



Neutral Citation Number: [2025] UKUT 2 (LC)

Case No: LC-2024-199

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY
CHAMBER AND AN APPLICATION FOR JUDICIAL REVIEW

REF: LON/OOBN/HNA/2023/0046

Royal Courts of Justice,
Strand, London WC2A 2LL

7 January 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – CIVIL PENALTY – licensing offence – true meaning of local housing authority
policy – whether policy “too rigid” – s.249A, Housing Act 2004 – appeal allowed
JUDICIAL REVIEW – FTT’s power to review and amend its own decisions – alternative
remedy available to challenge illegitimate review by appeal – application refused*

BETWEEN:

LONDON BOROUGH OF WALTHAM FOREST

Appellant

-and-

MARBLE PROPERTIES (LONDON) LIMITED

Respondent

AND BETWEEN:

LONDON BOROUGH OF WALTHAM FOREST

Claimant

-and-

THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Defendant

-and-

MARBLE PROPERTIES (LONDON) LIMITED

Interested Party

Martin Rodger KC, Deputy Chamber President

17 December 2024

Riccardo Calzavara, instructed by Sharpe Pritchard, for the appellant/claimant
Neither the respondent/interested party nor the defendant participated

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The following cases are referred to in this decision:

AA Homes & Housing Ltd v LB Croydon [2020] UKUT 181 (LC)

Brewer v Mann [2012] EWCA Civ 246

JS v Secretary of State for Work and Pensions [2013] UKUT 100 (AAC)

Kazi v Bradford Metropolitan District Council [2024] EWCA Civ 1037

London Borough of Waltham Forest v Marshall [2020] UKUT 35 (LC)

MT (Algeria) v Secretary of State for the Home Department [2010] 2 AC 110

Point West GR Ltd v Bassi [2020] 1 WLR 4102

R (RB) v First-tier Tribunal [2010] MHLR 192

Sutton v Norwich City Council [2021] EWCA Civ 20

Introduction

1. The temptation for the First-tier Tribunal to review a decision of its own under the power conferred by section 9 of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) is sometimes strong, but it should usually be resisted. Anyone who doubts that should read the Court of Appeal's decision in *Point West GR Ltd v Bassi* [2020] 1 WLR 4102. Anyone still in doubt might read this decision.
2. In all, the First-tier Tribunal, Property Chamber (the FTT) produced four decisions in this matter. In the first, it explained its reasons for allowing an appeal against a financial penalty imposed on a letting agent by a local authority. Its second decision was in response to the authority's application for permission to appeal, and included an additional, alternative reason why the FTT said it would reach the same conclusion, supposedly inserted under the power of review in section 9 of the 2007 Act. Because the FTT had taken that course without giving the parties the opportunity to make representations, it was obliged by rule 55(3) of its procedural rules to entertain an application to set aside the second decision on the grounds that it was a misuse of the power of review. This gave rise to a third decision in which the FTT explained its action and suggested further procedural routes by which it could supplement its original reasoning. Undaunted, the Council sought permission to appeal the second decision and a review of the third decision, which led to a fourth decision in which the FTT added further clarification of its additional reasoning.
3. Shorn of these complexities, the simple issue in these proceedings is whether the FTT misinterpreted the London Borough of Waltham Forest's private sector housing enforcement policy when it allowed an appeal against a civil penalty imposed on Marble Properties (London) Ltd under section 249A of the Housing Act 2004. I will refer to the appellant as the Council and to the respondent as MPL.
4. MPL managed a house at 1 Janson Road, London E15 on behalf of a landlord. The house was an HMO, a house in multiple occupation. It should have been licensed under an additional licensing scheme for HMOs introduced by the Council on 1 April 2020 under Part 2 of the Housing Act 2004. MPL was aware of the need to obtain a licence, but it did not apply for one until 28 January 2022. By managing the house without a licence MPL committed an offence under section 72, Housing Act 2004.
5. Rather than prosecuting MPL, the Council decided to impose a civil penalty of £12,000. It offered a 20% discount if the penalty was paid within 28 days. MPL did not pay but instead exercised its right to appeal to the FTT. By a decision issued on 15 January 2024 the FTT reduced the penalty to £6,000, having decided that the Council had misunderstood its own enforcement policy.
6. Two separate proceedings are now before the Tribunal.
7. The first is an appeal by Council against the FTT's original decision to reduce the penalty. The FTT granted permission to appeal that decision on two grounds. But when it did so it added an alternative justification for reducing the penalty. It decided that if the Council's interpretation of its policy was correct, then in the circumstances the application of the policy was "too rigid", and that the FTT was entitled not to follow it. That enabled the FTT to arrive at its original destination by a new and different route. At the same time the

FTT granted permission to appeal against its additional reasoning (before the Council was even aware of it).

8. The second proceedings are an application for judicial review of the FTT's decision to review its original decision, which led to the inclusion of its additional reasoning. The Council says that the FTT had no power to review its decision in that way. Moreover, it maintains that the only way it can challenge the decision to review is by judicial review and it sought permission to do so from the Administrative Court which transferred the claim to this Tribunal for determination. The defendant in the judicial review claim is the FTT itself, with MPL joined as an interested party.
9. I directed that I would determine the appeal, the application for permission and (if permission is granted) the substantive judicial review at the same hearing. Apart from the FTT's acknowledgment of service, neither it nor MPL have participated in the proceedings. The Council was represented at the hearing by Mr Calzavara, who had appeared on its behalf before the FTT. I am grateful to him for his helpful submissions.

