**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2020] UKUT 0292 (LC)**
**UTLC Case Number: HA/47/2019**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

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

***HOUSING – CIVIL PENALTY – houses in multiple occupation – breaches of Management of Houses in Multiple Occupation (England) Regulations 2006 – application of local housing authority policy on civil penalties – whether remedial works carried out after date of offences is relevant to assessment of seriousness of offences – whether works carried out to comply with improvement notices amounting to mitigation – consideration of totality of penalties for similar offences in adjoining HMOs – section 249A, Housing Act 2004 – regs 4, 7 and 8, Management of Houses in Multiple Occupation (England) Regulations 2006 – appeal allowed***

**BETWEEN:**

**SHEFFIELD CITY COUNCIL**

**Appellant**

**and**

**MR NAVEED HUSSAIN**
**(also known as Navid Sabir)**

**Respondent**

**Re: 249/251 Pitsmoor Road,**
**Sheffield S3 9AQ**

**Martin Rodger QC, Deputy Chamber President**

**13 October 2020**

**Hearing conducted by Skype**

*David Gilchrist*, instructed by the Solicitor to Sheffield City Council, for the appellant
*Jeremy Dable*, instructed by Abbey Scott Law, for the respondent

The following cases are referred to in this decision:

*London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC)

*Sutton v Norwich City Council* [2020] UKUT 90 (LC)

## Introduction

1. This appeal is against a decision of the First-tier Tribunal (Property Chamber) in which civil penalties imposed on the landlord of two houses in multiple occupation were reduced because the tribunal took a different view of the seriousness of the relevant housing offences from that taken by the local housing authority.

2. The FTT's decision was given on 18 September 2019 following its consideration of six separate appeals by the respondent, Mr Naveed Hussain, against final civil penalty notices served on him by the appellant, Sheffield City Council. The penalties were imposed in respect of breaches of regulations 4, 7 and 8 of the Management of Houses in Multiple Occupation (England) Regulations 2006 which were found to have occurred at 249 and 251 Pitsmoor Road, Sheffield.

3. Penalties totalling £75,000 were imposed pursuant to powers conferred on the appellant by section 249A, Housing Act 2004. At each of the two houses penalties of £15,000 were imposed for multiple breaches of regulation 4 (failure to take steps to ensure the safety of residents) and regulation 7 (failure to maintain common parts) with additional penalties of £7,500 for breaches of regulation 8 (failure to maintain living accommodation).

4. The FTT allowed Mr Hussain's appeal and reduced the penalties for the breaches of regulations 4 and 7 to £7,500 for each house. The penalties for breaches of regulation 8 were not varied so, in total, the penalties were reduced from £75,000 to £45,000.

5. The point of difference between the FTT and the Council concerned the relevance of remedial work carried out by Mr Hussain after the offences had been committed. When applying the Council's policy on civil penalties the FTT considered that, having regard to the remedial works, the residents of the houses had been exposed to a low level of harm. The Council had taken no account of the remedial works and assessed the breaches of regulations 4 and 7 as having resulted in a medium level of harm.

6. The appellant was granted permission to appeal by the FTT. The FTT had confirmed the penalties imposed for the breaches of regulation 8 and there is no appeal against that determination. Nor has Mr Hussain appealed against any of the FTT's determinations.

7. The sole ground on which permission was sought was that the FTT had been wrong to reduce the penalties on account of events that had taken place after the Council's original decision. Mr Gilchrist, who appeared on behalf of the appellant, formulated the issue rather differently. He sought permission to amend his grounds of appeal to argue that the FTT was bound to apply the Council's policy for the imposition of civil penalties and that, by determining that the level of harm was low by reason of the works that Mr Hussain had carried out after the Council's decision had been made, it departed from the policy without properly considering whether there was any good reason to do so.

