FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HX/HNA/2020/0007
Property	**:**	20 Frampton Close, Eastleaze, Swindon, Wiltshire SN5 7EN
Applicant	**:**	Mr Nicholas Young
Representative	**:**	Mr P Riddle, Morrison & Masters, Solicitors
Respondents	**:**	Swindon Borough Council
Representative	**:**	Mr D Bigwood, solicitor, Swindon BC
Type of Application	**:**	Appeal against a financial penalty – s.249A Housing Act 2004
Tribunal Member(s)	**:**	Judge M Loveday Mr S Hodges FRICS Mr P Gammon OBE
Date and venue of hearing	**:**	2 December 2020, remote hearing (CVP)
Date of Decision	**:**	27 January 2021

DETERMINATION

Decision

1. **This is an appeal against a financial penalty under s.249A of the Housing Act 2004 ("the Act"). For the reasons given below, the Tribunal finds that:**
   (a) A financial penalty should be imposed.
   (b) A penalty of £15,000 should be substituted for the penalty of £19,307.40.

Background

2. The Applicant is the leasehold owner of a flat at 20 Frampton Close, Eastleaze Swindon, Wiltshire SN5 7EN. The flat is a first-floor purpose-built property on a modern housing estate on the western side of Swindon comprising 1 bedroom, lounge, kitchen and bathroom/wc. There is a staircase leading down to the street door on the ground floor. Perhaps unusually for a property of this time, it appears the flat was not originally provided with a boiler or central heating – or at least there are no obvious signs of such a system today.

3. On 8 March 2019, the Respondent served an Improvement Notice under s.11 of the Act (no.19/0005/HNI112) which identified a category 1 hazard (excess cold) and four category 2 hazards (fire, lighting, electrical hazards and personal hygiene). Sch.2 to the Notice listed remedial works to begin not later than 6 April 2019 and to be completed by 4 May 2019. At the time the property was let by the Applicant to a Mr Willian Hacker and the involvement of the Respondent arose following an approach from the tenant's social worker. The remedial works can be summarised as:
   (a) Providing an efficient heating system – either (i) by way of a new gas fired boiler and radiators throughout the property or (ii) by electrical night storage heaters within each letting room. There was also a requirement to draughtproof the letterbox on the front door.
   (b) Repairing or replacing the fire alarm in the first floor living space and provide a smoke detector on the ground floor.

(c) Repairing and replacing defective wiring in the bathroom and lounge.

(d) Providing a hot water supply to the kitchen sink.

The Respondents have estimated these works would cost £3,615 to complete: see Final Decision Notice ("Justification for level of Financial Penalty").

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 timescale specified in the Improvement Notice.

5. On 11 May 2020, the Respondent gave a First Notice of their intention to impose a civil penalty of £19,3076.40 under s.249A of the Act. This was confirmed by a Final Notice dated 11 May 2020. The Final Notice particularised the offence as follows:

> "between the 3rd day of June 2019 and the 2nd day of September 2019 at 20 Frampton Close, Swindon in the County of Swindon, having been served with an Improvement Notice (19/00055/HNI112) which had become operative, in respect of deficiencies amounting to a Category 1 hazard, namely Excess Cold, and category 2 hazards, namely Fire, Electrical, Lighting and Person Hygiene, Sanitation and Drainage, failed to comply with a requirement of the notice to carry out the remedial work set out in schedule 2 of the Improvement Notice by the 4th May 2019, contrary to section 30(1) of the Housing Act 2004".

6. The Applicant appealed to this Tribunal on 8 June 2020. Directions were given on 20 July 2020 when the matter was listed for hearing by way of video proceedings (CVP). A remote hearing took place on 2 December 2020, when the Applicant was represented by Mr Peter Riddle of Morrison & Masters solicitors, and the Respondent was represented by Mr Daryl Bigwood, a solicitor in its legal service department.

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 (i) the Improvement Notice dated 8 March 2019 was operative and (ii) he had failed to comply with Sch.2 of that notice. At the hearing the representatives agreed there were two issues for determination:

(a) Whether the Applicant had made out a 'reasonable excuse' defence under s.30(4) of the Act.

(b) The amount of the financial penalty.

Although the bundle presented to the Tribunal comprised some 486 pages (with a bundle of authorities running to a further 98 pages), this sensible narrowing of the issues enabled the Tribunal to deal with the matter 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 2004 Act. If there is no appeal, s.15(2) of the Act provides that an improvement notice becomes operative 21 days after it is served. Under s.30 of the Act, the person on whom it was served commits a criminal offence if they fail to comply with it 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".

