

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTIES – whether converted office building a section 257 HMO or an “apart-hotel” – non-compliance with improvement notices – breaches of HMO Licensing and Management Regulations – service of notices by email – reasonable excuse defence – maximum penalties imposed on corporate building owner and on director for multiple breaches – section 257, Housing Act 2004 – Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 – appeals allowed in part

IN THE MATTER OF APPEALS UNDER SCHEDULE 13A, HOUSING ACT 2004

BETWEEN:

NICHOLAS SUTTON (1)
FAITHS' LANE APARTMENTS LIMITED
(in administration) (2)

Appellants

and

NORWICH CITY COUNCIL

Respondent

Re: Max House,
Wales Square,
60 St Faiths Lane,
Norwich,
NR1 1NN

Martin Rodger QC, Deputy Chamber President and Peter D McCrea FRICS

Royal Courts of Justice
7-10 January 2020

Mr Nicholas Sutton, the first appellant, represented himself
There was no attendance on behalf of the second appellant
Marcus Croskell and *Lynne Shirley*, instructed by NP Law, for the respondent

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The following cases are referred to in this decision:

Boddington v British Transport Police [1999] 2 AC 143

Crawley BC v Sawyer (1987) 20 HLR 98

Darlington Borough Council v Kaye [2004] EWHC 2836 (Admin)

Godwin v DPP (1993) 96 Cr. App. R. 244

Hastie & Jenkerson v McMahon [1990] 1 WLR 1575

IR Management Services Ltd v Salford City Council [2020] UKUT 81 (LC)

Living Waters Christian Centres Ltd v Conwy CBC (1998) 30 HLR 371, C.A.

London Borough of Waltham Forest v Marshall [2020] UKUT 0035 (LC)

Okereke v Brent London Borough Council [1967] 1 Q.B. 42, C.A.

PNC Telecom plc v Thomas [2003] BCC 202

R v Hackney LBC ex p. Evenbray Ltd (1987) HLR 191, QBD

R v Petrie [1961] 1 WLR 358

R v Rollco Screw and Rivet Co Ltd [1999] 2 Cr App R(S) 436

R v Unah [2012] 1 WLR 545

UKI (Kingsway) Ltd v Westminster City Council [2018] UKSC 67

Contents

	paragraphs
Introduction	1-3
The facts in outline	4-29
The statutory enforcement of housing standards	30-57
The issues in the appeal and the burden of proof	58-60
Was Max House a section 257 HMO?	61-99
The validity of the improvement notices – improper purpose	100-109
Can financial penalties be imposed on Mr Sutton personally?	110-119
Were the financial penalty notices properly served?	120-138
Was either of the appellants the manager of Max House and responsible for compliance with the 2007 Regulations?	139-143
Were the 2007 Regulations breached?	144-184
Were the improvement notices complied with?	185-211
Have either FLAL or Mr Sutton established a defence of reasonable excuse?	212-234
The appeals against the quantum of the penalties imposed	235-302
The prohibition order appeal	303-307
Disposal	308

Introduction

1. This is the decision of the Tribunal on a number of appeals by Mr Nicholas Sutton and Faith's Lane Apartments Ltd (FLAL) which principally concern civil financial penalties imposed on them by Norwich City Council under section 249A, Housing Act 2004. The penalties relate to alleged breaches of the 2004 Act concerning compliance with improvement notices served by the Council on FLAL, and breaches of the Licensing and Management of Houses in Multiple Occupation (Additional Provisions)(England) Regulations 2007 (the 2007 Regulations) in respect of Max House, a former office building at 60 St Faiths Lane, Norwich. FLAL owns the freehold of Max House and Mr Sutton is its sole director and majority shareholder.
2. In aggregate the penalties imposed on Mr Sutton and FLAL totalled £236,600 each. The civil penalty regime is a relatively new one, and for that reason, and because of the magnitude of the penalties and the number of issues, the appeals were transferred to the Upper Tribunal for hearing.
3. On 16 August 2019, shortly before the appeals were due to be heard, FLAL went into administration. That led to a postponement of the hearing to enable Mr Sutton to obtain new representation (having previously instructed solicitors and counsel with the company). In the

event, Mr Sutton chose not to obtain professional assistance and presented his own appeal. There was no representation on behalf of FLAL, but its administrators wrote to the Tribunal shortly after their appointment referring to the statutory moratorium on instituting or continuing legal proceedings against a company in administration; as there has been no application to postpone the hearings of the company's appeal, and as the moratorium applies to legal proceedings against a company, not proceedings brought by the company itself, we will deal with FLAL's appeal in this decision. The Council was represented by Mr Marcus Croskell and Ms Lynne Shirley. We are grateful to them all for their assistance.

The facts in outline

4. Max House was built as an office building, probably in the 1970s, but it had become vacant by 2008. It is arranged in two wings around a courtyard with three floors in each and an extensive basement. In 2008 planning permission was granted to a company owned by Mr Sutton to change the use of the building from offices to an "apart-hotel" an expression which Mr Sutton said meant "a serviced apartment complex for guests requiring extended stay serviced accommodation". That planning permission was never implemented and lapsed in 2011 but a second application for the same use was granted in June 2012. By that time the freehold of Max House had been transferred to FLAL, a single purpose vehicle of which Mr Sutton is sole director and majority shareholder.
5. In January 2013 FLAL granted a 25-year lease of the building to another of Mr Sutton's companies, Max Apartments (Norwich) Ltd. We assume that the work required to convert the building to its new use was carried out by that company. In any event the work was undertaken and by 2015 apartments and studios in the building were being advertised by local estate agents as available to let on conventional tenancies. The minimum period of occupation contemplated by the advertisements we have seen was six months, but shorter periods were available through other agencies targeting visitors to Norwich.
6. Initially at least, the apartments were occupied under "licences" in return for a monthly fee; in practice this was inclusive of other occupation expenses despite the licence agreements referring to an additional variable charge to cover utilities and other bills, including wi-fi and council tax. A deposit was taken equal to one month's occupation charge. The licences were granted in the name of a company named Max Estates Ltd, and were drafted as a deed to be executed on behalf of that company by its director Mr Sutton. Later, some apartments were let under conventional assured shorthold tenancies in which Mr Sutton was named personally as the landlord, including one occupied by Ms Abigail Nicholson in August 2018.
7. Although an application for Building Regulations approval was submitted in 2013, no completion certificate was ever obtained for the works to convert Max House from an office building to hotel or residential use. Whether this was simply because of frequent changes of personnel at CNC Building Control, the Council's building control contractor, or whether it was because the building was not compliant is a contentious point. In 2013 and again in February 2014 the possibility of a final inspection leading to the grant of a certificate was mooted but by the end of 2017, long after it had become substantially occupied, the building remained under scrutiny by CNC and by Norfolk Fire and Rescue Service. To this day, Max

House has not been certified as having been completed in compliance with Building Regulations.

8. On 7 December 2017 the occupant of one of the flats, Mr Kime, contacted the Council's private sector housing team to complain about the absence of heating which, he claimed, caused his flat to be "constantly freezing". The complaint was passed to the housing team leader, Ms Ellen Spencer, who carried out an inspection of the building on 19 December 2017 together with Mr Paul Clarke, one of her Council colleagues, and Mr George Bray, a senior fire safety advisor with Norfolk Fire and Rescue Service.
9. In the course of her inspection Ms Spencer carried out a Housing Health Safety Rating System (HHSRS) survey. HHSRS is the standard local authority assessment scheme for classifying safety hazards in residential buildings.
10. Ms Spencer notified the results of her inspection to Mr Sutton by email on 22 December 2017. She told him that Max House was a house in multiple occupation (HMO) under section 257 of the 2004 Act. 34 of its 47 apartments were occupied and in the 20 fitted with only single glazed windows she had found category 1 excess cold hazards (the most serious classification). Some of these flats were entirely without heating and Ms Spencer requested that, as a temporary measure, flats 101 and 102 be provided with portable electric heaters (flat 101 was Mr Kime's flat). She also recorded her concerns over the adequacy of fire precautions, especially in relation to fire separation and the protection of means of escape. She reported complaints made to her by occupiers about regular power cuts and informed Mr Sutton that she wished to carry out further investigations of the electrical installations. She concluded by making a formal request under the 2007 Regulations for a copy of the current electrical testing certificate for the building which she asked to be provided to her by 2 January 2018.
11. Ms Spencer sought information about the ownership and management of the building by serving formal notices under section 16, Local Government (Miscellaneous Provisions) Act 1976. The only response she received was from Max Estates Ltd on 22 January 2018, which stated that it was the "operator of serviced apartments" at Max House. Subsequently, on 24 April 2018, Mr Sutton confirmed that Max Estates Ltd acted as agent for the freeholder, FLAL.
12. No copy of an electrical testing certificate was provided by Mr Sutton, despite further reminders, and on 19 January 2018 he informed Ms Spencer that the relevant certificate had been "supplied to building control a long time ago". On 4 January 2018, on Ms Spencer's instructions, the electrical installations were tested by Facit Testing Ltd. They were found to be unsatisfactory and in poor condition. The test report listed 528 separate defects, nine classified as "Code 1" representing a present danger requiring immediate remedial action and a further 263 "Code 2" being potentially dangerous and requiring urgent action.
13. On 12 February 2018 the Council issued eight improvement notices under section 12 of the 2004 Act requiring remedial action to be taken by 29 June 2018. By section 30, 2004 Act it is an offence to fail to comply with an improvement notice.

14. The improvement notices were addressed to FLAL at the address provided for it at Companies House and at the Land Registry.
15. Six of the improvement notices required remedial action to be taken to remedy excess cold hazards affecting flats 001, 003, 012, 101, 102 and 112; the remedial action required was the provision of double or secondary glazing, and the installation of central heating, storage heaters or fixed panel heating.
16. A seventh notice required remedial action in relation to fire safety hazards throughout the building, including the installation of fire breaks behind electrical socket boxes, fire stopping collars around ducting and pipe work, and the provision of an electrical test certificate for the entire installation showing it to be free of the most serious (Code 1 and 2) deficiencies.
17. The eighth notice related to electrical hazards. It recorded that some work had already been carried out in the plant room (which required to be certified) and repeated some of the requirements of the seventh notice. It also required remedial action to be taken to remedy defects in the distribution boards serving individual flats, and to rectify the inadequacy of the sub-main circuit which was described as under-sized, overloaded and insufficiently earthed.
18. Each of the improvement notices stated that a person who failed to comply would be liable on summary conviction to a fine not exceeding £5,000. The notice made no mention of the availability of civil penalties of up to £30,000, which had been introduced with effect from 6 April 2017 under section 249A, 2004 Act.
19. The time for compliance with the improvement notices expired on 29 June 2018. On 10 July Mr Sutton provided an account of the work which had been completed or was shortly to commence. On 11 July Ms Spencer inspected the building and concluded that although some work had been done the notices had not been fully complied with. On further visits on 18 July and 31 August she formed the same impression.
20. Ms Spencer concluded that offences under section 30 of the 2004 Act had been committed in relation to five of the eight improvement notices – those relating to fire hazards, electrical hazards, and excess cold in flats 101, 102 and 112. The commission of such offences engages the power to levy civil penalties as an alternative to prosecution.
21. On 17 September 2018 Ms Spencer arranged for the service of ten notices of intent to impose financial penalties, five on Mr Sutton in his capacity as a director of FLAL, and five on FLAL itself. She had intended that notices would be served in respect of the excess cold hazard in flats 101, 102 and 112, but, in error, no notices were served in respect of flat 112, with two copies of the same notices referring to flat 101 being sent instead.
22. The penalties proposed in the notices of intent were substantial. For failing to comply with the three notices requiring remedial action against excess cold in flats 101 and 102 the maximum penalty of £30,000 was to be imposed on both Mr Sutton and FLAL in respect of each notice. The same maximum penalties against both were proposed for failure to comply

with the notice requiring fire safety improvements. Penalties of £20,000 each were proposed in respect of the notice concerning electrical hazards.

23. No representations were received from either Mr Sutton or the company in response to the notices of intent and on 17 October 2018 final notices imposing the proposed penalties (including one in respect of flat 112, given on the erroneous assumption that an appropriate notice of intent had been sent on 17 September) were served on both. In aggregate each set of five notices imposed penalties of £140,000 on Mr Sutton and same sum on FLAL.
24. As a result of her inspections of the building Ms Spencer had also become satisfied that there were sufficient breaches of the 2007 Regulations to justify the imposition of separate financial penalties. On 11 June 2018, before the expiry of the improvement notices, notices of intent to impose penalties were served, five on Mr Sutton in his capacity as a director of FLAL, and five on FLAL itself. It is Mr Sutton's case that proper service of the notices was not achieved because they were sent to the wrong address, although he also received the same material by email.
25. The following breaches were alleged in the notices of intent:
 1. breach of the requirement of regulation 4 that the name, address and telephone contact number of the manager of an HMO be clearly displayed in a prominent position in the common parts of the building;
 2. breaches of regulation 5(1)(b) and 5(4) which require that all means of escape from fire are maintained in good order and repair, and oblige the manager to protect the occupiers from injury;
 3. breach of regulation 7(3) which obliges a manager of an HMO to ensure that every fixed electrical installation is inspected and tested at intervals not exceeding 5 years by a suitably qualified person, and that a certificate of such inspection is produced to the local housing authority within 7 days of a request;
 4. breach of regulation 8(4)(a) relating to the condition of paving in the courtyard; and
 5. breach of regulation 10 which requires that sufficient bins or other suitable receptacles are provided for the storage of refuse and litter.
26. The notices of intent informed Mr Sutton and FLAL of the penalties contemplated by the Council: the maximum penalty of £30,000 was proposed for the breaches of regulations 5 and 7(3); £18,000 was proposed in respect of the breaches of regulations 8(4) and 10; and £600 was proposed for the breach of regulation 4. In respect of each breach the same penalty was intended to be imposed on Mr Sutton and on FLAL so that the total sum to be levied in respect of breaches of the 2007 Regulations was £193,200.
27. Written representations against these proposals were made by Mr Sutton on his own and FLAL's behalf on 4 July 2018. The same material was resubmitted on 31 August 2018 after further time had been allowed to enable legal advice to be taken. The representations did not divert the Council from its original intention and on 17 September 2018 final notices imposing the threatened financial penalties were served on Mr Sutton and FLAL.

28. The condition of Max House appears to have deteriorated during 2018, coinciding with the departure in April of the caretaker, Mr Colin Beadle, from his employment with Max Estates Ltd. There were frequent reports to Ms Spencer and her colleagues from residents of electricity outages, problems with sanitation in individual rooms and in the common parts of the building as a result of blocked toilets and drains, and other issues. In view of continuing concerns about the condition of the electrical systems and the standard of fire precautions in the building emergency remedial action was taken by the Council at the beginning of October 2018 to ensure that a functioning fire alarm system was available. On 30 October 2018 the Council served a prohibition order in relation to Max House prohibiting its use as residential accommodation with effect from 27 November 2018.
29. Following service of the prohibition order the building was emptied of its residents; as a result, FLAL's rental income ceased and it became unable to service its borrowing. It was this inability, rather than the burden of the financial penalties themselves (payment of which has been suspended because of these appeals) which appears to have led to the appointment of administrators by the chargee of the freehold.

