



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AU/HNA/2019/0070**

Property : **116C Blackstock Road, London N4
2DR**

Applicant : **Blackstock Property Limited**

Representative : **Mr Thomas Cockburn of Counsel**

Respondent : **London Borough of Islington**

Representative : **Ms Vivienne Sedgley of Counsel**

Type of Application : **Appeal against a financial penalty –
Section 249A of, and Schedule 13A
to, the Housing Act 2004**

Tribunal Members : **Judge P Korn
Ms S Coughlin**

**Date and venue of
Hearing** : **27th September 2019 at 10 Alfred
Place, London WC1E 7LR**

Date of Decision : **20th November 2019**

DECISION

Decision of the tribunal

The financial penalty imposed on the Applicant is reduced from £19,000 to £12,500.

Introduction

1. The Applicant has appealed against a financial penalty imposed on it by the Respondent under section 249A of the Housing Act 2004 (“**the 2004 Act**”).
2. The appeal concerns an improvement notice (“**the Improvement Notice**”) dated 22nd May 2018 served by the Respondent in respect of the Property. The Improvement Notice identified hazards at the Property relating to energy efficiency, heating, dampness and ventilation and security against intruders. It required specified works to be commenced from 22nd August 2018 and to be completed by 21st November 2018 (deadline for completion later extended to 14th April 2019), but the works were not completed until some time between 27th May and 11th June 2019.
3. On 23rd April 2019 the Respondent issued a “Notice of Intent to Impose a Financial Penalty”. The proposed financial penalty was £19,000.00. The Applicant made representations but the Respondent issued a “Final Notice to Impose a Financial Penalty” on 29th May 2019. The Final Notice confirmed the penalty at £19,000.00.
4. Details of the relevant legislation appears in the Appendix to this determination.

Agreed points

5. The Applicant does not take issue with the validity of the Improvement Notice. It also accepts that the deadline for compliance with the Improvement Notice (after the deadline was extended) was 14th April 2019 but that the works were not completed until after that date.

Applicant’s position

Summary of background

6. Following receipt of the Improvement Notice, the Applicant instructed its surveyor, Mr David King, to survey the Property. He attended the Property on 9th July 2018 and told the Respondent that it would not be viable to undertake the required works with a tenant still in occupation. The Applicant’s agent then on 6th August 2018 requested that the

period for compliance be extended by 6 months, due to the tenant still being in occupation, and this request was refused.

7. The Applicant commenced possession proceedings against the tenant and obtained a possession order on 14th August 2018 requiring him to vacate by 30th August 2018. Then on 16th October 2018 Mr King provided the Respondent with a schedule of works that the Applicant intended to undertake once the tenant had vacated. The Applicant then notified the Respondent that a warrant of possession would not be executed against the tenant until 14th January 2019, after which time it would be possible for the works to commence. The Respondent later agreed retrospectively to extend the period for compliance with the Improvement Notice until 14th April 2019.
8. After obtaining possession the Applicant reviewed the works to be done and sought a meeting with the Respondent to agree the final schedule of works. Discussions were protracted due to disagreements as to what works were necessary and as to the extent that a building notice was needed. It then became apparent that the works would not be completed by the revised deadline and the Applicant sought a further extension which was refused.
9. Having not identified any sign of the works having been undertaken, the Respondent then issued the Notice of Intent to Impose a Financial Penalty. The Applicant explained to the Respondent the steps that it was taking to comply with the Improvement Notice, and the Applicant's proposed works were approved by the Respondent by an email dated 1st May 2019 – an email which also stated that building control was only required in relation to the works to the roof. Mr King advised the Respondent on 27th May 2019 that the works had been completed but the Respondent still went ahead and issued the Final Notice to Impose a Financial Penalty. Ms Day of the Respondent visited the Property on 11th June 2019 and confirmed that the works had been completed. Building control then issued a completion certificate on 28th August 2019.