Evidence

10. Starting with the Respondent's evidence, this was given by Ms Catherine Owen, an Environmental Health Officer, whose witness statement is dated 31 July 2020. Ms Owen gave details of contacts with the Applicant between service of the Improvement Notice on 8 March 2019 and expiry of the relevant period specified above on 2 September 2019.

11. The first material event is referred to in paragraph 10 of Ms Owen's statement. On 16 April 2019, she received a call from the Applicant to say he did not have sufficient funds to pay for the works. He also advised her that due to the legal action, the Applicant was prohibited from visiting the property. Ms Owen says she advised him to comply with the Notice. On 17 April 2019, Ms Owen inspected the Flat which highlighted the same problems as before. She emailed the Applicant about electrical shocks from the electrical system in the Flat, reminding him that the Improvement Notice expired on 7 May 2019. He replied on 6 May 2019 by email. The email stated that he had been "extremely short of funds so much that I have had to sell my car to fund the improvements". He went on to say that "I have also been let down by an electrician but have acquired another that says he can do the required work on Thursday the 9th May". The Applicant asked for an extension of time to do the works. On 7 May 2019, Ms Owen granted an extension of time to 9 May. On 28 May, Ms Owen wrote to invite the Applicant or his representative to attend a joint inspection at the property on 30 May 2019. It does not appear there was any response. Ms Owen inspected the flat on 3 June 2019 and found none of the works had been carried out. Ms Owen therefore wrote to the Applicant, stating that none of the works had been completed and invited him to a formal interview - although the letter stated the Applicant was not obliged to attend. She emailed a copy of the letter to the Applicant the same day, and the Applicant responded by return stating that "my contractor has

Emailed you to delay but Mr Hacker refuses entry [and] is not helping". Ms Owen responded that she had not heard from the contractor, stated that "I have been advised that any contractor visits need to be arranged via Mr Hacker's solicitor" and asked for "example(s) of when the contractor has attempted access but been refused". There was apparently no immediate reply. She again wrote to the Applicant stating that the works in the Notice had not been complied with and offering another interview on 17 June 2019. The Applicant replied by email on 16 June declining the interview - although he did not address the issue of the works. Ms Owen replied – repeating that the interview covered compliance with the Improvement Notice. On 16 July 2019 Ms Owen offered the Applicant a further opportunity to discuss the offence on 22 July 2019, but he did not respond. On 25 July 2019, she wrote again, pointing out that the works had not been done, and giving a last opportunity "to provide mitigation as to why the Notice has not been complied with". The letter "most strongly [urged the Applicant] to complete those works as soon as possible". She then visited the flat on 2 September 2019, and again found that none of the works had been carried out. In response to questions from the Tribunal, Ms Owen stated she had no evidence of lack of access to the premises. The Respondent's figures for the cost of works was prepared from a schedule of rates for the work she held on file. She was not a quantity surveyor but had extensive experience of repair costs.

12. The Applicant's evidence substantially comprised his witness statement dated 9 September 2019 (with extensive exhibits) and his undated Statement of Financial Means. He was cross-examined on these at the hearing. In his witness statement, the Applicant explained that during the relevant period the premises had been occupied by Mr William Hacker. Mr Hacker moved into the property in 2010, and at that time it was clean and tidy and everything within it worked. There were two electric oil-fired radiators (one in the bedroom and one in the living room) and hot water was provided by way of an immersion heater. Between 2010 and 2018, the Applicant visited the property once (with a contractor), when the untidy

interior "appeared to have all the trappings of a 'bachelor pad'". Mr Hackler was liable to pay rent of £500pm, but he had a poor record of rent payments and he ceased paying rent entirely in February 2018. In August 2018, Mr Hacker commenced County Court proceedings *inter alia* alleging unlawful eviction between 8 and 16 March 2018 (case no.E19YM083). The Applicant exhibited numerous documents from those proceedings. After the court proceedings commenced, the Applicant says in para 10 of his statement that "I was never allowed into the property … even though I did try, accompanied, as required, by contractors". By September 2018 there were rent arrears of £12,110. The Applicant denied categorically that rent payments resumed in February 2019. Mr Hacker eventually vacated the flat in December 2019. Since Mr Hacker vacated, the Applicant had cleared the flat and he had undertaken works "as and when I can afford to". In his Statement of Means, the Applicant stated he is an HGV driver with a take home pay of £1,836.86pm. His rent is £520.34pm, he has other financial commitments of £1,374.15pm and obligations to pay legal fees etc. of £1,100pm. He confirmed at the hearing that the unsigned and undated Statement of Means was correct.

