



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

Case reference : **CAM/00KC/HNA/2021/0022**

Property : **The Farmhouse, Flaxbourne Farm,
Salford Road, Aspley Guise, Milton
Keynes MK17 8HZ**

Applicant : **Geoffrey Richard Barrett**

Respondent : **Central Bedfordshire Council**

Type of application : **Appeal against financial penalties:
section 249A Housing Act 2004 and
Electrical Safety Standards
Regulations 2020**

Tribunal member(s) : **Regional Judge Ruth Wayte
Regional Surveyor Mary Hardman
John Francis**

Date of hearing : **24 January 2022**

Date of decision : **3 February 2022**

DECISION

The tribunal:

- (1) Cancels the Final Penalty Notice dated 23 April 2021 issued in respect of the ESS Regulations; and**
- (2) Varies the penalties issued in respect of the licensing and HMO Management offences to a total of £4,789.**

The application

1. This application is an appeal in respect of:
 - (i) Two financial penalties imposed under section 249A of the Housing Act 2004 (“the 2004 Act”). In particular £22,500 for an alleged offence under section 72(1) of the 2004 Act of control or management of an HMO which was required to be licensed but was not and £22,500 for an alleged failure to comply with regulation 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006 (“the HMO Regulations”); and
 - (ii) One penalty imposed under regulation 11 of the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 (“the ESS Regulations”) of £4,000 for an alleged breach of duty under regulation 3(1) of the ESS Regulations.

Altogether, the penalties amounted to £49,000.

2. Directions were given on 22 June and 26 August 2021 and the hearing listed for 8 December 2021. That hearing was adjourned due to the serious illness of the applicant’s representative and difficulties with attendance from the respondent due to covid. The hearing was rearranged for 24 January 2022 and held face to face due to the applicant’s hearing problems.
3. At the hearing, which took place at the Campanile Hotel Milton Keynes, the applicant was represented by Ms Khilkevich, his solicitor. The respondent was represented by counsel Ms Harris and their witness Ms Bethany Goodlad, an Environmental Health Officer for the Council. Both parties had filed bundles in accordance with the directions.
4. After their evidence had been filed and following their decision to withdraw the policy originally used to set the penalties, the respondent used a new draft policy to revise the penalties sought to £14,000 for the licensing offence, £20,250 for the HMO Regulations and £11,250 for the ESS Regulations. At the hearing, it was conceded that a review by the council under paragraph 9 of Schedule 13A to the 2004 Act only permitted a reduction of the penalties. The penalty for the ESS Regulations therefore remained at £4,000, meaning that the penalties under appeal were reduced to £38,250.

Background

5. The applicant and his wife Davina Barrett are the joint freehold owners of the land known as Flaxbourne Farm, which consists of a number of buildings, including the property known as the Farmhouse. Mr Barrett is a retired dairy farmer. The Farmhouse, which is a substantial property on three floors, was the Barretts’ home until April 2018 when

they moved into a property known as Lake End House, nearby but separate to the Flaxbourne site. They had already converted some of the other property on the site to residential use and decided to convert the Farmhouse to an HMO, with the aim of using the rental income to supplement their pension.