Submissions – general

10. Ever since the service of the Improvement Notice the Applicant has attempted to work constructively with the Respondent to remedy any shortcomings in the condition of the Property. It instructed a builder and surveyor after service of the Improvement Notice, it took steps to gain vacant possession, it remained in correspondence with the Respondent throughout the operative period of the Improvement Notice, it refrained from carrying out any works until they were authorised by the Respondent and it complied with building control.
11. The works were completed by 27th May 2019, which meant that there was a delay of only 43 days.

Submissions – defence of reasonable excuse

12. Under section 30(4) of the 2004 Act, *“in proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice”*.
13. The Applicant argues first of all that there was no hazard for which there was an imperative to complete the works within the period specified by the Respondent, because at the revised date for compliance there was nobody in occupation and the Applicant had confirmed that the Property would not be re-let until all the required works had been completed.
14. Secondly the Applicant argues that the reason for the delay was the protracted correspondence with the Respondent in which the Applicant sought to agree the exact scheme of works. The Respondent had indicated as early as 11th July 2018 that alternative works to those specified in the Improvement Notice could be agreed if they achieved the same effect, and after being informed that the works specified in the Improvement Notice would cost £61,000 it was entirely justified for the Applicant to seek to mitigate these costs by proposing cheaper alternatives. The Applicant submits that it is no answer to this argument to counter that the Applicant did not appeal the Improvement Notice itself.
15. The Applicant also feels that it was at times receiving mixed messages from the Respondent and that this added to the reasonableness of the Applicant’s seeking to reach final agreement as to the works needed before commencing and completing them.

Submissions – quantification of penalty

16. If the tribunal does not accept that the Applicant has a defence of reasonable excuse, then the focus turns to the amount of the penalty, and in the Applicant’s submission £19,000 is out of all proportion to the alleged offence. In particular, the Applicant submits that the £10,000 minimum penalty for the offence has no rationale and the factors prescribed by the Respondent’s policy as being relevant to the level of penalty have been misapplied. In any event, the tribunal itself is not bound to follow the local authority’s policy.
17. The £10,000 minimum penalty assumes that the maximum fine for failure to comply with an improvement notice is unlimited. The Applicant initially argued that the maximum fine prescribed by section 30(3) of the 2004 Act was *“a fine not exceeding level 5 on the standard scale”*, i.e. £5,000, but at the hearing Counsel for the Applicant accepted that the fine is now unlimited. As regards the Respondent’s contention that the offence of failing to comply with an improvement

notice is significant because it exposes tenants to hazards, it is no offence to expose a tenant to a hazard; rather, the offence is failure to comply with measures prescribed to remedy the hazard concerned. In addition, the most important factor affecting the seriousness of the offence must be the level of risk to occupiers, and here there was none.

18. The Financial Penalty Notice Justification Form is itself a flawed document. The first two paragraphs purport to identify aggravating factors but in fact just describe the offence. The third paragraph is wrong and irrelevant as it suggests that an improvement notice can require compliance with building regulations.
19. The Applicant has no record of offending, and there is no evidence that previous complaints were justified. The only economic consequences of non-compliance were the negative ones that the Applicant was unable to rent the Property for a longer period. Furthermore, no adjustment to the penalty was made to give credit for the fact that the works were completed prior to issue of the financial penalty notice.