13. In cross-examination, the Applicant confirmed the reasons he did not comply with the Improvement Notice were (i) access was "frustrated" and (ii) he could not afford the works. As to paragraph 10 of his witness statement, he had accompanied a tradesman to the property and could not gain access. He accepted he had not given any details of dates etc. in the witness statement. He was referred to an Amended Defence in the County Court proceedings where the Applicant's solicitors had previously stated he had "employed a tradesman, who on one occasion attended to mend a leak in the bath" – but the Applicant said this was "a few years before" the present matter. The Applicant accepted that since the Improvement Notice he had not tried to exercise any legal right of access or applied for an injunction in the County Court proceedings to allow access to do the works in the Improvement Notice. As far as rent was concerned, the Applicant repeated that he had not been paid any rent since February 2018.

He accepted he had counterclaimed the arrears in the County Court proceedings, and that the counterclaim had been dismissed by DJ Havatny on 28 August 2019. The Applicant explained that the counterclaim was only dismissed because his wife had been unable to attend and give evidence of the arrears – not because rent had been paid. The Applicant further volunteered he had sold his car to fund the repairs. But the proceeds of the sale of the car had been used up in legal fees. The car had been sold for £1,500 and this had been done before expiry of the Improvement Notice.

14. In response to questions from the Tribunal, the Applicant stated that the contractor referred to in para 10 of his witness statement was Mr Neil White, who was the main contractor at his employer's premises. Mr White did plumbing and electrical work. The Applicant could not give a date when he visited - he was "not one for writing things down." But he initially stated that it was about a week after he received the "list of failings". The Applicant accepted he had not written or emailed Mr Hacker. In response to a later question from the Tribunal, the Applicant said he thought "we went round 3 times" and that Mr White had gone round on his own. As to means, this was the only property the Applicant owned, and he eventually intended to return to live there with his wife. They had a joint housing association tenancy of the property where they lived. The only charge on the property was to secure the financial penalty. When he attended the property with the contractor, he had intended to carry out the first option under para 1 of Sch.2 to the Improvement Notice, namely installing a new gas boiler and radiators. He considered the costs of works given by the Respondent was much higher than he would have paid for them, but he did not understand the works in the notice were the only option.

15. The Tribunal was not entirely satisfied with the evidence given by the Applicant. In particular, there was a tendency for him elaborate his answers in cross-examination and in response to questions from the Tribunal with answers which went well beyond what was initially stated in his witness

statement. The Tribunal generally prefers the evidence given by the Respondents' witnesses whose evidence of fact was (unlike their decision making) unchallenged. Indeed, that evidence included several material emails and communications *from the Applicant* which were not even referred to by him in his evidence.

16. The Tribunal finds the following facts on the evidence:

(a) None of the works set out in the Improvement Notice were begun before 6 April 2019.

(b) None of the works were completed by the date of the expiry of the notice on 7 May 2019, by the extended date of 9 May allowed by Ms Owen or by 2 September 2019.

(c) The Applicant was under financial pressure in April/May 2019 and prior to 2 September 2019 he sold a car for £1,500 to raise cash. This evidence is corroborated by the email of 6 May 2019. The Tribunal accepts that (at least in part), the financial pressure was caused by Mr Hacker's failure to pay rent. But in any event, the money raised from the car was used to pay legal fees and/or costs incurred relation to the County Court litigation involving Mr Hacker.

(d) The Applicant attended the premises on 9 May 2019 with Mr White. The Tribunal establishes this date from, the emails to the Respondent. The email to Ms Owen on 6 May does not suggest there had been a visit before that date - indeed, part of the blame for non-compliance was attributed to a previous contractor who had "let down" the Applicant. The first complaint about lack of access was on 3 June 2019, suggesting a visit before that date. The most likely date is therefore 9 May 2019, which was the date the Applicant stated he intended to visit with his contractor - on the basis of which Ms Owen extended the date for compliance with the Notice.

(e) When the Applicant went to the premises on 9 May 2019, Mr Hacker did not "refuse entry", as suggested in the email of 3 June

2019. The Tribunal notes the ambiguity in para 10 of the Applicant's witness statement, which simply says the Applicant and his contractor were "never allowed into the property". In cross-examination, the Applicant did not suggest he spoke to Mr Hacker on that day or that the tenant actively refused access. The Applicant did not suggest there was any communication with Mr Hacker on that occasion. Whether Mr Hacker was out, or simply did not answer the door, is unclear. But there was no active refusal of access.

(f) There is no evidence that the Applicant attempted to contact Mr Hacker or his solicitors to obtain access – whether prior to or after that date. The Applicant did not suggest he did so in his oral evidence, and he has not provided any emails etc. to suggest he did. There was also no response to Ms Owen's email of 3 June 2019 about the suggestion that he should arrange access through the solicitors.