Legislation relevant to the appeal

10. The licensing of HMOs is dealt with in Part 2 of the Housing Act 2004 (the 2004 Act). Not all HMOs are required to be licensed, but under section 56, 2004 Act, a local housing authority may designate an area in its district as being subject to a scheme of licensing, referred to as additional licensing, so that any HMO in that area which is of a description specified in the designation must then be licensed (section 55(2)(b)).
11. There has never been any dispute that while it was managed by MPL, 1 Janson Road was an HMO which was required to be licensed under the Council's additional licensing scheme which commenced on 1 April 2020 (immediately after the expiry of a previous licensing scheme under which the house had been licensed).
12. By section 72(1) of the 2004 Act it is an offence to manage or have control of an HMO which is required to be but is not licensed. Section 72(5) provides a defence where that person has a reasonable excuse.
13. By section 249A of the 2004 Act a local housing authority may impose a financial penalty on a person if satisfied beyond reasonable doubt that the person's conduct amounts to a relevant housing offence, including the offence of managing an unlicensed HMO contrary to section 72(1). By section 249A(4) the amount of a financial penalty is to be determined by the local housing authority but may not be more than £30,000.
14. Procedural requirements for imposing a financial penalty under section 249A are contained in Schedule 13A of the 2004 Act, paragraph 10 of which provides a right of appeal to the FTT against either or both of the decision to impose the penalty or the amount of the penalty; on such an appeal the FTT may confirm, cancel or vary the penalty notice (paragraph 10(4)). By paragraph 10(3)(a) any appeal is to be a re-hearing of the local housing authority's decision, which means that the FTT is required to decide for itself whether a financial penalty should be imposed and, if so, the amount of that penalty, rather than considering whether the authority was entitled to impose the penalty it did. There is a further right of appeal to this Tribunal.

15. When the FTT determines a financial penalty appeal under paragraph 10 of Schedule 13A, it must pay particular attention to any enforcement policy adopted by the authority and will normally follow it. In *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC) the Tribunal (Judge Cooke) considered a number of authorities on appeals from decisions taken in accordance with local authority policies. At [42] she said that the local authority was entitled to adopt a policy about financial penalties, but:

“[...] it is trite law that in applying such a policy it must not fetter its discretion. It must be “willing to listen to anyone with something new to say”: *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 625 per Lord Reid. As Lord Denning MR put it in *Sagnata Investments Ltd v Norwich Corpn* [1971] 2 QB 614, 626—627: ‘the administrative body must not apply the policy so rigidly as to reject an applicant without hearing what he has to say’.”

16. The Tribunal’s guidance in *Marshall*, which was subsequently approved by the Court of Appeal in *Sutton v Norwich City Council* [2021] EWCA Civ 20, was as follows:

“54... The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. 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. [...]

55. Nothing in these cases, or in the present appeals, detracts from the court's or a tribunal's ability to set aside a decision that was inconsistent with the decision-maker's own policy. Nor have the above cases said anything to cast doubt upon the ability of a court or tribunal on appeal to substitute its own decision for the appealed decision but without departing from the policy ... It goes without saying that if a court or tribunal on appeal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or which of which it took insufficient account, it can substitute its own decision on that basis.”

17. In *Kazi v Bradford Metropolitan District Council* [2024] EWCA Civ 1037, the Court of Appeal has recently reiterated that an appeal under paragraph 10 of Schedule 13A allows the FTT “in effect to step into the local housing authority’s shoes, the point being that this is not a scheme for appealing the local housing authority’s housing policy, rather it is a scheme for appealing a penalty made by that authority” (Birss LJ at [20]). In the same appeal, at [47], the Court of Appeal preferred not to consider an issue raised before it by Mr Calzavara on behalf of the local authority and which he would like to raise again in this appeal. That issue concerns the relationship between two principles. Birss LJ characterised the first briefly as “the FTT not being the place to challenge a local authority's policy on penalties” which should be challenged instead in the Administrative Court. The second is the principle of administrative law which had been referred to by Judge Cooke in *Marshall*, namely that a public body may not adopt a policy which fetters its own discretion (so that on an appeal against a penalty the FTT could depart from an authority’s policy if it had that effect).

The Council’s policy

18. A local housing authority is required by paragraph 12 of Schedule 13A, 2004 Act to have regard to guidance given by the Secretary of State in relation to financial penalties. Relevant guidance was issued by the Department for Communities and Local Government in April 2017 which encourages the formulation of an enforcement policy. The guidance was taken into account by the Council when it revised its Housing and Licensing Team Enforcement Policy in February 2020 to incorporate an appendix dealing specifically with civil penalties under section 249A.
19. The DCLG guidance identifies seven factors which an authority should consider to ensure that financial penalties are set at an appropriate level. In summary, those factors are: the severity of the offence; the culpability and track record of the offender; the harm caused to the tenant; punishment of the offender; deterrence of the offender; deterrence of others from committing similar offences; and, removal of any financial benefit obtained as a result of committing the offence. Each factor is supported by some further explanatory text.
20. The Council's policy begins by explaining that the general objective of the document is to promote transparency and consistency in the imposition of penalties. For those reasons the policy will only be departed from in exceptional circumstances and after careful consideration on a case-by-case basis.
21. The policy then recites the same seven factors as had been identified in the DCLG guidance as relevant to the determination of an appropriate penalty, together with their explanatory text, before stating that the Council will consider those factors "when deciding where, within the relevant band of the Civil Penalties Matrix below, a particular offence and penalty fall."
22. The Civil Penalties Matrix is a table identifying six bands covering offences of different levels of seriousness (moderate, serious or severe) with each band having a specified "band width" of £5,000. The lowest band, band 1, covers offences of moderate severity attracting a penalty from 0 to £4999. Band 2 is also for offences of moderate severity with penalties of £5,000 to £9,999. Bands 3 and 4 are for serious offences and provide for penalties from £10,000 to £14,999 (band 3) and from £15,000 to £19,999 (band 4). Bands 5 and 6 are for severe offences.
23. The policy explains that the Civil Penalties Matrix is intended to provide an "indicative minimum 'tariff' under the various offence categories with the final level of the civil penalty adjusted in each case, and generally within the relevant band, to take into account aggravating and mitigating factors." The tariff would normally be increased by up to £4,999 for each aggravating factor identified and the Council could "exceptionally, increase the penalty above the band maximum or, again exceptionally, decrease it below the minimum tariff". In the interests of consistency and transparency that discretion will be exercised only in exceptional circumstances and only after consideration on a case-by-case basis.
24. The policy then considers each of the housing offences for which a civil penalty may be imposed and places them in a band, or bands, depending on the characteristics of the offender. It explains that when committed by a landlord with one or two properties the offence of managing an HMO subject to an additional licensing scheme without a licence (the offence with which these proceedings are concerned) will be regarded as a moderate

matter, representing a band 2 offence, and attracting a penalty of at least £5,000. The policy continues:

“Where a landlord or agent is controlling/owning a significant property portfolio, and/or has demonstrated experience in the letting/management of property, the failure to licence an HMO would be viewed as being a serious matter attracting a civil penalty of £15,000 or above [a band 4 offence].”