8. Mr Jeremy Dable, who appeared on behalf of Mr Hussain, did not object to the reformulation of the grounds of appeal and I took the view that it made little practical

difference. The real issue between the parties concerns the relevance of remedial work carried out after the date on which the relevant housing offence had been committed.

**The statutory background**

9. Section 234, Housing Act 2004 authorises the making of regulations to ensure that satisfactory management arrangements are in place in respect of houses in multiple occupation (HMOs). The 2006 Regulations were made under that power, and they apply to any HMO in England other than a converted block of flats to which section 257 of the 2004 Act applies (reg 1(2)).

10. Three of the regulations are material to this appeal. Each imposes duties on the person managing an HMO.

11. By regulation 4 the manager is required to take certain safety measures. These include ensuring that all means of escape from fire are kept free from obstruction and maintained in good order and repair (reg 4(1)). The manager must also ensure that any fire fighting equipment and fire alarms are maintained in good working order (reg 4(2)). More generally, the manager must take all such measures as are reasonably required to protect the occupiers of the HMO from injury having regard to the design, structural conditions and number of occupiers of the HMO (reg 4(4)).

12. Regulation 7 imposes duties on the manager to maintain the common parts of the HMO, keeping them in good and clean decorative repair and reasonably clear from obstruction, and any fixtures, fittings and appliances in a safe and working condition. Regulation 7(6) provides a definition of "common parts" which includes staircases, halls and corridors and any other part of an HMO the use of which is shared by two or more households.

13. Regulation 8 deals with the duty of the manager to maintain each unit of living accommodation.

14. New provisions were inserted into the 2004 Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. Section 249A now empowers a local housing authority in England to impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence. A failure to comply with regulations made under section 234, 2004 Act is a relevant housing offence (s.249A(2)(e)). It is also a relevant housing offence for a person to fail to comply with an improvement notice served on them under Part 1, 2004 Act (s.249A(2)(a) and s.30, 2004 Act).

15. Schedule 13A to the 2004 Act prescribes the procedure for imposing financial penalties. This involves service of a notice of intent to impose a penalty, an opportunity for the person on whom the notice has been served to make representations in response to it, consideration of any representation received and service of a final notice imposing the penalty.

16. A person on whom a final notice has been served may appeal to the FTT against the decision to impose the penalty or against the amount of the penalty (para 10, Sch 13A, 2004 Act). By paragraph 10(3) the appeal is to be "a re-hearing of the local housing authority's decision" but it may be determined having regard to matters of which the authority was unaware.

17. Paragraph 12 of Schedule 13A requires a local housing authority to have regard to any guidance on financial penalties given by the Secretary of State. Relevant guidance was first published in 2016, and re-issued in 2018. It requires authorities to develop their own policies on determining the appropriate level of civil penalty. Paragraph 3.5 of the guidance states that "the actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous record of offending." In addition, when setting penalties authorities are directed to consider the following: the harm caused to the tenant; punishment of the offender; deterrence of the offender from repeating the offence; deterrence of others from committing similar offences; and removing any financial benefit the offender may have obtained as a result of committing the offence.

**The relevant facts**

18. Nos. 249 and 251 Pitsmoor Road comprise the matching halves of a substantial two-storey stone building. As originally constructed the building would have contained two self-contained residences, each with its own front door and separate address. As now arranged, each half of the building is divided into individual bed-sitting rooms, with eleven units of occupation together with kitchens and bathrooms in one half, and thirteen units in the other. At some time in the past openings have been created in the wall dividing the two halves of the building on both floors, and doors inserted into those openings. There is nothing before the Tribunal to indicate whether those doors are kept locked or whether communication between the two sides is possible. The Council has treated the two halves of the building as separate HMOs.

19. Mr Hussain, the respondent, is the freehold owner of No. 251 and the owner of a long lease of No. 249. He is the manager of both HMOs for the purpose of the 2006 Regulations.