Respondent's position

Generally

20. In response to the Applicant's written grounds, the Respondent states in written submissions that on 18th April 2018 it wrote to the Applicant advising of the existence of hazards and warning that an improvement notice would be served. The letter offered to meet with the Applicant's representatives to discuss, but no response was received. The Applicant had a right of appeal against the Improvement Notice but chose not to exercise that right.
21. On 5th June 2018 Ms Jacqueline Day of the Respondent received a telephone call from Mr Pinchas Weinberger on behalf of the Applicant. In that conversation he said that he felt that his tenant was the source of the problems but did not raise any concerns about the works required or the start date or the amount of time allowed for the works to be carried out.
22. The Improvement Notice required the works to be commenced no later than 22nd August 2018 and to be completed by 22nd November 2018. The tenant had been served with a notice to vacate expiring on 14th April 2018 but then the Applicant did not continue with the eviction process at that stage for reasons unknown to Ms Day. Ms Day was, though, later kept apprised of progress on the eviction process by a Ms Iva Sabera on behalf of the Applicant. On 1st November 2018 Ms Day received an email from Ms Sabera stating that the eviction date had been confirmed as 14th January 2019. In response, Ms Day sent a letter to the Applicant agreeing to an extension to the limit for completing the

works to 14th April 2019. This gave the Applicant ample time to carry out the works with vacant possession, and in fact it transpired that the tenant had vacated by 24th December 2018. Indeed, Mr King had previously confirmed that some of the investigative work could be carried out whilst the tenant was still in occupation, but the Applicant nevertheless failed to take any action until April 2019.

23. On 1st April 2019 Ms Day was still awaiting a schedule of works, an estimate for the roof works was dated 10th April 2019, the Applicant's damp report was dated 11th April 2019, an estimate by Wise Maintenance was dated 9th May 2019 and details of the heating were not provided until 28th May 2019.
24. The Applicant's surveyor, Mr King, was unable to provide evidence that works previously carried out were compliant with building regulations. The Applicant's agents repeatedly refused between February and March 2019 onwards to accept that building regulations approval was required for certain works, until finally a building notice was submitted on 28th March 2019 and, even then, the notice did not include the works to improve the thermal efficiency of the solid floor. The Applicant refused to carry out certain works required by the Improvement Notice.
25. On 16th April 2019 Ms Day visited the Property and found that no works had been carried out. When she visited again on 11th June 2019 the works had been commenced and completed. However, without the involvement of Building Control she believes it unlikely that the Applicant would have carried out works to an acceptable standard.

Calculation of financial penalty

26. The penalty was calculated using the Islington Financial Penalty Charging Policy, August 2018. The policy states that failing to comply with an improvement notice is a significant issue, and although the tenant vacated the Property in December 2018 he had been exposed to dampness and mould growth and inadequate temperatures whilst in occupation. The minimum penalty for failing to comply with an improvement notice is £10,000 because the lowest possible band for the offence was "Serious Band 3". The amount of the actual penalty imposed was then calculated taking into account the seven "Factors Affecting Level of Financial Penalty Imposed on Landlords and Agents" and the "Financial Penalty Charging Matrix". Having taken the abovementioned Factors and Matrix into account the Respondent considered that it was appropriate to move up a band to "Band 4, Serious" which allowed for a penalty between £15,000 and £19,000.
27. The fact that the works could not be carried out whilst the tenant was in occupation was considered to be a mitigating factor. However, there were the following aggravating factors:-

- the Applicant failed even to carry out surveys whilst the tenant was in occupation, despite its surveyor having confirmed that this could be done;
- the extension of time had been granted by the Respondent on the basis of a specification of works produced in September 2018 that met all the requirements of the Improvement Notice, but the specification was then revised in March 2019 and no longer met the requirements of the Improvement Notice in full; and
- the managing agents repeatedly refused to submit a building notice.