The statutory enforcement of housing standards

30. These appeals are against civil penalties imposed for two distinct types of offence, failure to comply with improvement notices served under Part 1, 2004 Act on the one hand, and failure to comply with the 2007 Regulations on the other. The 2007 Regulations apply only to HMOs whereas, as we will explain, the improvement notice regime is of more general application.

Improvement notices

31. Part I of the 2004 Act introduced a new scheme for assessing housing conditions and enforcing housing standards. It provides for hazards to be prescribed and their seriousness to be categorised, with different consequences for enforcement. A hazard is defined in section 2(1) as "any risk of harm to the health or safety of an actual or potential occupier of a dwelling which arises from a deficiency in the dwelling (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)."
32. Sections 1 to 4 create a framework for assessing housing hazards as either category 1 or category 2 hazards. Section 5 imposes an obligation on a local housing authority to take appropriate enforcement action if it considers that a category 1 hazard exists. Section 7 confers power to do so if an authority considers that a category 2 hazard exists.
33. The Housing Health and Safety Rating System (England) Regulations 2005 prescribe the method of calculating the seriousness of a hazard. More serious hazards are classed as category 1 hazards, whilst lesser hazards are in category 2.
34. In each case the action available to an authority includes the service of an improvement notice (sections 11 and 12) or the making of a prohibition order (sections 20 and 21).

35. Section 11 and 12 concern improvement notices relating to category 1 and category 2 hazards respectively. The duty or power is triggered in each case by the authority being aware of the existence of a hazard “on any residential premises” and it follows that an improvement notice may be served in respect of any dwelling, flat or HMO and is not restricted to HMOs alone. An improvement notice requires the person on whom it is served to take the remedial action specified in the notice. An improvement notice may relate to more than one hazard in the same building containing one or more flats, and a single notice may combine category 1 and 2 hazards in relation to the same premises (section 12(4)-(5)).
36. There is no prescribed form of notice, but section 13 identifies the information which an improvement notice must contain, including details of the hazard, the required remedial action and the time scale for commencing and completing that action, together with information concerning the right of appeal against the authority’s decision to serve the notice. The notice is not required to specify the penalty for non-compliance.
37. Section 18 and Schedule 1 to the 2004 Act deal with the service of improvement notices. In the case of an HMO which is not licensed under Parts 2 or 3 of the Act, the local housing authority must serve the notice either on the “person having control” of the HMO, or on the “person managing” it (Schedule 1, paragraph 2(2)(b)).
38. For most purposes (including those with which this appeal is concerned) the expression “person having control” is defined in section 263, as follows:

“263(1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack rent.”

39. A modified definition of “person having control” is provided for one type of HMO, known as section 257 HMOs, but this applies only for the purpose of Parts 2 and 3 of the 2004 Act (which are concerned with HMO licensing). The unmodified definition in section 263 accordingly identifies the person having control on whom improvement notices under Part 1 of the Act are to be served in respect of section 257 HMOs.
40. The alternative addressee of an improvement notice is the “person managing” the premises. So far as is relevant in this case, that expression is defined in section 263(3) as follows:

“263(3) In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises –

(a) receives (whether directly or through an agent or trustee) rents or other payments from –

(i) In the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) ...; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.”

41. The “owner” in relation to any premises is defined in section 262(7). It always includes the owner of the freehold interest. It also includes “a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceeds 3 years”. Thus, if the premises are subject to a lease with more than 3 years left to run the “owner” will include both the lessee (the holder of the lease) and the lessor (the person entitled to receive the rent payable under the lease).
42. The general rule is that an improvement notice becomes operative 21 days after it is served (section 15(2)). The recipient of the notice may appeal to the First-tier Tribunal within the same period of 21 days under the provisions for appeals contained in Part 3 of Schedule 1 to the Act. In the event of an appeal section 15(5) provides that the notice does not become operative until the appeal process is completed and the notice is finally confirmed.
43. By section 30(1) it is an offence for a person on whom an improvement notice has been served to fail to comply with it. A person who commits such an offence is liable on summary conviction to a fine not exceeding £5,000 (section 30(3)). It is a defence that the recipient of the notice had a reasonable excuse for failing to comply with it (section 30(4)).
44. Section 251 is concerned with offences by companies, and provides as follows:

“251 Offences by bodies corporate

(1) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

- (a) a director, manager, secretary or other similar officer of the body corporate, or
- (b) a person purporting to act in such a capacity,

he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly.”

Houses in multiple occupation and the 2007 Regulations

45. The 2007 Regulations are made under powers conferred by section 234 of the 2004 Act and it is an offence to fail to comply with them, subject to a defence of reasonable excuse (section 234(3)-(4)). As we will explain, the 2007 Regulations apply to only one type of HMO (although they are similar to the management regulations applicable to other types of HMO). In this appeal it is in dispute whether Max House was an HMO at all.

46. An HMO is a building or part of a building which satisfies one of five alternative tests in section 254(1), 2004 Act. HMOs take different forms, and may be a house, a self-contained flat, a converted building, a building in mixed use, or even a block of flats.
47. The “standard” HMO is a building occupied by persons who do not form a single household but who share basic amenities, and it is described in greater detail in section 254(2). This standard test of an HMO does not include a building comprising self-contained flats (section 254(2)(a)).
48. Most blocks of flats are not HMOs. A block of flats can only be an HMO where it is a “converted block of flats” to which section 257 applies. A converted block of flats is a building or part of a building which has been converted into, and consists of, self-contained flats (section 257(1)).
49. In the case of a converted block of flats on which building work was completed after 1 June 1992, section 257 applies if two conditions are satisfied: first, that building works undertaken in connection with the conversion did not comply with the requirements imposed at that time under regulations under section 1 of the Building Act 1984 (the relevant regulations in this case are the Building Regulations 2010), and still do not comply with them; and secondly, that less than two-thirds of the self-contained flats in the block are owner occupied (section 257(2)-(3)). Such a block of flats is referred to as “a section 257 HMO”.
50. It can therefore be seen that the object of section 257 is to bring converted blocks of flats which do not satisfy modern building standards within the scope of regulation under the 2004 Act. The 2007 Regulations apply only to section 257 HMOs in England (with one small exception). They impose similar duties on managers of section 257 HMOs to those imposed on managers of other types of HMO by the Management of Houses in Multiple Occupation (England) Regulations 2006.
51. The 2007 Regulations impose duties on “the manager” of a section 257 HMO. That expression is defined uninformatively in regulation 2(c) as “the person managing the HMO”. We will come to these duties in more detail when considering the appeals.

Financial penalties

52. New provisions were inserted into the 2004 Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. They included section 249A, which came into force on 6 April 2017 and which empowers a local housing authority in England to impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person's conduct “amounts to a relevant housing offence”. The expression “relevant housing offence” includes the offences under section 30 and section 234(3) of the 2004 Act concerning non-compliance with improvement notice or with the 2007 Regulations (section 249A(2)).
53. The amount of any financial penalty is to be determined by the local housing authority but it may not be more than £30,000 (section 249A(4)). A financial penalty is an alternative to prosecution for a housing offence. Thus, a penalty may not be imposed where the person has already been convicted of the offence in respect of the conduct in question, or where

criminal proceedings have been instituted and not yet concluded (section 249A(5)). Nor may a person be convicted of an offence in respect of which a financial penalty has already been imposed (section 30(8)).

54. Schedule 13A of the 2004 Act deals with the procedure for imposing financial penalties, including appeals, enforcement and guidance. By paragraph 1, before imposing a financial penalty under section 249A the local housing authority must first give the person concerned notice of its proposal to do so, referred to as a “notice of intent”. By paragraph 2, a notice of intent must be given within six months beginning with the first day on which the authority had sufficient evidence of the conduct to which the financial penalty relates. It must set out the amount of the proposed penalty, the reasons for proposing to impose it, and information about the right to make representations.
55. A person who receives a notice of intent may make written representations to the local housing authority. If the authority nevertheless decides to impose a penalty, it must give the person a final notice setting out the reasons for doing so together with information, including information about rights of appeal (paragraphs 6, 8).
56. By paragraph 10(1) of Schedule 13A, a person to whom a final notice is given may appeal to the FTT against the decision to impose the penalty, or the amount of the penalty. Such an appeal takes the form of a re-hearing, which means that the FTT must make its own determination whether the conditions for imposing a penalty are satisfied, rather than simply reviewing the decision making of the local housing authority. The FTT may have regard to matters of which the authority was unaware, and may confirm, vary or cancel the final notice.
57. A local authority is required by paragraph 12 of Schedule 13A to have regard to any guidance given by the Secretary of State about the exercise of its functions in relation to financial penalties. Relevant guidance was issued by the Department for Communities and Local Government in April 2017. In the light of that guidance the Council formulated its own policy on financial penalties which its staff are required to apply.

The issues in the appeal and the burden of proof

58. The Appellants’ grounds of appeal and statement of case are contained in a lengthy document drafted by experienced counsel and Mr Sutton adopted them as the basis of his argument. They identified six “general grounds” of appeal and a further six “additional grounds”. There is a substantial degree of overlap between the general grounds and the additional grounds, but we will list them in the order in which they appear in the appellants’ consolidated statement of case, as follows:

The general grounds

1. At the date the financial penalties were imposed Max House was not a section 257 HMO, it was a hotel to which neither the 2004 Act nor the 2007 Regulations applied.
2. Alternatively, Max House was not a section 257 HMO because it complied with the 2010 Building Regulations.

3. The appellants were not aware Max House was an HMO and accordingly they had a reasonable excuse for their conduct.
4. The improvement notices were invalid and of no effect.
5. The Council had no power to impose financial penalties on Mr Sutton personally.
6. The penalties were unlawful, in that they were disproportionate and failed to take account of relevant considerations.

The additional grounds

7. The notices of intention of 11 June 2018 in respect of regulatory breaches were not properly served on Mr Sutton or on FLAL, and no final notice was properly served on FLAL.
 8. Neither of the appellants was the manager of Max House for the purpose of compliance with the 2007 Regulations.
 9. The 2007 Regulations were complied with, or to the extent that there was non-compliance the financial penalties imposed were excessive.
 10. The notices of intention to levy a financial penalty in respect of non-compliance with the improvement notices were defective in form or in the process adopted.
 11. The improvement notices were complied with, or to the extent that there was non-compliance the financial penalties imposed were excessive.
 12. The prohibition order was invalid.
59. On behalf of the Council, Mr Croskell accepted that, although the appeals were brought by FLAL and Mr Sutton, it was for the City Council to satisfy the Tribunal beyond reasonable doubt that their conduct amounted to the relevant offences (section 249A(1), 2004 Act). In the case of the offences alleged against Mr Sutton personally, it was necessary for the City Council to establish to the required standard both that FLAL's conduct amounted to the relevant offences, and that Mr Sutton had consented or connived in that conduct, or that it had been attributable to neglect on his part (section 251(1), 2004 Act).
60. We will deal with grounds 3, 6 and 11, which relate to the question of reasonable excuse and the scale of the penalties, after we have considered the other grounds.

Grounds 1 and 2: Was Max House a section 257 HMO?

61. The two grounds on which Mr Sutton argued Max House was not a section 257 HMO were, first, that it was not an HMO at all, but rather was an "apart-hotel" providing accommodation for hotel guests for extended periods of time, and, secondly, that it had been completed in compliance with the 2010 Building Regulations and so did not satisfy the condition in section 257(2).

Can a hotel be a section 257 HMO?

62. To be a section 257 HMO a building must be a converted block of flats i.e. a building which has been converted into and consists of self-contained flats (section 257(1)).
63. Relevant definitions are provided by section 254(8) and section 262(6). A “*converted building*” is a building (or part of a building) consisting of living accommodation in which one or more units of accommodation have been created since the building was constructed. A “*self-contained flat*” is a separate set of premises which forms part of a building, either the whole or a material part of which lies above or below some other part of the building, and in which all three basic amenities (i.e. a toilet, personal washing facilities, and cooking facilities) are available for the exclusive use of its occupants. The expression “*occupier*” and related expressions refer to a person who “occupies the premises as a residence” and does so as a tenant or licensee.
64. Taken together these definitions describe the physical characteristics and facilities which will be found in a section 257 HMO. The only express requirement relating to the nature or quality of the occupation of those who may be using the building is found in section 257(2)(b) which makes it a condition of being a section 257 HMO that less than two-thirds of the self-contained flats are owner-occupied. The appellants’ original counsel, in their consolidated statement of case, nevertheless pleaded that, as a matter of ordinary language, a hotel was not a block of flats, and that the reference in section 257(2)(b) to owner-occupation was inconsistent with the notion that a hotel could be a section 257 HMO. There were also said to be other indications in the provisions relating to HMOs which demonstrated that they were not intended to include hotels. In particular, by reason of the definitions of HMOs in section 254, all other types of HMO consist of premises in which the persons occupying do so “as their only or main residence”, a condition which, it was said, could not be satisfied in the case of a guest occupying a hotel room.
65. Under the law as it was before the commencement of the 2004 Act, when the regulation of housing standards was governed by Part XI, Housing Act 1985, the requirement that premises should be occupied “as a residence” was absent from the definition of an HMO. As a result, houses occupied for the purposes of a hotel (*R v Hackney LBC ex p. Evenbray Ltd* (1987) HLR 191, QBD) and as a religious retreat centre (*Living Waters Christian Centres Ltd v Conwy CBC* (1998) 30 HLR 371, CA) were held to fall within the scope of the legislation. In *Okereke v Brent London Borough Council* [1967] 1 Q.B. 42, C.A. a house converted into flats was also held to be an HMO. The 2004 Act introduced much more nuanced classifications of four different types of HMOs.
66. Against that background it is striking that, to be an HMO of any type other than a section 257 HMO, the relevant premises must be intended to be occupied by someone “as a residence”. That requirement suggests a definite policy choice to limit the scope of local authority responsibilities and to exclude the sort of temporary accommodation which had been found to come within the 1985 Act. The same expression is not found in section 257 itself, but it appears to us probable that it is also a necessary requirement of a section 257 HMO, as a building which consists of “self-contained flats” less than two-thirds of which are “owner-occupied”, that those flats are available for occupation as a residence. The definition of self-contained flat in section 254(8) refers to the facilities which must be available for the exclusive use of its “occupants”, which, having regard to the definition in

section 262(6), means persons who occupy the premises “as a residence”, and as tenants or licensees.

67. The concept of occupation “as a residence” is familiar in housing law, and goes back at least to the Rent Act 1968 which made it a condition of the existence of a statutory tenancy. In *Crawley BC v Sawyer* (1987) 20 HLR 98 the Court of Appeal held that there was no material difference between occupying premises as a "home" and occupying them as a "residence". Each connotes a physical presence and an intention to remain or return which, together, give the occupation the quality of permanence which justifies statutory protection.
68. The Council did not present its case on the basis that a hotel could be a section 257 HMO and we received no argument on the question whether occupation as a residence was or was not a requirement of that classification. Because of the body of authority under the 1985 Act and its predecessors, to the effect that a hotel could be an HMO, and because of the absence of argument on either side, we do not intend to decide the point in this appeal. We will proceed on the assumption that occupation as a residence is a requirement of a section 257 HMO and that, for that reason, a hotel does not fall within the scope of the 2004 Act.

