FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UH/HNA/2022/0010
Property	**:**	11 Bedford Row, Worthing, West Sussex BN11 3DR
Applicant	**:**	Ms Joanna Weeks
Representative	**:**	In person
Respondents	**:**	Adur and Worthing Councils
Representative	**:**	Ms Shelley-Ann Flanagan, Lawyer, Adur and Worthing Councils
Type of Application	**:**	Appeal against a financial penalty – s.249A Housing Act 2004
Tribunal Member(s)	**:**	Judge Mark Loveday Mr Michael Donaldson FRICS Ms Jayam Dalal
Date and venue of hearing	**:**	17 October 2022, Havant Justice Centre
Date of Decision	**:**	28 November 2022

DETERMINATION

Decision

1. This is an appeal against a financial penalty under s.249A of the Housing Act 2004 ("the Act"). The Tribunal finds that:
   (a) A financial penalty should be imposed; and
   (b) A penalty of £3,000 is payable (in place of the penalty of £13,500).

Background

2. The Applicant is the leasehold owner of premises at 11 Bedford Row, Worthing, BN11 3DR. The premises comprise a 1-bedroom basement flat with yard, in a large listed terraced property containing 4 flats in the town centre close to the seafront. In around March 2021, the Applicant let the flat to a Ms Lineham at a rent of £825pcm, and Ms Lineham lived there with a young baby. The tenancy was determined by way of a notice under s.21 Housing Act 1988 given in July 2021.

3. On 20 July 2021, the Respondent inspected after receiving a complaint about housing conditions in the flat. On 24 September 2021, the Respondent served an Improvement Notice under s.11 of the Act (PSH/8790) which identified a category 1 hazard (2-Excess cold) and five category 2 hazards (1-Damp & mould growth, 12-Entry by intruders, 15-Domestic hygiene, pests and refuse, and 24-Fire). Sch.3 to the Notice listed six categories of remedial work to be completed by 25 November 2021:
   (a) Repair or replace latch to rear gate;
   (b) Arrange a survey of damp penetration by a suitably qualified surveyor and provide that report to the Respondent;
   (c) Arrange a survey of the party wall to 12 Bedford Row by a suitably qualified surveyor (which assessed its safety, stability and the likelihood of further falling render or other materials), and provide that report to the Respondent;
   (d) Install a smoke detector in the lobby;

(e) Upgrade the front door to comply with FD30S fire safety standards (with cold smoke seals), and;

(f) Replace the lock to the kitchen door so it can be opened from the inside without a key.

The notice listed five categories of further work to be completed by 25 January 2022:

(a) Provide an effective, efficient and economical fixed heating system suitable and sufficient for the property. This could be achieved by installing either a gas-fired central heating system with radiators to each of the bedroom, living room, kitchen/dining room, WC and the bathroom, or a modern slimline fan assisted storage heater in each room specified above, with a 2kW wall mounted heater in the bathroom combined with suitable dual tariff meter (Economy 7 or 10) to allow economic use.

(b) Carry out any remedial works identified in the damp report referred to above to prevent further watering grass.

(c) Carry out any works to the party wall identified in the surveyor's report referred to above to make the back yard safe and prevent further falling elements.

(d) Reseal the edge of the flooring in the WC.

(e) Fill the gaps around the pipes to the wash hand basin in the rear bathroom.

4. There was no appeal or other challenge to the Improvement Notice. There is also no dispute the Applicant failed to begin or complete the works within the timescales specified in the Improvement Notice.

5. On 6 April 2022, the Respondent gave a Notice of Intent to impose a civil penalty of £13,500 under para 1 of Sch.13A to the Act. This was confirmed by a Final Notice under para 5 of Sch.13A to the Act dated 22 June 2022. The Final Notice particularised the offence as "Failure to comply with an Improvement Notice, ref PSH/8790 dated 24 September 2021 (section 30 of the Act)".

6. The Applicant appealed the financial penalty to this Tribunal on 28 June 2022. Directions were given on 26 August 2022 and a remote hearing took place on 17 October 2022. At the hearing. the Applicant appeared in person and the Respondent was represented by Ms Shelley-Ann Flanagan of the Respondent's legal services team.

7. The appeal is by way of a rehearing. Nevertheless, the Applicant admits the main elements of the offence under s.30 of the Act, namely that on the relevant dates:

(a) The Improvement Notice was operative; and

(b) She failed to comply with Sch.3 of that notice within the appropriate timescales.