(g) The Tribunal accepts the Applicant's contractor may have visited once or twice apart from 9 May 2019. But in any event, there is no evidence Mr Hacker actively refused access to the contractor on those occasions.

(h) Between the date of the Improvement Notice and the date of judgment in Claim no.E19YM083 (28 August 2019), the Applicant was represented by solicitors in connection with that claim. This was not disputed, but lest there is any question of this, the Tribunal has had regard to the Defence filed by the Applicant dated 10 September 2018 which was prepared by solicitors.

(i) The Tribunal accepts the Respondent's estimate of the cost of works set out in the Final Decision Notice, namely that completing everything in the Improvement Notice would cost in the region of £3,615. No other estimate for the cost of the works has been provided.

17. As to means, the only issues of fact are resolved in favour of the Applicant:

(a) The Tribunal accepts the evidence of the Statement of Means that the Applicant's regular outgoings are equal to or exceed his income. The Tribunal further finds that this was the case at the time of the offence.

(b) It accepts the Applicant sold his car and intended to apply the £1,500 to the cost of works, but that he eventually used the money to pay legal costs.

(c) The Tribunal accepts the Applicant's evidence that he did not receive any rent for the flat after February 2018. Under para 10(3) of Sch.13A, the Tribunal is entitled to rely on evidence not before the Respondent when it made the penalty, and the Applicant's evidence of rent is exactly that kind of new evidence. Mr Bigwood relied on two pieces of written evidence to the contrary (namely an email from Mr Hacker's solicitors Forbes Robertson dated 24 April 2019 and a s.9 witness statement from him stating that "I had a Direct Debit payment set up between my bank account to Mr Young's bank account, of £502 a month on the 5th of every month)". But that evidence is hearsay and has been rejected by the Applicant. The allegation that rent was not paid is also wholly consistent with the Applicant's counterclaim in case no.E19YM083 in the County Court.

Reasonable excuse

18. The substantive defence which was argued on appeal related to s.30(4) of the Act.

19. Mr Bigwood referred to the test applied by the Upper Tribunal (Lands Chamber) for s.30(4) in *Sutton and another v Norwich City Council* [2020] UKUT 90 (LC), 214-216. The Respondent submitted there was no reasonable excuse. As to the alleged lack of access, the Applicant had not availed himself of the available options for access. As far as financial means were concerned, the Applicant himself accepted he had sold a car

and was in funds at the date the works in Sch.2 of the Improvement Notice were to be complied with.

20. The Applicant's case is in part set out in his application form and in a statement of case dated 10 September 2020 ("Expanded Statement of Reasons for the Appeal") which Mr Riddle expanded upon in oral submissions. Neither specifically elaborate on any "reasonable excuse" defence, but the Respondent raised no objection to it being argued before the Tribunal. Mr Riddle submitted that the evidence of photographs and other material in the bundle suggested the awful state of the flat was largely down to Mr Hacker. His first substantive argument was that the Applicant had been unable to get access to execute the works. The second was that he had insufficient funds to pay for the works and had sold his car to fund them. Mr Riddle submitted there was no evidence he was receiving any rent or that he could get credit. The Applicant's means should be tested at the date of the offence and not the date of the hearing – in particular no 'notional rent' should be taken into account.

21. Section 30(4) appears above. In *Sutton and another v Norwich City Council* [2020] UKUT 90 (LC), 214-216 the Deputy President elaborated the following test statutory housing defences:

> "214. … we nevertheless agree that in each case, once the facts amounting to the relevant housing offence have been made out by the local authority, it is for the person wishing to rely on the defence to prove that they had a reasonable excuse. Since the hearing of these appeals the Tribunal has considered where the burden of proof lies where the defence of reasonable excuse is relied on in answer to a relevant housing offence, and has confirmed that it is for the landlord or manager to prove that they had a reasonable excuse for their conduct: IR Management Services Ltd v Salford City Council [2020] UKUT 81 (LC).
>
> 215. Mr Croskell accepted that the question whether [the landlord] had a reasonable excuse for its conduct should be determined applying the civil standard of proof, the balance of probability. We agree.
>
> 216. Whether an excuse is reasonable or not is an objective question for the jury, magistrate or tribunal to decide. In *R v Unah* [2012] 1 WLR 545, which concerned the offence under the Identity Cards Act

> 2007 of possessing a false passport without reasonable excuse, the Court of Appeal held that the mere fact that a defendant did not know or believe that the document was false could not of itself amount to a reasonable excuse. However, that lack of knowledge or belief could be a relevant factor for a jury to consider when determining whether or not the defendant had a reasonable excuse for possessing the document. If a belief is relied on it must be an honest belief. Additionally, there have to be reasonable grounds for the holding of that belief."

