UPPER TRIBUNAL (LANDS CHAMBER)

LC-2021-631

Royal Courts of Justice,
Strand, London WC2A

2 September 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – house in multiple occupation – manager's duties – requirement to "ensure" safety measures and repairs – reasonable excuse defence – notice of defect – quantum of penalty – sections 234, 249A, Housing Act 2004 – Regulations 4 and 7, The Management of Houses in Multiple Occupation (England) Regulations 2006 – appeal dismissed

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

BETWEEN:

ADIL CATERING LIMITED

Appellant

-and-

THE CITY OF WESTMINSTER COUNCIL

Respondent

Re: 161 Praed Street,
London W2

Martin Rodger QC, Deputy Chamber President

Heard on 20 June 2022

Edward Blakeney, instructed by Collins Benson Goldhill LLP, for the appellant
The respondent did not participate in the appeal

The following cases are referred to in this decision:

D'Costa v D'Andrea [2021] UKUT 144 (LC)
I R Management Services Limited v Salford City Council [2020] UKUT 81 (LC)
Palmview Estates Limited v Thurrock Council [2021] EWCA Civ 1871
Reliance Permanent Building Society v Harwood-Stamper [1944] Ch. 362
Sheffield City Council v Hussain [2020] UKUT 292 (LC)

Introduction

1. The main issue in this appeal concerns the scope of the duty imposed on the manager of a house in multiple occupation ("HMO") by regulations 4 and 7 of the Management of Houses in Multiple Occupation (England) Regulations 2006, ("the Management Regulations").

2. Regulation 4(1) provides that "the manager must ensure that means of escape from fire in the HMO are – (a) kept free from obstruction; and (b) maintained in good order and repair". Regulation 4(2) provides that "the manager must ensure that any fire fighting equipment and fire alarms are maintained in good working order".

3. Using similar language regulation 7 requires the manager to "ensure" that all common parts of the HMO are maintained in a safe and working condition, and (amongst a number of specific duties) must in particular ensure that the common parts are fitted with adequate light fittings that are available for use at all times by every occupier of the HMO.

4. Until 28 September 2021 the appellant, Adil Catering Limited held a lease of an HMO at 161 Praed Street, London W2. On 3 June 2020, following complaints received from a tenant, the local housing authority, Westminster City Council, wrote to the appellant requiring it to remedy defects in, amongst other things, the fire alarm system serving the building. The appellant undertook certain works but on 30 July 2020 when a Council enforcement officer attended the property, he found a number of defects including in the fire alarm system. Some of the defects were the same as those identified in the Council's original letter but some were different.

5. On 17 December 2020 the Council imposed a financial penalty of £16,000 on the appellant pursuant to section 249A Housing Act 2004 ("the 2004 Act") on the basis of breaches of the Management Regulations identified at its inspection on 30 July.

6. The appellant appealed to the FTT against the civil penalty but by its decision of 1 October 2021 the FTT confirmed the imposition of a financial penalty, reducing the total amount payable marginally to £15,750. The FTT granted permission to appeal against that decision.

7. At the hearing of the appeal the appellant was represented by Mr Edward Blakeney. I am grateful to him for his interesting submissions about the meaning of the Management Regulations. The Council chose not to participate in the appeal.

The relevant statutory provisions

8. Power to make the Management Regulations is contained in section 234(1), 2004 Act:

"The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations –

(a) there are in place satisfactory management arrangements; and

(b) satisfactory standards of management are observed."

9. It is an offence to fail to comply with the Management Regulations (section 234(3)). By section 234(4), it is a defence to proceedings for such an offence that a person had a reasonable excuse for not complying with a regulation.

10. By section 249A, 2004 Act a local housing authority may 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 in respect of premises in England. Relevant housing offences include the offence of failing to comply with the Management Regulations.

11. The Management Regulations impose duties on the person managing an HMO. Regulation 4 is concerned with safety measures. Regulations 4(1) and 4(2) have already been quoted, and it is sufficient for the purpose of this appeal to refer additionally to regulation 4(4), which provides:

"(4) The manager must take all such measures as are reasonably required to protect the occupiers of the HMO from injury, having regard to –

(a) the design of the HMO;

(b) the structural conditions in the HMO; and

(c) the number of occupiers in the HMO."