The Applicant did not contend that her explanation for default amounted to a reasonable excuse under s.30(4) of the Act. The only issue was therefore the level of financial penalty. The bundle presented to the Tribunal comprised some 412 pages, but this sensible narrowing of the issues enabled the matter to end within the limited time allotted.

The legislation

8. A person on whom an Improvement Notice is served may appeal to this Tribunal under Sch.1 to the Act. If there is no appeal, s.15(2) provides that an improvement notice becomes operative 21 days after it is served. Under s.30, the person on whom it was served commits a criminal offence if they fail to comply without a reasonable excuse:

> **"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.
> (2) For the purposes of this Chapter compliance with an improvement notice means, in relation to each hazard, beginning and completing any remedial action specified in the notice—
> (a) (if no appeal is brought against the notice) not later than the date specified under section 13(2)(e) and within the period specified under section 13(2)(f);
> …

> (3) A person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale."
> (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."

9. Sch.13A provides for appeals against financial penalties imposed for breach of Improvement Notices. In the event of such an appeal, it is provided by para 10(3) of Sch.13A that it:

> "(a) is to be a re-hearing of the local housing authority's decision, but
> (b) may be determined having regard to matters of which the authority was unaware".

The case for the parties

10. The Tribunal invited the Respondent to present its case first.

The Respondent's case

11. The Respondent's evidence was given by Mr Bruce Reynolds, a Private Sector Housing Manager, whose witness statement is dated 12 September 2022. Mr Reynolds produced copies of the Improvement Notice and the other relevant notices and gave details of contacts with the Applicant and of inspections on 23 August 2021 and 1 September 2021. On the latter occasion, Mr Reynolds noted:

- "Elevated damp meter readings" in the bedroom, living room and kitchen, indicating possible penetrating damp. Also, some peeling and bubbling paint to the eastern wall of the bathroom.
- Fixed heating that did not appear to be effective or economic.
- There was no smoke detection as required by the Smoke and Carbon Monoxide Alarm (England) Regulations 2015.
- The front door to the flat did not meet FD30S requirements.
- The flank wall to the courtyard had cracked and spalling render that was falling from height into the garden.

Mr Reynolds took a series of digital photographs, a selection of which were attached to his witness statement.

12. Mr Reynolds then took the Tribunal through his assessment of the financial penalty by reference to a matrix set out in a Civil Penalty Assessment Form, cross-referencing this with national and the Respondent's local policy, where necessary. In essence, the Mr Reynolds assessed culpability as "high" and the level of harm as "high", giving a matrix score of 9. This produced a starting penalty of £11,250. Mr Reynolds then considered aggravating features, which he considered "significant", which increased the penalty to £13,500. Mr Reynolds produced a great deal of documentary material to support the assessment, including a BRE Excess Cold Calculator for the flat dated 23 September 2021. This estimated that the mean temperature in the living room of the flat varied between 17.25C (in winter) and 19C (in summer), which was consistent with a temperature reading of 19C taken on 31 August 2021. The BRE software tool estimated that the current heating system cost around £1,762pa to operate, as opposed to £1,357pa if the flat had the benefit of electric storage heaters. Mr Reynolds suggested storage heaters were the most appropriate alternative to the current heating system.

13. When questioned by the Applicant, Mr Reynolds accepted there was no evidence the former had harassed her tenant. He was asked about the fire safety system, and explained that on inspection there had been a heat detector in the kitchen but no smoke alarms. As to the render in the courtyard, Mr Reynolds accepted that when he went to inspect on 12 September 2022, it was not easy to see into the yard, but he could see the top parts of the party wall that had not been replastered or decorated.

14. In closing submissions, Ms Flanagan made several points about the various considerations in the Civil Penalty Assessment Form. First, she contended there was clearly an offence on 2 February 2022, when Mr Reynolds inspected, but that the period of offending began on 25 No-

vember 2021 and 25 January 2022, the dates specified in the Improvement Notice.