20. The Council first became interested in the HMO's in January 2018 and a formal inspection was carried out on 7 March 2018 when significant breaches of the 2006 Regulations were identified. An advisory schedule of work was served on Mr Hussain in May but further inspections in July and finally on 11 October 2018 revealed that none of the suggested work had been carried out.

21. On 25 October 2018 the Council served improvement notices requiring Mr Hussain to carry out work to remedy the hazards at both HMOs which had been identified on its inspections. The improvement notices were before the FTT but they were not included in the material for the appeal. I was told that the improvements required were to remedy the defects which constituted breaches of the 2006 Regulations, and in respect of which the civil penalties were later imposed.

22. On 8 November 2018 the appellant served six notices of intent to impose civil penalties on Mr Hussain as owner and manager of the HMOs. The notices specified breaches of regulations 4, 7 and 8 in relation to each property.

23. The breaches of regulation 4 related to the need for servicing of the automatic fire detection control panel and the fire extinguishers in the buildings. The integrity of the fire escape route was said to have been compromised by holes in ceilings and walls where electrical works had been undertaken but not made good and by the presence of a door between the two halves of the building (which was said not to have the required 60 minute fire resistance).

24. The breaches of regulation 7 concerned a defective central heating system, the absence of certification of the emergency lighting installation, defects in a number of electrical sockets and other electrical installations, and a catalogue of building defects including damp, poorly fitting windows and doors, cracked window panes and defective handrails on the staircases.

25. The breaches of regulation 8 identified a small number of defects in individual bedrooms similar to those described in the common parts. At No. 249 defects were noted in nine of the thirteen bedrooms while in No. 251 there were defects in six of eleven bedrooms.

26. The penalties proposed by each of the four notices for the breaches of regulations 4 and 7 were £15,000, while the breaches of regulation 8 were said to merit a penalty in each case of £7,500. The total for all six notices was £75,000.

27. Mr Hussain made written representations claiming that he was not the manager of the HMOs. He did not question the details of the offences alleged in the notices of intent.

28. On 20 December 2018 final notices were served by the Council confirming the penalties at the levels previously intimated.

**The Council's policy and its assessment of the appropriate penalties**

29. The penalties was determined by the Council applying its civil penalties policy. The policy largely follows the approach recommended by the Secretary of State's Guidance and requires a three-stage assessment. At stage one the culpability and track record of the offender and level of harm or potential harm to the occupiers of the HMO are assessed. At step two any aggravating or mitigating circumstances are taken into account. At step three final adjustments are considered to ensure that the penalty to be imposed is fair and proportionate and achieves the objectives of the policy. The policy explains each step in greater detail.

30. The seriousness of an offence is assessed having regard to the offender's culpability and to the harm which resulted. Both culpability and harm are classified as high, medium or low. Having regard to a track record of housing offences, Mr Hussain was assessed to be highly culpable for the offences (a classification that meant he had intentionally or recklessly

breached or wilfully disregarded his obligations under the law). As there is no challenge to that assessment I need say no more about culpability. The policy then requires actual harm, the potential for harm, and the likelihood of harm to be taken into account.

31. The Council's policy contains a grid with penalties for the nine possible combinations of high, medium and low culpability and harm. Each entry in the grid is a single figure, rather than a range, and it is intended to provide the starting point for the assessment.

32. The Council considered that the harm to which the occupiers of the HMOs were exposed was at the medium level. A classification of medium harm is appropriate for offences which have adverse effects on individuals, or which created a moderate risk of harm to an individual or have a broader impact. Harm is assessed as being at a low level if there has been minimal adverse effects on individuals, a low risk of harm to an individual, or a limited impact or effect on occupiers. The Council's assessment that the occupiers of the HMOs had been exposed to a moderate risk of harm was based on the variety of hazards identified in each of the notices of intent.

33. An offence of high culpability which exposes occupiers to medium harm merits a penalty of £15,000, while an offence of high culpability and low harm attracts a penalty of £7,500.

