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## Financial penalties under the Housing Act 2004: law, practice and procedure

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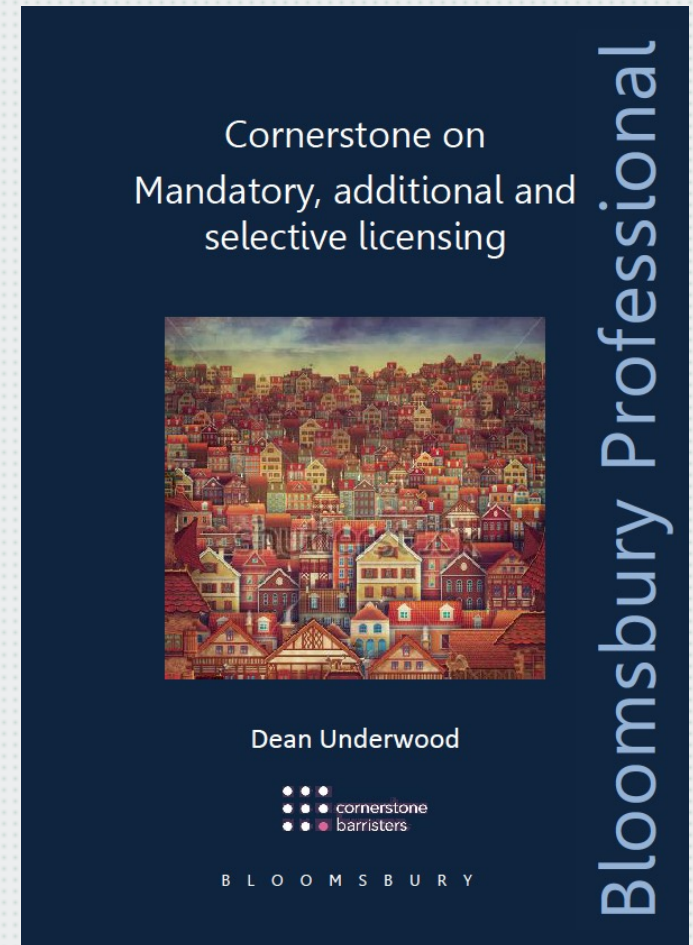


- Financial penalties under section [249A](#), Housing Act 2004: law, practice and procedure -
  - assumes a basic knowledge of Parts 1 to 4 of the 2004 Act
  - provides a summary of local housing authorities' power to impose financial penalties as an alternative to prosecuting various offences under Parts 1 to 4 and 7 of the 2004 Act
  - includes an overview of recent and significant case law
    - *Waltham Forest LBC v Younis* [2019] UKUT 0362 (LC)
    - *Waltham Forest LBC v (1) Marshall (2) Ustek* [2020] UKUT 35 (LC)
    - *Sutton v Norwich CC* [2020] UKUT 90 (LC)
- Links to statutes, decisions and other materials are provided throughout, where available: simply click (or right-click) on the link
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 **The statutory power to impose a penalty**

# Fundamentals of the statutory power



- Financial penalty? In broad terms: a fine levied by a local housing authority (“LHA”) in England on an individual or organisation as an alternative to prosecution for certain housing-related offences under the 2004 Act.
- Introduced by amendments made to the 2004 Act by the Housing and Planning Act 2016
  - Insertion of section [249A](#) and [Schedule 13A](#) in particular
- Power to impose penalties came into force on 6 April 2017 and applies to offences committed on or after that date, not beforehand: *Regulation 4(f), SI 2017/281*
- LHA may impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person’s conduct amounts to a prescribed offence in respect of premises in England: *section 249A(1), 2004 Act*
- A person’s conduct includes a failure to act: *section 249A(9), 2004 Act*

# The prescribed offences



- By section [249A\(2\)](#), the offences for which a LHA may impose a penalty are:
  - failing to comply with an improvement notice, under section [30](#), 2004 Act;
  - managing or having control of an unlicensed HMO, under section [72\(1\)](#);
  - permitting an HMO to be occupied by more than the authorised number of households or persons, under section [72\(2\)](#);
  - failing to comply with an HMO licence condition, under section [72\(3\)](#);
  - managing or having control of an unlicensed Part 3 house, under section [95\(1\)](#);
  - failing to comply with a licence condition in respect of a Part 3 house, under section [95\(2\)](#);
  - failing to comply with an overcrowding notice in respect of an HMO that is not required to be licensed under Part 2 of the 2004 Act, under section [139\(7\)](#); and
  - failing to comply with regulations made under section [234](#) of the 2004 Act relating to the management of HMOs.