15. Secondly, Ms Flanagan addressed the question of the electric radiators. She said that the problem with the installed radiators was not that they had failed, but that the system was unaffordable. She referred to Mr Reynolds's detailed evidence on the health threats posed by heating systems which were unaffordable for a tenant to run. In particular, Sch.1 to the Improvement Notice noted the current heating system was £400+ pa more than electric storage heaters to run. Reference was made to the case of *Liverpool CC v Kassim* [2011] UKUT 169 (LC), which involved an application to quash a Prohibition Order under s.20 of the Housing Act 2004. In para 31 of his decision, the President stated:

> "31. In her witness statement, Ms Griffiths says this:
>
> > "If heating systems are prohibitively expensive to use, I consider that the occupants of the property will not use them or will restrict their use thus resulting in the effects of Excess Cold which the HHSRS is aiming to address."
>
> This in my view properly identifies the potential relevance of the cost of running a heating system. An occupier could be deterred by cost from using a heating system by the cost of running it, just as he might be deterred from using it effectively by the difficulties of operating it. Whether he would be so deterred is a matter for the authority or, on appeal, the RPT."

It was submitted similar principles applied here.

16. Thirdly, as far as "harm" is concerned, the consideration was not just whether actual harm occurred to Ms Lineham. The Respondent suggested one had to consider the "likelihood" of harm and referred to para 25.30 of the Housing Health and Safety Rating System Operating Guidance Operating Guidance (February 2006) in this respect. Indeed, in appeals against civil penalties, it was unlikely actual harm to health would ever be a material consideration, since the local housing authority

would have pursued other remedies in more serious cases where actual harm had been caused.

17. Fourthly, whether the Applicant gained any financial benefit was not the only factor. There was also the deterrent effect of a penalty.

18. Finally, whatever the Applicant's stated means, on her own admission at the hearing she owned another property.

The Applicant's case

19. The Applicant relied on her statement of case and Reply, which she elaborated upon at the hearing. In the statement of case, the Applicant focussed on the cold hazards. In 2018, she had fitted modern electric radiators in each room with programmable thermostatic controls, the size of each radiator being carefully calculated by the Applicant's building contractor. They were all in perfect working order. The external defects were essentially flaking paint, which it was an exaggeration to describe as a structural defect. The front door could be closed, and the tenant had a key to the back gate. The Respondent had given no information at all about alleged damp, which was a common feature of every single basement flat in the country. There was no evidence of ill-health suffered by Me Lineham or the baby. In essence, the flat was lovely and done up for the Applicant herself to live there, and she strongly contested the fine.

20. The Reply provided documentary evidence of the calculations used by the contractor in 2018 to assess the sufficiency of the electric radiators. She did not agree with the vague suggestion that the fixed heating "did not appear to be effective or economic", a statement that was not founded in fact. The external wall was repaired and decorated in April 2022, although it was not easy to see this area from outside the flat. As to the tenant, the relationship with Ms Lineham had deteriorated over damage to the flat, and the Applicant produced messages showing several complaints she made to the tenant. In fact, by July 2021, Ms Lineham was not even living in the flat. There were no baby things there and

Ms Lineham had simply stacked up all her furniture in the bedroom. The flat was empty. As far as damp was concerned, the Respondent had not provided evidence of damp readings. There was a long-term leak from the water stopcock in the communal hallway which eventually dripped through to the lounge ceiling in early 2022, which may have elevated any damp readings. The Applicant had absolutely no intention of renting out a property again, and it had been a nightmare. She had no track record and caused no harm to the tenant. The main offence seemed to be having efficient, programmable modern radiators.

21. At the hearing, the Applicant explained she had bought the property in 2016 to live in it. A brand-new heating system was installed in 2018 and it was redecorated in 2019. Overall, the Applicant spent over £30,000 on the property, including work to load bearing walls. She accepted the flat was not double glazed. The Applicant rented the flat to Ms Lineham's father from September 2020 to March 2021, before it was rented to Ms Lineham. She self-managed the flat, herself without managing agents. The flat was now in the process of being sold, with an offer of £195,000, although there was no date for exchange.

22. The Applicant accepted she had not appealed the Improvement Notice and had not started or completed the works by the dates specified in the notice. The reason was that she had various work commitments and had been unwell, being on antidepressants at the time.