Was Max House occupied as a residence or as a hotel?

69. Assuming that the status of a converted block of flats as a section 257 HMO depends on the self-contained flats comprised in it being occupied as residences, the next question is whether such occupation has been proven during the relevant period beginning in December 2017 and continuing until the emptying of the building in response to the prohibition order. We are satisfied that it has.
70. Mr Sutton described Max House as an “apart-hotel”, an apartment complex for guests requiring extended stay serviced accommodation. Each of the 47 flats or studios had cooking, washing and sleeping facilities. The fully furnished units were available either for short stays booked through hotel booking agencies or on extended stays through estate agents on the basis of rolling monthly agreements. The features on which he relied as demonstrating that the building was a hotel, rather than a conventional block of flats, were that no credit checks were undertaken and, rather than paying a deposit, guests paid the first and last month’s fee for occupation when they moved in. Guests paid no council tax or utility charges and the whole building was assessed for business rates as a single unit. Extended stay guests could request a weekly cleaning service. Planning consent had been granted in 2012 for the conversion of offices (class B1) to a 47 unit apart-hotel (Class C1), and the units within the building did not comply with the space standards for residential apartments in the local plan.
71. We also received evidence from Michelle Brown, who manages the head office operations of Max Estates Ltd, which was responsible for the letting and management of Max House on behalf of FLAL. When the building first opened in 2014 occupiers were sourced through online agencies and most were business or leisure customers who stayed for a few nights. As the business became more established clients wished to stay for longer periods. Lettings were also sourced through on-line listings on Rightmove and Zoopla by conventional letting

agencies. These occupiers tended to stay for longer and were charged correspondingly favourable rates. The company had a key to each room in the building.

72. Evidence was adduced by the Council in the form of written witness statements by 17 former residents of Max House, of whom five gave oral evidence. The effect of that evidence (which was largely unchallenged by Mr Sutton) was, in every case, that after seeing an on-line advertisement the witness had taken a more or less conventional letting of an apartment in the building, arranged through an estate agent or letting agent. None considered themselves to be a guest in a hotel, none obtained any services from Max Estates Ltd or FLAL while they were in occupation, and most regarded Max House as their only home.
73. The earliest occupier to give evidence was Ms Petya Radina, who had moved into Max House with her husband in June 2016, a few weeks before the birth of her first child, remaining until the building was closed down in November 2018. She had paid a deposit of £1,000, which was to be deducted from the last month's rent and signed a six-month contract which had continued on a monthly basis. The first floor of the building, where she lived, was mostly occupied when she moved in, and there were several other families with children. She was aware that some people used the building for short stays of only a few days, as a hotel, which they booked through websites such as Booking.com, but these were not typical. No services were provided to the longer-term residents.
74. Dr Georgios Xydopoulos, a Research Associate at the University of East Anglia, lived at Max House from about December 2016 until October 2017. He signed a six month contract in May 2017 but moved out early because of a leak through the ceiling of his flat. He had given permission to the caretaker to enter his flat to inspect it when the leak occurred. He had not received his deposit back when he left the flat, and when he asked for it to be returned he was told by Max Estates that he should have used it as his last month's rent. He told us there were many movements of people in and out of the building.
75. Ms Abigail Nicholson arrived in Norwich to take up a new job in August 2018 and moved in to a flat in Max House after signing an assured shorthold tenancy agreement provided by Abbott Fox, a letting agency, which named Mr Sutton as her landlord. She moved out, terminating the tenancy by mutual agreement, after less than two weeks because of a leak coming through the ceiling of her flat (which Mr Sutton suggested in cross examination was due to a deliberate act by a disaffected occupier who left taps running upstairs). Her deposit was repaid.
76. Nigel Roberts, a biomedical scientist, had previously lived in Bath, where he owned a home with his wife. The couple separated and he moved to Norwich to take up a new job in July 2018. His flat in Max House was his only residence in Norwich and he had no plans to return to live in Bath. He occupied under a written agreement which provided for him to pay a separate fixed amount for utilities and council tax.
77. The oldest witness to give evidence was Mr Henry Fox, aged 90, who moved to a one bedroom flat in Max House in August 2017 after selling his previous home.

78. Other relevant evidence was given by Mr Otis Hernandez, one of the City Council's housing officers, who told us that when he undertook an inspection of the fire detection and fire alarm systems in the building on 9 October 2018 he found three flats which were unoccupied and set up as hotel bedrooms, with tea and coffee making facilities and freshly made beds.
79. The planning status of the building is not relevant to application of the 2004 Act. What matters is the basis on which those who lived in Max House occupied it, and whether they were in occupation as their residence.
80. During 2017 and 2018 at least 30 of the 47 flats and studio apartments in Max House were occupied. On the basis of the evidence we have heard and read we are sure that most of those who lived there did so in what was their only home, occupying it as their residence. None of those who have given evidence had any reason to regard themselves as guests in a hotel, and while unoccupied flats were available to short term guests, these were relatively few in number and did not affect the status of the building. The permanent residents were in occupation under written agreements which were inconsistent with the suggestion they occupied as hotel guests, being usually for periods of six-months and typically giving the occupier no right to terminate without paying for at least three months. None of the long-term occupiers received any services in their flat (the only service suggested by Mr Sutton was the reception desk staffed by the caretaker, Mr Beadle) and while their contracts said that cleaning was available at an additional cost none took advantage of that offer. None was registered for council tax, but their written agreements stated that the sum payable for utilities included a payment in respect of council tax. They had exclusive possession of their flats and, however their written agreements described their status (usually as licensee), as a matter of law they were assured shorthold tenants. None was ever asked to move to a different flat, and had they been, such a request could not lawfully have been enforced except by following the procedure for terminating an assured shorthold tenancy.
81. Thus, if, as we assume for the purpose of this appeal, a hotel cannot be a section 257 HMO and there is a requirement instead that the self-contained flats in a converted building must be occupied by persons as their residence, we are satisfied that that requirement was met in the case of Max House throughout at least 2017 and 2018.

Did Max House comply with the 2010 Building Regulations?

82. For a building to be a section 257 HMO it must be shown that building work undertaken in connection with the conversion did not comply with the appropriate building standards, and still does not comply with them (section 257(2)(a)). The appropriate standards for a building converted in 2013 were the 2010 Building Regulations, which impose control on "building work". Building work includes work relating to a material change of use of a building, such as the creation of a flat in a building which did not previously contain a flat (regulations 2(1) and 5(b)).
83. Where work is done to bring about a material change of use of a building, the work must comply with the requirements of the 2010 Regulations relating to, amongst other things, means of escape, internal fire spread, and electrical safety (regulation 6(1)(a)).

84. Responsibility for enforcing building regulations lies with the relevant local authority under section 91(2), 1984 Act. A person carrying out building work must give the local authority notice not more than five days after the work has been completed, or that the building is to be occupied before it has been completed, and if it is satisfied that the relevant requirements of the 2010 Regulations have been satisfied the authority must give a certificate to that effect (regulations 16(4)-(5), 17(2)). A completion certificate is evidence, but not conclusive evidence, that the requirements specified in the certificate have been complied with (regulation 17(4)).
85. Mr Sutton acknowledged that no completion certificate under the 2010 Regulations had ever been issued. It was not suggested by the Council that the absence of a certificate was conclusive of the issue of compliance with the 2010 Regulations, but, had there been a certificate, the burden of establishing non-compliance to the required standard would have been a much more onerous one having regard to regulation 17(4).
86. Mr Sutton relied on two emails from surveyors at the Council's building control contractor, CNC Building Control, in support of his case that the building did comply with the relevant standards. The first of these was from Mr Richard Parker on 27 February 2014, and the second was from Mr Darrell McConnell on 19 December 2017.
87. It was a feature of CNC's involvement, about which Mr Sutton complained, that it experienced a very high turnover of personnel, and several inspectors were involved in connection with Max House. Neither Mr Parker nor Mr McConnell was called to give evidence, but Mr Dave Saunderson, a building control surveyor currently employed by CNC, did give evidence at the request of the Council, and produced records showing that at least six different surveyors had been involved in some capacity between 2013 and 2017. There had been three general inspections in 2013, and three separate completion inspections in July 2015, December 2016 and December 2017, none of which had resulted in a completion certificate being issued. The notes made by Mr McConnell on 12 December 2017 recorded that a completion certificate was being chased by the building owner, but that this was "not to be issued as a satisfactory completion inspection has not been carried out".
88. Mr Sutton produced an email he had received from Mr Parker of CNC on 27 February 2014. It identified information which was required before an "approval notice" could be issued. The main information recorded was in respect of the pumped drainage system "details of which had not yet been finalised", but information was also required on the final position and type of fire signage. Mr Parker said that he would be happy to agree the details on site with Mr Sutton's foreman and added that "if this is the only item left to be resolved I would be happy to note this on an approval notice". He stated that a final inspection would need to include witnessing the operation of the fire alarm system but added "we have carried out site inspections as requested by your foreman and no contraventions of the Building Regulations have been noted." Mr Sutton naturally relied strongly on that statement.
89. The second document relied on by Mr Sutton was an email from Mr McConnell to him on 19 December 2017, following an inspection which he had carried out on 15 December (two days after his note recording that a satisfactory completion inspection has not been carried out, and four days before the first inspection by Ms Spencer and Mr Bray). Mr McConnell

identified two items of paperwork which had not been supplied (commissioning certificates for the fire alarm and the emergency lighting systems) and two items of work which needed to be rectified (reinstatement of a ceiling where services had been repaired, and the replacement of a self-closer on a fire door) and stated that “once the above have been satisfactorily carried out then a completion certificate can be issued.” Mr Sutton also relied heavily on that indication and argued that it was only the intervention of Ms Spencer after her visit on 19 December 2017 which prevented the completion certificate being issued.

90. We do not place much weight on the December 2014 email from Mr Parker. It contains reference to details which had not yet been finalised, and proposes meetings with the site foreman, both of which suggest work was continuing and not yet complete. An entry in the CNC site records dated 15 July 2015 refers to a “completion issues email” and to a meeting with a representative of the building owner. In cross examining Mr Saunderson of CNC, Mr Sutton put to him that work identified as being necessary in 2015 had been undertaken and that there had then been a flood in the basement which had delayed final approval. The fact that work was continuing in 2015, after Mr Parker’s email, limits the inferences which can be drawn from it. Mr Sutton is entitled to rely on the statement that no contraventions of the Building Regulations had been noted, but that still begs the question of how closely the building had so far been inspected.
91. Mr McConnell’s email of 19 December 2017 is potentially more telling. It followed an inspection by Mr McConnell himself, and appears to give the building a clean bill of health subject to some apparently minor details. On the same day Mr Sutton emailed the commissioning certificate for the fire alarm, and on 3 January 2018 he provided photographs showing that the snagging work had been completed. He was, however, apparently unable to supply a commissioning certificate for the emergency lighting system; the request to supply it was repeated by Mr McConnell on 11 January 2018 and we were shown no document suggesting it had ever been provided. Mr Sutton told us that he had not seen it.
92. Whether a completion certificate would have been issued if the evidence requested by Mr McConnell had been forthcoming, or if Ms Spencer had not intervened, are not the critical issues. The absence of a certificate does not relieve the Council of the burden of proving beyond reasonable doubt that the building did not comply with the 2010 Building Regulations. However, on the basis of the evidence we have heard we are sure that the building did not comply in some significant respects, for the following reasons.
93. Mr McConnell’s email exchanges with Mr Sutton are not easy to reconcile with his own notes of his inspection on 15 December 2017, which included a reference to “inadequate fire stopping to service penetrations on compartment walls/floors in numerous areas and holes in walls on protected escape routes.” It is not clear why this concern was missing from his email of 19 December, but we are confident that the need for further fire stopping work had not been satisfied in the short period between the inspection and the email. The lack of proper attention to measures to stop the spread of fire between flats, and between flats and fire escape routes, was one of the most significant issues identified by Mr Bray of Norfolk Fire Service during his visit on 19 December 2017, and it remained an issue of concern to him, and to Mr Saunderson during his inspections on 24 April and 22 October 2019.

94. Fire safety is a key consideration in building standards and Schedule 1 of the 2010 Building Regulations contains relevant requirements applicable to all building work. Paragraph B1 requires appropriate means of escape in case of fire “capable of being safely and effectively used at all material times”, and paragraph B3(4) requires that the building be designed and constructed so that the unseen spread of fire and smoke within concealed spaces is inhibited. In practice these requirements are interpreted as being satisfied if fire can be contained at its source for 30 minutes in the case of a hotel, or 60 minutes in the case of an individual flat.
95. We were shown photographs taken during the inspection on 19 December 2017 of intumescent collars fitted to service pipes passing through walls or between floors in the building. The collars are designed to expand when subjected to heat and to provide a seal preventing the passage of smoke between compartments, but the examples we were shown were not fitted to any adjacent surface which, as Mr Bray pointed out, would render them useless to prevent the spread of smoke. Although the destructive risk assessment which Mr Bray said he had been calling for since 2016 had never been carried out, the problem with poorly fitting collars, and service pipes without any collars passing over escape routes, appeared to him to be a general one, not limited to the two examples we were shown. That assessment was supported by the evidence of Ms Spencer and Mr Bray concerning basement room C which contained a service riser to the top of the building without any fire stopping between levels, creating what Ms Spencer described as a chimney allowing smoke and flames to pass unobstructed to every level of the building. This room, and many others in the building, including the main first floor plant room, lacked proper fire doors and were fitted instead with flimsy doors of hollow construction into which grilles had been inserted which would allow the rapid passage of smoke into ground floor reception area and the corridors on each level which provided the primary means of escape.
96. Mr Saunderson identified the same extensive problems with fire stopping when he inspected in April 2019, long after the building had ceased to be occupied; his notes record “all fire collars passing through walls separating corridors from flats need pushing up against plasterboard and to be correctly fixed ... all holes at duct penetrations to be completed”. The necessary work seems finally to have been completed by September 2019, although at that time work was continuing to fit intumescent pads behind sockets and switches in the walls of flats which compromised smoke retention and put flats and means of escape at risk. This problem had first been identified in January 2018 by Facit Testing. It was not suggested by Mr Sutton that fire stopping had been interfered with in any way, and the provision made for it seems simply to have been inadequate. Ms Spencer suggested that the unstopped riser would have been permissible in an office building, but not in a block of flats or a hotel, and it may be that insufficient care was taken in designing and implementing the conversion.
97. Mr Sutton said that he had employed competent architects and engineers and that any defects in design were not his responsibility. We will defer consideration of that submission until we deal with the FLAL’s defence of reasonable excuse for non-compliance with the 2007 Regulations and the improvement notices. A reasonable belief that a building is not an HMO does not matter at this stage, because whether a converted building is an HMO or not depends only on satisfaction of the conditions in section 257(2). The state of knowledge of the building owner is irrelevant to the question whether the building has been converted in compliance with Building Regulations.

98. As will become clear when we deal with the improvement notices, the provision of satisfactory fire stopping between flats and escape routes is not the only respect in which the building's compliance with Building Regulations is in issue. Non-compliance at all material times with Paragraphs B1 and B3(4) of Schedule 1 to the Regulations is beyond doubt and is sufficient to enable us to conclude that Max House was a section 257 HMO. We therefore dismiss the appeals on grounds 1 and 2.
99. We now come to consider different respects in which the improvement notices are said to have been invalid.