6. As neither of the Barretts were experienced landlords and had no knowledge of HMOs, they approached the council for advice as to their requirements. Jonathan Arnold, then a Senior Environmental Health Officer, arranged a meeting on site with them on 1 June 2018. Mr Arnold also sent through some information beforehand, although indicated to Mr Barrett that the guidance would be changing in October (presumably due to the change in definition for a mandatory HMO).
7. In August 2018 Mrs Barrett was rushed to hospital after collapsing at home. She had suffered a major stroke and spent the next few months in hospital and rehabilitation before she could return home in December 2018. Unfortunately, her recovery has been limited. Although she is able to communicate, she is reliant on full-time care and confined to a wheelchair. After her stroke she was no longer able to assist her husband with the running of the Flaxbourne Farm.
8. In the meantime, works had continued to the Farmhouse to convert it into an HMO. Mr Arnold had provided guidance on fire safety and a Grade A interlinked alarm was installed, together with other fire safety measures, such as fire doors and emergency lighting. The Barretts had already engaged Thomas Connelly to act on their behalf as Managing Agents for the residential lettings and a Mr Ariel Banda, known as Kam, was assigned to Flaxbourne Farm. He offered to use his expertise to assist with the conversion of the Farmhouse to an HMO in return for accommodation and Mr Barrett agreed. Unfortunately, he was subsequently dismissed by Thomas Connelly and left the Farmhouse in summer 2019.
9. In November 2019 a joint inspection was carried out by Bedford's housing and planning teams of the residential properties at Flaxbourne Farm. Mr Arnold had access to the common parts of the Farmhouse and advised Mr Barrett that an HMO licence was required. He also pointed out that dust covers had been left on some of the smoke detectors and needed removing. Unfortunately, his witness statement was extremely brief and gave no other details about the extent of occupation of the Farmhouse at that date.
10. In March 2020 the coronavirus pandemic came to the United Kingdom, leading to the first lockdown from 26 March 2020.
11. After a series of problems with the residential tenants and the service provided, Mr Barrett parted company with Thomas Connelly in May 2020. Lindsay Jobling, a family friend, stepped in to help. She had no

experience of property management but was able to assist with the day to day running of the lettings as Mr and Mrs Barrett were shielding in accordance with the Government's Covid Guidance. Both were vulnerable due to their age (they are in their late 70s) and of course Mrs Barrett was particularly vulnerable following her stroke.

12. Ms Goodlad first became aware of the Farmhouse on 2 October 2020 after involvement with another property on the site. As Council records from the visit in 2019 indicated that the Farmhouse was a seven bed HMO without a licence she used her powers of enforcement to inspect that property, together with the other residential units at the farm, on 12 November 2020. She met Lindsay Jobling, who explained that Mr and Mrs Barrett were isolating. Ms Goodlad came to the conclusion that the Farmhouse was being occupied as a 9 bedroom HMO, although at the hearing this was revised down to 7 bedrooms – occupied by 6 people. This concession was made as a result of the council accepting that there were two self-contained flats on the third floor, which could not be considered as part of the HMO.
13. Following the inspection, Ms Goodlad issued a number of Suspended Prohibition Orders, planning contravention notices and penalty notices in respect of alleged breaches of the ESS Regulations in respect of other residential accommodation at the farm. These penalties were paid by the Barretts and were not the subject of this appeal.
14. On 6 January 2021 a Domestic Electrical Installation Report was obtained by Mr Barrett. That report stated that the installation was generally in good order with a few minor issues that need rectifying. Four Code 2 (potentially dangerous) defects were identified, two of which were in Flat 8, one of the self-contained flats.
15. On 8 February 2021 Ms Goodlad served initial notices to issue financial penalties for the two alleged offences and breach of duty. Notices were served on Mr and Mrs Barrett individually, meaning that the total penalties at that stage amounted to £108,000 (£25,000 for each of the licensing and HMO Regulation offences and £4,000 for the ESS Regulations x 2).
16. On 5 March 2021 the fire alarm in the Farmhouse was tested and found to be in good working order. No failures were recorded.
17. On 19 March 2021 the Code 2 defects were remedied and a satisfactory Domestic Electrical Installation Condition Report was issued for the Farmhouse.
18. Following the representation process final notices were served, again on both Mr and Mrs Barrett, on 20 April 2021 (the ESS notice was re-served on 23 April 2021). The penalties for the licensing and HMO

Regulations had both been reduced by £2,500 as a result of the representations and therefore the total claimed at that stage was £98,000.

19. On 5 May 2021 the notices served on Mrs Barrett were withdrawn, apparently due to “*the mitigating circumstances*” of her health.
20. On 7 May 2021 Mr Barrett’s representatives advise Bedford that the Farmhouse is no longer being occupied as an HMO which requires a licence due to a reduction in the number of occupants.
21. On 18 May 2021 the applicant lodged his appeal against the remaining penalties amounting to £49,000.
22. At the hearing, the council confirmed that they had now further reduced the amount sought to £38,250 in accordance with their new draft policy, having accepted that the previous enforcement policy was defective. This review was carried out on 28 October 2021.