12. Regulation 7 concerns the duty of a manager to maintain the common parts, fixtures, fittings and appliances found in the HMO. The relevant parts have already been quoted.

The facts

13. 161 Praed Street is a four-storey residential building which (at the relevant time) had restaurant premises on the ground floor and at least 10 bed sitting rooms on the upper floors. It was included in a lease granted to the appellant in 2018 which was due to expire in September 2020. In 2018 the appellant had been granted a licence by the Council to use the building as an HMO. The average number of people living on the premises was reported in November 2019 to be 12, and by 2020 the appellant's rental income from the residential parts of the building was £70,200 a year.

14. On 21 November 2019 a fire risk assessment report was prepared for the appellant. It reported three "significant findings" which required action within one month. Those related to the provision of no smoking signs, a fire blanket in the kitchen, and the development of an emergency plan. The report addressed a further 25 fire safety

questions in respect of which it found "no action required". It confirmed that there was a manual fire alarm system in the premises and that emergency escape lighting was fitted which was sufficient to ensure safe evacuation. Portable fire fighting equipment was provided in communal areas but the fire extinguishers in the communal area were described as "outdated." The report recommended that all the portable fire fighting equipment in communal areas should be serviced. Surprisingly, that recommendation appeared in a section of the report headed "no action required". The report also recorded that the next risk assessment was due in two years' time in November 2021.

15. On 1 June 2020 one of the tenants in the building complained to the Council about the condition of the fire alarm system in the common parts which was reported to be "randomly going off at night". The last such incident was said to have been on 6 December 2019 and on that occasion the tenant had not been able to reset the system herself. The landlord had sent a handyman the following morning who had "silenced" the alarm without remedying the cause of the problem so that "the board has been flashing "fire" and "general fault" ever since." The same complainant said that an inspection had been carried out a couple of months previously and that the fire extinguishers in the building now had a label warning that "corrective action" was required. She also reported an infestation of rats or mice and a problem of water penetration through ceilings when it rained and said she had reported these concerns several times.

16. On 3 June 2020 Mr Withams, the Council's environment health enforcement officer, wrote to the appellant about possible contraventions of the Management Regulations based on the information recently provided by the tenant. He pointed out that the condition of the fire alarm and detection panel and the fire fighting equipment, the infestation of mice and the problem with water penetration, might all contravene the regulation 4 duty to take safety measures. He asked for those issues to be attended to without delay and warned that a failure to comply with the Management Regulations constituted an offence.

17. The following day, Mr Greg Arabian of the appellant spoke to Mr Withams on the telephone and informed him that an electrician had been instructed to inspect the fire alarm system. On 22 July the electrician reported that he had conducted an inspection on 8 June and had observed faults showing in zone 3 on the fire alarm control panel. The panel identified the faults as having occurred in flats 2B and 2G, both of which were vacant (and had been since April). The system was then tested and no faults were found.

18. It was the appellant's usual practice to have the premises inspected fortnightly, but during the early months of the Covid-19 pandemic these regular inspections were suspended. The appellant's evidence before the FTT suggested that after the end of March 2020 the only routine inspection occurred on 7 July. There is no contemporaneous record of that inspection but in their submissions to the FTT it was reported that the lights in the communal areas had been operational on that date.

19. A routine annual service of the fire alarm control panel was carried out on 21 July 2020. On that occasion the control panel was showing faults in zones 2 and 3 which were

traced to flats 1B and 2A both of which had recently been vacated. Once again the system was tested and no faults were found and the panel was reset. When the electrician reported his observations to the appellant on 22 July, he suggested that "the error could have been due to tenants' cooking facilities and tenants may have tried to reset the system themselves."

20. The same electrician also produced a separate document dated 20 June 2020 which I take to have been the record of an annual inspection of the fire detection and alarm system on that date. The system was described as "well maintained" and after testing was reported to have been left in working order.