## Exercising the power to penalise: proof and policy



- LHAs must satisfy themselves, before taking formal action, that there would be a realistic prospect of conviction – i.e. proving the offence to the criminal standard of proof - if they were to prosecute the offence in the Magistrates' Court.
- Statutory guidance recommends that LHAs consult the Crown Prosecution Service [Code for Crown Prosecutors](#), to determine whether they would have sufficient evidence to secure a conviction in the Magistrates' Court.
- Further, LHAs are expected to develop and document their own policies to determine when to prosecute and when to impose a penalty; and to decide which option to take on a case-by-case basis, in accordance with that policy.
- Prosecution, the guidance suggests, may be - but is not necessarily - the most appropriate option where an offence is particularly serious or the offender has a history of committing similar offences.
- See: *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (DCLG, April 2018), section 3 ([here](#))

# Limitations on the statutory power



- LHAs' power to impose a penalty is circumscribed in several important respects.
- First, a LHA may not impose a financial penalty in respect of conduct constituting an offence:
  - if the person has already been convicted of the offence in respect of that conduct, or
  - criminal proceedings for the offence have been instituted in respect of the conduct and the proceedings have not been concluded: *section [249A\(5\)](#), 2004 Act*
- Secondly, a LHA may impose only one financial penalty on a person in respect of the same conduct: *section 249A(3), 2004 Act*.
  - Where more than one person has committed the same offence, however – for example, where neither the person managing nor the person having control of a licensable HMO has applied for a licence authorising its occupation – a LHA may impose a penalty on each of them as an alternative to prosecution..
- Thirdly, the amount of the penalty must not exceed £30,000: *section 249A(4), 2004 Act*.





# Pre-penalty procedure

# Notice of intent to impose a penalty: content and response



- Before imposing a financial penalty, the LHA must give notice of its proposal to do so – a ‘notice of intent’: [Schedule 13A](#), 2004 Act, paragraph 1
- The notice must set out:
  - the amount of the proposed financial penalty;
  - the LHA’s reasons for proposing to impose the penalty; and
  - information about the right to make representations under paragraph 4 of Schedule 13A to the 2004 Act.

*Schedule 13A, 2004 Act, paragraph 3*

- Failure to comply with the statutory formality requirements, or to provide the recipient with sufficient reasons, will not necessarily invalidate the notice:

*Waltham Forest LBC v Younis* [2019] UKUT 0362 (LC)

- A person served with such a notice may make written representations to the LHA about its proposal to impose a financial penalty, but must do so within a period of 28 days, beginning with the day after that on which the notice was given.

*Schedule 13A, 2004 Act, paragraph 4*

# Waltham Forest LBC v Younis [2019] UKUT 0362 (LC)

## Sufficiency of reasons in notices of intended financial penalties



### Essential facts

- Notice of intent to impose a financial penalty (“NIP”) must set out: the amount of the penalty; the reasons for imposing it; and info. about the right to make representations ([Sched.13A](#), para.3, HA 2004)
- W served notice on Y for breaching a condition of his Part 3 licence, contrary to [s.95\(2\)](#) HA 2004
- W did not elucidate but exhibited statements detailing the offence, and referred Y to its online enforcement policy
- Y later appealed against W’s final penalty notice, arguing that the NIP was insufficiently reasoned and invalid
- FFT found W’s reasons insufficient, the notice invalid and allowed Y’s appeal in full

### Held: W’s appeal allowed

- NIP must provide a sufficient account of a LHA’s reasons to enable the recipient to understand what conduct or omission amounts to the offence [50]
- W had done so: there was no reason why a LHA’s reasons could not be set out in more than one document [51-52]
- Still, a “*concise statement of the facts*” of the offence “*would be preferable*” [58]
- A mere link to an online policy would not be enough to explain the penalty amount [57], but W had provided enough info. with its NIP
- Insufficiency of reasons will not invariably invalidate a NIP [74]. Even if W’s reasons had been defective, Y had not been prejudiced [76]