The Law

23. Financial penalties as an alternative to prosecution were introduced by the Housing and Planning Act 2016 which amended the Housing Act 2004 by inserting a new section 249A and schedule 13A. It is for the local authority to decide whether to prosecute or impose a fine and guidance has been given by the Ministry of Housing, Communities and Local Government (now renamed as the Department for Levelling Up, Housing and Communities). In order to impose a financial penalty the local authority must be satisfied beyond reasonable doubt that the conduct amounts to a relevant housing offence.
24. Section 249A lists the relevant housing offences which include offences under section 72 (licensing of HMOs) and section 234 (management regulations in respect of HMOs) of the 2004 Act.
25. Schedule 13A sets out the requirement for a notice of intent to be given before the end of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates. It also contains provisions in respect of the right to make representations within 28 days after that initial notice and the requirements for the final notice.
26. Appeals are dealt with in paragraph 10 of Schedule 13A. The appeal is a re-hearing and may be determined having regards to matters of which the authority was unaware. On an appeal the First-tier Tribunal may confirm, vary or cancel the final notice.

27. The ESS Regulations came into force on 1 June 2020, replacing the relevant HMO management regulation. A breach of any of the duties of private landlords can also lead to a financial penalty. Schedule 2 of those regulations sets out the process for and appeals against the penalties which mirror those in the 2004 Act.

28. The maximum civil penalty for each offence/breach of duty is £30,000. The relevant factors as set out in the MHCLG guidance are:

- (a) Severity of the offence;
- (b) Culpability and track record of the offender;
- (c) The harm caused to the tenant
- (d) Punishment of the offence
- (e) Deter the offender from repeating the offence
- (f) Deter others from committing similar offences.
- (g) Remove any financial benefit the offender may have obtained as a result of committing the offence.

The issues

29. The applicant admitted both offences and the breach of regulations. His representative confirmed that he did not wish to raise a reasonable excuse defence, as opposed to mitigation in respect of the penalties sought by the council. No challenge was made to the procedure adopted by the council in respect of the issue of the penalty notices. In the circumstances, the hearing and the evidence focussed entirely on the revised penalties sought by the council.

The Civil Penalties: the Council's Policy

30. As stated above, the council has suspended the Financial Penalty Policy originally used to calculate the penalties as they came to the conclusion that it was defective in terms of its failure to consider proportionality, totality or double punishment. In the circumstances a review of the penalties was carried out by Ms Goodlad against a new matrix, described as a draft policy. Although this does not appear to have been formally adopted by the council the applicant accepted that the tribunal would have regard to that policy in determining the appeal.

31. The new matrix provides for the consideration of three factors (incorporating most of the MHCLG factors referred to above) when determining the amount of the financial penalty:

- (i) Severity of offence and harm caused to occupants and visitors: this is to be assessed against consideration of the actual harm caused; severity of the offence i.e. its nature; risk of harm or perceived harm and other relevant matters to severity. There are 4 levels of harm, with a minimum score of 5 and a maximum of 40.
- (ii) Culpability and track record of offender: relevant considerations are whether the offender is part of a Landlord/Managing Agent accreditation body; history of relevant offences and conduct; person in place of relevant responsibility and trust (e.g. police officer) and other relevant factors to culpability. The levels and scores are as before.
- (iii) Punishment of offender: relevant considerations are the removal of financial gain for non-compliance during the offence period and consideration of the offender's overall income and assets over the period of offending. The levels and scores are as before.

The matrix concludes with a scoring range leading to the civil penalty starting point from £100 to £30,000, subject to personal mitigation, proportionality and totality.

32. Factors reflecting personal mitigation are stated as: steps taken to remedy the problem; a high level of co-operation with the investigation, beyond that which will always be expected; a history of good communication and compliance regarding work as a landlord; co-operation and acceptance of responsibility and other mitigating factors where brought to the attention of the decision-making officer. The matrix states that the officer has discretion to reduce the fine but the fine should not represent a cheaper alternative to the offender than the cost of complying with the relevant statutory and regulatory requirements.

33. Next, the matrix requires consideration of proportionality. This is to be considered in the context of the overall means of the offender and suggests that a reduction will only be approved in limited circumstances such as where their income is less than the national average of £440 per week gross.