23. The Tribunal took the Applicant through the various works set out in the Improvement Notice. She stated she had carried out some works in early 2022. She fitted a new fire door in February 2022 and repaired the render in April 2022. No changes had been made to the heating system. As to damp, her decorator had not found any damp, although the Applicant accepted she had not had the flat inspected by a surveyor or damp specialist. As far as fire safety was concerned, there was a smoke detector in the kitchen at the start of the tenancy and the decorator saw

it was still there in early 2022. It was checked by the estate agents, so she presumed the tenant must have removed it. The front door was missing a self-closing door mechanism, but the door closer had been removed by the tenant and was replaced in February 2022. The kitchen door lock worked, the edge of the flooring in the WC was repaired before Christmas. She had not had the gaps around the washbasin filled in.

24. The Tribunal invited the Applicant to comment on the Respondent's Civil Penalty Assessment Form, although she had no real experience of this process. The Applicant submitted that culpability should be "low", and the level of harm also "low", giving a matrix score of 1. This produced a starting penalty of £750. As to aggravating and mitigating features, the Applicant had a house in Wales and only this rental property

25. The Applicant produced two statements of means. One (dated 1 September 2022), gave her occupation as a shop owner/wholesaler with a net income of £1,500pm plus pensions of £600pm, outgoings of £1,648pm and savings of £500. The other (dated 12 September 2022) gave income of £2,000pm plus pension of £650pm, outgoings of £2,917pm, and listed various creditors and loans. At the hearing the Applicant estimated her total income from all sources was in the region of £19,200pa. Outgoings included service charges and other living expenses.

Level of penalty – overall approach

26. Para 12 of Sch.13A to the Act requires a local housing authority to have regard to any guidance given by the Secretary of State about the exercise of its functions under Sch.13A or s.249A. Such guidance is to be found in "*Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*", which was re-issued in April 2018. Para 3.5 says that housing authorities "should develop their own policy on determining the appropriate level of civil penalty in a particular case" and lists several factors to be considered:

- Severity of the offence
- Culpability and track record of the offender
- The harm caused to the tenant
- Punishment of the offender
- Deter the offender from repeating the offence
- Deter others from committing similar offences
- Remove any financial benefit the offender may have obtained as a result of committing the offence

27. At the hearing, there was no dispute that the proper approach was for the Tribunal to apply the national guidance and the Respondent's local "Private Sector Housing Enforcement Policy", which includes the Civil Penalties Matrix referred to above. The approach to local policies was summarised by Upper Tribunal Judge Cooke in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC); [2020] 1 WLR 3187, which involved appeals against penalties imposed under section 249A of the Act. At para 54 the judge stated:

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

Judge Cooke also considered the weight to be attached to the local housing authority's decision in any appeal at para 62:

> "the court is to afford considerable weight to the local authority's decision but may vary it if it disagrees with the local authority's conclusion".

The policy is therefore the starting point.

28. In this case, the Respondent's policy adopts a five-stage approach to assessment of the Civil Penalty. The Tribunal deals with each in turn.

Assessment of the works listed in the Improvement Notice

29. Both parties addressed the Tribunal on the seriousness of the defects which were required to be remedied, and the Tribunal must make a broad assessment of the defects in Sch.3 to the Improvement Notice. Without dealing with every item, the assessment is as follows:

(a) It is clear enough from the photographs that this flat was in reasonable decorative order.

(b) There was a functioning and relatively new electric panel radiator system. The Tribunal bears in mind the detailed evidence of affordability, and the observations of the Upper Tribunal in *Liverpool CC v Kassim*. But in essence, some distinction must be made between a landlord who rents out a flat with space heating which is not functioning at all, and a landlord who rents out a flat with a modern and perfectly usable space heating system, but one which is more expensive to run than other space heating systems. That kind of default is lower down the scale of seriousness, because the risk of harm to health is far less.

(c) There was a fire safety system, albeit that it did not cover the whole flat and it was partially or wholly ineffective.

(d) There is evidence of damp, but no suggestion of mould, etc.

(e) There were relatively minor defects to render in the yard.

(f) The other defects appear modest.

Putting this together with the uncontested evidence that significant works were carried out in 2018/19, the Tribunal finds the property was basically in reasonable condition but with a range of things which needed to be done to meet HHSRS standards. The scale and scope of the defects is at the lower end of the scale.