22. The first reason advanced is that the Applicant was unable to complete the works because of a lack of access to the premises. In the light of the above facts, the Tribunal finds that any failure to obtain access to undertake the works was primarily the Applicant's fault. Before the last date for the works to start on 6 April 2019, no attempts at all appear to have been made to gain access. The Applicant did not make any reasonable attempts to gain access before the works were due to be completed on 4 May 2019. The Applicant's own failures cannot be a reasonable excuse for failing to start or complete the works. Even after the time limit was extended by Ms Owen to 9 May 2019, no preliminary contact seems to have been made with Mr Hacker to arrange access, something which would have been an obvious preliminary step. Simply waiting until the very last day of an (already extended) time period for compliance and simply turning up with a contractor was objectively unrealistic. Even had access been given, there was patently insufficient time allowed for completion of works which (the Applicant admitted) were to include installation of radiators and a boiler. Moreover, the reasonableness of the Applicant's actions can be assessed against the background that at the time he had access to legal advice in relation to Mr Hacker's occupation of the premises (in the other proceedings), and did not attempt to pursue any legal rights of access. It is also notable that at one point Ms Owen suggested access could be obtained through Mr Hacker's solicitors – but the Applicant neither acted upon this nor responded to the email. For all these reasons, lack of access is patently not a reasonable excuse in this case.

23. The second reason advanced is impecuniosity. On this, the Tribunal agrees with Mr Riddle that the Applicants' means should be tested at the date of the offence, not today. The Tribunal also agrees it must consider the cash position in 2019, not whether there was a notional right to receive rent at that time – and the cash position shows the Applicant's regular income was not being supplemented by rent.

24. However, ultimately the Tribunal does not consider the Applicant's impecuniosity provided a reasonable excuse. The Tribunal does not consider that lack of funds alone is (by itself) ever sufficient to amount to a reasonable excuse for failure to comply with an Improvement Notice. It may be an excuse, but it will not necessarily be a "reasonable" excuse without examining the reasons for the lack of funds. On this, the Tribunal notes the evidence that Applicant sold a car for £1,500 with the specific intention of using this money to fund the works. Although the Tribunal appreciates there were no easy choices available to the Applicant, the decision to spend this money on legal fees, rather than the works, is not a reasonable one. Moreover, the evidence was that the premises are a valuable unencumbered asset. There is no evidence the Applicant took any steps to see whether he could raise money on the security of this asset. Finally, it is not reasonable to consider capital expenditure on works should be capable of being funded from regular rental income. All rental properties require capital expenditure of some kind or another from time to time. A reasonable landlord makes provision for capital expenditure from time to time. That the Applicant may not have done this does not reasonably excuse the consequences of not making such a provision. Had there been an external and sudden external cause for lack of funds (such a bank failure which caused the loss of moneys prudently set aside for capital expenditure on the flat) this might well have been a reasonable excuse for not being in funds to carry out the works failing. But in this case the reason was simply that the Applicant's modest letting business was not sufficiently successful to pay for works required let the property. That is an excuse, but not a reasonable one.

25. Accordingly, the Tribunal finds there was no reasonable excuse for failing to comply with the Improvement Notice.

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, Mr Bigwood and Mr Riddle agreed that the proper approach was for the Tribunal to apply the Respondent's local policy adopted in February 2019, namely "Private Sector Housing: Guidance of determining the amount of a Civil Penalty". The approach to such 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 2004 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".

28. Mr Riddle (correctly) suggested this did not mean the Tribunal must therefore adopt the figures used in the Respondent's Civil Penalty Calculation Sheet attached to its final notice dated 11 May 2020. But the policy itself is the starting point.

Level of Penalty - Stage 1

29. The first stage of the Respondent's policy is to determine the penalty band. This assessment involves 4 steps which we will deal with in turn.

Step 1 – Culpability

30. This part of the policy assesses a "culpability score" according to a table which ranks this factor into four categories ranging from "very high" through "high" to "medium" to "low". The table includes indicators enabling parties to apply the correct category. The indicators for "high" are:

(a) "Offender fell far short of their legal duties"; for example by:

- failing to put in place measures that are recognised legal requirements or regulations;
- ignoring warnings raised by the Council or other regulator, tenants or others;
- failing to make appropriate changes after being made aware of risks, breaches or offences;
- allowing risks, breaches or offences to continue over a long period of time.

(b) Serious and/or systemic failure by the person or organisation to comply with legal duties".