34. Finally, the matrix requires consideration of the totality principle, described as a consideration of whether the total penalties are just and appropriate to the offending behaviour. Reference is made to the Offences taken Into Consideration and Totality Definitive Guideline,

published by the Sentencing Council which reiterates that when a sentence reflects a number of offences, while it should reflect all offending behaviour, it must be just and proportionate. It states that this is unlikely to be achieved by simply adding together notional single sentences, as opposed to considering the offending behaviour and factors personal to the offender as a whole.

Bedford's Case

35. Bedford provided a Statement of Reasons for Financial Penalty which sought to justify their decision to issue a penalty for each offence and breach of duty. Ms Goodlad had completed the statement and matrix on 28 October 2021. The main reason given for pursuing a financial penalty was that *“the offences had continued for a considerable period of time”*. A caution was not deemed appropriate as the offences were *“of a serious nature that could have serious harm implications to the occupants”*. She then considered each offence and duty in turn in terms of the calculation of the penalty.
36. In terms of the licensing offence, Ms Goodlad relied on her finding at the inspection that the property was a 9 bed HMO occupied by 8 persons. No licence was in place and no application had since been received. She referred to the original advice visit in 2018 and a further visit in 2019 when Mr Barrett was advised to apply for a licence.
37. Her scoring was 10 for severity of offence and harm (level 1), reflecting that no harm had occurred but stating that if the property had been licensed it would have been regularly inspected and any defects would have been noted and rectified. She scored 30 for culpability and track record (level 3), relying on the fact that the offender had been advised in 2018, 2019 and 2020 to licence the property but no application had been received to date. Finally, she also scored 30 (level 3) for punishment of offender, relying mainly on the household income for 2020 as stated in the financial information provided by Mr Barrett but also stating that the residential accommodation would provide an annual income of £99,300. The total score of 70 equated to a civil penalty starting point of £14,000.
38. Ms Goodlad made no reduction for personal mitigation, mainly due to Mr Barrett's failure to remedy the problem by applying for a licence. She stated that Mr Barrett had been verbally abusive on the telephone. No reduction was made for proportionality, again on the basis of the household income in 2020 and no reduction was made for totality. The council therefore sought £14,000 for this offence.
39. Ms Goodlad's summary of the second offence, maintenance of the fire alarm, stated that although a Grade A fire alarm system was installed by Mr Barrett, dust covers were left on the detector heads in most locations which would delay early warning. This system also required a

professional inspection every 6 months, which could not be evidenced by the landlord. Together, this amounted to a breach of regulation 4(2) of the HMO Regulations which obliges the manager to ensure that any fire alarms are maintained in good working order.

40. She scored severity and harm as high (level 4), with a score of 32. This was based on a high risk of harm, taking into account the top floor in particular which the council has now agreed is not part of the HMO and 8 occupants as opposed to 6. Culpability was assessed at level 3, medium, with a score of 30. Ms Goodlad maintained that Mr Barrett was made fully aware of his responsibilities in 2018, the covers were pointed out in 2019 and no action was taken until after the inspection in November 2020. She accepted the dust covers were removed immediately afterwards and that the fire alarm was tested in March 2021 and found to be in good working order. Punishment was also assessed at level 3 with a score of 30, again based on the consideration of the household income of the Barretts.
41. The total score of 92 led to a civil penalty starting point of £22,500 which was reduced by 10% due to the quick removal of the covers. No other deductions were made. The council therefore sought £20,250 for this offence.
42. In respect of the breach of the 2020 Regulations, Ms Goodlad relied on the tenancies which were granted after the Regulations came into force on 1 July 2020, 5 of the 6 tenancies in the HMO. She also stated that an electrical inspection certificate would have been required beforehand under the now repealed HMO Management Regulation. She noted that Mr Barrett had obtained a report in January 2021 but stated that four code 2 or potentially dangerous hazards had been identified. These were rectified but not until March 2021.
43. She scored severity and harm as low (level 2) with a score of 20. Culpability and track record was also assessed as low with a score of 20, mainly due to the fact the regulations had only just come into force. Punishment of offender was put in level 3 at 30, again based on the household income over the whole of 2020. This led to a total score of 70 and a civil penalty starting point of £12,500. Again a reduction of 10% was applied as a report was obtained and the defects rectified but not until 19 March 2021. This reduced the penalty to £11,250 but as stated above, the council cannot increase the original penalty levied against their previous policy of £4,000.
44. Ms Harris for the respondent argued that it was right to consider all of the Barretts' income, pointing to paragraph 3.4 of the MHCLG Guidance which states that "*Local housing authorities should use their existing powers to, as far as possible, make an assessment of the landlord's assets and any income they receive (not just rental income) when determining an appropriate penalty*". In that context, the