21. On 30 July Mr Withams attended the property to follow-up his letter of 3 June. He identified five separate breaches of the Regulations which he notified to the appellant on 6 August. He found a build up of litter and discarded furniture in the common stairway which he considered was a breach of regulation 4 and regulation 7. He found the following additional breaches of regulation 4 in the common parts of the building: the fire door to the second floor was broken, did not close and had a hole in it; the fire alarm control panel indicated a fire in zones 2 and 3 and showed that there was a fault in zone 4 as well as a "general fault"; one of the fire extinguishers in the common parts had the word "condemned" written in hand in the service schedule and the same extinguisher carried a label stating "warning – corrective action required"; two of the three lights in the common corridor on the third floor were found not to be working and the gas safety certificate for the premises had expired more than a year earlier.

22. In response to Mr Withams' letter, Mr Arabian explained by email that the property was about to be handed back to the landlord for redevelopment and all but five rooms were already empty. The fire panel had been serviced and was working properly and, he said, there was no gas at the property. Mr Arabian included photographs showing the common parts to be clear of debris and the fire alarm control panel displaying no faults.

23. On 12 November the Council served notice of its intention to impose a civil penalty of £20,000 for the breaches of regulations 4 and 7. It invited comments from the appellant and on 17 November Mr Arabian stated that all of the works required by the letter of 30 July had been completed by 17 August. In a further email on 7 December he explained that the appellant's offices had been closed and its staff had been furloughed in June when Mr Withams' original letter had arrived. As a result, he had had no additional property management support, but he maintained that the appellant had managed the building competently and professionally while complying with pandemic lockdown restrictions.

24. The Council considered Mr Arabian's observations and took them into account when resolving on 17 December to serve final notice imposing financial penalties under section 249A. It was satisfied that the appellant's conduct had amounted to five separate breaches, which it listed. No reference was made to the gas certificate. The obstruction of the escape route at first floor level by a build-up of litter and discarded furniture observed by Mr Witham on 30 July was treated as a breach of regulation 4(1) only. The penalty the Council had originally intended to impose was reduced by 20% because the

works to address the breaches had been carried out by 17 August. The resulting penalty amounted to £16,000.

The FTT's decision

25. The FTT began its decision by reminding itself that, although the proceedings before it were an appeal, the appeal was a rehearing, and it was required by paragraph 10(3)(a) of Schedule 13A to the 2004 Act to decide for itself on the evidence whether to impose a financial penalty and was not limited to reviewing the decision made by the Council.

26. Three of the points taken by the appellant before the FTT remain in issue. The first is whether, on the evidence, the alleged breaches of the Regulations were made out. Mr Blakeney, who appeared for the appellant before the FTT as he did on the appeal, had argued that it was not enough for the Council to show that the means of escape from fire, for example, had been obstructed on a single occasion. The FTT disagreed, and directed itself by reference to the decision of this Tribunal in *I R Management Services Limited v Salford City Council* [2020] UKUT 81 (LC), at [27], that "the offence of failing to comply with the relevant regulation is one of strict liability, subject only to the statutory defence." Thus, it decided, if relevant defects existed at the time of the inspection a breach of the Management Regulations would have occurred and, unless the appellant had a reasonable excuse, an offence would have been committed. The FTT had heard the evidence of Mr Witham and was satisfied that it established the breaches to the relevant standards.

27. The FTT then rejected the appellant's complaint that the Council had not applied its own policy, which called for an informal indication of potential contraventions before enforcement action was taken. That is exactly what had happened on 3 June.

28. Finally, the FTT considered the appellant's defence of reasonable excuse. It had submitted in support of its defence that the pandemic had made managing the property difficult, that the issues identified on 3 June had all been resolved in June and July, that the appellant's own inspection had found the property to be in satisfactory condition, and that it had had no notice of the issues raised for the first time in the Council's notice of intention on 12 November. The FTT noted the prompt action taken to deal with some issues (notably the mice and water penetration) but that others had been apparent on 30 July. It rejected the defence of reasonable excuse because the defects had been in the common parts, the report that parts of the premises were in satisfactory condition did not deal with the breaches, and the pandemic did not justify leaving important repairs outstanding.