The indicator for "very high" is "deliberate breach of, or flagrant disregard for, the law".

31. Mr Bigwood adopted the penalty sheet assessment of the culpability score as "very high". The indicators for this consideration were a "deliberate breach of, or flagrant disregard for, the law". Mr Bigwood relied on the Applicant's failure to sign an undertaking before the Improvement Notice was served. He also relied on the fact the Applicant was aware of the requirements of the Improvement Notice and had discussed it with officers. By September 2019, the works had still not commenced and there was a risk of harm to the tenant. The Applicant also failed to attend interviews or return interview questions when asked. The period of default was long.

32. Mr Riddle stressed that the "medium" culpability score already meant the offender "fell short of their legal duties", so the "high" category already recognised a serious default. Although the Applicant may have fallen short of his obligations, he had probably not fallen "far short" of them – and if anything, a "high" score was excessive. But he was satisfied with arguing that the Applicant's culpability was "high" rather than "very high".

33. The Tribunal has considered all the documents and emails referred to above. It has particular regard to the Respondent's view that this is in the very most serious category of offence. But against that, it places rather greater weight on having heard from the Applicant in person and been able to question him about these matters. From this, the Tribunal formed the view that this is a landlord of a single property who was simply out of his depth. It relies on the following:

    (a) The Applicant has a modest family income which he (at least in theory) supplements with rent from a rental property. He is not a professional landlord.

(b) Even had he been receiving rent, the Applicant plainly had no real understanding of the need for long-term maintenance or capital expenditure on the premises.

(c) In this case, he did make some effort to comply with his obligations set out in the Notice, but hopelessly late and inadequate in scope. The attempts to gain access were unrealistically late and done without attempting even the most cursory contact with the tenant. It does not seem he appreciated it was unlikely that a new central heating system could be installed in a single day.

(d) The Applicant's response to guidance from officers was often to bury his head in the sand (as in the case of the suggestion of contacting Mr Hacker's solicitors for access).

(e) His attempts to find the money for the works plainly fell short - even the sale of the car would have generated about a third of the cost of the works and the money was in any event used to meet costs elsewhere.

(f) The offences, although for long period of time, did not continue for the very longest periods of time – months (not weeks or years).

(g) The Tribunal also notes there are no previous offences relied upon by the Respondent to support a history of offending.

For all these reasons, the Tribunal formed the view this was ineptness rather than wilful breach or disregard for the law.

34. The Tribunal notes the policy's objectives expressly state that "Generally, the maximum Civil Penalties will be reserved for the very worst offender": see section on "Determining the Civil Penalty Amount: Factors to be taken into account when deciding the level of Civil Penalty". This suggests that culpability should be graded with the most serious penalties reserved for those who are most culpable. It is satisfied R's assessment of culpability did not fairly reflect that the breaches were not "deliberate", in the sense that the Applicant knew he was in breach of the Improvement Notice and intentionally placed himself in that position.

All the matters the Respondent relies upon meet the indicators in the "high" category, but the "Very High" category requires something more – namely an element of wilfulness or contemptuous behaviour. For the reasons given above, the Tribunal finds these attributes were absent in this case. The Tribunal finds that the Applicant cannot be described as "the very worst offender" and it rate culpability as "high", not "very high".

Step 2 (*Seriousness of Harm Risked)*

35. The policy assesses "harm risk" by splitting it into three bands. Level A corresponds with Class I and II harm outcomes in the Housing Health and Safety Rating System (HHSRS). Level B corresponds to Class III and IV harm outcomes in the HHSRS. The matrix used by the Respondent identified 5 risks, namely excess cold (hazard 2), fire (hazard 24), electrical hazards (hazard 23), Lighting (hazard 13) and personal hygiene (hazard 17). Of these, however, only "excess cold" scored in highest rating category of A, with an HHSRS harm score of 58571.

36. Mr Bigwood adopted the penalty sheet assessment of harm risks in Level A, which were in turn derived from the table attached to a Health & Safety Rating Calculation Sheet dated 18 January 2019. The sheet had been prepared for the purposes of the Improvement Notice itself. Mr Bigwood invited the Tribunal not to revisit this harm risk score.

37. Mr Riddle invited the Tribunal to look again at the harm risks and the matrix. It was pointed out that the score of 58571 was only 11 points below the upper level for Level B. In particular, there was no evidence Mr Hacker had in fact suffered any harm.