Level of Penalty - Stage 1

30. Stage 1 involves banding the offence. The initial band is decided by the assessment of two factors, namely the culpability of the landlord and/or agent, and the level of harm that the offence has had or may

have. The scores are multiplied to give a penalty score using the following Scoring Matrix:

Scoring Matrix for Financial Penalty					
LEVEL OF CULPABILITY (SERIOUSNESS OF OFFENCE)	Significant	4	8	12	16
	High	3	6	9	12
	Moderate	2	4	6	8
	Low	1	2	3	4
		Low	Moderate	High	Significant
FACTORS	**IMPACT, LEVEL OF HARM**				

Culpability and track record: Factor 1

31. The policy assesses a "culpability score" according to a table which ranks this factor ranging from "very high" through "high" to "medium" to "low" levels. This factor should take into account the scale and scope of the offences, the length of time of the offence, the legislation being breached, the extent the offence was premeditated or planned, whether the landlord knew or ought to have known they were not complying with law, steps taken to ensure compliance, the likelihood of the offence being continued, repeated or escalated, and the responsibilities the landlord had with ensuring compliance in comparison with other parties. There is a table with indicators enabling the correct category to be applied. The material indicators are:

"**Low** Offence committed with little fault, for example, because:

- Significant efforts were made to address the risk although they were inadequate on this occasion
- There was no warning/circumstance indicating a risk
- Failings were minor and occurred as an isolated incident

Moderate Offence committed through act or omission which a landlord exercising reasonable care would not commit

High Landlord had actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken."

32. The Respondent adopted Mr Reynolds's assessment that the culpability score was "high". The Applicant was solely responsible for

managing the property and carrying out any necessary repairs. She was fully aware of the operation of Improvement Notices because she knew about action taken against her partner, Mr Borrow, in respect of Improvement Notices served in relation to another property. The Applicant made it clear she had no intention of complying with the notice in this case. But she did not appeal to the Tribunal as she was advised to do. All in all, the Applicant had been wilfully defiant, and the level of culpability should therefore be considered as "high".

33. The Tribunal has regard to the assessment made by the Respondent and gives weight to it. But the local policy must be read in the light of the national guidance. Para 3.5 of *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (2018) refers to the "culpability and track record of the offender" and suggests:

> "A higher penalty will be appropriate "where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations."

It is clear enough that the national guidance puts rather more stress on the landlord's "track record" than the local policy. Indeed, the local policy does not mention the words "track record" at all dealing with Factor 1. The Tribunal is entitled to have regard to this additional consideration as well and places some weight on it. It is a good example of circumstances where a Tribunal may depart form the local policy in accordance with *Marshall v Waltham Forest LBC.*

34. The Tribunal has considered all the circumstances of the offence of failing to comply with the Improvement Notice. One of the most important considerations is the scale and scope of the offences, and the Tribunal's findings on this are set out above. In addition, failure to

comply did not appear to be pre-planned or premeditated, even if there was a complete failure to comply with the Improvement Notice during the periods specified. As to the state of knowledge of the Applicant, she plainly knew she was not complying with the Improvement Notice, but whether this was a cynical and calculated approach is very much a matter of impression. Having heard the Applicant, the Tribunal considers she came over as a small-time "accidental landlord", who did not appreciate the full consequences of not complying with the Improvement Notice - whatever may have been the approach of her partner in relation to his other property. The Applicant was certainly not a large professional landlord who ought to have known better. Moreover, it is unlikely (at on the face of what the Applicant's said) that she will continue, repeat or escalate the offence, since the flat is now on the market. Finally, the Tribunal reflects the consideration that there was no track record of offending, which it places significant weight on.

35. In the light of the above, the Tribunal finds the offence more properly falls within the "moderate" level of culpability and track record. The offence was not at a "low" level (principally because no efforts were made to comply with the Improvement Notice during the time stipulated for compliance, and even after that, compliance has been only partial). Neither is it at a "high" level (there was no actual foresight or wilfulness involving a calculated risk). The offence can instead properly be considered to have been committed through acts or omissions which a landlord exercising reasonable care would not commit.

Level of Harm: Factor 2

36. The local policy again assesses the "level of harm" at four levels, of which the three most relevant are:

"Low

- Low risk of an adverse effect on individual(s)
- Public misled but little or no risk of actual adverse effect on individual(s)

Moderate

- Moderate risk of an adverse effect on individual(s) (not amounting to low risk)
- Public misled but little or no risk of actual adverse effect on individual(s)

High

- Adverse effect on individual(s) (not amounting to significant)
- High risk of an adverse effect on individual(s) or high risk of serious adverse effect, some vulnerabilities.
- Regulator and/or legitimate industry substantially undermined by offender's activities
- Consumer/tenant misled

39. Para 3.5 of *Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*, states:

> "(c) **The harm caused to the tenant**. This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty".