34. A variety of potential aggravating and mitigating factors are identified in the policy which are to be taken into account at stage two by adjustments to the figure provided by the grid. Aggravating factors include previous convictions, a financial motive, obstruction of the Council's investigation or deliberate concealment. Mitigating factors include cooperation with the Council's investigation and "any voluntary steps taken to address issues". For each aggravating or mitigating factor the policy allows the appropriate penalty to be adjusted up or down by an unspecified amount, provided the maximum permitted penalty of £30,000 for each offence is not exceeded.

35. The Council took a number of aggravating factors into account including the large number of defects, Mr Hussain's failure to respond to requests for information, his record of letting sub-standard accommodation and of poor management, and his failure to attend for interview under caution on two occasions. Balanced against these were the fact that some work had begun on site at the beginning of July when an electrician had attended to undertake testing and repairs of the fire alarm and emergency lighting. There had also been assurances from Mr Hussain that the property would be brought up to standard. Those mitigating factors were not considered enough to overcome the aggravation and the Council eventually concluded that there was no reason to adjust the penalty in the grid either up or down at the second stage.

36. At the third stage the policy draws attention to the Secretary of State's guidance and highlights the objective that civil penalties should remove any financial benefit that a landlord may have obtained as a result of committing the relevant offence. The Council was satisfied that this was achieved by the proposed penalties and made no further adjustment.

**The FTT's decision**

37. The FTT rejected Mr Hussain's evidence that he had been unaware of the issues at the properties and had not received copies of the notices of intent when they were first served on him. It confirmed the Council's assessment that he was highly culpable for each of the offences. The FTT then considered the question of harm. It noted that, by the time of the hearing before it in August 2019, all of the work required by the improvement notices served on 25 October 2018 had been completed. It went on (at [80]):

> "Paragraph 10(3) of Schedule 13A of the Act provides any appeal to the First-tier Tribunal is by way of re-hearing. The position regarding harm is therefore now different than at the time the Council made the original determinations. If the accommodation is now satisfactory any likelihood of harm to the tenants must now be reduced. Accordingly, the Tribunal finds harm for all of the breaches is now low."

38. The appropriate penalty under the appellant's policy for an offence of a high culpability which has exposed occupiers to a low risk of harm is £7,500. The FTT therefore reduced the penalties for each of the four breaches of regulations 4 and 7 from £15,000 to £7,500.

39. Finally, the FTT considered the balance of aggravating and mitigating factors and decided that since the mitigating factors did not outweigh the aggravating factors there was no reason to make any further adjustment.

**The appeal**

40. Mr Gilchrist criticised the FTT for reducing the level of harm assessed by the Council from medium to low. The final notices stipulated that the breaches had been identified on 11 October 2018 and the Council had been satisfied at that time that the offences had been committed. The relevant date for considering the seriousness of the offences was therefore 11 October 2018. The risk of harm to which occupiers of the building had been exposed had existed unchanged since at least January 2018 when officers first inspected and it was that harm which ought to be taken into account. The fact that steps were taken to remedy defects after the offence had been committed did not fall to be taken into account when the seriousness of the offence was assessed and the starting point for the penalty was fixed. Any remedial work undertaken after the offence had been committed could only be considered as mitigation, at the second stage.

41. In this case, as Mr Gilchrist pointed out, the remedial work was undertaken only, or at least substantially, in response to the improvement notices and not as a voluntary act. Any mitigation of the appropriate penalty on account of those works was very modest and could not justify a reduction by half. The FTT had therefore erred in law by taking works undertaken after the offence had been completed into account when assessing their seriousness.

42. For the respondent Mr Dable focussed initially on the ground of appeal for which permission had been granted by the FTT. He submitted that there was no reason why evidence of facts which had occurred after the commission of the offence should not be taken into consideration by the FTT. Paragraph 10(3)(b) of Schedule 13, 2004 Act

specifically allowed the FTT to take into account matters of which the Council had been unaware when it made its decision and there was no reason to restrict those matters to such as had existed at the time of the decision.