38. This is a rehearing, not a review. But it is clear from the above case law that the Tribunal should afford considerable weight to the Respondent's

decision in relation to this consideration. The scoring was of course originally used for the purposes of the Improvement Notice itself, and no appeal was made against that notice. Moreover, the burden is on the Appellant to show why the Tribunal should depart form the decision. In that respect, the summary of factors in the policy states that pertinent factors will include "the harm caused to the tenant", and Table 2 refers to the "harm score". But step 2 focusses instead on "the harm risked". Indeed, the general policy of the legislation is to remove hazards which present a health risk to tenants, not to punish for causing personal injury. So the assessment of harm risks involves a prediction of the risk of injury, not the occurrence of injuries. For example, the Housing Health and Safety Rating System Operating Guidance itself (2008) states at para 3.14 that "Assessing likelihood is not determining or predicting that there definitely will be an occurrence". Actual health (rather than risk) is therefore not a reason to mark down the harm risk score.

39. The Tribunal therefore adopts the Respondent's harm risk score of Level A, based on its assessment of the most serious risk of excess cold (hazard 2).

Step 3 – Penalty levels

40. The penalty level is assessed by reference to a table which depends on the scores for steps 1 and 2. The Respondent's penalty level was "5+": see Civil Penalty Calculation Sheet. A culpability score of "high" and a harm risk at Level A reduces this to a penalty level of 5. There is no discretion involved here. It is a simple mathematical formula.

Step 4 – Penalty bands

41. The policy goes on to state that the penalty levels should be placed into one of five penalty bands to arrive at the basic level of penalty. Table 4

of the policy shows the "starting point" for a penalty levels of "5 or 5+" to be £15,000 with an "upper limit" of £30,000. This is again a mathematical exercise, with apparently no discretion given to the Respondent. In particular, the notes to "Stage 1 Step 4: Penalty Bands" in the policy make no suggestion one can differentiate between banding derived from the two highest categories of culpability.

42. It is not altogether clear why Table 4 makes no distinction between penalties derived from penalty levels of 5 and 5+. Mr Riddle was critical of this approach, which meant penalties for "very high" culpability are in every case exactly the same as penalties for offenders with "high" culpability. The Tribunal accepts this is a surprising position – and renders a 5+ banding wholly otiose (as it is in this case). In this appeal Mr Riddle did not argue the Tribunal should depart from policy in accordance with *Marshall* – for example by imposing a Civil Penalty below the £15,000 "starting point" for a penalty level of 5. But it may well be that landlords may wish to consider the point in future and the Respondent will also wish to review Table 4 of its policy in the light of this issue.

Level of penalty – Stage 2

43. The second stage of the Respondent's policy is to consider the Offender's Income and Track Record with a view to increasing the level of penalty beyond the basic figure above. This involves two further factors, namely the offender's finances and the offender's track record. Again, there are 4 steps involved:

    (a) Step 1 - Determining the 'Income in Scope'.
    (b) Step 2 - Determining the 'Income Amount'.
    (c) Step 3 – Considering the Offender's Track Record.
    (d) Step 4 – the Civil Penalty Amount.

Step 1 – the Income in Scope

44. In its Civil penalty calculation sheet, the Council assessed the 'Income in Scope' as being limited to the rental income for the premises. Both Mr Bigwood and Mr Riddle agreed the Tribunal should adopt this approach.

45. The sheet stated that the "Rental Income (Owners)" was £115.40 per week. It stated that £502 rent had been paid per month had been paid by way of housing benefit since February 2019, which was equivalent to £115.20 per week. Mr Bigwood urged the Tribunal to accept this, and to find rent had been paid. Alternatively, the 'Income in Scope' should be based on the rent payable for the flat, rather than sums received.

46. Mr Riddle argued that the income in scope should be limited to net rent, not any notional right to receive rent.

47. The first point to make here is that the Income in Scope has not apparently been assessed in accordance with the policy, which envisages that the "all the offender's income" may be taken into account when considering band 5 or 5+ offences: see Table 5 of the policy. But since neither solicitor invited the Tribunal to consider anything other than rent for the premises, the Tribunal limits its consideration to this aspect of the Applicant's income.

48. In that respect the policy states that:

> "*For property owners, this will be the weekly rental income, such as is declared on the tenancy agreements, for the property where the offence occurred, and at the time the offence occurred. Where this information is not available, it will be estimated*".

The Tribunal has considered the meaning of these words. On the one hand, the phrase "weekly rental income" suggests rent actually received, rather than a mere contractual right to a receive rent. On the other hand, reliance on the rent stated in the tenancy agreement suggests the Income in Scope might well be a contractual right to receive rent rather

than actual moneys received. The Tribunal finds that the intention the wording from "such as" to "estimated" was to deal with evidence of "rental income", not a determination of what that "rental income" comprises. If there is no evidence of what the offender has in fact received, one assumes the offender has received the rent set out in the tenancy agreement. But if there is other evidence, that presumption does not apply. It follows that the words "rental income" have their ordinary natural meaning, namely rents received, not rents payable. Moreover, this approach is consistent with the 2018 Guidance stated above that the Respondent's policy should "remove any financial benefit the offender may have obtained as a result of committing the offence". If no rent has been paid, the offender has not received any benefit.

