having not been carried out as, in the Applicant's opinion, they were not economically feasible. The Tribunal notes that both flats had been re-inspected later in the year and Flat 5 was inspected in August 2018, when the Respondent had still assessed the Excess cold in that flat as a category 1 hazard. In addition, the Tribunal does not regard the

question as to whether any works were economically feasible as being a reasonable excuse for failing to comply with the notices, such as to be considered a defence under section 30(4) of the Act. The Tribunal considers that both of these issues could have been raised as matters to be considered in an application to the Tribunal to appeal against the improvement notices. Despite making an application to the Tribunal to appeal the improvement notices, the Applicant had failed to provide the evidence required for that application to proceed and the application had, accordingly, been struck out. Consequently, under section 30 (1) of the Act, the improvement notices had become operative and the Applicant was obliged to carry out the remedial action detailed within them.

58. From the Applicant's Interview Response and the Written Representations, it was evident that the Applicant had not carried out the remedial action detailed in the improvement notices, as the Applicant had stated that he had received estimates for the works but was awaiting approval from the Freeholder. As such, the Tribunal is satisfied beyond a reasonable doubt that the Applicant had committed a relevant housing offence under section 249A(2)(a) of the Act, in that he had failed to comply with the improvement notices.

59. The Tribunal is also satisfied that the decision to impose a financial penalty was in the public interest, taking into consideration the Applicant's actions, his lack of cooperation and the significant delays before effective remedial works were completed. The Tribunal does not consider the fact that the Applicant had already incurred substantial costs in carrying out works to the flats, and that there was no evidence that anyone had suffered any ill health, would mean that such an action would be disproportionate.

60. In relation to the submissions regarding the amount of the financial penalty imposed, the Tribunal considers that it was reasonable for the Respondent to assess the Applicant's culpability as 'High' bearing in mind the Excess cold hazard had initially been identified in February 2018 and, nearly 18 months later, the Applicant had still failed to reduce the hazard; however, considering the fact that the Applicant had completed works to alleviate all of the other hazards which had been identified in the original hazard awareness notices issued against Flats 4 and 6, as well as contributing to substantial costs in relation to the completion of the balcony, a level of 'Medium' might have been more appropriate. Regarding the landlord's income and track record, the Tribunal did have concerns that the Nottingham City Council's Enforcement Guidance, adopted by the Respondent, referred to the 'gross' amount of the fees. The Tribunal notes, though, that the Respondent had departed from the guidance and that in the Final Notice they had adjusted their figures to only include the income from the Properties and then reduced the rental income by the Applicant's outgoings in relation to the Properties (as set out in the Written Representations), the Tribunal considers this to be a fair and sensible approach.

61. The Tribunal does have concerns as to whether it was appropriate to have included a 5% multiplier at Stage 3 for the failure of the Applicant to have complied with the other improvement notices, as these all related to the same set of works. However, the real concern for the Tribunal relates to the time taken by the Respondent to issue the Final Notice.

62. The Tribunal considers, as previously stated, the Respondent was justified in considering that the imposition of a financial penalty was appropriate and that the Notices of Intent were issued correctly. However, after receiving the Written Representations on 29th August 2019, and the period for representations having ended on 31st August 2019 (being 28 days beginning with the day after the date on which the notice was given – paragraph 4(1) of Schedule 13A), the Respondent was obliged to decide whether to impose a financial penalty and, if so, the amount of the penalty.

63. The Respondent has submitted that, although the time period for making representations and for a penalty to be paid is clearly set out as being 28 days in the Act, there is no such time period given in paragraph 5 or 6 of Schedule 13A as to when a final notice must be given. If the Tribunal accepts that submission, then this would result in a local housing authority having an unlimited time period within which to give a final notice. The Tribunal notes that paragraph 2 of Schedule 13 imposes a six-month time limit for the giving of a notice of intent after an authority has sufficient evidence of the conduct to which the financial penalty relates (mirroring the six-month time limit for the laying of information in respect of a summary offence in section 127 of the Magistrates Court Act 1980), a period extended in respect of continuing offences. Although there is no time period specified by the Act for the issuing of the final notice, the wording of paragraph 5 states that the local housing authority "*must*" decide whether to impose a financial penalty and the amount of the penalty "*After the end of the period for representations*". In the Tribunal's view, this wording makes it clear that these decisions should be made in a timely manner once any representations made have been considered.

64. In this matter, the Final Notice was not issued until eight months after the issuing of the Notices of Intent. In addition, the Respondent took into account the fact that the Applicant had, some months after the Notices of Intent had been given, carried out all of the works to the Properties. The Tribunal notes Mr Connor's statement – that he appreciated that the time period between the two notices had been lengthy but the Respondent did not wish to jeopardise the completion of the works — but the Tribunal does not consider that this is a sufficient excuse for such a delay. In addition, as the Notices of Intent were given in August 2019 and the Final Notice given at the beginning of April 2020, the Tribunal does not consider that the national lockdown would have had any significant effect on the delay.

65. The Guidance sets out a number of factors which local housing authorities should have regard to when considering whether a civil penalty is set at appropriate level. These include the punishment of the offender and

deterring the offender from repeating the offence. The Guidance does not suggest that the issuing of a notice of intent could be used as a threat or to coerce a person into carrying out any works. A local housing authority, by the time of issuing a notice of intent, will have already decided that a person has committed an offence and, taking into account any representations, will simply decide whether a penalty should be imposed and the correct level of any penalty. The Guidance also states, at 2.4, that if a landlord fails to comply with an improvement notice and subsequently receives a civil penalty as a result, the authority can issue a further improvement notice if the person still fails to carry out the work.

66. The Tribunal has a measure of sympathy with the Respondent in that the Applicant had consistently made clear his view that significant insulation works were not required and that the condensation occurring was attributable simply to the lifestyle of occupiers and, indeed, he reiterated this at the hearing. The Tribunal also notes that the original construction of the Building is such that cold bridging would be anticipated – this issue could have been addressed had the Applicant pursued his appeal against the improvement notices. Instead, the Applicant demonstrated a lack of cooperation with the Respondent and had been dilatory in carrying out remedial work. Given his conduct and track record in this matter, it is understandable that the Respondent was keen to ensure that the Applicant finally addressed the necessary work. However, as indicated in the paragraph above, the Guidance draws attention to the fact that an authority can issue a further improvement notice in the event of continuing default.

67. In addition, if the Respondent considered that the Applicant had finally realised, after receiving the Notices of Intent, the seriousness of the action and that he was intending to carry out the works, the Respondent could have, under paragraph 9 of Schedule 13A, withdrawn any final notice that had been issued or reduced the penalty specified in it.

68. As it was, the Applicant was left for a period of eight months not knowing whether or not a penalty would be imposed or the amount of any such penalty. This, as the Respondent acknowledges, would have caused the Applicant a great deal of anxiety and, as stated above, a substantial delay in issuing a final notice as a means of applying pressure to comply with an improvement notice does not appear to the Tribunal as having been within the intention of the legislation. As such, the Tribunal considers that the Respondent did not comply with the procedure set out in paragraph 5 of Schedule 13A to the Act and determines that the Final Notice should be cancelled.

Appeal Provisions

69. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after

these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
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Judge M. K. Gandham