# Notice of intent to impose a penalty: time limits



- Notice must be given before the end of the period of 6 months beginning with the first day on which the LHA has sufficient evidence of the conduct to which the penalty relates: [Schedule 13A, 2004 Act, paragraph 2\(1\)](#)
  - Note: the language differs from that limiting the period for beginning prosecutions in the Magistrates' Court under section [127\(1\)](#), Magistrates' Court Act 1980:
- If, however, on that day:
  - the person continues to engage in the conduct; and
  - the conduct continues beyond the end of that day,

the LHA may give notice of its intent at any time when the conduct is continuing or within the period of 6 months beginning with the last day on which the conduct occurs: *Schedule 13A, 2004 Act, paragraph 2(2)*
- For this purpose, again, a person's conduct includes a failure to act: *Schedule 13A, paragraph 2(3)*

# Final notice of a LHA's penalty decision



- Once the period for representations has ended, the LHA must decide whether to impose a penalty and, if it decides to do so, its amount: [Schedule 13A](#), 2004 Act, paragraph 5
- In that case, it must then serve a further notice - a 'final notice' - imposing the penalty and requiring it to be paid within a period of 28 days, beginning with the day after that on which the notice is given: *Schedule 13A, 2004 Act, paragraphs 6 and 7*
- The notice must also set out:
  - the amount of the penalty,
  - the LHA's reasons for imposing it,
  - information about how to pay the penalty,
  - the period for payment of the penalty (above),
  - information about the person's rights of appeal, and
  - the consequences of failing to comply with the notice.

*Schedule 13A, 2004 Act, paragraph 8*

- Note: The LHA may at any time withdraw a notice of intent or a final notice, or reduce the amount specified in either such notice. To do so, it must give notice in writing: *Schedule 13A, 2004 Act, paragraph 9*

 The penalty amount

# Determining the penalty amount



- Presently, LHAs may impose a penalty not exceeding £30,000 for each prescribed offence committed: section [249A\(4\)](#), 2004 Act
  - Note: the Secretary of State is given power, under section 249A(8), to amend the prescribed maximum to reflect changes in the value of money.
- There is no statutorily prescribed minimum.
- LHAs are expected to have a documented policy to determine the appropriate amount of a penalty in any given case.
- Generally, statutory guidance suggests, the amount imposed should reflect the gravity of the offence committed, as well as the offender's history of offending. The maximum amount of £30,000 should, it is suggested, be reserved for the very worst offenders.
- See *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (DCLG, April 2018), paragraph 3.5 ([here](#))

## Determining the penalty amount: relevant factors



- The Secretary of State recommends that LHAs consider the following factors to ensure that the penalty is fixed at an appropriate level:
  - The severity of the offence.
  - The offender's culpability and track record.
  - The harm caused to the tenant.
  - Punishment of the offender
  - Deterring the offender from repeating the offence
  - Deterring others from committing similar offences
  - Removing any financial benefit to the offender
- LHAs will also need to consider the resources of the person on whom they intend to impose a penalty and, to that end, assess the offender's assets and income.
- See *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (DCLG, April 2018), paragraphs 3.4 to 3.5 ([here](#))
- This list should not be treated as exhaustive; and care should be taken not to penalise a recipient twice for offences arising from the same conduct: *Sutton v Norwich CC* [2020] UKUT 90 (LC) at [243] ([here](#))



# *Sutton v Norwich CC* [2020] UKUT 90 (LC)

## Double punishment, totality and proportionality



### Essential facts:

- N imposed financial penalties on S and the company of which he was a director, F, totalling c.£236k each
- Penalties were imposed for (a) failing to comply with improvement notices, contrary to [s.30\(1\)](#) HA 2004, and (b) breaching the Licensing and Management of HMOs (Additional Provisions) (England) Regulations 2007, contrary to [s.234\(3\)](#)
- S and F appealed on numerous grounds including (for present purposes) that the penalties were disproportionate and failed to take account of relevant considerations, including (a) the totality principle, i.e. that the total of penalties imposed should reflect all offending behaviour and be proportionate.