43. Mr Dable also argued that where a local housing authority has served improvement notices an assessment of the likelihood of those notices being complied with should form part of the assessment of harm to the occupiers. If the risk of harm had been reduced by the service of improvement notices it was open to the FTT to take compliance with those notices into account when it formed a judgment on the seriousness of the offence.

**Determination**

44. In *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC) the Tribunal (Judge Cooke) considered the weight to be given to a local housing authority's policy on an appeal against a decision which had applied that policy. At [54] Judge Cooke explained the proper approach:

> "The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed."

At [55] she recognised the power of a court or tribunal to set aside a decision which was inconsistent with the decision-maker's own policy. Furthermore, having regard to the fact that an appeal under Schedule 13, 2004 Act is a rehearing:

> "It goes without saying that if a court or tribunal on appeal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or of which it took insufficient account, it can substitute its own decision on that basis."

45. The proper approach was also discussed by the Tribunal in *Sutton v Norwich City Council* [2020] UKUT 0090 (LC), at [254], as follows:

> "If a local authority has adopted a policy, the Tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision."

46. I agree with Mr Gilchrist that in paragraph 80 of its decision the FTT focussed its attention on the wrong point in time. The approach to civil penalties commended by the Secretary of State's guidance and adopted by the Council requires the seriousness of the offence to

be determined by reference to the culpability of the offender and the harm or risk of harm to which the occupiers of the property in question were exposed. An assessment of the seriousness of the offence should therefore focus on the circumstances of the offence itself and should take into account matters as they were at the date of the offence.

47. That is not to say that matters which occur after the offence has been committed are necessarily irrelevant to its seriousness. The longer an offence continues the more serious it may become, and the decision maker, whether the authority or the FTT, may take into account what has happened between the time the offence was first committed and the date of the decision. But an offence of long duration does not become less serious by being remedied; it does not get any more serious, but nor does it become less serious.

48. Once the seriousness of the offence has been identified, there is a starting point for determining the appropriate penalty. That penalty may be greater or less than the starting point, because of aggravating or mitigating factors. But both logically, and within the structure of this policy, the stage at which aggravating or mitigating features are to be taken into account is at the second stage when adjustments to the relevant figure are to be made.

49. I therefore disagree with Mr Dable's submission that the seriousness of an offence, assessed by reference to the culpability of the offender and the level of harm created, can be reduced by events which occur after the elements of the offence are complete.

50. In my judgment the proper place for consideration of remedial work undertaken after the commission of the original offence is at the stage of the FTT's consideration of aggravating or mitigating factors. I consider that the FTT was in error in treating the remedial works as reducing the seriousness of the offence.

51. Paragraph 10(3)(b) of Schedule 13A to the 2004 Act does not require a different approach. The FTT is directed to undertake a re-hearing of the local housing authority's decision to impose a civil penalty. It may, of course, take into account further facts which were unknown to the authority when it made its decision but it may only take into account relevant facts. In the scheme of the Council's policy, which the FTT considered it was applying and gave no reason for departing from, the fact that remedial work has been carried out after the commission of the offence is relevant to the issue of mitigation but not to the seriousness of the offence.

52. I am satisfied, therefore, that the FTT took into account an irrelevant consideration in its assessment of the seriousness of Mr Hussain's offences. It departed from the Council's policy in a material way without giving any good reason for doing so (and intending to apply the policy). That too was an error of law. I therefore set aside the FTT's decision so far as it concerns the penalties appropriate to the breaches of regulations 4 and 7.

53. Neither party suggested that the matter should be remitted to the FTT for reconsideration by it. Rather, I was asked to substitute a decision of my own. That is clearly the appropriate course.

54. There has never been any appeal against the Council's assessment of the facts of the offences themselves, apart from Mr Hussain's unsuccessful plea that he was not the manager of the HMOs, which was not revived before me. I am satisfied beyond reasonable doubt, as was the FTT, that the offences described in detail in the notices of intent were committed.