Ground 4: The validity of the improvement notices – improper purpose

100. FLAL did not appeal against the improvement notices served on it and no appeal directly challenging the validity of those notices is before the Tribunal. Nevertheless, in the grounds of appeal prepared on behalf of the appellants it was argued that they were entitled to rely on the invalidity of the improvement notices on public law grounds as a defence to the financial penalties imposed on them for non-compliance. In support of that proposition the grounds of appeal cited *Boddington v British Transport Police* [1999] 2 AC 143, in which the House of Lords decided that a passenger convicted of smoking a cigarette in a non-smoking train carriage, contrary to railway byelaws, was entitled to raise the issue of the legality of the decision by the railway company to designate all of its carriages non-smoking, as well as challenging the validity of the byelaw itself. If a public law defence was available to a criminal charge, it was submitted that it should equally be available to a civil penalty predicated on the commission of the same offence.
101. The alleged illegality of the improvement notices rested on two alternative grounds. The first was that Max House was not an HMO at all. We have already dismissed that argument which, in any event, would not assist the appellants because a building need not be an HMO before a valid improvement notice may be given (although the fact it is an HMO may affect the identity of the person on whom the notice must be served).
102. The second alleged ground of illegality was that the improvement notices had been served for an improper purpose, namely to maximise the revenue which could be recouped by the Council in the event of non-compliance. It was pointed out, correctly, that all of the hazards with which the Council was concerned could have been included in a single improvement notice; section 12(4) allows more than one category 2 hazard to be included in a single notice, and section 12(5) allows notice of category 1 and category 2 hazards to be combined in a single document.
103. It was said that the Council had acted unlawfully in serving eight separate improvement notices rather than including all the works required in a single notice. In the absence of evidence that the Council had a valid reason for giving eight notices, it was argued, the natural inference was that it did so to circumvent the restriction in section 30(3), that failure to comply with an improvement notice is a single offence for which a single penalty of a limited fine may be imposed.

104. On behalf of the Council Mr Croskell pointed out that, by section 15(6), if no appeal is made against an improvement notice “the notice is final and conclusive as to matters which could have been raised on an appeal”. He did not, however, submit that an improvement notice served for an improper purpose could provide the basis for a valid civil penalty and did not challenge the appellants’ reliance on the principle in *Boddington*.
105. We reject the suggestion that the decision to serve eight improvement notices, rather than a single notice covering all of the alleged hazards, was tainted by the improper motive of maximising the potential penalties which could be imposed on the appellants in the event of non-compliance. It was not suggested to Ms Spencer in cross examination by Mr Sutton that that had been her motivation at the time, and no document we have seen supports the suggestion, including the City Council’s financial penalty policy which was approved in June 2017. The suggested improper purpose is simply, as it was pleaded to be, an “inference” drawn by the appellants from the fact that more than one notice was served. But no such inference can sensibly be drawn from that fact alone.
106. When an improvement notice is served on an apparently responsible company in respect of the condition of a substantial building housing many residents, the normal expectation would be that the notice would either be complied with or would be the subject of an appeal, if for any reason it was unjustified. The suggestion that the Council anticipated non-compliance and wished to maximise its potential income from the new civil penalty regime strikes us as improbable. The appropriate penalty for any breach would, in any event, be required to take into account all of the relevant circumstances, including whether other penalties were being imposed in respect of different breaches. It could not be assumed that the use of multiple notices would necessarily result in a higher aggregate penalty.
107. There are also practical reasons why separate hazards could properly be made the subject of separate notices. For example, an improvement notice does not become operative in the event that an appeal is brought against it (section 15(5), 2004 Act); if multiple hazards are combined in a single notice, an appeal in respect of any one hazard, or challenge to a single item of work out of a much larger number, may have the effect that the whole notice does not become operative.
108. As Ms Spencer explained in response to questions from the Tribunal, there were perfectly good reasons why the hazards were addressed by the service of eight notices. The excess cold hazard concerned the condition of six different self-contained flats, which were not identical, either in their position or orientation within the building, the heating provided, or the age or state of health of their occupiers. Discrete items of work were required in each flat, and Ms Spencer’s preference was to treat each separately, as the subject of its own notice. The notices concerning hazards from electricity and fire affected the whole building and required distinct packages of remedial work, although there was some overlap between the two in that the electrical faults were a significant contributor to the fire hazard. A large amount of work was required to be completed and it cannot be said to have been irrational or improper to divide it between two separate notices.
109. For these reasons we dismiss the appeal on ground 4.

Ground 5 – Can financial penalties be imposed on Mr Sutton personally?

110. Two different points were made by or on behalf of Mr Sutton under this ground of appeal.
111. Mr Sutton suggested that because no improvement notice had been served on him personally, no penalty could be imposed on him for non-compliance. The point was put in a slightly different way in the grounds of appeal, where it was said that because Mr Sutton was not an owner or person managing Max House, he could not be the subject of a financial penalty. We are satisfied that neither of these is a good point.
112. The proper recipient of an improvement notice requiring work to be done to an HMO which is not a flat is either the person having control of the HMO, or the person managing it (paragraph 2, Schedule 1, 1984 Act). Mr Sutton did not satisfy either description and no improvement notice was, or could have been, served on him.
113. Mr Sutton explained that Max Estates Ltd acted as the agent of FLAL. Although it was party to the individual occupation agreements and received the rent payable under them, it had no leasehold or other interest of its own in the building. It employed the caretaker and discharged the running costs of the building from the letting income it received from occupiers. It used the net balance to discharge some of the interest owed by FLAL on the money it had borrowed to fund the purchase and development of the building.
114. Under the arrangements described by Mr Sutton, Max Estates Ltd, was in receipt of the rack rent of the premises as agent, and was the person having control of the building (as defined in section 263(1)). As an owner of the building in receipt of rent from occupiers through its agent (it is immaterial that the money was used to discharge liabilities rather than being remitted directly to FLAL), FLAL satisfied the description of a person managing the building (section 263(3)). The Council could therefore have served improvement notices on either FLAL or Max Estates Ltd but chose to serve them on FLAL.
115. Financial penalties were levied on Mr Sutton because (subject to any available defences) FLAL committed an offence by not complying with the improvement notices. By section 251(1) Mr Sutton would commit the same offence and would be liable to be proceeded against and punished for it if, as the Council allege, FLAL's offence was committed with his consent or connivance, or because of his negligence. Proof of the elements of the offence under section 251(1) does not require that Mr Sutton should have received an improvement notice in his own right, nor does it require that he be a person on whom an improvement notice could have been served. Mr Sutton's suggested liability is based on his having been a director, not on his having been the owner or person managing the property.
116. A different point was taken on Mr Sutton's behalf in the grounds of appeal. That was that for a director to be liable for the offence under section 251, the company must first have been convicted of the offence under section 30 *at a criminal trial*. That was said to be the result of the words "proved to have been committed" in section 251(1) which it was suggested could only properly be construed as relating to proof in criminal proceedings. The same point was made about section 249A(1).

117. Once again, we are satisfied that this is not a good point. The relevant portion of section 251(1) reads as follows:

“Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of ... – (a) a director ... he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly.”

We do not read these words as imposing a requirement that the body corporate must first have been convicted of an offence before proceedings may be taken against its director. There are two matters which must be proved, namely, that an offence has been committed by the company, and that the offence was committed with the consent of the director. There is nothing in the language to prevent the required proof of both elements being provided in proceedings in which the director is the only respondent (for example where the company has been dissolved). Whether or not the company is also charged with the offence or subject to a civil penalty on account of it is irrelevant to the proof required to convict or penalise the director.

118. Nor is there anything in either section 251(1) or section 249A(1) which prevents proof of the commission of an offence by the company being provided in the context of proceedings for the imposition of a civil penalty. Section 249A(1) permits the imposition of a civil penalty if the local authority is satisfied beyond reasonable doubt that a person’s conduct “amounts to a relevant housing offence”. The conduct of a director will only amount to a housing offence if an offence has been committed by the company with the consent or connivance of the director. But if that can be shown, beyond reasonable doubt, there is no additional requirement that the company must already have been charged or convicted, or that it need ever be.
119. For these reasons we are satisfied that ground 5 does not assist the appellants.

Grounds 7 and 10 – Were the financial penalty notices properly served?

120. Three points were taken about the service of notices in the grounds of appeal. First it was said that “no notice of intention to levy a financial penalty in proper form” was ever served on Mr Sutton. Secondly it was said that “the notices of intent were defective and/or were not served on FLAL”. Finally, it was alleged that no final notices were ever served on FLAL, or alternatively that no final notices came to the attention of the company or Mr Sutton until an interim charging order was served on FLAL.
121. Section 246, 2004 Act deals with service of documents. The section is not prescriptive and generally extends the methods of service available to local authorities under section 233 of the Local Government Act 1972. Subsections (2) to (5) of section 233 apply to any notice, order or other document required or authorised to be given to or served on any person by or on behalf of a local authority. They authorise various methods of service including by sending the document by post to the proper address of the intended recipient (section 233(2)). In the case of a company any such document may be served on the company

secretary (section 233(3)). The proper address of any person is their last known address; in the case of a company it is its registered office (section 233(4)).

122. Where a statute authorises any document to be served, given or sent by post, section 7 of the Interpretation Act 1878 provides that, unless the contrary intention appears, service is deemed to be effected by properly addressing, prepaying, and posting a letter containing the document. Unless the contrary is proved, service is then deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Ground 7 - The notices of intent relating to breaches of the 2007 Regulations

123. Ms Spencer's evidence was that she took great care to record and prove the steps she took in relation to service. We accept her evidence that she personally prepared all of the notices we were shown and made arrangements for them to be served by first class post with a second copy sent using the Royal Mail "signed for" service. The questions which arise concern the addresses to which the documents were directed, and whether the appellants can prove non-delivery.
124. As to the first challenge, on 11 June 2018 two sets of five notices of intent were sent to Mr Sutton, in his capacity as a director of FLAL, notifying him of the Council's intention to impose civil penalties for breach of the 2007 Regulations.
125. The notices were addressed to Mr Sutton at 11 Gough Square, London WC4A, which was the address given for him on the Companies House website in respect of his appointment as a director of FLAL. The notices were signed for as having been received at that address on 13 June 2018. Mr Sutton explained that it was the address of a firm of solicitors which had previously acted for him and accepted that it was shown as his correspondence address at Companies House, but he did not accept that the documents had been properly served on him. Given that the Gough Square address was one provided by Mr Sutton at Companies House, and was his last known address, service of the notices on him at that address was sufficient, in the absence of proof by him that they were not received (at that address). The evidence is that they were received.
126. As to the notices of intent to impose financial penalties on FLAL for breach of the 2007 Regulations, these were served on the same date and in the same way as the notices served on Mr Sutton. Two copies were sent, one by first class post and one by the Royal Mail "signed for" service, addressed to an address at Croydon Road, Beckenham, which Mr Sutton agreed was the address of his former accountants and the address of the company's registered office at that time. Service at that address was also sufficient, in the absence of proof by the company that they were not received.
127. None of the notices were returned to the Council as undelivered. On 4 July 2018 Mr Sutton made representations against the proposed penalties on his own behalf and on behalf of FLAL. He did not object to the way the notices had been served (although he did provide his home address, which was used in subsequent correspondence). He did not say at which address the notices had been received, but as he told us that he had not looked at the versions sent to him by email, and as he was clearly aware of the contents of the notices, the

documents must have been received by him from one of the addresses to which they were sent by post. Given this implicit acknowledgement of receipt, and the absence of any positive evidence as to which (if any) of the notices was not actually received at the address to which it was sent, we are satisfied that all of the notices of intent sent on 11 June 2018 were properly served on Mr Sutton and on FLAL.

Ground 10 - The notices of intent relating to non-compliance with the improvement notices

128. The notices of intent to impose additional financial penalties for non-compliance with the improvement notices were prepared by Ms Spencer in the same way as before on 17 September 2018. We accept her evidence to that effect. She made a contemporaneous note that they had been sent and she retained the posting receipt. This shows that a letter, which we accept contained the five notices, was sent to Mr Sutton at his home address on that date. A second letter was sent to the registered office of FLAL, addressed to the Company Secretary.
129. There was no evidence that either of these packages was not received, and we therefore find that there was good service of the second set of notices of intent.
130. Some aspects of the Council's evidence were presented in a chaotic fashion and it was not until we reviewed the source material after the hearing that it became apparent that no notices of intent to levy a financial penalty for failure to comply with the improvement notice in respect of flat 112 were included in the hearing bundle. In response to our request for copies of these documents, the Council confirmed on 23 January 2020 that it could find no such notices. It appears that, in error, two sets of notices referring to non-compliance with the improvement notices in relation to flat 101 were served, and none for flat 112.

The final notices

131. Mr Sutton did not dispute that final notices had been served on him personally, but he said that no such document had ever been served on FLAL.
132. The decision to serve the final notices for breaches of the 2007 Regulations was made on 5 September 2018, but the five documents themselves are dated 17 September 2018 and they were sent on that day at the same time as the notices of intent referring to non-compliance with the improvement notices. Ms Spencer's note of that date, and the posting receipt, record the posting of two copies of the final notices to the company's registered office. Signed proof of receipt at the registered office on 19 September 2018 was also provided. Ms Spencer said that a second copy sent to the address shown for the company at the Land Registry was returned.
133. Final notices relying on non-compliance with the improvement notices were sent on 17 October 2018. Ms Spencer took the documents to the post office herself, because the postal officer employed by the City Council was not available that day. She paid for the post and handed the documents over the counter. No other proof of receipt was tendered by the Council, but we are satisfied that the documents were posted to the company's registered office and despatched by first class post. Beyond a bare denial that the documents had ever

come to his attention, Mr Sutton provided no evidence that the documents had not been delivered to the registered office. We therefore accept that these final notices were also properly served on FLAL.

134. As has become apparent since the hearing, the final notices in respect of flat 112 relied on notices of intent which had never been prepared or served. The giving of a proper notice of intent is an essential pre-condition to the service of a final notice. This is not a case in which it would have been obvious that one of the two notices of intent served in respect of flat 101 was intended to refer to flat 112. For those reasons we find that the final notices served on Mr Sutton and FLAL purporting to impose a penalty of £30,000 on each of them for failure to comply with the improvement notice relating to flat 112 were invalid.