penalties sought by the council were clearly affordable. She submitted that the pandemic had very little effect other than in January 2021. The council did not dispute Mrs Barrett's health issues but given Mr Barrett's decision to let the property as an HMO was made after her stroke in 2018, submitted he couldn't rely on "third parties" to avoid his personal liabilities.

Mr Barrett's Case

45. Mr Barrett's witness statement contained a good deal of information in respect of a long running planning dispute with the council in respect of a different property, which he felt had led to them taking disproportionate action against him in relation to Flaxbourne Farm. That included other prosecutions which had recently been withdrawn by the council but in respect of which he had incurred significant professional costs. This expense had left the couple's savings depleted and impacted on Mr Barrett's ability to afford the financial penalties now sought by the council.
46. In terms of the licensing offence, Ms Kilkevich obtained confirmation from Ms Goodlad that there were no concerns about the property other than those detailed in the statement of reason for the penalties. As stated above, the council conceded at the hearing that the HMO was in fact only the 7 bedrooms on the ground and first floors, as the top floor was arranged as two self-contained flats. Although the council repeatedly referred to the HMO as requiring a licence from 2018, a licence was only in fact required once the level of occupancy reached 5. Mr Barrett accepted that this level had been reached at the inspection in November 2020 and Ms Kilkevich pointed out that from the tenancy agreements provided to the council during the investigation, the fifth tenancy had only commenced in October 2020. Although Mr Barrett had originally planned to licence the property as an HMO, he subsequently decided to reduce the occupation below the levels for a mandatory licence, which was achieved by 7 May 2021. That meant that the period when the HMO was actually occupied as an HMO which required a licence was just 7 months.
47. Turning to the matrix, Ms Kilkevich had no challenge to the assessment of harm as level 1 but argued that culpability should be low (level 2). She pointed out that Mr Barrett was new to residential lettings in 2017, had proactively sought advice from the council before starting the project and developed the property in accordance with the council's requirements for HMOs. His priority was looking after his wife after her stroke in 2018 and he had tried to engage professionals to manage the property who had let him down. He had no recollection of Mr Clarke's advice that he needed a licence in November 2019 but by that time the estate had become mired in a number of planning enforcement and other issues which had confused him – he had thought all he needed was planning permission for an HMO, which was

applied for in April 2020 and has now been granted. In terms of punishment, again Ms Kilkevich argued that the appropriate level was 1. Mr Barrett had given evidence of the huge capital investment to convert the farm for residential use and the relatively limited income from the HMO. The council's assessment of level 3 looked at the income from the entire estate and the whole Farmhouse over a much longer period than the actual offence.

48. Turning to the HMO Management Regulations, Mr Barrett gave evidence that he had been told by his decorator in early 2019 that the dust caps had been removed and put in a drawer on the ground floor. He believed they were refitted by some of the tenants who had started to grow and/or smoke cannabis at the property and Ms Kilkevich pointed out that according to the council's evidence there were differences in terms of where caps had been fitted in 2019 and 2020. The caps were removed immediately after the inspection in November 2020 and the fire alarm was fully tested and confirmed to be in good working order in March 2021. The tenants had carried out some informal testing on his behalf prior to that test, although he conceded that better records should have been kept. Ms Kilkevich submitted that the assessment of a high risk of harm overstated the issue and took no account of the other fire safety measures in the property. She repeated her arguments in respect of punishment and the failure of the council to consider the very strong personal mitigation in this case.
49. Finally, in terms of the breach of the 2020 Regulations, she made the point that they were newly enacted and that Mr Barrett was completely unaware of the duty to provide a report to new tenants, which is a new requirement over and above the 2006 Regulations. That omission was promptly remedied at the earliest opportunity. She submitted that the punishment was disproportionate in all the circumstances and no penalty should have been levied at all.
50. If the tribunal was minded to confirm a penalty for that breach, Ms Kilkevich submitted that the score of 20 for both severity of the offence and culpability was far too high. The assessment for punishment also overstated Mr Barrett's income, leading to another inflated score.
51. Looking at the penalties as a whole she submitted that they were not a just and proportionate sentence for the nature of the offences and breach of duty. All had been remedied by the landlord at the earliest opportunity. None of the tenants had suffered any detriment and a number of them gave witness statements of behalf of the applicant. She submitted that the couple had been under enormous stress for over a year due to the action taken against them by Bedford on a number of fronts and the initial huge level of the penalties, including the decision to pursue Mrs Barrett for a duplicate amount. She submitted that Mr Barrett had been punished enough.