Ms Jacqueline Day's evidence

28. Ms Day is an environmental health officer at the Council. Her witness statement contains a chronology of events as she understands them.
29. At the hearing she said that the details of the works which the Applicant was prepared to carry out were only received by her “in dribs and drabs”, and there was no clear method statement until March 2019. The building control surveyor was awaiting further information from the Applicant as late as 29th May 2019.
30. In cross-examination, she accepted that building control was now happy with the standard of works carried out. She also accepted that the required works were intrusive and not consistent with someone being in occupation. As regards the original deadline of 22nd August 2018 for commencement of the works, this deadline had been set on the basis that it gave the Applicant enough time to gain vacant possession. Ms Day acknowledged that the Respondent had initially, on 12th September 2018, refused a request for an extension of time for carrying out the works, and she said that this was because at that time it was felt that the Applicant had been given enough time to evict its tenant and that the Applicant could have dealt with possession proceedings more quickly.
31. As to why the Respondent was not prepared to give a further extension when the Property was vacant, Ms Day said that improvement notices need either to be complied with or appealed, and there is also a legitimate concern about residential properties being kept empty for no good reason in the context of a housing shortage. Counsel for the Applicant put it to her that matters were progressing at this point and therefore that it was a good time to agree an extension, but she said that much information was still awaited and the Applicant had already been given a considerable amount of time within which to comply.

32. It was also put to Ms Day that a site meeting arranged for 19th February 2019 which was attended by her colleague Mr Salter (in her absence on holiday) resulted in some agreement being reached. On being asked whether she accepted that the meeting had been helpful she said that it had not. She also did not accept that Mr Salter had taken a more constructive approach.
33. Counsel for the Applicant also referred Ms Day to part of an email from her to the Applicant's representatives dated 20th March 2019 and put it to her that it was overly aggressive and did not build confidence. She replied that she did not have any confidence at that stage and that, in any event, she had found the Applicant's representatives to be very hostile.
34. Ms Day was asked about Mr King's schedule of works in early April 2019 followed by email updates as to progress. In response, whilst she accepted that he was liaising with her in good faith up to a point the problem was that his proposals were still not fully compliant in relation to floor insulation and there was insufficient action as regards carrying out and communicating the results of the necessary investigative works and a failure to provide a comprehensive list of works. These problems in aggregate caused long delays.
35. Ms Day accepted that a refusal to submit a building notice was not itself a breach of the Improvement Notice but she regarded it as indicative of a certain attitude. She accepted that she did not know how many properties the Applicant owns, but she maintained that she was still in a position to calculate what level of fine would act as a deterrent because she could see from a search at Companies House that the Applicant was in the property business.

Mr Edward Salter's evidence

36. Mr Salter is the manager of a team of environmental health officers at the Council and is Ms Day's line manager. His witness statement contains a chronology of events as he understands them.
37. The tribunal asked him some questions about the Council's policy on financial penalties. It was put to him that the policy document did not contain a proper explanation as to how the minimum penalties had been set and he replied that the Council had planned to publish this but that it did not exist yet. He was also unable to explain on what basis the minimum penalty had been moved from a Band 3 amount to as Band 4 amount, although he speculated that maybe it had been moved up a band due to aggravating factors.

38. In cross-examination Mr Salter did not accept that at the meeting on 19th February 2019 a meaningful agreement was reached because the Applicant did not follow up on that meeting with any proper responses.

Mr Pinchas Weinberger's evidence

39. Mr Weinberger is a director of the Applicant company. His witness statement contains a chronology of events as he understands them and also includes his opinion on a number of matters relevant to the application.
40. In cross-examination he said that only when the Property was vacant did he know its true state. In relation to the works themselves, the main works took 10 days and the rest of the time was taken up in obtaining certificates and dealing with other technicalities. Mr Weinberger declined to answer a question as to whether poor insulation can affect the level of electricity bills on the ground that he was not an expert in such matters. He also accepted that his witness evidence was not wholly accurate as to the length of the period for which the Applicant's employees and representatives were unable to work in the key month of April 2019.

Mr David King's evidence

41. Mr King is the Applicant's surveyor. His witness statement contains a chronology of events as he understands them and also includes his comments regarding compliance with the notice and the works undertaken.
42. In cross-examination he said that he had had limited involvement between October 2018 and March 2019. He had limited recollection as to whether he had seen certain emails. He accepted that he had been wrong in his original analysis regarding the flat roof drainage. He also accepted that the details of the proposed flat roof works emailed by him to the Respondent on 11th April 2019 represented a slight change from the specification of 1st April 2019 and that therefore he had changed his mind between these two dates.