### Held ([here](#)) on transfer to the UT:

- Substantial penalties exceeding the maximum for an individual offence may be given to penalise a number of offences [241]
- As he was a director of F, S had in effect been punished twice for offences arising out of the same facts [250]
- That was unjustified: the penalty imposed on each of the appellants should have been fixed having regard not just to the statutory maximum but also to the penalty being imposed on the other [251]
- The correct approach was to ask: (1) what financial penalty the offence merited, and (2) the level that corporate and personal defendants could reasonably be expected to meet: *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr.App.R(S) 436 [249]



## Ancillary consequences

## Ancillary consequences



- LHAs may include the details of a person who receives two or more financial penalties in a twelve month period in the database of rogue landlords and property agents that it is required to maintain under Chapter 3 of Part 2 to the 2016 Act.

Section [30\(2\)](#), 2016 Act

- While not obliged to do so, LHAs are strongly encouraged to make such use of the database as it, “will help ensure that other local housing authorities are made aware that formal action has been taken against the landlord”.

*Civil Penalties under the Housing and Planning Act 2016:  
Guidance for Local Housing Authorities* (DCLG, April 2018), paragraph 7.4 ([here](#))

- Further, LHAs may take any such penalties into account when considering whether a person is fit and proper to hold a licence under Part 2 or Part 3 of the 2004 Act.

Sections [66\(2\)](#) and [89\(2\)](#), 2004 Act



## Recovery and use of penalty sums

# Recovery and use of penalties



- If a person fails to pay a financial penalty, or any part of it, the LHA may enforce it in the County Court. In that case, the penalty, or such part of it as is unpaid, may be recovered as if it were payable under an order of the Court: [Schedule 13A](#), 2004 Act, paragraph 11
- In such proceedings, a certificate which:
  - is signed by the LHA's chief finance officer; and
  - states that the amount due has not been received by a date specified in the certificate,will be conclusive proof of that fact; and will be treated as being signed by the LHA's chief finance officer unless the contrary is proved: *Schedule 13A, 2004 Act, paragraph 11*
- A LHA may apply any financial penalties recovered under section 249A of the 2004 Act to meet its costs and expenses - whether administrative or legal – incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector.
- Any amount not so applied must be paid into the Consolidated Fund.

*Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017, Regulation 4 ([here](#))*



# Appeals to the First-tier Tribunal

# Appeals to the First-tier Tribunal



- A person to whom a final notice is given may appeal to the First-tier Tribunal against either the LHA's decision to impose the penalty or the amount of the penalty: [Schedule 13A](#), 2004 Act, paragraph 10
- An appellant must provide the Tribunal with notice of any appeal "within 28 days after the date on which notice of the decision to which the appeal relates was sent to the appellant": [Rule 27](#), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
- The Tribunal has power to extend the time prescribed by Rule 27, above, under Rule 6:  
*Pearson v Bradford MDC* [2019] UKUT 0291 (LC) ([here](#))
- When considering an application to extend time, a tribunal's approach should be similar to the 3-stage CPR approach, i.e. per *Denton v T H White Ltd* [2014] EWCA Civ 906 at [para.24](#) [21-23]:  
*Haziri v Havering LBC* [2019] UKUT 330 (LC); [2020] LLR 112 ([here](#))
- In the event of an appeal, the LHA's final notice is suspended until the appeal is finally determined or withdrawn: *Schedule 13A, 2004 Act, paragraph 10*

# Pearson v Bradford MDC [2019] UKUT 0291 (LC)

## Extending time for FTT appeals



### Essential Facts

- B imposed a financial penalty on P, under [s.249A](#) HA 2004, for failing to license an HMO, contrary to [s.72\(1\)](#)
- Final notice of the penalty, dated 7.11.18, informed P that he had 28 days to appeal (see [r.27](#), Tribunal Procedure (FTT) (PC) Rules 2013)
- P appealed, but not until 25.01.19
- FTT struck out the appeal, on the basis that (a) it was out of time and (b) P had offered no good reason for delay – he had “*been busy*” over Christmas
- P appealed