25. For licensing offences potentially aggravating factors are identified, including the presence of significant hazards, evidence of poor management, overcrowding or inadequate safety precautions, and evidence that the offender is familiar with the need to obtain a licence, such as where the premises had previously been licensed in their name.
26. Finally, the policy allows a 20% discount to be applied to the penalty if the offender remedied the breach before the service of a final penalty notice. A discount of 20% of the original penalty can also be obtained if the penalty is paid within 28 days of the date of the Final Notice.
27. When it determined the penalty appropriate to MPL’s offence in this case, the Council selected a figure of £15,000 from the matrix, a figure at the bottom of the range appropriate to a band 4 offence. It made no adjustment up or down for any aggravating or mitigating factors, but it applied a discount of 20%, reducing the penalty to £12,000 in accordance with the policy because a licence had been applied for before the final penalty notice was served. In its final notice dated 18th May 2023 it explained that the penalty would be reduced to £9,000 if payment was made within 28 days.

The FTT’s first decision

28. The FTT’s reasons for reducing the financial penalty from £12,000 to £6,000 are contained exclusively in its first decision, issued on 15 January 2024. Although it identified an additional point in its first decision it said expressly that it was not necessary to decide it. In its second decision it decided that additional point after all. In its fourth decision it said that it “could perhaps have expressed itself better” when deciding the additional point and gave what on one view was a different explanation of it. It will be necessary to consider some of those extra stages in the context of the Council’s application for judicial review. But for the purpose of the appeal what matters is the first decision.
29. The FTT first decided that MPL had not shown that it had had a reasonable excuse for managing the HMO without a licence. It was therefore guilty of the offence, contrary to section 72(1), 2004 Act, and the only issue was the amount of the penalty.
30. Having quoted from the Council’s policy, and having referred to the evidence, the FTT directed itself, in accordance with this Tribunal’s guidance in *Marshall* that it should apply the Council’s policy although it could and should depart from it in certain circumstances, such as where it had been applied too rigidly.
31. The FTT’s critical reasoning recited and then addressed a submission by Mr Calzavara on behalf of the Council, saying this:

“19. [...] Mr Calzavara’s submission is that, if the starting point for a financial penalty is at the bottom of a band, it is never possible to reduce the financial penalty further, regardless of how good the mitigation might be, unless the mitigation was “exceptional”.

20. In our judgment, this is to misread the relevant part of the policy. The policy provides that an offence such as the current one is “viewed as being a serious matter attracting a civil penalty of £15000 or above [a band 4 offence].” There are a number of elements to this. Firstly, the offence is to be treated as a “serious matter”. Secondly, it attracts a penalty of £15,000 or more. Thirdly, it is a band 4 offence. A sensible reading of this is that the offence is a serious matter (and thus in band 3 or band 4), that it will be appropriate to make an award of £15,000 or more and that that will mean it falls in band 4. However, in deciding whether to take a starting point of £15,000, it is necessary in our judgment to take any mitigation into account before fixing the amount. If mitigation is not taken into account at the stage of fixing £15,000, then the award could never move out of band 4, unless the mitigation was exceptional. A case under the policy will only fall into band 4 if it is £15,000 or more, but the decision to award £15,000 or more must be made before the appropriate band is selected. If the local authority had wanted all awards to be in band 4, then the policy did not need to start with reference to the breach being “serious” and attracting a penalty of £15,000 or more. It just needed to say that the penalty must fall in band 4. (That might then raise issues, which we on our construction do not need to consider, as to whether such a direction fell into the “too rigid” category of exception to a policy identified in *Marshall*.)

21. In our judgment, taking the policy as a whole, it is legitimate to apply mitigation to the £15,000 before making a determination of the appropriate band. Here there is in our judgment very good mitigation. Firstly, the only works required to the property were minor. This is not a case (as we so often see) in which the property was in a poor condition. Secondly, we accept that Covid made carrying out the minor works much more difficult. Thirdly, we note that the appellant is of exceptionally good character. Fourthly, we accept that Mr Miah took steps to try and regularise the position and was not helped by the local authority’s planning department.

22. In our judgment these matters mean that the £15,000 is too high. The case therefore falls in the other band of “serious”, namely band 3. Looking at the mitigating features and the absence of aggravating features in our judgment the appropriate financial penalty before discounts is £10,000.”

32. The FTT then applied two discounts to its figure of £10,000. The first repeated the 20% reduction given by the Council because a licence had been applied for before the final penalty notice. That reduced the penalty to £8,000. The FTT then explained that the Council had taken an “uncompromising position” by refusing to volunteer an additional discount of 20% if the reduced penalty fixed by the FTT was now paid within 28 days. The FTT did not approve:

“26. We are afraid that we find this an unacceptable stance to adopt. If the local authority had reached (what we have found to be) the right amount of the financial penalty, then the appellant would only have had to pay £6,000 (assuming it paid promptly). The local authority cannot in our judgment be

better off for having had to be successfully appealed. To decide otherwise would be an affront to justice. Awarding £6,000 only means that the appellant has no incentive to pay quickly, but the local authority has put itself in this position by refusing to offer the discount voluntarily.

27. In these circumstances, we determine the amount of the financial penalty in the sum of £6,000.”

33. It is apparent from the final sentence of paragraph 26 that the reduction to £6,000 was not conditional on payment being made within 28 days. Nor was it said to be an application of the Council’s policy (which clearly it was not). The discount was allowed to prevent what the FTT thought would be “an affront to justice” arising from the Council’s refusal to extend its discount policy to cover payments made within 28 days of a tribunal decision.

The FTT’s second decision and its grant of permission to appeal

34. The Council applied for permission to appeal the first decision to enable it to challenge the FTT’s interpretation of the policy, and its treatment of the discount for early payment. In its second decision the FTT dealt with the application and granted permission on those two issues. But before doing so it reminded itself that under rule 53 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 it was first required to consider whether to review its decision and then, if it did not alter its decision, to consider whether to grant permission to appeal.
35. The power of review to which the FTT referred is contained in section 9 of the 2007 Act. It is necessary to refer here only to the following material parts of the section:

9. Review of decision of First-tier Tribunal

(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).