55. I will adopt the same approach as the Council in its policy by first assessing the seriousness of the offences. I was not invited by Mr Dable to reconsider the issue of Mr Hussain's culpability, and there is no reason to disturb the Council's assessment that this was high.

56. I am satisfied that the accumulation of defects recorded in each of the notices relating to fire safety precautions and the condition of the common parts created a medium risk of harm. There is no evidence of any individual having suffered any actual harm, which I take into account as relevant, but there were many examples of disrepair and poor workmanship which might have caused a serious risk to the safety of residents in the event of a fire. That was the view of the appellant's experienced officers and the FTT only took a different view because it had regard to the remedial work carried out long after the offences were committed. I therefore see no reason to disturb the appellant's assessment that the starting point in each case for an offence of high culpability and medium harm is £15,000.

57. Because the FTT had taken the completion of the works necessary to remedy the defects as justifying a reduction in the seriousness of the offence, it was not necessary for it to consider whether it amounted to mitigation. The only exception was the modest remedial work undertaken in July which was weighed by the FTT against the various aggravating factors and did not appear to it to justify any movement from the starting penalty. It is necessary for me to consider afresh whether the fact that work was eventually carried out amounts to mitigation justifying a significant reduction in the penalties.

58. The most important fact about the work which Mr Hussain carried out was that it was undertaken under compulsion. The Council had been trying to get him to carry out remedial work since March 2018. Very little appears to have been done until the beginning of October 2018 when the improvement notices were served. The improvement notices were complied with in full, but that was no more than Mr Hussain's legal obligation. Had he not complied with the notices he would have committed further relevant housing offences under section 30 of the 2004 Act and would have been exposed to further financial penalties.

59. The Council's policy treats "voluntary steps taken to address issues" as mitigating factors. Where remedial action has only been taken in response to further enforcement action by the local housing authority the level of mitigation is small. In this case I consider that it justified a reduction that no more than 10%. I therefore reduce the civil penalties imposed for the breaches of regulations 4 and 7 from £15,000 to £13,500. The total penalty levied in respect of the four offences which are the subject of this appeal is therefore £54,000. To which must be added a further £15,000 in respect of the two offences under regulation 8 which were not the subject of any appeal.

60. I have considered whether an aggregate penalty of £69,000 is proportionate to the offences with which these appeals are concerned. In any case involving multiple offences which are the subject of individual penalties the total may quickly mount up to a level which appears excessive. The Council's own policy requires that, at the final stage, the decision maker consider whether the outcome arrived at in the previous stages is fair and consistent with the objectives of the policy. It is therefore necessary to stand back from the individual offences and assess the totality of the penalty.

61. £69,000 is a substantial sum, and is more than double the maximum penalty which may be imposed for each individual offence. There was no challenge to the Council's treatment of the building as two HMOs, which I have no doubt it was, but the risks to which the residents were exposed and the neglect and mismanagement which created those risks was substantially the same in both halves of the building. I do not lose sight of Mr Hussain's previous offences, or of his reaction to the initial notices (which was to deny responsibility for the condition of the premises and to dispute service). I bear in mind the large number of individuals who were living in the building and who were exposed to a risk of harm over a prolonged period. I nevertheless consider that the imposition of the same penalties twice for offences involving substantially the same mismanagement in two halves of the same building has produced an excessive and unfair result.

62. Applying the Council's own policy, I consider that the appropriate penalty for the totality of the offences committed by Mr Hussain is one of £50,000. The penalties of £7,500 for each of the offences under regulation 8 have not been challenged. I impose separate penalties of £8,750 in respect of each of the four offences under regulations 4 and 7.

63. I therefore allow the appeal, set aside the FTT's decision and impose penalties as above totalling £50,000.

Martin Rodger QC

Deputy Chamber President

28 October 2020