Service by email

135. It was also Ms Spencer's practice to send documents by email. Copies of all ten notices of intent served on 11 June 2018 were also sent by email to Mr Sutton's personal email address on that date. He agreed that he had received them but said that he did not open them. The copies of the notices sent by email on 17 September 2018 were undeliverable. Copies of the final notices for non-compliance with the improvement notices were sent to Mr Sutton (and received) on 17 October 2018.
136. In *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575 the Court of Appeal accepted that service of documents by fax was valid service for the purposes of a consent order in civil proceedings under the Rules of the Supreme Court. Glidewell LJ qualified his acceptance by emphasising that if a document is served by a means for which neither the rule nor statute provides, there would only be good service if the sender proved that the document had been received in a complete and legible state by the intended recipient (in other words, there is no rebuttable presumption of service, such as is provided for by section 7 of the Interpretation Act 1878). Later, in *PNC Telecom plc v Thomas* [2003] BCC 202, Sir Andrew Morritt V-C held that a letter sent by fax constituted a validly "deposited" notice to convene an extraordinary general meeting under section 368 of the Companies Act 1985.
137. These authorities were considered by the Supreme Court in *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67. The law was brought up to date when the Court addressed the question whether a completion notice to bring a newly constructed building in the non-domestic rating list for the first time under section 46A of and Schedule 4A to the Local Government Finance Act 1988 could properly be served by email. At [44] Lord Carnwath, with whose opinion the other members of the Court agreed, said that although the earlier cases were concerned specifically with fax transmission of a copy of the relevant notice, no good reason has been suggested for distinguishing that from transmission by email as occurred in that case.
138. On that basis (whether or not Mr Sutton chose to open the attachments to Ms Spencer's email of 11 June 2018) we are satisfied that, with the exception of the notices in respect of flat 112, there was good service on him of the notices of intent of that date and the final notices of 17 October 2018. We therefore dismiss the appeal on grounds 7 and 10.

Ground 8 – Was either of the appellants the manager of Max House and responsible for compliance with the 2007 Regulations?

139. This ground was advanced in the appellants’ statement of case as an answer to the penalties based on non-compliance with the 2007 Regulations. It was said that, as neither FLAL nor Mr Sutton was the manager of Max House, neither was bound to comply with the 2007 Regulations nor liable for any breach of them.
140. The Council’s case is that FLAL was the manager of Max House. As we have explained when dealing with ground 5 (see paragraph 112 above) Mr Sutton’s suggested liability is based not on his having personally been responsible for compliance with the improvement notices or the 2007 Regulations, but on his alleged culpability as a director of FLAL for non-compliance by it.
141. The 2007 Regulations impose duties on the manager of an HMO. The “manager”, in relation to an HMO, means “the person managing it” (regulation 2). That expression is defined in section 263(3), 2004 Act (the 2007 Regulations were made under powers contained in section 234, 2004 Act, and the definition is apt to identify the person on whom the manager’s duties are imposed). We have already set out the text of section 263(3) at paragraph 37 above.
142. By section 263(3), in the case of an HMO, the person managing the premises means an owner or lessee of the premises who receives (either directly or through an agent or trustee) rents or other payments from persons in occupation of parts of the premises as tenants or licensees. Where the rents or other payments are received by the owner or lessee through an agent or trustee, that person is also a “person managing” the premises. If the owner or lessee does not receive the rents or other payments because they have entered into an arrangement with another person who is not an owner or lessee by virtue of which that person receives the payments, the owner or lessee is still regarded as the person managing the premises.
143. We have explained the financial arrangements between Max Estates Ltd, which was responsible for letting units in Max House, and FLAL, the building owner, at paragraphs 110 and 111 above. For the reasons we have given there, FLAL was the person managing the premises within the meaning of section 263(3), 2004 Act and the 2007 Regulations. Accordingly, we dismiss the appeal on ground 8.

Ground 9, limb 1 – Were the 2007 Regulations breached?

144. The notices of intent to impose financial penalties in respect of the 2007 Regulations dated 11 June 2018 were based mainly on breaches which were said to have existed on 19 December 2017. The Tribunal is required to be satisfied beyond reasonable doubt that the relevant regulations were breached on that date in the manner alleged in the notices of intent.
145. In addition to the oral evidence of Mr Bray, Ms Spencer, Mr Hernandez and Mr Clarke, we were shown numerous photographs of the interior and exterior of the building as well as

some short video clips. Our findings on the various breaches alleged, based on that material, are as follows.

Regulation 4 – the duty to provide information

146. Regulation 4 requires the manager to ensure that “his name, address and any telephone contact number are clearly displayed in a prominent position in the common parts” of the HMO so that they can be seen by all occupiers. The person whose contact details are required is the manager, not the caretaker or managing agent. There is no absolute obligation to provide a telephone number, but if the manager has a telephone contact number it must be provided. The object of the requirement appears therefore to be that occupiers of an HMO should know the identity and address of the person responsible for ensuring that satisfactory management arrangements are in place and standards of management are observed (those being the purposes for which the 2007 Regulations were made, see section 234(1), 2004 Act). The Regulations do not require the manager to provide a telephone number for use in emergencies, or to ensure that someone is on call to deal with management issues 24 hours a day.
147. The breach alleged in the Council’s final notice of 17 September 2018 was that the required information had not been displayed on 19 December 2017.
148. In this case the manager was FLAL, but as it received the rents or license fees payable by the occupiers through an agent, Max Estates Ltd, that agent was also a manager (section 263(3)).
149. We received no argument as to the effect of regulation 4 in circumstances where two persons meet the definition of manager. In the absence of argument, we will assume that the requirement is satisfied by the name and contact details of either one of them being displayed, but it is arguable that the details of both are required.
150. The evidence about exactly what information was displayed in the common parts of Max House was inconclusive. None of the Council’s witnesses had any recollection and no photographs had been taken. Mr Sutton accepted that a name and contact numbers had been displayed, as at 19 December 2017, but no address. It is possible that the name was that of the caretaker, Mr Beadle, and at least one of the phone numbers was his (although when Mr Clarke, one of the Council’s Housing Officers, tried to use the numbers on 12 October they were found to be unobtainable). It is therefore only on the basis of Mr Sutton’s admission that no address was displayed, that we are satisfied that there was a breach of regulation 4 on 19 December 2017.

Regulation 5 - duties in respect of fire precautions

151. Regulation 5(1)(b) requires that all means of escape from fire in the HMO are maintained in good order and repair, and regulation 5(4) obliges the manager to take all measures reasonably required to protect the occupiers from injury.

152. The breach alleged in the Council's final notice of 17 September 2018 was that the required measures to protect the means of escape from fire and smoke were not in place on 19 December 2017.
153. On that date Mr Bray noted that the fire alarm system control panel was showing a fault. On request, no service documents were available for inspection. Mr Bray explained that plant rooms are considered a high risk and should be protected by a minimum of 30 minutes fire resistance. The plant rooms at Max House opened directly into the corridor escape routes and were not fitted with suitable fire doors. The limited protection from smoke or flame which the flimsy doors might have provided was compromised by ventilation grills inserted into them.
154. The first-floor plant room door and frame were damaged, and the room was used to store miscellaneous items which Mr Bray considered significantly increased the fire loading within. No servicing information or commissioning certificate was available for the main electrical supply intake and Mr Bray was of the opinion that the condition of sub-mains and the additional fire loading in the main first-floor plant room meant the risk of fire was above a safe level. With the door unsecured, fire and smoke would compromise the central stair core, potentially affecting escape from all floors.
155. In addition, holes through which services passed through the walls from the plant room into the escape routes had not been fire stopped. Any fire in the plant rooms would quickly spread into the means of escape. Services also passed from flats into escape routes through openings which again had not been fire stopped. Plastic piping in service ducts had been fitted with intumescent collars, designed to fill gaps and contain fire, but these had not been secured to the walls and were ineffective.
156. In an email to Mr Sutton on 22 December 2017, Ms Spencer notified him of her concerns over fire separation standards.
157. Mr Sutton accepted that vents were present in plant room doors, but told us that the fire separation issues identified at the time of the inspection related to a flat in the basement of Max House which had not yet been completed and was neither occupied nor available for occupation. Furthermore, this section of corridor was lobbied, there were no flats in it, and there was an alternative means of escape for the occupiers of the flats who would have to pass through this section. No building control inspector had ever advised that the ventilation grills on the doors to the water heater room or other storerooms needed to be changed and work was subsequently undertaken by Prestige Property Services to close the vents.
158. We do not accept that the issues over fire separation between flats and escape corridors were as isolated as Mr Sutton contended. The inspection by Mr Bray and Council officers on 19 December 2017 was not comprehensive, and they did not enter many (if any) occupied flats, but the problem of inadequate separation between the main plant room and the common parts, and within the service risers, and the failure to install adequate fire doors on any of the plant rooms, all demonstrate that failures of design and workmanship were systemic.

159. As late as July and August 2018 issues with fire safety remained. Mr Hernandez and Mr Clarke found incorrectly fitted fire doors, broken fire door hinges, at least one fire door held open by a hook installed for that purpose and means of escape blocked by refuse sacks. Many doors which should have provided a minimum of 30 minutes fire resistance were lightweight and insufficient for their purpose, affording little protection.
160. We therefore have no doubt that that on 19 December 2017 there were serious and extensive breaches of regulations 5(1)(b) and 5(4).

Regulation 7 - duties in respect of electrical installations

161. Regulation 7(3) obliges the manager of an HMO to ensure that every fixed electrical installation is inspected and tested by a suitably qualified person at intervals not exceeding five years, and that a certificate of such inspection is produced to the local housing authority within seven days of a request. The breach alleged in the final notice of 17 September 2018 was a failure to supply test certificates despite formal requests.
162. During Ms Spencer's inspection on 19 December 2017 the occupiers of flats 101 and 007 told her that the electricity supply regularly cut out. Ms Spencer spoke with the caretaker who confirmed that this was the case. He was not on site 24 hours a day but if such an outage occurred when he was there, he would go to the electrical distribution board cupboard in the basement and switch the trip switches back on. The cupboard door was missing, and a sign hung from the distribution board warned "DANGER - Treat as Live". Mr Beadle was aware that the board was dangerous, so he used a broom handle to re-set the switches.
163. Ms Radina, who lived in Flat 007 for two years, explained that in the two winters she was resident the electricity would go off frequently, often at about 5pm when people returned from work, and would sometimes remain unavailable throughout the night. Residents would sometimes re-set the trip switches in Mr Beadle's absence.
164. Ms Spencer requested a copy of the current electrical inspection report in her email of 22 December 2017 to Mr Sutton. She asked again on 3 January 2018, without response, and on 17 January 2018 she issued a formal request for the report to be submitted to her within 7 days. No report has ever been supplied in response to that request and the failure is the basis of the Council's case that FLAL is in breach of regulation 7(3).
165. Mr Sutton responded to Ms Spencer on 19 January 2018 claiming that "the Electrical Certificates were supplied to building control a long time ago". He also said that he had given instructions for new test and commissioning certificates, and that the necessary testing would begin in the following week and would take three weeks. In the event these tests were not undertaken, possibly because any instructions given by Mr Sutton were overtaken by action taken by the Council.
166. The Council commissioned its own electrical inspection which was carried out by Facit Testing Ltd on 4 January 2018 and signed off by its Managing Director, Mr Impleton, on 24 January 2018. He reported in the following terms:

“The installation is in a poor condition with various cable and containment types throughout, the installation is unsatisfactory with defects present which require rectification before a satisfactory report can be issued, sub main and communal circuits must be upgraded and the distribution boards made safe urgently. We would advise that a review is made within 28 days of this report, otherwise a Danger Notice is to be issued via the NICEIC.”

167. The Facit report identified 528 defects: nine were classed C1 (Danger present. Risk of injury. Immediate remedial action required); 263 were classed C2 (Potentially dangerous. Urgent remedial action required); and 256 were classed as C3 (Improvement recommended).
168. Mr Impleton gave oral evidence and confirmed the contents of the test report. He had been on site personally for the first two days of the testing programme and had supervised eight engineers to complete the work. He explained that the C1 defects were missing distribution board covers and exposed live terminals present in the plant rooms on all five floors of the building, all of which were accessible by residents. The basement room in which the sub-main distribution board was used by some residents to store their bikes. The board was open to anyone to touch and the 450 volts charge it would deliver could kill. The C2 defects were mostly instances of poor workmanship and bad practice in the wiring in individual flats, such as the use of over-sized circuit breakers for a shower or cooker, the absence of rubber shrouds to prevent accidental contact with live parts on a busbar or distribution board, the failure to use cable grips to prevent cables coming into contact with fittings, or omitting to insert blanking plates in the unused fuse slots on domestic circuit boards. Mr Impleton explained that there was an element of judgment in allocating a defect to the C1 or C2 categories, and depending on its location the same defect could be in either category (for example, a missing blanking plate on an inaccessible fuse board would be less serious than one on the main distribution board in a room to which many people had access).
169. In his written representations of 4 July 2018, Mr Sutton did not accept that there had been a breach of regulation 7(3). He did not repeat his original claim that the building had a test certificate which had been “supplied to building control a long time ago”. Instead he explained that the electrical installation at the property had been installed by a very experienced contractor, Alpha Electrical (East) Limited. When the Council had identified issues with the electrical installation such as the missing distribution board covers, these were immediately rectified (he told us that he had been made aware of the missing covers on Friday, 26 January and they had been replaced by the following Tuesday). FLAL had been working hard to find an electrical contractor to re-test and certify every flat within the building and common parts but they had been overtaken by the appointment of Facit Testing. A contractor had subsequently been appointed to carry out all the required work. Test certificates would be provided to the Council for each flat but this could not be done until the testing of the whole building had been completed. None of these points goes to the question whether testing had taken place by 19 December 2017, or whether a test certificate had been supplied.
170. In their statement of case the only point taken by the appellants in respect of the alleged breaches of regulation 7(3) was that the time had not yet arrived when a test certificate was required. That was on the basis that regulation 7(3) requires testing at intervals not exceeding five years, and, so it was said, a period of five years “since construction of the building” had

not yet elapsed by 19 December 2017. We reject this defence for two reasons. First, the requirement of regulation 7(3) is that a test certificate be supplied within seven days of a request from the local housing authority. To satisfy that duty, the manager must have a certificate at all times. It is correct that, once a certificate has been obtained, no further testing or certification is required for up to five years, but that provision is about the intervals between tests, and does not affect the duty to have and produce a test certificate. Secondly, on the facts, Max House is a 1970s building which had been in the ownership of FLAL since 2012. The regulation 7(3) obligation is to produce a test certificate for every fixed electrical installation and the period of the manager's ownership is irrelevant to compliance with that requirement.

171. We are satisfied that at 19 December 2017, FLAL was in breach of regulation 7(3). No electrical certificate from Alpha Electrical or any other qualified person was produced in response to the Council's repeated requests. Mr Sutton acknowledged that there were "issues" which were, in part at least, rectified after that date, many of the issues remained outstanding when the closure order was made.

Regulation 8 - duty to maintain exterior common parts in good order

172. Regulation 8(4)(a) requires the manager to ensure that outbuildings, yards and forecourts used in common by two or more households living within the HMO are maintained in repair, clean condition and good order.
173. The final notice of 27 September 2018 asserted that the pavement in the forecourt was not in good order: "the flagstones were not merely loose but they see-sawed when trodden on". It was said that surface variations of 20mm to paths increase the likelihood of tripping. The area was unlit at night which also increased the chances of falling.
174. In his representations of 4 July 2018, Mr Sutton accepted that paving slabs had been pushed up by 40mm, owing to tree roots, but maintained that the risk to a person tripping was marginal. He had not received any complaints from any occupier. He said that Prestige Property Services had been instructed to lift and re-lay the slabs.
175. We were shown a short video clip of the paving stones outside the rear courtyard entrance to the building. This demonstrated that the stones had indeed been disturbed by the roots of trees. One rocked quite noticeably when stepped on. In his written evidence Mr Fox, the 90-year-old former resident of flat 103, said that quite a few of the stones had settled and projected at an angle. The area was poorly lit, and he avoided walking there at night because it was dangerous, and he found it unnerving.
176. We are satisfied that the paving in the courtyard was not in repair or in good order and that there was a breach of regulation 8(4)(a). It would have been obvious to anyone passing through this area that the surface was disturbed and a potential hazard.