(2) The First-tier Tribunal’s power under subsection (1) in relation to a decision is exercisable—

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure Rules may ... [impose certain restrictions on the power of review]

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—

(a) re-decide the matter concerned, or

(b) refer that matter to the Upper Tribunal.

[6]-[11] ...

36. The FTT granted permission to appeal on the issue of whether it had correctly interpreted the Council's policy, but it did so "subject to the point which we did not need to determine, as to whether the construction urged by the Council was 'too rigid'". That was a reference to the last sentence of paragraph 20 of its first decision (see paragraph 31 above). It then said that it would review its decision in that respect only:

"The Tribunal did not determine whether (if we were wrong on the true construction of the policy) the "too rigid" exception applied. So that all matters are before the Upper Tribunal without the need for a cross-appeal, we do review our failure to determine this matter. In our judgment, if we erred in our construction of the policy, then the construction urged by the appellant would be too rigid, so that the same result would be reached but by this different route."

37. The FTT then summarised the matters on which it granted permission to appeal, which were:

(a) whether it had erred in its construction of the Council's policy by placing the conduct in respect of which the financial penalty was imposed in band 3 rather than band 4;

(b) whether, if it had erred in that way in its construction of the policy, it had nonetheless reached the right conclusion on the basis that applying the policy in such a manner was "too rigid", so as to fall within the exception identified in *Marshall*;

(c) whether it had erred in giving a further discount of 20% to reflect the discount for speedy payment which would have been given if the Council had itself determined what the FTT considered to be the correct financial penalty to be imposed.

38. It is convenient at this stage to consider the first and third of these grounds of appeal, each of which challenges an aspect of the FTT's first decision. The second ground of appeal, for which the FTT granted permission without the Council having requested it, is advanced by the Council as part of its appeal, but the decision to incorporate the additional reasoning (rather than the substance of that reasoning) is central to the application for judicial review so the second ground of appeal is best considered in that context.

Issue 1: Did the FTT misinterpret the Council's policy?

39. For the Council, Mr Calzavara reframed the ground of appeal for which the FTT gave permission in a number of different ways, but I prefer the relative simplicity of the FTT's formulation. The question is whether it erred in its construction of the Council's policy by placing the conduct in respect of which the financial penalty was imposed in band 3 rather than band 4.

40. The issue focuses on paragraph 20 of the first decision in which the FTT considered the part of the policy which deals with the penalty for a landlord or agent with a significant

portfolio who commits a licensing offence. The FTT’s “sensible reading” of the policy involved these four stages: first, a recognition that the offence was a serious matter; secondly, as a result of being serious, the offence was in band 3 or band 4; thirdly, it was appropriate to make an award of £15,000 which would mean the offence falls in band 4; and fourthly, it was necessary to take any mitigation into account before deciding “whether to take a starting point of £15,000”.

41. What follows in paragraph 20 of the decision is the FTT’s justification for those steps, and in particular for the fourth step. Paragraph 21 then identifies what the FTT regarded as “very good mitigation”, leading it to three conclusions in paragraph 22, namely: that a penalty of £15,000 was too high; that the case “therefore falls in the other band of ‘serious’, namely band 3”; and that, before discounts, a penalty of £10,000 was appropriate.
42. The enforcement policies of local housing authorities usually adopt one or other of two different techniques to arrive at an appropriate penalty in an individual case. Some policies suggest a starting point to the decision maker, usually identified by considering the seriousness of the offence and the harm or potential harm to the tenant. The decision maker may then move up or down from that starting point to take account of other relevant considerations. An example of this approach is the policy described in *AA Homes & Housing Ltd v LB Croydon* [2020] UKUT 181 (LC) at [10] to [13]. Rather than identifying a specific figure as a starting point other policies suggest a penalty range. The decision maker then selects the appropriate penalty within that range, or exceptionally outside it, moving higher or lower to take account of all the relevant features of the case. An example of this approach is the policy described in *Sutton v Norwich City Council* [2020] UKUT 90 (LC) at [246] (although it might be said that in that case the policy combined features of both approaches by additionally suggesting a starting point within the range).
43. In his submissions on behalf of the Council, both to the FTT and on the appeal, Mr Calzavara represented the Council’s policy as adopting the first approach I have just described i.e. he suggested that the lower limit of the “band width” for each band in the Civil Penalty Matrix was a starting point for the decision maker when assessing the penalty for an offence in that band. Thus for a band 4 offence the starting point would be £15,000. That was also how the FTT appears to have interpreted the policy in paragraph 20 of its decision. Its complaint was that, in a case with no aggravating factors, the assessment could not take account of the presence of mitigating factors if it could not go below the starting point of £15,000.
44. With respect to Mr Calzavara and to the FTT, this seems to me to be a misreading of the policy as a whole. There is no reference in the policy to the bottom of the band being a “starting point” and treating it as such gives no weight to the explanation in the policy of how the matrix is intended to be used. That explanation comes immediately after the list of seven relevant factors taken from the DCLG guidance and states: “The Council will consider the above factors when deciding where, within the relevant band of the Civil Penalty Matrix below, a particular offence *and penalty* fall” (emphasis added). That seems to me to be critical to understanding the approach which the policy requires. It indicates that the Council expects all of the relevant factors to be taken into account in determining where within the relevant band the penalty for a particular offence will be set. In the course of his submissions Mr Calzavara agreed that the seven factors were relevant

both to the band into which the Council placed each type of offence, and to the identification by the decision maker of the appropriate penalty for each individual offender within that band. That is not consistent with reading the policy as prescribing a starting point at the bottom of a range, from which the penalty can only be increased.