Tribunal's analysis

General points

43. Much of the factual background is undisputed, the key differences being (a) the appropriate interpretation to be placed on that factual background and (b) the extent to which the Respondent applied its policy appropriately in setting the financial penalty and the extent to which (if at all) the policy itself is flawed.

44. Under Schedule 13A to the 2004 Act, this appeal is to be a re-hearing of the Council's decision but may be determined having regard to matters of which the authority was unaware.
45. Ms Day and Mr Salter came across as credible witnesses on the factual issues and on their analysis of those issues, but they struggled to some extent to explain the way in which the Respondent had applied its policy in arriving at the figure of £19,000. Mr Weinberger's witness was inaccurate in one key respect, and generally we found his analysis less persuasive than that of Ms Day and Mr Salter. Mr King's evidence was reasonably straightforward, but he had limited involvement between October 2018 and March 2019 and had limited recollection of certain matters.

Defence of reasonable excuse

46. As noted above, under section 30(4) of the 2004 Act, "*in proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice*".
47. As regards the argument that there was no hazard for which there was an imperative to complete the works within the period specified by the Respondent because at the revised date for compliance there was nobody in occupation, we do not accept this argument. There is nothing in the legislation to indicate that improvement notices can or should only be served when somebody is in occupation of the relevant property or that they cease to need to be complied with once an occupier vacates. There are legitimate policy reasons for requiring property owners to remove hazards from their property even if at a specific moment in time the property is vacant. There is also an argument that landlords should not be rewarded for evicting tenants by not being obliged to comply with an improvement notice, particularly one which has triggered the need to remove the tenant so that the works can be carried out.
48. The Applicant's other grounds for arguing that it had a reasonable excuse are that the Respondent gave mixed messages to the Applicant and that the Applicant was simply seeking a cheaper but equally effective method of carrying out the necessary works. We do not accept these arguments either. The Applicant did not challenge the Improvement Notice itself, nor did it (at the time) challenge the details of the required works or the timetable. Indeed, initially at least, the Applicant failed to engage with the Improvement Notice at all.
49. At a later stage, the Applicant did make more of an effort to engage with the Respondent. However, in our view the Applicant took undue advantage of the leeway later given to it by the Respondent and we do not accept that it was confused by the messages that it was receiving from the Respondent. The initial deadline for commencement of the

works gave the Applicant, in our view, sufficient time to gain vacant possession. For reasons that have not been made wholly clear, the Applicant initially suspended the process for the eviction of its tenant. Nevertheless, having initially refused to grant an extension the Respondent then granted a long extension to 14th April 2019. However, despite having apparently given assurances about conducting surveys whilst the tenant was still in possession, no action was taken until April 2019. In addition, we accept that the Applicant's specification of works was changed from one which the Respondent had confirmed would comply with the Improvement Notice to one that in the Respondent's view did not. The Applicant also refused for a long period to submit a building notice. Taken as a whole, the Applicant's conduct in our view reflected an attitude which was more focused on what was the minimum that it could get away with doing rather than on the importance of complying with the Improvement Notice.

50. Therefore, we do not accept that the Applicant had a reasonable excuse for failing to comply with the Improvement Notice.

Quantification of penalty

51. We have concerns regarding the adequacy and clarity of the Respondent's Financial Penalty Charging Policy and the way in which it has been applied.
52. We accept that the offence of failure to comply with an improvement notice is serious and that therefore the Respondent can justify placing the offence in Band 3 of its Financial Penalty Charging Matrix which allows for a penalty between £10,000 and £14,999. It cannot, in our view, be placed in a higher band because the Respondent has not provided a cogent reason in line with its policy to justify this and, in addition, the policy itself – insofar as it allows a penalty above £14,999 – is simply not clear enough.
53. As regards other factors relevant to the level of penalty, the factors set out in the Respondent's Financial Penalty Charging Policy are in our view reasonable factors to consider. We have already commented on the severity of the offence. As regards the culpability of the Applicant, in our view the Applicant aggravated the situation by securing a long extension through providing a schedule of works which would have complied with the Improvement Notice but then later – despite being fully aware through its surveyor of the structure of the building and the works needed (by his own admission) – arguing about the extent and nature of the works needed and avoiding putting in a building regulations notice.
54. As for the Applicant's track record, there has been some information about a previous notice having been served but no detailed evidence and no evidence of any previous convictions. There was no harm