Regulation 10 - duty to supply sufficient litter bins.

177. Regulation 10 requires the manager to ensure that sufficient bins or other suitable receptacles are provided, adequate for the requirements of each household occupying the HMO for the storage of refuse and litter pending their disposal.
178. The breach alleged in the final notice was that on 19 December 2017 there were only two bins available and these were seen to be overflowing.
179. Mr Sutton's response was that a contract was in place with a refuse company for the weekly removal of rubbish and emptying of bins; the bin provision at the time of the inspection was in relation to the apart-hotel C1 planning use of the building and the refuse strategy subsequently described in the planning application for the change of use to residential did not apply.
180. The photographic evidence does not support the suggestion that the bins were overflowing on 19 December 2017, the date on which the regulation is alleged to have been breached. The only photographs taken on Ms Spencer's first visit show two large waste bins with a few stray items of waste on the ground near the bins, but the lids appear to be almost completely closed and the evidence could simply show that one resident was inconsiderate when disposing of their own rubbish.
181. Photographs taken on subsequent occasions give a different impression and do demonstrate that the provision of bins was inadequate. Those taken on 24 April 2018 show the same two bins so full that their lids could not be closed, with a further mound of plastic rubbish bags next to them, at least enough to fill another receptacle of the same size. Photographs taken on 31 July 2018 show the situation to be at least as bad, with rubbish strewn all around the bins. There was also evidence from Michelle Brown, the manager of Max Estates Ltd, that Mr Beadle, the caretaker, would be required to remove bags of rubbish stacked around the bins so that the refuse disposal contractors could have unobstructed access (we understood her to mean that the contractors were not obliged to move all rubbish, but simply to empty the bins, a task they were unable to perform while their access was blocked).
182. Mr Sutton's comment on the photographs of bins overflowing was that the provision was designed for an apart-hotel, not for a block of flats. We can well understand that hotel guests, even those staying for quite long periods, may create less refuse than private householders, but for the reasons we have already explained we are satisfied that the building was not a hotel.
183. There was no suggestion that the number of residents increased between December 2017 and April 2018, nor that the number of bins available for their use reduced between those dates. As the evidence shows that the provision of bins was inadequate at the later date we are satisfied beyond doubt that it was also inadequate on the date alleged in the notice of intent, despite the absence of photographs showing the problem on that date.

Conclusion on breaches of 2007 Regulations

184. For these reasons we are satisfied that the Council has proved each of the breaches of the 2007 Regulations alleged in the final notices beyond reasonable doubt. We therefore dismiss the appeal in respect of limb 1 of ground 9.

Issue 11, limb 1 – Were the improvement notices complied with?

185. FLAL did not appeal against the improvement notices served on it, as it could have done. Its only appeals are against the financial penalties imposed on it. The offences on which those financial penalties were based were FLAL's failure to comply with the improvement notices by carrying out the work required by them. It is not permissible for FLAL, or Mr Sutton, now to challenge the facts alleged in the improvement notices in their appeals against the financial penalties.

186. The unchallenged improvement notices required work to be done to address three categories of hazard arising out of excess cold, electrical safety and fire safety. The need for that work must be taken to have existed, as described in the notices, and the necessary remedial work must be taken to be that required by the notices. The only issue we are now concerned with is whether that work was done.

Excess cold hazards

187. Six of the improvement notices served on 12 February 2018, those for Flats 001, 003, 012, 101, 102 and 112, identified excess cold as the relevant hazard and noted that the large, single-glazed windows were showing signs of condensation and dampness. In Flats 003 and 101 no heating was provided, and in the other four flats the only heating was by an electric panel heater or plug-in heaters. Damp and mould were noted in Flats 001, 012 and 112.

188. The notices required the installation either of new double-glazed units or of secondary glazing. Three alternative remedial heating options were also specified: the installation of full central heating throughout the flat; the provision of fan assisted storage heaters; or the installation of fixed panel heating. In each case, the work was required to be commenced by 19 March 2018, and completed by 29 June 2018.

189. In his response of 4 January 2018 to Ms Spencer's email of 22 December 2017 recording her findings on her initial inspection Mr Sutton said that the company had accepted a quote to replace all the single glazed aluminium windows with double-glazed UPVC units, and that five additional heaters had been installed on 19 December 2017.

190. The period allowed for compliance with the notices had already expired when Mr Sutton emailed Ms Spencer on 10 July 2018, telling her that most of the windows on the front elevation had been changed and that he was awaiting a final delivery to complete the work.

191. On the following day, Ms Spencer re-inspected flats 101, 102 and 112. In flat 101 and 112 the windows had not been replaced and no heating had been installed, while in flat 102 the window had been replaced but no heating had been installed. Mr Sutton explained that the windows on the front elevation of the building had been replaced in April 2018, but that

those around the rear courtyard had been more of a problem because of difficulties of access. He said that the windows to flat 101 were eventually replaced in September or October 2018.

192. In the light of our finding that no notice of intent was ever served in relation to flat 112, we need only deal with Flats 101 and 102. We are satisfied that in relation to flat 101 none of the work specified in the improvement notice addressing the hazard of excess cold was carried out within the time permitted; and in relation to Flat 102 some but not all of the required work was carried out.

Electrical hazards

193. One of the improvement notices served on 12 February 2018 indicated that the Council was satisfied that category 2 electrical hazards existed on the premises. The deficiency giving rise to the hazard was identified by reference to the Facit Testing report, which had specified in detail the Code C1 and Code C2 defects found in January 2018 (see paragraph 168 above).
194. The notice required remedial action to be commenced by 19 March 2018 and completed by 29 June 2018. The action to be taken included the provision of an installation certificate to show that work already carried out since the Facit Testing report was satisfactory. The schedule of action to be taken also required blanks to be fitted to the distribution boards in individual flats, all Code 2 deficiencies to be remedied, work to ensure sub-main cabling was correctly sized and earthed, and that an electrical certificate be provided for the entire installation showing it to be free from deficiencies.
195. In his email of Tuesday 10 July 2018, after the expiry of the notice period, Mr Sutton told Ms Spencer that he had attended the building the previous week to see what work remained to be done. The only electrical items amongst the 12 he mentioned were the missing covers to the distribution boards which had been replaced, and the submains in the building which were to be upgraded later that week. It is not disputed that the C1 deficiencies had been attended to within a few days of the Facit Testing report being provided to Mr Sutton at the end of January, but when Ms Spencer inspected the building on 11 July she was unable to establish whether any other work had yet been carried out. No testing certificate had been provided and Ms Spencer was not able to establish from her own observation whether the 263 C2 defects had been remedied.
196. Mr Sutton explained in his oral evidence that his electricians had been working through the building and would issue electrical certification for each of the rooms, common parts and plant rooms when they had completed all of the work. He said he had appointed Prestige Property Services (PPS) on 11 June 2018, although the first relevant document we were shown was a quotation for work dated 16 July 2018. That company delivered a second quote for additional work on 2 August, in which they said it would be necessary for them to contact the power supplier “as required to meet legislation in mains power into the building”. They added that the current installation was not earthed and was “a major hazard” (other evidence suggested the electrical supply to the building was earthed by a temporary stake in the ground, such as might be employed on a building site). PPS said they would be forwarding a full report of further issues in due course. If such a report was ever produced, we were not shown a copy of it.

197. The evidence establishes conclusively that the work required by the improvement notices had not been completed by 29 June 2018. The date on which PPS actually began work is uncertain but we are satisfied beyond reasonable doubt that the only significant work to have been attended to within the time permitted was the remediation of the nine C1 defects. Other work started in July but on 31 August Ms Spencer inspected again and was told by Mark of PPS that blanks had been fitted to some distribution boards in individual flats but he could not tell her which and there was no written record of which flats had been worked on. When she inspected the property on 12 October 2018, Mr Sutton told her that there had been a delay to the work but that a certificate should be issued shortly. We were shown no evidence that an electrical testing certificate has ever been issued.

Fire safety hazards

198. The final improvement notice served on 12 February 2018 stated that a Category 2 fire safety hazard existed. The deficiencies giving rise to the hazard were the condition of the electrical installation, the use of portable heaters, insufficient fire separation between flats, and between the flats and the means of escape, and defective fire doors to the plant rooms and boiler rooms. The remedial action required was to commence by 19 March and be completed by 29 June 2018. It first comprised the carrying out of the work specified in the improvement notice referring to electrical hazards. The remaining requirements were the provision of suitable fixed heating, the provision of proper fire separation between flats, and within the means of escape (including correctly fitting fire stopping collars) and the fitting of compliant fire doors to plant and boiler rooms, which were also to be emptied of stored goods.
199. We have already referred to the evidence concerning electrical hazards when dealing with the breaches of the 2007 Regulations at paragraphs 151 to 171 above, and the electrical hazards improvement notice at paragraphs 193 to 197.
200. In his email to Ms Spencer of 10 July 2018, Mr Sutton referred to fire protection works and said that:

“all means of escape are checked to be clear and all fire doors have been checked and will continue to be checked. The plant rooms will be kept clear. The vents from the storerooms are being blocked. A review is being undertaken of each plant room to ensure all pipes and cables that exit are suitably fire stopped. The intumescent pads are being checked as part of the electrical certification works. All fire doors will be checked.”

We infer from this email that Mr Sutton had given instructions that these steps were to be taken, but we do not read it as suggesting that those instructions had yet been carried out (except possibly that all fire doors had been “checked”, whatever that may mean), let alone that the improvement notice had been complied with.

201. Ms Spencer inspected the property again on 11 July and found that the work required by the improvement notices had not been completed. No electrical testing certificates had been provided, fixed heating had not been installed, she could not tell whether intumescent socket

boxes had been installed to provide fire breaks between flats, the ceilings in the corridors had not been disturbed suggesting that fire stopping work had not been done in the means of escape. She confirmed this in an email to Mr Sutton on 23 July in which she again requested a copy of the current electrical certificate. Her evidence was that the work remained incomplete at her inspections on 18 July and 31 August.

202. We are satisfied on the evidence we have referred to so far that the improvement notice in relation to fire hazards was not complied with by the date fixed by the notice itself. It is convenient at this point to record our further findings of fact concerning the state of fire precautions in the building after June 2018, as they have a bearing on the issue of the proportionality of the penalties imposed by the Council, and the defence of reasonable excuse relied on by FLAL and Mr Sutton.

Events leading to the service of the prohibition order

203. Mr Hernandez and Mr Clarke visited Max House again on 31 July. They noted a fire door at the end of the ground floor corridor which was fitted incorrectly and not closing. Mr Hernandez returned on 9 August and toured the building with Mark, the building foreman from PPS, who pointed out some of the electrical and fire safety issues in the building. The main power supply was insufficient for the demands placed on it; it was unearthed and needed to be upgraded (the supplier, Eon, was due to attend within 3 weeks to address these problems). On the first floor, some of the large immersion heaters which heated water for the building were not functioning because the fused power supply to the heaters was located on the floor directly in front of them, and had blown out when a pressure release valve had caused water to be released on to the floor. Mr Hernandez took photographs of these features as well as of further examples of ill-fitting fire doors, and others which were wedged open or had broken hinges. The fire escape towards Prince of Wales Road was found to be obstructed by refuse sacks.
204. On 14 August 2018 Mark replied to an email from Mr Hernandez stating that fire door coordinators were due to be fitted and the following day Michelle Brown claimed that works had started.
205. On 3 September 2018 (after her inspection on 31 August) Ms Spencer requested proof that work to address these continuing issues was in hand, such as copies of estimates or purchase orders, and confirmation that funds had been allocated. She pointed out that the fire detection panel was still showing a fault, which needed to be rectified immediately.
206. On 28 September 2018 Mr Bray wrote to Ms Spencer to explain his continuing concerns about fire safety within the building:
- (a) No final building control certificate had ever been issued and compliance with requirements for compartmentation and protection of escape routes could not be demonstrated. A fire within a flat might spread into the escape routes and in some locations, such as the basement, this would definitely occur.

- (b) The original fire precautions proposals submitted for building control approval assumed use of the building as an hotel, not as flats. This entailed significantly reduced safety measures on the basis staff would always be on site to manage an evacuation. Compartmentation has not been provided to support a “stay-put” policy, such as would be expected in a block of flats.
- (c) The fire alarm system registered an unexplained fault at the time of his most recent visit and could not be confirmed as fully functional.
- (d) The electrical systems were reported to be overloaded and were incorrectly earthed. They could fail and cause fire particularly as higher demands were placed on them as the weather cooled.
- (e) Several plant rooms were still fitted with inappropriate doors.
- (f) There were no procedures in place for maintenance or failure and standards were deteriorating rapidly. The electrical system represented a significant risk of fire within the building. Unless the owners complete the building to the required standards and put in place appropriate management and maintenance systems, safety could not be guaranteed and would continue to deteriorate.

We observe that Mr Bray’s assessment that safety standards had declined over the period of involvement was consistent with the evidence of Ms Brown that Mr Beadle, the caretaker, had left FLAL’s employment in April 2018 and had not been replaced.

- 207. Ms Spencer took these concerns seriously. On 1 October 2018 an engineer from London Security Systems was instructed by the Council to assess the fire detection system and ensure it was in working order. The following day Mr Hernandez attended to check on the urgent work. He found numerous fault lights illuminated on the fire alarm control panel. He was informed that there had been insufficient time for the engineer to identify all the faults on his first visit, and that one or two days would be needed to diagnose all of the issues and ensure that the system was fully operational. There appeared to be four alarm circuits, one covering each floor; two circuits had faults, which meant two floors in the building may not be covered by the fire detection system.
- 208. The Council commissioned its own contractor to undertake emergency remedial action. Non-functioning detector heads and sounders were replaced and by 10 October all faults with the detection system panel appeared to have been resolved.
- 209. On 12 October Mr Hernandez and Mr Clarke returned to the building and found it was still occupied by 20 individuals (a number of tenants, including Ms Nicholson and Dr Xydopoulos had already moved out because of issues with plumbing and sanitation systems with which we are not concerned in these appeals). Although the Council’s officers considered that they had bought some time by the emergency work to the fire detection systems, the improvement notices had not yet been fully complied with and the defective electrical installation and absence of proper fire separation remained acute concerns. On 29 October 2018 the Council served a Prohibition Notice preventing the property from being used for sleeping or living accommodation with effect from 27 November 2018. Mr Sutton was critical of this decision suggesting that the delay of four weeks in closing the building indicated that there was no real urgency. We reject that suggestion. The emergency

remedial works undertaken by the Council itself had not resolved the long-standing safety issues and we have no doubt that the decision to prohibit residential use of the building was justified and proportionate.

210. The evidence of the further observations and actions taken by the Council after the expiry of time for compliance with the improvement notices demonstrates conclusively that FLAL did not comply fully with the notices concerning fire precautions and electrical safety, and that the extent of the default in compliance was significant.