45. I appreciate that the bottom end of the band is later referred to as an “indicative minimum tariff”, but the policy does not say that the minimum tariff is to be adjusted to take account of aggravating and mitigating factors; it says that the final level of the penalty is to be adjusted for those matters. I take the reference to a minimum tariff to mean that the penalty for an offence in that band will not be less than that minimum tariff; I do not read it as dictating that the assessment of the penalty should begin at the bottom of the band and then be adjusted for aggravating or mitigating factors as Mr Calzavara initially suggested. Such an approach creates the problem with which the FTT struggled, by making it impossible to take account of mitigation, unless either counterbalancing aggravating features, or exceptional circumstances can be identified. In many cases that would contradict the instruction that the final level of the penalty is to be adjusted to take account of mitigating factors. Additionally, as some of the relevant factors from the DCLG Guidance (such as deterrence or deprivation of benefits) would not count either as mitigation or aggravation it would be inconsistent with the direction that all seven factors are to be taken into account when determining where, within the relevant band, the penalty will be set.
46. The policy is not as clear as it might be, but the better way for a decision maker to give effect to its intent appears to me to be to approach the assessment without a preconceived starting point, other than that the figure will be within the range for the band into which the offence falls unless there are exceptional circumstances. Where within that band the appropriate penalty sits is to be determined having regard to the seven factors taken from the DCLG Guidance. That assessment will itself incorporate consideration of aggravating and mitigating features. The seven factors include the broad categories of “culpability and track record of the offender” and “harm caused to the tenant” which are capable of accommodating matters which reflect well on a landlord or agent, and not simply those which reflect badly. For example, an offender’s excusable lack of knowledge of a licensing scheme or the absence of any harm from accommodation which, though not licensed as it should have been, was nevertheless fully compliant with relevant safety standards and well maintained, could be taken into account as matters relevant to culpability and harm which would point the decision maker to a figure towards the lower end of the band.
47. It is clear from paragraph 20 of the decision that the FTT did not read the policy in this way. But even a decision maker who treated the policy as mandating a starting point of £15,000 could not properly have proceeded to a final figure by the route taken by the FTT (in the absence of exceptional circumstances). I agree with Mr Calzavara that it is impossible to read the policy as placing MPL’s offence of managing an unlicensed HMO in band 3 or band 4. The policy is explicit in placing the offence in the higher of the two “serious” bands and as requiring exceptional circumstances before a penalty outside that band could be imposed. That seems to me to be the FTT’s principal error. It was also wrong to consider mitigating factors before selecting a band, but it was only able to adopt that approach because it regarded itself as having a choice between bands 3 and 4, which it did not have.

48. The explanation which the FTT gave in paragraph 20 for endowing itself with the flexibility to place the offence in bands 3 or 4 at its discretion does not stand scrutiny. The complaint that mitigation must be taken into account before deciding on a band because otherwise the penalty could never fall below £15,000 in the absence of exceptional circumstances disappears if the policy is read as I have suggested it should be. Mitigating circumstances can be taken fully into account in fixing the penalty within the range or, exceptionally, below it. The alternative justification is no more convincing, i.e. that if the Council had intended all such offences to be in band 4, it need only have said so, and need not have referred to the breach being “serious” and attracting a penalty of £15,000 or more. But the Council did say that all such offences were in band 4, £15,000 is the minimum within that band and the reference to the offence being serious cannot be read as a justification for ignoring the other two descriptions which have placed it firmly in the higher of the two available bands.
49. For these reasons the FTT’s decision to reduce the penalty to £10,000, in the absence of exceptional circumstances, was wrong because it was based on a misreading of the policy. The appeal therefore succeeds on the first issue. Whether the decision should be set aside as a consequence depends on the answer to the second issue for which the FTT gave permission to appeal. Before dealing with that issue, and with the judicial review claim, I will deal with the third issue, concerning the second of the two discounts which the FTT applied to arrive at its final figure.

Issue 3: Was the FTT entitled to give a further discount of 20%?

50. The FTT said that its decision to allow an additional discount of 20% was “more difficult”. It was not possible for MPL to earn the additional policy discount of 20% for prompt payment, because it had not paid the penalty within 28 days of the final notice. The policy did not allow for any further discount so, having arrived at a figure which it considered was in accordance with the policy, the FTT ought to have stopped there with its figure of £8,000 (including the first discount for remedying the breach). But it did not do so, and instead deducted a further 20% to arrive at its final penalty of £6,000.
51. The second deduction was not intended as an incentive for MPL to pay promptly. It was, as it were, baked into the penalty, whenever it might be paid. It was given explicitly because, in the FTT’s view, the Council “cannot in our judgment be better off for having had to be successfully appealed”. That seems to me to be an impermissible approach.
52. As stated in the final penalty notice, the penalty determined by the Council was £12,000. It was not £9,000, although the Council was prepared to accept that figure as discharging the debt if it was paid within 28 days. MPL’s appeal to the FTT was against the penalty stated in the final notice, and the FTT had power to confirm, vary or cancel the final notice (paragraph 10(4) of Schedule 13A, 2004 Act). The statutory scheme makes no provision for discounts for early payment and considerations of whether a discount should be allowed were irrelevant to the FTT’s task which required it to consider the figure in the final notice only.
53. How the Council chooses to deal as a creditor with its own debtors is a matter for it. It is a matter over which the FTT has no jurisdiction and with which it has no business to interfere. It is not for the FTT to declare the Council’s policy to be “unacceptable”, or to punish the Council’s policy choice by reducing the penalty further whether or not it was

paid promptly. If MPL wished to challenge the FTT's refusal to provide a discount after an appeal, the proper place to do so was by challenging the policy in the Administrative Court.

54. I should add that I can see nothing wrong with a policy of allowing a voluntary discount for prompt payment but withholding it where an appeal is pursued. The benefits to a local authority of early payment are obvious; it secures payment, avoids enforcement costs, and is likely to mean that there will be no appeal with all the additional irrecoverable expense that entails. The value of those benefits will be largely or completely eliminated by the cost of an appeal, whether it is successful or unsuccessful. In those circumstances there seems to me to be nothing unjust or unacceptable in a policy which refuses to allow the same discount for prompt payment after the amount of a penalty has been redetermined on an appeal.
55. For these reasons the FTT was wrong to allow a gratuitous discount from the penalty it considered appropriate under the Council's policy.