29. When it came to the penalty itself, the appellant asked for the relative modesty of the breaches and the early remediation work to be taken into account. As far as the breaches concerning fire precautions were concerned the FTT was unimpressed by these submissions and refused to reduce the penalty of £12,000. It did reduce the penalty of £5,000 for the defective lighting by 25% to £3,750, rather than by the 20% allowed by the Council, saying that it was not as concerning as the fire safety breaches.

The grounds of appeal

30. The FTT gave permission to appeal on three issues which it said raised important questions:

    1. Whether it had been wrong to reject the appellant's argument that the breaches had not been made out to the required standard of proof or had failed to give sufficient reasons for its conclusion on that issue.
    2. Whether it should have found that the defence of reasonable excuse was established.
    3. Whether it had failed to take account of relevant considerations when setting the penalty.

Issue 1 – Did the evidence prove the breaches?

31. Mr Blakeney's principal argument on the appeal was that the FTT had been wrong to find that there had been breaches of the Management Regulations. He submitted that both section 234 of the 2004 Act and the Management Regulations themselves are concerned with the attainment of proper management of HMOs and are not intended to guarantee that no individual defect will ever exist. The rule making power authorised regulations for the purpose of ensuring "satisfactory management arrangements" and "satisfactory standards of management". The Management Regulations should be interpreted with that purpose in mind, and not on the basis that they were designed to prohibit and penalise imperfection.

32. Mr Blakeney submitted that it is inevitable that, from time to time in even the best managed HMO issues will arise which need to be dealt with. The achievement of proper management did not involve the imposition of an absolute standard, and it would be wrong to suggest that there is mismanagement simply because a need for some form of remedial action has arisen. The Management Regulations are not aimed at penalising HMO managers as soon as any issue arises, they are aimed at rogue landlords and at ensuring that tenants occupy properly maintained premises. When considering whether any of the Management Regulations has been breached, the focus should therefore be on whether the manager has acted appropriately and whether problems were properly addressed when they arose.

33. As far as Mr Blakeney was aware, the question of what constitutes 'management' of an HMO in this context, or what a manager has to do to comply with the duty to "ensure" the required safety measures has not previously been considered by tribunals or courts. He suggested that some guidance on the scope of a statutory duty "to ensure" might be provided by *Reliance Permanent Building Society v Harwood-Stamper* [1944] Ch. 362, a case which turned on the meaning of section 10 of the Building Societies Act 1939. That imposed a duty on a mortgagee to take reasonable care when exercising a power of sale "to ensure that the price at which the estate is sold is the best price which can reasonably be obtained." Vaisey J had the following to say on the meaning of the word 'ensure':

> "The word "ensure" has puzzled me a good deal. I think it is used in the common and colloquial sense in which "making sure" is used, that is, as equivalent to ascertaining or satisfying oneself, and does not mean anything in the nature of warranty or guarantee."

34. A similar colloquial construction should be given to 'ensure' where it is used in the Management Regulations, Mr Blakeney argued. That would be consistent with his suggested interpretation of 'management' which did not import an absolute obligation, or a warranty or guarantee, but rather required the manager to satisfy themselves that the relevant HMO was properly managed.

35. Further support for Mr Blakeney's submission was said to be provided by *Sheffield City Council v Hussain* [2020] UKUT 292 (LC) at [9] to [12], but all the Tribunal was doing in those passages was describing the statutory scheme. Mr Blakeney's real purpose in citing that case was to contrast the patient engagement of Sheffield City Council with the prompt action taken by the Council in this case. *Dorval v Tendring District Council* [2022] UKUT 44 (LC) was cited by Mr Blakeney for the same purpose, but civil penalty appeals turn on their own facts and no relevant principal can be discerned from the facts of either case.

36. Mr Blakeney suggested that the FTT had overlooked the factual circumstances. The appellant had inspected the property regularly, had taken immediate action when the need for works had been raised by the Council and had received confirmation that the defects concerned had been seen to. Some of the problems which subsequently re-appeared were matters which the appellant had been told by its contractors had been resolved, while it had had no notice of others which were identified for the first time on the Council's inspection on 30 July. Rather than analysing the facts the FTT had described the offences as being of "strict liability" and had treated the mere existence of defects on the day of Mr Withams' attendance as sufficient evidence to prove beyond reasonable doubt that the offences had been committed.