The tribunal's decision

52. Although Bedford argued that the history of disputes with Mr Barrett was largely irrelevant, it has clearly affected perceptions on both sides. Ms Goodlad appeared to take the very worst view of Mr Barrett, giving the maximum score available for each level on the matrix, which she was unable to explain. She also refused to consider Mrs Barrett's stroke as mitigation, or the couple's age and the effect of the pandemic given their vulnerability. Mr Barrett for his part lost his temper when speaking to Ms Goodlad on the telephone and accused Bedford of being biased against him. Having started out seeking advice from Bedford to ensure that their requirements were met, it is extremely unfortunate that the net result is that the Farmhouse is largely empty. Given that Mr Barrett has planning permission to use it as an HMO and the huge investment made by the couple, it is a shame that accommodation is not being made available, provided of course that a licence is applied for as soon as occupation reaches the mandatory level.
53. Before considering the amount of the penalties, the tribunal needs to decide whether it was proportionate for the council to issue civil penalties for each offence and the breach of duty. In the event that the tribunal decides that a penalty should be issued, it will consider its findings against the council's new draft policy to determine the appropriate amount.
54. Turning first to the licensing offence, this was clearly an offence of omission on Mr Barrett's part, due to his wife's stroke and confusion in respect of the administrative requirements for an HMO. The tribunal also accepts the applicant's evidence that the HMO was only occupied at a level which required a licence for 7 months (10 October 2020 to 7 May 2021). The applicant's decision to reduce the numbers rather than apply for a licence was of course a totally reasonable remedy. That said, Mr Barrett had been advised about the need for a licence in 2018 and given the importance of the licensing regime in terms of safety, the tribunal does consider it appropriate that a penalty be levied. However, the amount needs to properly take into account the facts and the substantial mitigation argued on behalf of the applicant.
55. With those facts in mind, the tribunal agrees with level 1 for the severity of offence and harm. This level has a scoring range of 5-10. Ms Goodlad had no explanation for her choice of 10 but that was clearly based on her opinion that a larger HMO had required licensing for 3 years, which was incorrect. In the circumstances the tribunal scores 5 for this factor. On culpability and track record, the tribunal agrees with Ms Kilkevich that the correct level is 2 – low culpability. Mr Barrett was not a professional landlord and the assessment by Ms Goodlad again relies on her mistaken belief that the property should have been licenced in 2018. Mr Barrett has apologised for his oversight for the relatively brief period that the HMO required a licence and has now

remedied the problem by reducing its occupation. Level 2 has a range of 11-20 and again the tribunal considers that 11 is the appropriate score. Finally, punishment. Again, the tribunal agrees with Ms Kilkevich that the appropriate level is 1. The matrix is clear that it is the period of offending that counts in terms of removal of the financial gain for non-compliance. It is less clear what that gain is, other than the licence fee itself and that consideration was not addressed by Ms Goodlad. The second bullet requires consideration of the offender's overall income over the period of offending. Mr Barrett's evidence was that the rental income suffered due to covid, particularly from the commercial lettings but no particular evidence was supplied. On balance, the tribunal considers that a score of 10 is appropriate. This gives a total score of 31 with a civil penalty starting point of £2,421.