The judicial review

56. The remainder of this decision is all about "review".

Terminology

57. It is essential to keep in mind that "review" is used to describe two different activities. I have already referred to section 9 of the 2007 Act at paragraph [35] above. It provides that "The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1)". That is the first type of review and its most significant feature is that it is undertaken by the FTT itself.
58. The second type of review is "judicial review". Judicial review is described in the Administrative Court Judicial Review Guide as "the procedure by which an individual, company or organisation can challenge the lawfulness of a decision or other conduct of a person or body whose powers are governed by public law". The FTT is such a body. Judicial review is undertaken in the Administrative Court, a branch of the High Court, and in certain limited circumstances in the Upper Tribunal. A claim for judicial review can only be brought with the permission of the reviewing Court or Tribunal. One of the ways in which judicial review is distinct from a review under section 9 of the 2007 Act is that judicial review involves scrutiny of the lawfulness of a decision by a different court or tribunal from the one which made the decision.
59. As the Administrative Court Judicial Review Guide explains (at paragraph 6.3.3) judicial review is a "remedy of last resort". If the Court finds that the claimant has (or had) an adequate alternative remedy, it will generally refuse permission to apply for judicial review.
60. Under section 11(1), 2007 Act, there is a right of appeal to this Tribunal on any point of law arising out of most decisions of the FTT, including a decision on an appeal against a

financial penalty under section 249A, Housing Act 2004. But there is no right of appeal against an “excluded decision”.

61. Excluded decisions of the FTT cannot be appealed but are subject to judicial review. But the FTT may sometimes make an excluded decision in the course of arriving at a decision which is not an excluded decision. Where such an excluded decision has been made but the claimant has a right of appeal against the subsequent decision of the FTT, it will be necessary to consider the sufficiency of an appeal as a method of providing the claimant with redress, including against the excluded decision. If an appeal would be an adequate alternative remedy permission to apply for judicial review of the excluded decision is likely to be refused.

The FTT’s power of review

62. The FTT’s review power is governed by section 9 of the 2007 Act to which I have already referred, and by rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the 2013 Rules). The substance of the power is in section 9, and it cannot be understood or properly applied by reference only to rule 55. That is because section 9(4)-(5) specifies the action that may be taken in the light of the review i.e. correct accidental errors, amend reasons given for the decision, or set the decision aside and then either redecide the matter or refer it to the Upper Tribunal.
63. Rule 55(1) is as follows:

55 Review of a decision

- (1) The Tribunal may only undertake a review of a decision—
 - (a) pursuant to rule 53 (review on an application for permission to appeal); and
 - (b) if it is satisfied that a ground of appeal is likely to be successful.
- (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
- (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

64. It can be seen that, by rule 55(1), a review may only be undertaken if two conditions are satisfied. The first is that there must have been an application for permission to appeal. This limitation excludes the use of the power on the FTT’s own initiative which would otherwise be permitted by section 9(2)(a). If the FTT has received an application for permission to appeal it is required by rule 53(1) to consider whether to review its decision. There is no requirement that a specific application for a review must have been made by one of the parties, but an application for permission to appeal is essential.
65. The second condition is that the FTT must be satisfied that a ground of appeal is likely to succeed. If the FTT considers that its decision was correct and that an appeal is not likely

to succeed, whether on substantive or procedural grounds, it has no power to review its decision. In that event it may not take either of the actions in section 9(4)(b) or (c), by setting aside its decision or giving amended reasons (the power to correct accidental errors is also available separately under rule 50, and where that power is exercised the condition in rule 55(1)(b) need not be satisfied).

66. As the Court of Appeal explained in *Point West GR Ltd v Bassi* [2020] 1 WLR 4102, the purpose of the power of review is to allow the FTT to avoid the need for an appeal to the Upper Tribunal in the case of clear errors. Before it undertakes a review it is necessary for the FTT to identify “the matter in [the] case” which it proposes to review, as section 9(1) does not authorise an open ended reconsideration of a decision, but only a focussed examination of whether a specific feature of its reasoning or conduct of a case is likely to be reversed on appeal: “a review is not an occasion on which the FTT can reconsider the whole case” (*Point West*, at [48]).

67. In *Point West* Lewison LJ drew on *R (RB) v First-tier Tribunal* [2010] MHLR 192, a decision of the Upper Tribunal (Administrative Appeals Chamber) presided over by the then Senior President of Tribunals, Carnwath LJ. In *RB* the Tribunal referred to paragraph 100 of the explanatory notes to the 2007 Act which stated that:

“Sections 9 and 10 provide powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter. This is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal.”

68. In *RB*, the Tribunal placed firm principled limits around the power of the FTT to undertake a review, which were summarised and approved in *Point West*, at [46]. The Tribunal held:

“(i) That the power of review on a point of law is intended, among other things, to provide an alternative remedy to an appeal. In a case where the appeal would be bound to succeed, a review will enable appropriate corrective action to be taken without delay.

(ii) It was not intended that the power of review should enable the FTT to usurp the UT’s function of determining appeals on contentious points of law. Nor was it intended to enable a later FTT judge or panel, or the original FTT judge or panel on a later occasion, to take a different view of the law from that previously reached, when both views are tenable. Both these considerations demonstrated that if a power of review is to be exercised to set aside the original decision because of perceived error of law, this should only be done in clear cases.

(iii) There were occasions when it would be desirable for a case to be reconsidered by the FTT so that further findings might be made even if it was likely to go to the UT eventually.

(iv) The key question was what, in all the circumstances of the case including the degree of delay that may arise from alternative courses of action, would best advance the overriding objective of dealing with the case fairly and justly.”

69. Rule 55(1) restricts the power of review to cases where there has been an application for permission to appeal and prevents the FTT from undertaking a review on its own initiative. Given that restriction it must have been intended that the power would only be exercisable where one of the parties had sought permission to appeal on the point on which the FTT's decision was clearly wrong. It cannot have been intended that an application for permission to appeal would give the FTT licence to review its decision on a matter which was not challenged in the application.
70. The action which the FTT may take when it has decided to review a decision includes amending the reasons given for the decision (section 9(4)(b)). The interpretation and application of that power was considered by a three judge panel of the Upper Tribunal (Administrative Appeals Chamber) in *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC). The tribunal procedural rules which were under consideration in that case were the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 which deal with the power of review in rule 40, the effect of which is not materially different from rule 55 of the 2013 Rules.
71. The Tribunal in *JS* considered the significant restrictions on the power to amend the reasons for a decision following a review. It referred, at [34]-[35], to cases decided on appeals from employment tribunals where a similar power had been exercised:

“[34] [...] Those decisions make clear that the power to give additional reasons is only to be exercised exceptionally and with safeguards. Mummery LJ gave a clear and helpful statement on the approach to be taken in *Woodhouse School v Webster* [2009] ICR 818. He first explained the purpose of the procedure:

26. ... The purpose of the procedure is to give the employment tribunal the opportunity of fulfilling its duty to provide adequate reasons for its decision without the inconvenience that might be involved in the appeal tribunal allowing a reasons challenge to the employment tribunal decision under appeal and having to remit the case to the tribunal for a further hearing. Under the procedure developed by the appeal tribunal and this court the employment tribunal can be asked before the hearing of the appeal to supply, if it is possible to do so, the reasons for which the request is made.