40. Pausing there, the Tribunal notes the clear distinction the local policy makes between the "risk of an adverse effect" on health in all three categories, and the "adverse effect" to an individual's health made in the "high" category. The common sense position is that an offence which actually damages a person's health must attract a higher penalty than an offence which merely poses a risk to that person's health.

41. Here, there was a young mother and baby in occupation, but no evidence of actual health damage caused to either. The level of harm does not fall within the first bullet point in the "high" risk category.

42. This leaves the possibility that there was "High risk of an adverse effect on individual(s) or high risk of serious adverse effect, some vulnerabili-

ties". For the most part, the Tribunal finds the defects could not possibly amount to causing a "high" risk of injury or high risk of "serious" adverse effects. Items such as faulty gate latches, loose render and unboxed pipework present only minor risks. Plainly damp and heating can be a much more serious threat to health and may even lead to serious adverse health effects. By itself, the damp does not seem to have been particularly serious, since there was no visual evidence of the damp (other than in the bathroom) and the meter readings are only described as "elevated". But in combination with heating issues, there is an obvious possible threat to health. In *Liverpool CC v Kassim* at [35], the Upper Tribunal dealt with the assessment of potential effect on health of panel radiators (as opposed to storage heaters), albeit in a slightly different context. It commented that the tribunal must:

> "make a common sense judgment in the light of the evidence as to whether any deterrent effect that it considers that cost might have would be such as to create sufficient risk to give rise to a category one hazard".

In this particular case, one of the notable features is the relative paucity of evidence about the deterrent effect an additional cost of £400pa (£7.60pw) would have on an adult and young child. There is no specific evidence the additional expense of panel radiators in fact had a deterrent effect on heating in this particular flat, nor was there any evidence it would have an effect on the class of tenant who might be expected to occupy the flat. The Tribunal notes that the BRE Excess Cold Calculator, the Housing Health and Safety Rating System itself, and indeed *Liverpool CC v Kassim* all focus on the evidence of health risks to the 65+ age group, but not to younger families. Fuel poverty is of course an important and terrible feature of modern society, but that is not the same thing as saying an additional fuel bill of £7.60pw in 2021 would be a serious deterrent to typical tenants for this kind of property using panel radiators at all. The Tribunal repeats what was said in *Liverpool CC v Kassim*, namely that there must be evidence to support a tribunal's assessment – and there is no cogent evidence before this Tribunal to sup-

port the suggestion there was a "high risk" of an adverse effect on the health of individuals or a "high risk" of any serious harm to them. Apart from this, the Tribunal notes the Applicant's contention that the flat was unused from around July 2021, and any threat to health caused by failure to comply with the Improvement Notice will have in practice ended by this stage. It follows the Tribunal does not consider the risk of harm falls within the "high" category.

43. That leaves the "low" and "moderate" categories. The wording of the first bullet points in each category is not very informative. But the Tribunal considers the combination of defects listed in the schedule to the Improvement Notice cannot properly be characterised as only presenting a "low" risk of harm. Together they raise the risk to "moderate".

Level of penalty

44. If one applies a finding of "moderate" for culpability/track record and a finding of "moderate" for harm risk, the Scoring Matrix produces a penalty score of 4. The Civil Penalty Scoring in the local policy suggests this means a starting point of £3,000 for the Civil Penalty.

Aggravating factors: Stage 2

45. The Respondent's policy lists several potentially aggravating factors which are "relevant to the offence". They include:

- Previous convictions, having regard to (a) the nature of the offence to which the conviction relates and its relevance to the current offence; and (b) the time that has elapsed since the conviction (is conviction spent)?
- Motivated by financial gain, profited from activities.
- Deliberate planned concealment of activity resulting in offence and obstructive nature of landlord towards investigation
- Established evidence of longer-term impact on the (wider) community as a consequence of activities.

- Refusal to accept offer of, or respond to the Councils' advice regarding responsibilities, warnings of breach or learned experience from past action or involvement of the Councils or other Regulatory Body.
- Any further factor that can be deemed of a sufficiently aggravating nature that is not covered above or within the culpability and harm banding factors.