caused to the tenant by the Applicant's delay in complying with the Improvement Notice as by then the tenant had vacated. However, whilst harm to a tenant will be an aggravating factor, it does not follow that the Applicant should receive a reward for evicting the tenant.

55. The need to punish offenders and to deter them from repeating the offence, as well as to deter others from committing similar offences, are connected to some extent. In our view the penalty needs to be large enough to accomplish these three things. There was no hard evidence to indicate that the Applicant has a large property portfolio, but one point which is relevant in this case is that the cost of carrying out the works was quite high, and it is appropriate to impose a penalty which was high enough to act as a financial incentive for the Applicant to carry out the works and as an incentive to other potential offenders to comply with such notices in the future.
56. As regards the need to remove any financial benefit that the Applicant may have obtained as a result of committing the offence, we accept that in this case it did not receive any financial benefit other than the financial benefit of not paying for the carrying out of the required works for so long as the Applicant failed to carry them out.
57. Taking the above factors into account, we consider that an appropriate penalty is one in the middle of the £10,000 to £14,999 range. The Applicant aggravated the nature of the offence through its dealings with the Respondent and this should increase the level of penalty. It is also important for penalties to be set at a level which will have a deterrent effect. On the other hand, the Applicant's track record is not an aggravating factor here, and nor has there been harm to a tenant arising out of a failure to comply with the Improvement Notice. The Applicant did also eventually comply with the Improvement Notice. Balancing out all of these factors, we consider an appropriate penalty to be £12,500.

Cost applications

58. As discussed at the hearing, any cost applications that either party wishes to make must be sent to the tribunal, with a copy to the other party, within **14 days** after the date of this decision. Any response that a party wishes to make to any cost application made by the other party must be sent to the tribunal, with a copy to the other party, within **28 days** after the date of this decision.

Name: Judge P Korn

Date: 20th November 2019

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix

Housing Act 2004

30 Offence of failing to comply with improvement notice

- (1) Where an improvement notice has become operative, the person on whom the notice was served commits an offence if he fails to comply with it.
- (4) In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice.

249A Financial penalties for certain housing offences in England

- (1) The 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 in respect of premises in England.
- (2) In this section “relevant housing offence” means an offence under—
 - (a) section 30 (failure to comply with improvement notice),
 - (b) section 72 (licensing of HMOs),
 - (c) section 95 (licensing of houses under Part 3),
 - (d) section 139(7) (failure to comply with overcrowding notice), or
 - (e) section 234 (management regulations in respect of HMOs).
- (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
- (4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
- (5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if— (a) the person has been convicted of the offence in respect of that conduct, or (b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.
- (6) Schedule 13A deals with—
 - (a) the procedure for imposing financial penalties,
 - (b) appeals against financial penalties,
 - (c) enforcement of financial penalties, and
 - (d) guidance in respect of financial penalties.

- (7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.
- (8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.
- (9) For the purposes of this section a person's conduct includes a failure to act.

SCHEDULE 13A

FINANCIAL PENALTIES UNDER SECTION 249A

Appeals

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

10

- (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against – (a) the decision to impose the penalty, or (b) the amount of the penalty.
- (3) An appeal under this paragraph – (a) is to be a re-hearing of the local authority’s decision, but (b) may be determined having regard to matters of which the authority was unaware.
- (4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.