He then set out the danger that had to be avoided:

27. It is not, however, desirable for the employment tribunal to do more than answer the request. The employment tribunal should not, for example, advance arguments in defence of its decision and against the grounds of appeal. It must not engage, or appear to be engaged, in advocacy rather than adjudication. ...

Then he identified the way to avoid that danger:

28. First, it is necessary for the appeal tribunal to identify correctly the point on which the employment tribunal's reasons may be inadequate. This was not done here. ... If there were grounds for considering that the reasons of the employment tribunal were inadequate (which I doubt), it would have been more to the point to ask for additional reasons for the finding of an implicit instruction to dismiss.

[35] In our view, that reasoning is equally applicable to the review power under section 9. There is always the risk and so an apparent danger that the presiding judge will seek to defend the tribunal's decision rather than reproduce faithfully the reasons that actually determined the appeal. That danger is the greater if the judge is given a representative's detailed criticisms."

72. In *Brewer v Mann* [2012] EWCA Civ 246 the Court of Appeal had previously warned against the temptation of a judge or tribunal seeking to improve on their original reasons when faced with an application for permission to appeal:

"31. ... where a judge has received no request from the parties to reconsider his judgment or add to his reasons, and has not demonstrated the need in conscience to revisit his judgment, but on the contrary has received grounds of appeal and an application for permission to appeal on the basis of the alleged inadequacies of his judgment, then it would be most unwise for him to rewrite his judgment (other than purely editorially) and it would take the most extraordinary reasons, if any, to justify such a course on his part."

The Tribunal in *JS*, at [36], quoted that passage and considered that the same restriction must be applied to the power in section 9(4) to give amended reasons: "One of the limits on the power to supplement reasons is that it must not be used to correct defective reasoning or to provide a commentary on the grounds of appeal."

73. The same concern underlies the Tribunal's interpretation of section 9(4)(b), at [37]-[43], from which I take the following key points:
- (1) An amendment of the reasons for a decision extends beyond the correction of the accidental errors referred to in section 9(4)(a).
 - (2) The purpose of amended reasons is the same as the purpose of the original reasons: to show how the tribunal made its decision. They must be the reasons that led the tribunal to decide as it did, flawed though they may be, not a later attempt to rationalise the decision.
 - (3) There is a risk in amending reasons that they become a later rationalisation or that they reflect the views of the presiding judge rather than the whole panel.
 - (4) There is a risk that the judge will drift into justification to such an extent that the tribunal changes from a decision-maker into an adversary in the appeal process.
 - (5) The purpose of the power to amend is to avoid the need to set the decision aside or the need for an appeal to the Upper Tribunal. An amendment that supplies an omission may be sufficient to satisfy a party, whereas a further attempt to explain how the tribunal assessed the evidence may merely lead to a different set of criticisms.
 - (6) The power must not be used in such a way that it undermines confidence in the judicial decision-making process and in the finality of decisions.
74. The Tribunal in *JS* concluded that the power to amend a decision "is limited to cases in which it would be proper to amend the reasons rather than set aside the decision" and where there is some "objective reason to believe that something has been omitted from the original reasons". It gave as examples of permissible amendments a case where an issue

had been expressly raised and explored at the hearing, but had not been mentioned in the decision, or where a passage in a decision was ambiguous. In such cases it would be clear that something had gone wrong with the composition of the reasons. An example of an impermissible amendment would be where a passage gave a poor explanation of a tribunal's analysis of a piece of evidence. In such a case, it would not be self-evident that something had gone wrong, and there would be an unavoidable risk that the judge would drift into supplementing the tribunal's actual reasons and, perhaps, into justification.

75. Each of these considerations is of equal relevance to the exercise of the power of review in the Property Chamber.
76. The final point of general significance in the Tribunal's decision in *JS* is its consideration of the scope of the right of appeal in a case where, following a review by the FTT, it has added additional reasons to its own decision, relying on the power in section 9(4)(b). It will be remembered that section 11(1), 2007 Act provides a right of appeal to the Upper Tribunal on any point of law arising from a decision of the FTT "other than an excluded decision". Section 11(5) lists a series of decisions which are excluded decisions. Among these are the following, at section 11(5)(d):

"(d) a decision of the First-tier Tribunal under section 9—

- (i) to review, or not to review, an earlier decision of the tribunal,
- (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,
- (iii) to set aside an earlier decision of the tribunal, or
- (iv) to refer, or not to refer, a matter to the Upper Tribunal,"

77. In *JS*, at [60], the Tribunal explained that on appeal, the Upper Tribunal has jurisdiction to consider whether additional reasons were properly added under the review power. Two explanations were given for that view. First, because a decision to amend reasons is not one of those listed as excluded in section 11(5)(d). Secondly, because on an appeal for error of law a party is entitled to rely on any ground for judicial review: *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110 at [73]. The Tribunal in *JS* allowed an appeal against the FTT's decision to add additional reasons to its decision, because the original reasons had been tolerably clear, and the additional reasons were an impermissible commentary on the grounds of appeal. It then determined and allowed the appeal against the decision of the FTT in its original form.

Application to this case

78. It is convenient to begin with the claim for judicial review. In his skeleton argument Mr Calzavara submitted that the review conducted by the FTT was outside the legitimate scope of the power in section 9 and rule 55(1). I agree.
79. When it considered the Council's application for permission to appeal the FTT expressed no doubt about its interpretation of the policy. On the contrary, in paragraph 6 of its second decision it said specifically that it had reconsidered its construction in the light of the grounds of appeal and remained of the view that its approach was correct. It nevertheless considered it right to grant permission to appeal because the contrary view

was arguable. That should have been the end of any thought of conducting a review. If the FTT considered that it had reached the right conclusion for the reason it had explained in its original decision, it could not have believed that an appeal against its decision was likely to succeed so the condition in rule 55(1)(b) was clearly not satisfied.