46. The Civil Penalty Assessment Form sets out the aggravating factors considered by Mr Reynolds in assessing the financial penalty. In particular, there is a reference to the Applicant pursuing unfounded complaints against the Council, rather than appealing to the Tribunal, which was the legally mandated channel for challenging Improvement Notices. The Applicant further blamed the Respondent for placing a vulnerable tenant in the flat without carrying out checks, despite the Respondent having had no involvement in placing the tenant in the flat. In addition, the Applicant harassed the tenant and accused her of damaging the property, although there was no evidence any damage occurred. It was also said the Applicant had alleged the tenant had mental health problems.

47. Apart from the issue of the formal complaints against the Council, a decision on each of these points would require wholly disproportionate trials of subsidiary issues and require consideration of evidence which was not before the Tribunal. None of the allegations is directly "relevant to" an offence of failing to comply with an Improvement Notice, and neither do any of them naturally fall within the kind of considerations specifically listed in the policy as aggravating factors.

48. As far as the allegation of unjustified complaints against the Council, Mr Reynolds explains in his witness statement that he advised the Applicant on 24 September 2021 that if she disagreed with the Improvement Notice, she should appeal to the Tribunal. Instead, the Applicant

complained to the Local Government and Social Care Ombudsman, and the decision of the Ombudsman dated 15 March 2022 is attached to Mr Reynolds's statement. The Ombudsman found it would not investigate the Applicant's complaint about the Improvement Notice because she had not used her right of appeal to the Tribunal. An investigation solely into the complaint about officer conduct was not justified.

49. It seems to the Tribunal that failure to appeal an Improvement Notice cannot in itself be an "aggravating" feature. A party is never under an obligation to appeal. Moreover, a complaint to the Local Government Ombudsman is a perfectly proper legal mechanism for challenging the decision of a local authority, even if the Ombudsman rejects the complaint. It would be quite contrary to public policy for a Tribunal to penalise a person who had recourse to a perfectly lawful public complaints system, even if their complaint is wholly rejected.

50. For these reasons, the Tribunal finds there are no aggravating features which would cause it to adjust the penalty band.

Mitigating factors: Stage 3

51. The Respondent's policy again lists several potentially aggravating factors "relevant to the offence". They include:

- Steps voluntarily taken to remedy problem.
- High level of co-operation with the investigation, beyond that which will always be expected.
- Good record of maintaining property and compliance with legislation, statutory standards and industry standards.
- Self-reporting, co-operation and acceptance of responsibility.
- Where the person has been assessed as having mental health issues or learning disabilities, where linked to the commission of the offence.

- Where the person is diagnosed with a debilitating or life limiting medical conditions requiring urgent, intensive or long-term treatment where linked to the commission of the offence.
- Age and/or lack of maturity where it affects the responsibility of the offender.
- Any further factor that can be deemed of a sufficiently mitigating nature that is not covered above or within the culpability and harm banding factors.

52. The Civil Penalty Assessment Form states there are no mitigating features. By contrast, the Applicant relies on the fact she voluntarily dealt with various items in the Improvement Notice and had a good record of maintaining the property.

53. The Tribunal does not accept these two considerations are mitigating features. The works in the Improvement Notice were either completed late, or not at all. Moreover, the Applicant may not have a track record of offending, but neither does she have much of a record of maintaining property and complying with legislation statutory standards and industry standards. This was effectively a first time letting.

Proportionality and Totality: Stages 4 and 5

54. The Tribunal must next consider proportionality. One aspect of this is the means of the Applicant. But the Tribunal is hampered in this exercise because the Applicant completed two contradictory means forms and gave inconsistent information at the hearing itself. Moreover, as the Respondent points out, the Applicant admits she has another property elsewhere in the country (which were not mentioned in either means form). The Tribunal may therefore draw the inference that the Applicant has the means to pay and that a penalty of £3,000 is proportionate to her means.

55. The final stage is the totality principle. But that does not apply in this case, since it is a single offence.

56. It follows that the basic civil penalty of £3,000 remains unaffected by any of the other considerations. Standing back, the Tribunal considers a penalty of £3,000 is proportionate to the offence, representing over 3.5 months' gross rent for the flat.

Conclusions

57. The Tribunal substitutes a Civil Penalty of £3,000 in place of the penalty of £13,500 made by the Respondent.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.