Conclusion on compliance with improvement notices

211. It will be apparent from what we have already said that we are satisfied beyond reasonable doubt that FLAL failed to comply with three of the improvement notices requiring that the hazard of excess cold in Flats 101 and 102 (the notice in respect of Flat 112 was also not complied with, but no notice of intent was given and no valid penalty has been imposed). We therefore dismiss the appeal under limb 1 of ground 11.

Ground 3 – Have either FLAL or Mr Sutton established a defence of reasonable excuse?

212. In proceedings against a person for the offence under section 30(1), Housing Act 2004, of failing to comply with an improvement notice which has become operative, it is a defence that the person had a reasonable excuse for non-compliance (section 30(4)). Similarly, a person who fails to comply with the 2007 Regulations may rely on a defence of reasonable excuse in answer to a charge under section 234(3).
213. As for the position of Mr Sutton, as a director of a company accused of offences under section 30(1) and 234(3), the relevant portion of section 251(1) reads as follows:

“Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of ... – (a) a director ... he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly.”

No separate defence of reasonable excuse is available to a director; if the company has a reasonable excuse for its conduct, no offence will have been committed by it, and there will be no basis on which a director could additionally be liable. In this case, if the Tribunal is satisfied that FLAL did not have a reasonable excuse for its failure to comply with the improvement notices or with the 2007 Regulations, the only separate defence available to Mr Sutton will be that FLAL’s offences were not committed with his “consent or connivance”.

214. Mr Croskell submitted that it was for the appellants to prove that they had the suggested reasonable excuse. He referred to a number of authorities in different legislative contexts, including *R v Petrie* [1961] 1 WLR 358, 361, and *Godwin v DPP* (1993) 96 Cr. App. R 244, both decisions of the Court of Appeal concerning offences where the relevant provision stated in terms that it was for the person charged with the offence to prove their good reason.

No such statement is contained in either section 30(4) or section 234(4), 2004 Act, but 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 ... (LC).

215. Mr Croskell accepted that the question whether FLAL 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.
217. The appellants' statement of case raised two separate arguments in relation to the "reasonable excuse" defence. The first asserted that because they were not aware that Max House was an HMO, the defence of reasonable excuse was available to FLAL and to Mr Sutton. The second, on which Mr Sutton placed more emphasis in his oral argument, was that the appellants had relied on reputable professionals to prepare the specification of work for the conversion of Max House to residential use; those plans had been approved by the Council, including by its Building Control department; the works had been professionally supervised; and the appellants had been informed in two separate emails from Building Control surveyors that they had been carried out compliantly. These facts were said to establish a reasonable excuse for the offences of failing to comply with the 2007 Regulations or the improvement notices.
218. The first suggested ground of defence is unsustainable.
219. The notices of intent to impose financial penalties alleged that breaches of the 2007 Regulations had occurred on 19 December 2017. The 2007 Regulations apply to any HMO in England which is a section 257 HMO, as we are satisfied Max House was. Knowledge on the part of the manager that a building is a section 257 HMO, or that the 2007 Regulations exist, is not a condition of the obligations imposed by them. Nor is such knowledge an element of the offence of breaching the Regulations. The offence is one of strict liability, subject to the defence of reasonable excuse.
220. Mr Sutton has at different times been a director of more than 100 property companies and held 39 directorships in 2017. He nevertheless explained that his experience of residential

property development was limited, and he had not previously encountered the legislation regulating HMOs. Assuming that to be the case, the relevant question is nevertheless whether FLAL had a reasonable excuse for failing to comply with the 2007 Regulations or the improvement notices. It was not established that Ms Brown, who managed the head office operation of Max Estates, or Mr Beadle, the caretaker, or any of the firms of solicitors or letting agents engaged to craft and use the licences given to occupiers of the building, were similarly ignorant of the Company's responsibilities.

221. It is possible to conceive of circumstances in which a lack of knowledge of the facts which caused a house to be an HMO might provide a reasonable excuse for non-compliance with the 2007 Regulations. For example, in *IR Management Services Ltd v Salford City Council*, to which we have already referred, the manager's defence was that he had been unaware that the HMO was occupied by more than one household, and so he did not take the additional steps required by the relevant regulations; that defence failed on the facts, but if the manager's evidence had been accepted it might have succeeded. This is not that sort of case. FLAL was aware of all the facts which caused Max House to be a section 257 HMO; its defence is that it was unaware of the consequences of those facts. The maxim that ignorance of the law is no defence is a familiar one. Just like a private individual, a company cannot fall back on its own omission to inform itself of its responsibilities as a "reasonable excuse" for its failure to comply with them.
222. The position in relation to the improvement notices is even clearer. The notices were served on 12 February 2018, seven weeks after Ms Spencer had first informed Mr Sutton that Max House was an HMO, so the factual premise of the defence is not made out. In any event, as we have explained, improvement notices may be served in respect of hazards found at any residential premises and the obligation to comply with them does not depend on whether the building is an HMO.
223. The second ground of defence appears superficially more attractive, but on closer examination it too must be rejected.
224. Taking the offences of failure to comply with the improvement notices first, it was made clear to FLAL by the service of the notices themselves, as it had earlier been by Ms Spencer on 22 December 2017 and by the Facit Testing report sent at the end of January 2018, that the building's electrical installations and fire precautions were defective in many respects. By that time at the very latest FLAL had ample grounds for questioning the quality of the professional services provided to it, or reconsidering the wisdom of its decision to use a building converted for use as a hotel as if it were a block of flats. The time for compliance with the notices expired on 29 June 2018, six months after the alarm was first raised and more than four months after the service of the notices. It was not suggested that the time allowed for compliance was too short, or that the company was let down by contractors appointed to carry out the works in good time. Mr Sutton's reliance on previous professional advice, or on the views expressed by Building Control surveyors, cannot provide a reasonable excuse for the delay in commencing the work required by the notices or the failure to complete it on time.

225. The breaches of the 2007 Regulations occurred on 19 December 2017. At that time FLAL employed a full-time caretaker, and until early 2017 Mr Michael Everest, Max Estate's maintenance manager had lived in the building. It was their duty to report any significant defects of which they were aware to their employer and FLAL must be taken to have been aware of the condition of its own building. Mr Sutton's evidence was that he had visited Max House on a weekly basis during the construction phase of the conversion project, which ended in 2014. Thereafter he inspected the building every four to eight weeks in his asset management role.
226. As a result of his visits Mr Sutton cannot have failed personally to have been aware at least of the following, all of which were apparent on inspection of the building: that neither FLAL's address nor those of Max Estates or of Mr Beadle, were clearly displayed in the common parts; that numerous fire doors were poorly fitting, did not close properly, were propped open, or were pierced by ventilation grills; that the paving in the courtyard was defective; and that insufficient bins had been provided for the storage of refuse (the evidence of Ms Radina was that rubbish first began to pile up in 2016).
227. Mr Sutton confirmed that he was aware that there were regular power outages in the building, especially in winter, and he said he had given instructions that no portable heaters were to be allowed. He claimed that he was unaware that Mr Beadle used a broom handle to reset the electrical fuses when they tripped and said that as soon as he became aware of any serious problem, he would deal with it. Even if that is correct, Mr Beadle was obviously aware that there were serious problems with the electrical installations and any failure to report their full extent to his employer cannot provide the company with a reasonable excuse for failing to take proper steps to protect the occupiers of the building from the risk of fire.
228. Mr Sutton said he was sure that an electrical testing certificate must have been supplied, but that having searched his emails he could find no trace of one. He did not respond to Ms Spencer's request for a copy of the current certificate on 22 December 2017 until 19 January 2018 when he asserted that the certificates "were supplied to building control a long time ago". If he undertook his email search in the period between the request and his response, he must have known there was no basis for that assertion. In any event, the requirements of regulation 7(3) includes that the building must have an electrical testing certificate and produce it on request. To mistakenly believe that a certificate was obtained at some time in the past, by someone else, cannot in our judgment provide a reasonable excuse for the fact that no certificate was ever obtained. To establish that it would be necessary for the company to show by evidence that it had given instructions for a certificate to be produced, and that it had some objectively reasonable basis for thinking its instructions had been complied with.
229. We are satisfied beyond reasonable doubt that there never was a certificate and, given the condition of the electrical installations and their knowledge of its inadequacies, there is no basis on which we could conclude that Mr Sutton or any of the staff at Max Estates reasonably believed one had been obtained. It follows that FLAL had no reasonable excuse for its non-compliance with regulation 7(3).
230. We accept that a non-professional observer of the building in its completed condition would not have known that the required measures to protect the means of escape from fire and

smoke were not in place, to the extent that those were concealed above ceilings or behind wall finishes. The defects shown on the fire systems panel would have been obvious, however, and it is clear from the evidence that these existed in December 2017 and were a recurring problem. The condition of the fire doors would also have been obvious.

231. Ms Brown confirmed that she was aware of the difficulties concerning refuse, and that Mr Beadle had to remove rubbish to allow the collection contractor access, but she dismissed these as “just a moan by Colin”.
232. For these reasons we are satisfied that FLAL was aware at all relevant times of the deficiencies which constituted breaches of the 2007 Regulations.
233. We are also satisfied beyond reasonable doubt that the offences were all committed with the consent or connivance of Mr Sutton. He is the controlling mind behind both FLAL and Max Estates. He visited the building regularly and spoke to the staff on site. We formed the impression that Mr Sutton is well informed about his businesses and would have expected a proper report from his employees. We are satisfied that he would have been made aware by Mr Beadle of matters of importance of which he was aware as well as observing for himself those matters visible on inspection. He gave the relevant instructions when remedial work was eventually commissioned and was the person ultimately in a position to have required effective measures to be taken much earlier. Instead, he took ineffective measures, such as banning the use of portable heaters, and delayed instructing competent contractors to do the work required by the improvement notices until after it was too late for them to be complied with. Given his state of knowledge, his inaction amounts to consent for, and connivance in, the continuation of all aspects of the unsafe and hazardous conditions in the building.
234. We therefore reject both the reasonable excuse defence and Mr Sutton’s defence to his own personal liability under section 251(1), Housing Act 2004.

Grounds 6, 9 and 11: the appeals against the quantum of the penalties imposed

235. So far, we have found that the Council was entitled to impose financial penalties on both FLAL and Mr Sutton for breaches of five of the 2007 Regulations and for non-compliance with four of the eight improvement notices. It was not entitled to impose any penalty for the breach of the improvement notice concerning Flat 112. We now come to consider the appeals of both appellants against the quantum of the penalties themselves.
236. As we have already explained, an appeal under paragraph 10 of Schedule 13A, Housing Act 2004 takes the form of a re-hearing. We must make our own determination of the appropriate penalty to be imposed, rather than simply reviewing the decision made by the Council. In doing so we may confirm, vary or cancel the final notice and may have regard to matters of which the Council was unaware.
237. In their consolidated grounds of appeal the appellants made a number of points which are relevant to this aspect of the dispute. They assert that the penalties imposed by the Council are contrary to the totality principle, i.e. that the total penalties imposed should properly reflect all of the offending behaviour and should be just and proportionate in all the

circumstances; the penalties are, it is suggested, wholly disproportionate to the level of offending, to the previous conduct of the appellants, the general circumstances of the offences, including the large areas of overlap between certain offences, and the value of the property. They also complain that the Council failed to have regard to the fines imposed in the Magistrates' Court for housing offences, or to the means of the appellants.

238. Additionally, it is pointed out that FLAL and Mr Sutton are closely connected and the fact that the same penalties have been imposed on each of them in respect of the same conduct penalises that conduct twice. This, it is said, has resulted in disproportionate and unlawful penalties, exceeding the maximum permitted for any single relevant housing offence. This contention raises an important point of principle which may be encountered quite frequently in cases involving the imposition of civil penalties under the 2004 Act, and we will consider it shortly.

The Secretary of State's Guidance

239. A local housing authority is required by paragraph 12 of Schedule 13A, Housing Act 2004 to have regard to any guidance given by the Secretary of State concerning the exercise of its functions in relation to civil penalties. The Secretary of State published such guidance in 2016, which was re-issued in April 2018, entitled *Civil Penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*.
240. At paragraph 2.4 of the Guidance the Secretary of State points out that while no more than one civil penalty may be imposed for a single offence of failing to comply with an improvement notice, subsequent improvement notices requiring the same work may result in separate civil penalties. This observation is relevant to the submission made on behalf of the appellants in their statement of case that they have been penalised repeatedly for the same offence. Circumstances which amount to a breach of the 2007 Regulations, and which justify a civil penalty, may justify the imposition of a separate penalty if they are the subject of an improvement notice which is not complied with. The fact that a penalty has already been imposed because of the hazardous condition of a building will have to be taken into account when considering the appropriate penalty for a failure to take the steps required by an improvement notice to rectify that hazard, but the offending behaviour in each case is different, and there is no doubt it can be separately penalised.
241. Paragraph 3.3 reminds local housing authorities that a civil penalty of up to £30,000 can be imposed where a serious offence has been committed and that an authority may decide that a significant penalty “(or penalties, if there had been several breaches)”, rather than prosecution, is the most appropriate and effective sanction in a particular case. We agree that substantial penalties, exceeding the maximum for an individual offence, may properly be imposed where a number of separate offences have been committed.
242. At paragraph 3.5 the document advises local housing authorities to develop their own policies on the appropriate level of civil penalty and identifies a number of factors which must be taken into account when considering the penalty to be imposed for a particular offence. A number of factors are identified as relevant to the level of civil penalties:

- (1) the severity of the offence
 - (2) the culpability and track record of the offender
 - (3) the harm caused to the tenant (elsewhere it is explained that harm includes the potential for harm)
 - (4) punishment of the offender
 - (5) deterrence of the offender from repeating the offence
 - (6) deterrence of others from committing similar offences
 - (7) removing any financial benefit the offender may have obtained as a result of committing the offence.
243. The imposition of civil penalties is no more susceptible to rigid categories than criminal sanctions. Each case must be dealt with having regard to its own circumstances, but we agree that all of these factors are likely to be relevant. Although this list should not be treated as exhaustive, when read with the accompanying commentary it covers the matters likely to be of most importance.

Tribunals and local housing authority policy

244. It is an important feature of the system of civil penalties that they are imposed in the first instance by local housing authorities, and not by courts or tribunals. The local housing authority will be aware of housing conditions in its locality and will know if particular practices or behaviours are prevalent and ought to be deterred. The authority is well placed to formulate its policy and in *London Borough of Waltham Forest v Marshall* [2020] UKUT 0035 (LC) the Tribunal (Judge Cooke) gave guidance on the respect that should be afforded to a local authority's policy by the FTT when hearing an appeal from a civil penalty imposed by the authority. As Wilkie J put it, concerning the approach which should be taken by magistrates, in *Darlington Borough Council v Kaye* [2004] EWHC 2836 (Admin):

“The Justices ... ought to have regard to the fact that the local authority has a policy and should not lightly reverse the local authority's decision or, to put it another way, the Justices may accept the policy and apply it as if it was standing in the shoes of the council considering the application.”