80. The FTT nevertheless decided to provide an additional reason for its decision, purportedly under the power of review. In its second decision it explained that it was doing so “so that all matters are before the Upper Tribunal without the need for a cross-appeal”. There are three further fundamental objections to that course of action.
81. First, the additional reasoning was not provided to make good any inadequacy in the expression of its original decision; it was to supply a reason which the FTT had consciously chosen not to consider when it reached its original conclusion. It did not “amend reasons given for the decision”, as section 9(4)(b) contemplates, but instead gave a new reason which had been no part of the decision. That was not a legitimate use of the power of review.
82. Secondly, the additional reason was not provided in response to any of the grounds of appeal advanced by the Council, with a view to removing the need for an appeal. It was provided to bolster the decision against the possibility that an appeal against the original reasoning might succeed. That again was not a legitimate use of the power of review because, in the absence of a relevant ground of appeal, the FTT was deciding to review its decision on its own initiative.
83. Thirdly, the additional reason was not supported by any explanation why it would independently justify allowing the appeal and reducing the penalty to the figure previously determined by the FTT. There is no suggestion in the original decision that a point had been taken by MPL about the policy having been “too rigid”, and Mr Calzavara told me he had no recollection of having addressed the FTT on that topic. The FTT did not tell the parties it intended to review its decision or amend its reasons so it received no submissions from either of them before it supplemented its reasoning. That was procedurally unfair and contrary to the approach recommended by the Upper Tribunal in *JS*.
84. The difficulty for Mr Calzavara in the judicial review is that all of these points could have been taken on an appeal against the FTT’s decision to amend its decision. Mr Calzavara submitted that the FTT’s decision to review its first decision was an excluded decision because it fell within section 11(5)(d)(i), 2007 Act. It could not be the subject of an appeal. I agree. But the decision to amend the reasons included in the FTT’s decision as a consequence of the review was not an excluded decision, for the reasons given in *JS*, at [60], with which I agree.
85. Mr Calzavara submitted that it was better to challenge the decision to review in proceedings for judicial review, because that was the earliest link in the chain of illegitimate decision making. But that is not a good reason to seek judicial review, which has considerably complicated these proceedings. On the contrary, the availability of a right of appeal against the FTT’s decision to amend its reasons is a complete answer to the judicial review claim. Each of the three reasons identified above would have provided sufficient grounds for an appeal against the FTT’s decision to add its additional reasoning in its second decision. The claim for judicial review was therefore unnecessary and I refuse permission to bring it.

Issue 2 – Was the Council’s policy or its application in this case “too rigid”

86. The Council did not ask for permission to appeal against the decision to amend the FTT’s reasons. Had it done so I would have set aside those parts of the second decision which added the additional reasoning. But as there is no ground of appeal challenging its inclusion, it is necessary to consider whether the FTT’s alternative reason provides justification for its decision to reduce the financial penalty.

87. One difficulty with the FTT’s additional reasoning is that it is expressed in two different ways. In its second decision the FTT said this:

“In our judgment, if we erred in our construction of the policy, then the construction urged by the Council would be too rigid, so that the same result would be reached but by this different route.”

That appears to be a determination that the policy itself is too rigid. But, in the same decision, when it granted permission to appeal the FTT phrased the ground of appeal (for which permission had not been requested), in the following terms:

“whether, if the First-tier Tribunal erred in its construction of the policy as aforesaid, nonetheless the Tribunal reached the right conclusion on the basis that applying the policy in such a manner was “too rigid”, ...”

That suggests that the FTT was concerned that the application of the policy in this case was too rigid.

88. In its fourth decision, in which it refused to review its third decision, the FTT said that it “could perhaps have expressed itself better in explaining that it was the application of the policy which was too rigid”. That reflects the ground of appeal which it had formulated but is different from the way it had originally expressed its reasoning. The original formulation focussed on the policy being too rigid, while the reframing in the ground of appeal and in the fourth decision focussed on the application of the policy.

89. The shortest answer to either way of putting this point is that it was not one which the parties asked the FTT to decide, or on which it heard argument, or for which it provided reasons in any of its decisions. That is a sufficient basis on which to set the FTT’s alternative justification for its original decision aside.

90. A second answer is that the FTT’s assessment of the policy, or its application in this case, was based on its flawed interpretation of the process of assessment which the policy requires. The FTT assumed that the decision maker was required to begin at the bottom of the relevant band and could not go below it other than in exceptional circumstances. That was thought to be too rigid a policy, or its application too rigid in this case, because it did not allow for mitigation to be taken into consideration. I have already explained why I consider that was not a proper interpretation of the policy as a whole. In my judgment the policy requires the decision maker, ordinarily, to determine a penalty within a range from £15,000 to £19,999, taking into account all relevant considerations, including mitigation. It is true that, in the absence of exceptional circumstances, the penalty will not fall below £15,000, but that is because the Council assesses this sort of licensing offence as serious

and as meriting significant punishment when committed by a property professional or substantial landlord. That broad policy assessment is not one with which the FTT can properly interfere, nor did it purport to in this case in what seems to have been its preferred version of the “too rigid” complaint.

91. The policy refers to the need for enforcement action to be proportional to the risks presented by the offence and draws attention to the possibility that exceptional circumstances may justify a penalty outside the usual band. In a case involving exceptional mitigation the policy would therefore permit a penalty lower than £15,000 for a property professional or £5,000 for a small landlord. The FTT considered that there was “very good mitigation” in this case which justified a penalty lower than £15,000. It did not consider whether that mitigation was sufficient to make the circumstances of the offence exceptional, thereby allowing the lower penalty to be imposed within the constraints of the policy. There no doubt will be cases, rare perhaps, in which the decision maker considers that exceptional mitigation justifies that conclusion.
92. The FTT’s additional reasoning does not support its conclusion and I allow the appeal on the second ground.

Disposal

93. For the reasons which I have given, the Council’s application for permission to bring proceedings for judicial review is refused but its appeal against the FTT’s first and second decisions is allowed. The penalty of £12,000 which the Council imposed is reinstated.

Martin Rodger KC,
Deputy Chamber President
7 January 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal’s decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.