49. As to what income there was, the Tribunal has already determined above that the Applicant received no rent from the premises during the relevant period. The Income in Scope is therefore zero.

Step 2: The Income Amount

50. The policy applies percentage multiplier to the Income in Scope and adds this to the penalty calculation: see Table 6. The percentage multiplier is 400% for a penalty level of 5, and 600% for a penalty level of 5+.

51. By reason of the above, there is no sum to be added to the penalty on this basis.

Step 3 – The Offender's Track Record

52. The parties agreed no additional penalty should be imposed for this.

Step 4 – the Civil Penalty Amount

53. At Stage 2, the policy envisages adding the Penalty Band Minimum to the Income Amount and the Track Record Amount. The Penalty band

Minimum is for a level 5 penalty (or indeed a level 5+ penalty) is £15,000. Nothing else is added at Stage 2. The Tribunal therefore finds the Civil Penalty Amount is £15,000. By way of a cross-check, the Respondent's calculation sheet shows an equivalent figure of £15,692.40.

Level of penalty – Stage 3

54. The third stage is to consider whether it is appropriate to impose a further penalty to remove the financial benefit the offender has obtained as a result of committing the offence. The policy states that:

> "A guiding principle of Civil Penalties as an offence disposal option is that they should remove any financial benefit that the offender obtained as a result of committing the offence. The Civil Penalty imposed should never be less than it would have reasonably cost the offender to comply in the first place. All identifiable financial benefit will be considered, and Table 9 only gives typical examples for each offence".

Table 9 in the policy gives an example of a financial benefit obtained by failing to Comply with an Improvement Notice:

> "The cost of any works that were required to comply with the improvement notice but which have not been removed by works in default".

The policy goes on to say:

> "Where it can be shown that the offender has derived financial benefit through the offence; the 'Financial Benefit Amount' will be added to the Civil Penalty Amount to give the final Civil Penalty to be paid, up to the Penalty Band Maximum for the offence".

There follows a formula that "Civil Penalty Amount + Financial Benefit Amount = Civil Penalty to be paid = ‹ Penalty Band Maximum".

55. In effect, this is the most important aspect financially. The Respondent's calculation sheet added £3,615 at Stage 3. The Tribunal has already indicated above that it finds this figure would have represented the cost to the Applicant of complying with the Improvement Notice.

56. Mr Bigwood referred to the cost of complying with the notice and contended that the policy meant one should add these costs as an additional item at Stage 3. He relied, in particular on the words "will be added to the Civil Penalty Amount". Mr Riddle disagreed. He argued the sum should only be added if the benefit figure (£3,615) exceeded the penalty figure (£15,000).

57. The Tribunal finds that the sum of £3,615 does represent "a benefit" to the Applicant. But the real question is whether such a benefit is added to the minimum Penalty Band figure of £15,000 in every case, up to the level of the maximum Penalty Band of £30,000. Or should one only add the financial benefit if it exceeds the minimum Penalty Band figure if the benefit to the Appellant exceeds £15,000?

58. The Tribunal favours the latter approach for the following reasons:
    (a) The principle underpinning Stage 3 is expressly stated to be that "The Civil Penalty imposed <u>should never be less than</u> it would have reasonably cost the offender to comply in the first place.
    (b) The policy is aimed at removing the risk that a Civil Penalty is set at a level where landlords are finically better off ignoring the requirements of the legislation. So much is clear from the 2018 Guidance objective to "remove any financial benefit the offender may have obtained as a result of committing the offence" That is not a risk which arises if the cost of works is less than the minimum penalty which would otherwise be imposed.
    (c) The direction that "the 'Financial Benefit Amount' will be added to the Civil Penalty Amount", must be read in the context of the preceding words "where it can be shown that the offender has

derived financial benefit through the offence". Where a landlord incurs a penalty of £15,000 to avoid incurring a cost of £3,615, it is hard to see what "financial" advantage it has had.

59. It follows that since the benefit of £3,615 does not exceed the £15,000 Penalty Band minimum for a band 5 penalty level, nothing stands to be added at Stage 3.

Conclusions

60. The Tribunal therefore finds that the Applicant's defence that he had a reasonable excuse under s.30(4) is not made out. But it substitutes a Civil Penalty of £15,000 in place of the penalty of £19,307 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.