### Held ([here](#)): Appeal dismissed

- FTT had a discretion to extend time for P’s appeal (see rr.27 and [6\(3\)\(a\)](#) of the 2013 Rules)
- It had an unfettered discretion to extend time under r.6(3)(a)
- The UT would only interfere with an exercise of FTT discretion on procedural matters if it “*has exceeded the bounds of a reasonable exercise of discretion*” [5]
- The FTT had not taken a wrong approach and no good reason had been offered for the delay



# Haziri v Havering LBC [2019] UKUT 330 (LC); [2020] LLR 112

## Extending time for FTT appeals



- **Essential Facts**

- HLBC imposed penalties on H for failing to license an HMO, contrary to [s.72\(1\)](#), and for breaches of HMO management regulations, contrary to [s.234\(3\)](#)
- H appealed, but did so 10 days late, after the 28-day limitation period had expired
- FTT refused to extend time and H appealed

- **Held ([here](#)): appeal dismissed**

- UT “*should not interfere with a discretionary case management decision by an FTT judge who has applied correct principles and taken into account matters which should be taken into account and not taken into account irrelevant matters unless ...*

- *... it is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the FTT judge.”* [20]
- A tribunal’s approach to procedural non-compliance should be similar to the 3-stage CPR approach, i.e. per *Denton v T H White Ltd* [2014] EWCA Civ 906 at [para.24](#) [21-23]
- “*It is [...] vital [...] that this Tribunal uphold robust fair case management decisions by FTT judges*” [24]
- “[...] *the proper focus is not on the underlying merits of the dispute.*” [26]
- Further, delay is a relative concept: “*A delay of 10 days in doing something which is required to be done in 28 days is capable of being regarded as significant.*” [28]

# First-tier Tribunal hearings and disposal



- An appeal in respect of a financial penalty is a re-hearing of the LHA's decision but may be determined having regard to matters of which the LHA was unaware: [Schedule 13A](#), 2004 Act, paragraph 10

*“On a rehearing an appellant is entitled to expect that the F-tT will make up its own mind. In doing so it is not required to adopt the approach advocated by Mr Madden of starting with a blank sheet of paper, and it is entitled to have regard to the views of the local housing authority whose decision is under appeal.”*

*Clark v Manchester CC* [2015] UKUT 0129 (LC) at [41] ([here](#))

- The proceedings are civil in nature, decided according to Tribunal rules, and applying the same approach to procedure as the F-tT ordinarily applies, *not* by importing criminal procedure rules: *Waltham Forest LBC v Younis* [2019] UKUT 0362 (LC) at [48]
- The Tribunal may determine the appeal by confirming, varying or cancelling the LHA's final notice.
- It may not, however, vary the final notice so as to impose a larger financial penalty than the LHA could have imposed, i.e. £30,000: *Schedule 13A*, 2004 Act, paragraph 10



## **The F-tT's approach to LHA decisions and policies**

# Waltham Forest LBC v Marshall and Ustek [2020] UKUT 35 (LC)

## Respect due to financial penalty policies



### Essential facts:

- W imposed financial penalties on M and U, under [s.249A](#) HA 2004, for failing to license flats under their control, contrary to [s.95\(1\)](#)
- W calculated penalties according to its licensing enforcement policy and, principally, the seriousness of the offence, categorised in six bands in a Civil Penalties Matrix
- M's offence fell within Band 2, U's within Band 4; and M and U were penalised accordingly: £5000 and £12,000 respectively
- On appeal, the FTT reduced M's penalty to £1000 (equivalent to a low penalty for a Band 1 offence) and U's to £4000 (equivalent to a high penalty for a Band 1 offence)

### Held ([here](#)): W's appeals allowed

- FTT may not entertain challenges to a LHA's policy: only Admin. Court may do so [52-53]
- FTT must start from the LHA's policy and consider any arguments that it should depart from it
- The appellant bears the burden of persuading it to do so [54]
- FTT must look at the policy's objectives and ask whether they will still be met if it departs from the policy [54]; and consider the need for consistency between offenders – the very rationale for having a policy [85]
- Further, FTT must “*afford considerable weight*” - “*special weight*”- to the LHA's decision [61-62]
- FTT had paid only lip service to W's policy and decisions: W's “*generous*” penalties reinstated [85-92] [97-101]



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