37. According to Mr Blakeney the FTT's approach had been wrong in principle. The fact that a potential breach has been identified by the Council was not the end point but only the starting point in determining whether a manager had failed to ensure it had complied with its obligations. Given the lack of visits on which issues were repeatedly noted and given the evidence that the appellant acted properly in remedying any problems of which it was aware, the FTT could not have been sure that the offence of failing to ensure proper management had been committed. On the contrary, Mr Blakeney argued, it could only have found that no breach was made out and that the appellant was ensuring that the HMO was properly managed.

38. I do not accept that the FTT made the error suggested by Mr Blakeney.

39. The starting point in interpreting the Management Regulations is section 234(1), 2004 Act. The purpose of regulations made under that power is "ensuring that … (a) there are in place satisfactory management arrangements; and (b) satisfactory standards of management are observed." I agree with Mr Blakeney that the focus of both the power

and the Regulations themselves is on standards of management, but management need not be a limited concept nor is there any reason why regulations about management should not require managers to achieve specific outcomes. I do not think the section sheds much direct light on the issues in this appeal, which turn on the meaning of regulations 4 and 7 themselves.

40. I agree with Mr Blakeney that the critical issue concerns the meaning of "ensure". A dictionary will provide a number of definitions, including to secure or guarantee, to safeguard, or to make sure or certain. The sense of each of these alternatives is that an obligation to ensure involves making sure that something happens.

41. Regulation 4 imposes a variety of duties using different language. The duty in sub-paragraph (1) to ensure that means of escape are kept free from obstruction is to be contrasted with the duty in sub-paragraph (4) to "take all such measures as are reasonably required to protect occupiers of the HMO from injury" having regard to the characteristics of the HMO itself. The contrast is significant, and it would be wrong, in my judgment, to treat the two provisions as if they had the same effect. The former duty relates to a specific part of the HMO and requires the achievement of a state of affairs, freedom from obstruction, which is easily described and readily understood. The latter obligation applies to the building as a whole and does not attempt to define all the measures which may have to be taken to achieve a condition of safety.

42. The effect of Mr Blakeney's argument would be that the duty to ensure means of escape are free from obstruction would be equivalent to a duty to take all such measures as are reasonably required to ensure that the means of escape are free from obstruction. But the substance of the duties are different: sub-paragraph (4) requires the manager to perform activities, whereas sub-paragraph (1) requires the manager to achieve an outcome. The standards which the two formulations import are also different: one is absolute, the other is relative. When the regulation already applies a relative standard to one duty, it would not be appropriate to water down the absolute language which has been chosen to describe a different duty.

43. Further linguistic pointers are found in regulation 7(2). The manager must ensure that handrails and bannisters are to be kept in good repair "at all times" and that light fittings are available "at all times". That duty will clearly be breached if, at any time, the handrails are out of repair or the light fittings are not available. Simply having a management procedure in place which involves regular inspections and prompt remediation will not prevent a breach.

44. In construing these provisions it is particularly significant that the statutory scheme does not make every breach of duty a criminal offence. Section 234(4) provides that it is a defence to proceedings for the offence of failing to comply with regulations that a person had a reasonable excuse for not doing so. The absurd consequences which Mr Blakeney suggested might follow from a strict interpretation of the Management Regulations is therefore avoided by the statutory defence. A landlord who has implemented a comprehensive inspection regime and who conscientiously remedies every defect on

becoming aware of it would not be guilty of an offence whenever somebody obstructed a means of escape by dumping rubbish on it.

45. I do not find the *Reliance Permanent Building Society* case to which Mr Blakeney referred of assistance. The context was significantly different, and the relevant obligation was already a qualified one. A duty "to take reasonable care … to ensure" (the duty which Vaisey J was considering) is not the same as a duty "to ensure", as found in the Management Regulations.