56. Turning to factors reflecting personal mitigation, Ms Goodlad ignored the effect of Mrs Barrett's stroke and the pandemic, both of which were brought to the attention of the council and clearly are relevant considerations as set out in the draft policy. The tribunal considers that this mitigation is significant and reduces the penalty by 50% to £1,210.
57. The HMO Management Regulations apply to any HMO, which is defined in the Housing Act 2004 as a property occupied by 3 or more persons from different households. Mr Barrett's witness statement stated that from late 2018 to early 2020 the average number of tenants at any one time was 3 or 4, although that would presumably include the two self-contained flats which are not part of the HMO. The tribunal considers that, on a balance of probabilities, the remaining dust caps had been on the detector heads from the date of installation to shortly after the inspection in 2020. However, the tribunal accepts Mr Barrett's evidence that he thought they had been removed by the decorator and that he has no recollection of being advised to remove the dust caps in November 2019. The tribunal determines that the presence of dust caps on some of the detectors, particularly in the kitchen and living room, would lead to a risk of harm and that given the importance of fire safety it is again appropriate to issue a civil penalty for this offence. That said, the system itself was shown to be in good working order when tested in 2021 and therefore the tribunal does not consider that the lack of testing between 2019 and 2021 adds anything to the offence (other than it would have again pointed out the presence of dust caps).
58. Turning to the amount of the penalty, the tribunal agrees with Ms Kilkevich that the high risk of harm (level 4) ignores the fact that Mr Barrett had installed the highest specification of fire alarm, including heat sensors and emergency lighting and fitted fire doors. It also ignores the nature of the offence itself, which is again an oversight. Taking that into account, the tribunal considers that an overall assessment is more realistically the bottom end of level 3, leading to a score of 21. Culpability is assessed at level 2 as before, with a score of 11 – Mr Barrett installed a top of the range system and should be given

some credit for that. On punishment, there is even less obvious financial gain for this item, other than servicing costs and again the tribunal considers that level 1 and a score of 10 is appropriate. This gives a total score of 42 and a civil penalty starting point of £4,772.

59. Again, Mr Barrett's personal mitigation was not properly taken into account by Ms Goodlad, other than 10% for the swift removal of the caps. However, it would have been relatively straightforward for Mr Barrett to arrange for a third party (for example Ms Jobling) to inspect and/or test the fire alarm rather than leaving it to the tenants and therefore the tribunal considers that a lower percentage of 25% is appropriate for this offence. This reduces the penalty to £3,579.
60. Finally, the Electrical Safety Standards (ESS) Regulations. The tribunal is not convinced that the HMO Regulations required a certificate at the outset of the Farmhouse being rented (they require testing at least every 5 years) and the 2020 Regulations allowed a 12 month bedding in period for existing tenancies, which would have included Flat 8 where two of the Code 2 defects were found. It does seem punitive of the council to issue a penalty when the Regulations had only just come into force and the issue was remedied within a few months. Incidentally, the ESS Regulations require the issue of a remedial notice and the opportunity for the landlord to remedy the breach within 28 days from service of that notice. It is not clear whether such a notice was issued in this case but the installations were inspected on 4 January 2021 and the work undertaken on 19 March 2021. The tribunal accepts that Mr Barrett took all reasonable steps to comply with this duty once he was aware of it.
61. With this in mind, if the tribunal had been minded to agree that a penalty should be issued for this breach, the score on the matrix would have been minimal, indicating a civil penalty starting point of £100 before the consideration of any mitigation and totality. The council levied two separate civil penalties for the same breach of the ESS Regulations in respect of other residential accommodation on the Farm, amounting to £1,400. Mr Barrett paid these penalties as he took the view that they were not worth appealing. He has therefore already paid a much higher penalty for breaching the ESS Regulations than this tribunal might have imposed. In the circumstances and with particular regard to the principle of totality, which is part of the council's draft policy, the tribunal cancels the Final Notice dated 23 April 2021.
62. This means that the total penalties, after mitigation, amount to £4,789. The tribunal considers that amount to reflect the true nature of the offending in this case and to be just and proportionate. The tribunal is also satisfied that Mr Barrett will be able to afford to pay the penalty and therefore makes no further adjustment.

Name: Judge Ruth Wayte

Date: 3 February 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).