46. In effect the appellant interprets the relevant parts of the Management Regulations as requiring steps to be taken, processes to be devised, and policies to be implemented rather than as requiring a result to be achieved. That does not seem to me to be the natural meaning of regulations 4(1) or (2), or of regulation 7(2). To my mind the natural meaning of these provisions requires the achievement of an outcome or the bringing about of a state of affairs. A duty to ensure that means of escape are kept free from obstruction and maintained in good order is performed if the means of escape are not obstructed or in disrepair, and it is breached if they are. Similarly, a duty to ensure that adequate light fittings are available for use at all times by every occupier has been performed if the light fittings are adequate and is breached if they are not.

47. This outcome should not be thought surprising. As far as it concerns premises which remain within the control of the covenantor, it accords with the interpretation of contractual repairing obligations. As Nourse LJ explained in British Telecommunications plc v Sun Life Assurance Society [1996] Ch. 69, as between landlord and tenant:

> "The general rule is that a covenant to keep premises in repair obliges the covenantor to keep them in repair at all times, so that there is a breach of the obligation immediately aa defect occurs."

48. For these reasons I think the FTT was entitled to find that, in the absence of a reasonable excuse, the existence of defects was enough in itself to prove breaches of the Management Regulations to the criminal standard. That is sufficient to dispose of the main ground of appeal.

Issue 2: Reasonable excuse

49. The statutory defence of reasonable excuse was considered by the Court of Appeal in *Palmview Estates Limited v Thurrock Council* [2021] EWCA Civ 1871 which concerned a failure to licence an HMO, contrary to section 72(5), 2004 Act. I agree with Mr Blakeney that the defence in section 234(4) is materially the same.

50. In discussing whether the FTT had properly understood the defence, Asplin LJ said this:

> "31. There is no definition of "reasonable excuse" in the 2004 Act. However, it seems to me that the plain meaning of the words used in the sub-section as a whole and taken in context is that there is a defence if, viewed objectively,

> there is a reasonable excuse for having control of or managing an HMO without a licence. It seems to me that it is obvious, therefore, that the reasonable excuse must relate to the activity of controlling or managing the HMO without a licence. It is that activity which is the kernel of the offence in section 72(1).
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> …
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> 33. … Mr Paget submits, therefore, that section 72(5) should be construed broadly in the light of the strict liability offence to which the defence relates. In fact, Mr Ham, on behalf of the Council, agrees. I also agree.
>
> 34. However, the offence to which the defence of having a reasonable excuse relates, is not framed in terms of failure to apply for a licence. The prohibited activity is controlling or managing an HMO without a licence. The reasonable excuse is framed expressly in terms of the offence itself. It must relate to the prohibited activity…"

51. It can therefore be seen that, to provide a defence, the 'reasonable excuse' must relate to the offence in question. The defence is construed broadly since, absent a reasonable excuse, the offence is one of strict liability.

52. Mr Blakeney submitted that the FTT erred as a matter of law by misunderstanding what the statutory defence was concerned with and what it requires, and also failed adequately to explain its decision to reject the appellant's excuses.

53. The appellant had relied on three justifications for the state of affairs existing at the property at date of the Council's inspection.

54. First, it said that it had had no notice of certain issues. They had not been flagged by the tenant's complaints or during the appellant's own inspections of the property and had been drawn to its attention only in the Council's notice of intention which was served after the appellant's lease had expired.

55. Secondly, the appellant's contractors had informed it that the issues previously identified by the Council had been properly remedied or did not yet need to be addressed. Mr Blakeney suggested that this put the case on a par with *D'Costa v D'Andrea* [2021] UKUT 144 (LC) in which a landlord established the defence because she had been told by an officer of the local authority that she did not need a licence for her premises and that she would be informed if the position changed.

56. Thirdly, whilst Covid-19 did not mean that a landlord escaped their obligations to repair their premises, it did impact on the practicality and safety of organising more frequent inspections.

57. The FTT dismissed all of these excuses and its reasons for doing so are clear enough. The duty to ensure the safe condition of the HMO is not a duty to remedy defects of which the manager has notice. That is what the FTT meant when it said that the Council was entitled to raise issues in the notice of intention which it had not raised before, and

that its having done so could not provide a defence. It was for the appellant to inform itself sufficiently of the condition of the premises to enable it to take timely remedial action. The evidence was that it had failed to do so. No inspection of the property took place between the end of March (at the latest) and 8 June when an electrician attended. The only general inspection took place on 7 July, and the only other attendance was by electricians to attend to specific faults or carry out the biannual survey of the electrical installations. In those circumstances the FTT was entitled to find that the appellant's ignorance of the defects was not a reasonable excuse because it had failed to take proper steps to inform itself.

58. As to the second excuse, the FTT accepted that some matters had been remedied but others had not. The notice of intention was given in respect of the defects found on 30 July not the earlier defects. The main issue was the condition of the fire alarm panel which, on the evidence, had been defective for at least eight months. On both of their subsequent visits the appellant's contractors found problems. On 8 June faults were showing in zone 3 and on 21 July faults were showing in zones 2 and 3; on each occasion the panel was reset. There is no suggestion that any significant work was done on either occasion, or that the source of the problem was identified, and the Council found further problems on 30 July. In those circumstances the FTT was entitled to find that the ineffectual remedial works did not amount to a reasonable excuse.

59. Nor can the appellant claim to have attended to problems notified to it. It was informed in September 2019 that the fire extinguishers in the common parts required "corrective action" and one was marked as "condemned" in the service schedule. The fire risk assessment may have reported erroneously that no action was required but anyone who read the body of the recommendations would have seen that that was not correct. The suggested analogy with *D'Costa* is not a good one because the manager's responsibility to ensure safety cannot be delegated and the appellant did not act on the warnings it received.

60. As to the third excuse, the pandemic did not prohibit property inspections and, as the FTT pointed out, there was no need to enter the tenanted rooms in the premises in order to locate and remedy the defects on which the penalties were based. A different tribunal might have made a more sympathetic assessment, but it cannot be suggested that the FTT's response was irrational. The history of repeated defects in the fire alarm system, and the failure to service the fire extinguishers, both predating the pandemic by many months, provided ample justification for a conclusion that the undoubted difficulties experienced during the period of restrictions did not provide a reasonable excuse.

Issue 3: The quantum of the penalty

61. Mr Blakeney finally submitted that the FTT had erred in failing to make appropriate reductions from the financial penalties it imposed.

62. He first suggested that the FTT had not addressed his submission that a reduction of more than 20% should be applied to the Council's penalty because the appellant had remedied the breaches before the Council served its notice of intention. I do not think

that complaint is justified. The Council's policy is a guide, not a straitjacket. The FTT recorded the submission that all of the issues had been remedied following the letter of 6 August and it allowed a 25% deduction from the penalty the Council had initially been minded to impose in respect of the lesser of the offences (the defective lighting). It gave reasons for rejecting the submission that the more serious penalty for breaches relating to fire precautions should be reduced. Although those reasons did not repeat the early remediation submission, they did refer to the appellant's history of failure to repair, to the seriousness of the breaches, and to the appellant having been on notice of the condemned fire extinguisher since the previous year. In those circumstances the appellant can have been left in no doubt why it had not been given more credit for early remediation.

63. Mr Blakeney also submitted that the FTT applied the reduction for early remediation incorrectly. It considered that the breach of regulation 7 was less significant than the breaches of regulation 4 and justified a 25% reduction. That did not appear to allow any reduction for early remediation of the breach. If the FTT had considered that the breach was not serious, it should have started from a lower penalty and then applied what Mr Blakeney called "the appropriate reduction". The answer to that point has already been given. The Council's policy is a guide, not a straitjacket, and the FTT had it in mind when assessing the penalty it considered appropriate and gave the reasons it felt justified a reduction from the figure assessed by the Council. The penalty it ended with for the breach of regulation 7 was modest and it is not the purpose of an appeal to fine tune an assessment which has been arrived at lawfully. It is not possible to say that the penalty of £3,750 was not one which a properly directed tribunal could have imposed and this ground of appeal also fails.

64. The appeal is dismissed.

Martin Rodger QC,
Deputy Chamber President

2 September 2022

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.