245. If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision.

The Council's policy

246. As required by the Secretary of State's Guidance, the Council adopted its own financial penalty policy in June 2017. The policy refers to the factors identified in paragraph 3.5 of the guidance and states that the Council will use a consistent approach based on the Magistrates' Sentencing Guidelines in the assessment of culpability and harm. Eight

separate penalty bands are identified, ranging from offences in band 1A meriting a penalty of £100, to those in band 6 at £22,500 to £30,000. In bands 2 and above an assumed starting point towards the lower end of the band is identified (for example in relation to band 6 the assumed starting point is £25,000). Steps or increments to be used in adjusting the assumed starting point for mitigating or exacerbating features are also provided (for example, £2,500 in the case of band 6).

247. The band into which each offence is placed depends on an assessment of culpability and harm. An offence involving low culpability and low harm will fall into band 1A. A medium culpability offence which causes a medium level of harm is placed in band 4, which attracts significantly higher penalties in the range £6,000 to £12,000 than lesser offences. The most serious band 6 is reserved for high culpability offences causing a high degree of harm.
248. The penalty “matrix” produced by the Council is similar to those adopted by other local housing authorities (see for example the scale of penalties used by the Waltham Forest reproduced at paragraph 17 of the Tribunal’s recent decision in *London Borough of Waltham Forest v Marshall*). It is not necessary that each of these matrixes be identical, and there is no requirement of absolute uniformity of approach as local authorities are entitled to respond to the circumstances of their own area. Within limits, consistency within a local authority area is more important than consistency between authorities, and tribunals should be slow to rely on the approach taken by a different authority, or on decisions on appeals in different areas, as justifying a departure from the policy.

The avoidance of double punishment of company directors

249. In *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr. App. R(S) 436 a company and its two directors were convicted of offences under the Health and Safety at Work etc. Act 1974 arising out of an extremely serious asbestos contamination incident. The directors sought permission to appeal against the level of fines imposed on them personally. Lord Bingham CJ, at 441, accepted a submission on behalf of the directors that:

“... one must avoid a risk of overlap. In a small company the directors are likely to be the shareholders and therefore the main losers if a severe sanction is imposed on the company. We accept that the court must be alert to make sure that it is not in effect imposing double punishment. On the other hand, it seems to us important in many cases that fines should be imposed which make quite clear that there is a personal responsibility on directors and that they cannot simply shuffle off their responsibilities to the corporation of which they are directors.”

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. In addressing the first question the Court of Appeal aggregated the fines imposed on the company and the directors, and then asked itself whether that sum represented an appropriate penalty for the offending, before deciding that it did.

250. In this case Mr Sutton is a director of FLAL and owner of 54.8% of the company. We therefore accept that the warning given by Lord Bingham against imposing double punishment is relevant. Although the offences committed by Mr Sutton and those committed by FLAL are legally distinct, they arise in each case out of the same facts. The additional ingredient in the offences by Mr Sutton is simply that those committed by FLAL were with his consent or connivance.
251. The maximum penalty which may be imposed for a relevant housing offence under section 249A(4), Housing Act 2004, is £30,000. The complaint in this case is that the approach taken by the Council has, in practice, subjected Mr Sutton to penalties which exceed the statutory maximum. We consider that the extent to which that occurred in this case was unjustified, and that the penalty imposed on each of the appellants should have been fixed having regard not just to the statutory maximum penalty but also to the penalty being imposed on the other.
252. In this case, there is a complicating factor. FLAL is in administration, having been deprived of what we understand to be its sole source of income by the making of the prohibition order in October 2018. No evidence was available of the financial standing of FLAL and we were shown no copies of its annual accounts. In his written argument Mr Sutton informed us that the company's accounts for the year ending 29 December 2017 (before any enforcement action was taken against it by the Council) showed a profit and loss account deficit of £536,652. The only information we have about the value of the building is contained in the copy of the land certificate exhibited to the Council's evidence for which we learn that the price paid for the building by FLAL in March 2012 was £515,000. No more recent valuation was provided by Mr Sutton. We were informed that the mortgagee, which took possession of the building when the prohibition notice was served, has been carrying out further work but we do not know whether it is yet able to be occupied.
253. We are conscious of the need to avoid the imposition of double punishment for the same offending behaviour, but there is a risk in this case that the apportionment of the appropriate penalty between FLAL and Mr Sutton will result in the payment of a lesser sum than is justified by the offending behaviour. That risk arises because any penalty imposed on FLAL may go unpaid because the company's liabilities exceed its assets. In principle, however, we do not think that is a relevant consideration, and it cannot be relied on as a justification for imposing a greater penalty on Mr Sutton personally that would otherwise have been appropriate.

Ability to pay

254. The ability to pay, or the means of the offender, is relevant to any financial punishment; although not mentioned specifically in the Secretary of State's Guidance, it is an important component of both punishment and deterrence. Mr Sutton emphasised in his closing submissions that he had been, as he put it, the "main loser" out of the development project at Max House. He had derived no personal benefit from the property; on the contrary he had "lost a fortune". We did not understand this to be a plea that he is unable to pay the penalties imposed upon him, but rather a submission that he has already suffered enough

financially and that that is a matter which we ought to take into account in determining the appropriate penalty.

255. Mr Sutton also submitted that, at the time the relevant offences were being committed, Max Estates had been collecting licence fees of £22,000 a month from occupants of the building and was incurring management costs, utility charges and other expenses at the rate of £10,000 per month. The balance of £12,000 per month was used by the agent to contribute towards the monthly interest bill of £40,000.
256. A corporate or individual appellant who wishes the Tribunal to have regard to their own financial standing when considering the appropriate financial penalty to impose, should provide up-to-date evidence of their assets and liabilities. The information provided by Mr Sutton in submissions about the expenses and liabilities FLAL had incurred was not supported by any documentary record, and he provided no information about his own resources. The Tribunal has no solid foundation on which to form a view of how the development project has been funded.
257. In *Rollco* the Court of Appeal referred with approval to the following statement by Scott Baker J in *R v F. Howe & Sons (Engineers) Ltd* [1999] 2 Cr. App. R (S) 37:

“If a defendant company wishes to make any submission to the court about its ability to pay a fine it should supply copies of its accounts and any other financial information on which it intends to rely in good time before the hearing both to the court and to the prosecution. [...] Where accounts or other financial information are deliberately not supplied the court will be entitled to conclude that the company is in a position to pay any financial penalty it is minded to impose.”

We are conscious that in this appeal Mr Sutton has been acting without professional representation since FLAL went into administration. On the other hand, he did have access to advice at an earlier stage of the proceedings when evidence was being prepared; we have no reason to doubt that he was in a position to obtain representation if he had chosen to do so. He is an experienced professional person and could easily have produced information regarding his own means or the extent to which he been funding FLAL from his own resources, but he has chosen not to do so. We will approach the question of the appropriate level of penalty to be imposed on him on the assumption that he is a person of means; we will give no separate weight to the suggestion that he has already incurred significant personal losses in connection with Max House.

Hardwick House and Mr Sutton’s track record

258. Before considering the penalties for each offence, we will address one factor which the Council took into account in making each of its own penalty decisions.
259. Each notice of intent and final notice stated that the Council considered the culpability of both FLAL and Mr Sutton in relation to the relevant offence to be “very high” (an expression explained in the appendix to the Council’s policy as meaning that “the offender has

intentionally breached or flagrantly disregarded the law”). The notices explained that assessment by reference to circumstances at a different property in Norwich, known as Hardwick House, which was said to be owned, developed and managed by other companies (not FLAL) connected to Mr Sutton. The freehold was owned by Imperial Properties (Norwich 2) Ltd, of which Mr Sutton was the sole director. Concern over inadequate fire precautions caused the Fire Service to take enforcement action. The Council had also used its powers to prohibit the use of the flat on the top floor of the building, both because it had “not passed building regulations” and because it determined that there was a category 1 excess cold hazard.

260. The evidence presented to the Tribunal concerning Hardwick House comprised documents exhibited by Ms Spencer, the oral evidence of Mr Timothy Allison, a Fire Safety Adviser with Norfolk Fire Service and the evidence of Mr Sutton. Mr Allison provided details of Fire Service involvement with the building in July 2012, when the detection system had been reported to be faulty. His initial attempts to contact the building manager, to whom he was directed by Imperial Properties, met with no response.
261. In January 2013 Mr Allison had further dealings in relation to the building when it was reported to him that the fire detection system was being run from the power supply to the penthouse flat. This had caused a power overload which could have resulted in a fire. Mr Allison established that the fire detection system was not running from the common parts electricity supply because this had been disconnected due to a dispute over an unpaid bill for £19,000 (Mr Sutton suggested that his company had been entitled to a credit in a similar amount, and we assume an impasse had been reached leading to the termination of the power supply). The Fire Service arranged a temporary supply. Smoke control systems and emergency lighting were also disabled by the lack of power.
262. After speaking to the Property Director of Imperial Properties, a Mr Glover, Mr Allison served a formal requisition for information and an enforcement notice was issued on 26 February 2013 requiring reinstatement of the primary power supply to the fire detection installations. In response to the requisition Mr Allison learned that the building had no current fire risk assessment, despite the conversion having been completed in 2008. By 18 March nothing had yet been done to comply with the enforcement notice, and an extension of time was granted by Mr Bray. On 10 April the fire precautions were still being powered from the inadequate penthouse supply and it was not until 17 June 2013, following payment of the disputed electricity bill, that the three-phase supply was reconnected and the fire safety systems fully reinstated. Mr Allison’s assessment was that the fire risk in the building ought not to have taken a year to remedy and that continual pressure from the Fire Service had been necessary to ensure the property was made safe.
263. Mr Allison was cross examined by Mr Sutton, who put to him that Mr Glover’s initial lack of response had irritated him, implying that this explained his negative evidence. We reject that insinuation and accept the evidence of Mr Allison.
264. Hardwick House is a Grade II listed building with a large flat on the top floor which features a substantial glazed roof light which had originally served the whole of the building core and the banking hall on the ground floor. Mr Sutton explained that the building had been in

derelict condition but had been restored by his companies and converted for use as professional offices and 24 flats. Because of its listed status, the roof light could not be upgraded by the installation of double glazing. The penthouse apartment was occupied by the site manager involved in converting the rest of the building, and by other builders who were still present in February 2013.

265. CNC Building Control had undertaken a completion inspection in August 2009 after which they identified a series of outstanding issues, including the absence of an energy performance certificate, and incompletely protected fire doors. An energy performance certificate was subsequently obtained and showed that the penthouse flat was poorly rated because of the large area of glazing and an inadequate panel heating system. A prohibition notice was served in May 2013, and this remained in force in July 2014 when Ms Spencer was contacted about it by Savills, who had been instructed to market the penthouse for sale. In February 2015 Mr Sutton informed Ms Spencer that new heat pump units had been installed, but her request for further information about these went unanswered.
266. In oral evidence and in his written representations in response to the notices of intent on 4 July 2018 Mr Sutton acknowledged that there had been an issue with the electricity supply to the common parts of the building which had been cut off. He said this was because leaseholders did not pay their service charges. As for the glazed roof, the building conversion had been designed by a prominent firm of architects and mechanical and electrical engineers in Norwich and the space had been provided with both air conditioning and heating. Despite these installations, Mr Sutton acknowledged that it had been hot in summer and cold in winter, but he disputed the approach taken to this problem by the Council because it took no account of the listed status of the building or the fact that there had been no complaint from the occupier of the apartment.
267. There was no evidence that Hardwick House was an HMO, and although Mr Croskell put it to Mr Sutton in cross examination that it was, he disputed that proposition and said it was 24 flats let on long leases. If, as we were told, the other flats in the building were let on long leases, it would not have been a section 257 HMO. Mr Sutton said that the penthouse flat was the only part of the building which had not been signed off by the Council's Building Control Surveyors and he denied that any offences had been committed at Hardwick House. There had certainly been no prosecution.
268. In our judgment the evidence in relation to Hardwick House is relevant to the culpability of Mr Sutton. He did not dispute that the conversion project was one of his, and indeed he was clearly very proud of what had been achieved in bringing a derelict building back into use. He sought to direct blame towards others, including leaseholders, but he did not suggest that he had been unaware of the issues concerning fire safety or the underlying dispute over the electricity bill which appears to have been the cause of the excessive delay in resolving a serious situation. We treat his dealings with Hardwick House as evidence of Mr Sutton's disregard for the safety of others, his dilatory approach to the resolution of concerns about fire precautions, and his disinclination to comply promptly with enforcement action leading to statutory authorities having to step in with emergency remedial action, all of which are features of what occurred at Max House. To the extent that similar behaviour is evident at Max House we will treat the management of Hardwick House as a relevant aggravating

factor. FLAL is a separate company which had nothing to do with Hardwick House and we do not consider the events there to be relevant to the penalties to be imposed on it.

269. We can now turn to the individual offences, beginning with those concerning breaches of the 2007 Regulations.

Regulation 4

270. For the breach of Regulation 4 of the 2007 Regulations by failing to ensure that the name, address and any telephone contact number of the manager were displayed in the common parts, the Council imposed a penalty of £600. That sum was based on an assessment of Mr Sutton's culpability as very high in relation to an offence exposing residents to a low level of harm, putting it in band 2 of the policy matrix, which attracts financial penalties of between £200 and £800, with an assumed starting point of £400.
271. We bear in mind (as we have found in paragraph 150 above) that the offence was only proven on the basis of Mr Sutton's admission that no address was displayed in the common parts of the building, although a name and contact telephone numbers were. We bear in mind also that the address of Max Estates, which was responsible for the management of the building, appeared on the licence agreements signed by the occupiers. Taking these matters into account we assess the degree of culpability of low, rather than very high. We also consider the degree of harm (as at 19 December 2017, when Mr Beadle was still employed in the building and responded to telephone requests for assistance out of hours) also to be low.
272. Applying the Council's penalty matrix the appropriate penalty for the breach of regulation 4 would be £100. Had that been the only offence we would have imposed that penalty on FLAL alone. We would not have imposed a separate penalty on Mr Sutton for this rather technical breach (there is no suggestion anything similar had occurred at Hardwick House). However, in the context of the penalties for other offences, we think the addition of a small additional sum would be pointless. We therefore impose no penalty for this breach on either appellant.

Regulation 5

273. The offences of failing to ensure that means of escape from fire are maintained in good order and repair, and of failing to take all measures reasonably required to protect the occupiers from injury, both contrary to regulation 5, are much more significant. The Council thought them sufficiently serious to impose on each appellant the maximum permitted penalty of £30,000 (which the Secretary of State's Guidance suggests should be "reserved for the very worst offenders").
274. We consider the risk of harm arising from fire as a result of the condition of the building to be high. In the event, no fire eventuated, but the likelihood that, once started, a fire would spread quickly through the building was very significant. The deficiencies identified in January 2018 contributed to the decision to make a prohibition order nine months later. We bear in mind the overlap between these inadequacies in fire protection and the deficiencies

with regard to the testing of the electrical installations. We nevertheless consider it appropriate to deal with them separately.

275. In the case of FLAL we consider its level of culpability to be in the medium bracket, while that of Mr Sutton we consider to be high. We refrain from placing their responsibility at a higher level because both can legitimately point out that the work to the building was designed by apparently reputable architects, and its implementation was professionally supervised. There is no evidence establishing that, as at 19 December 2017, Mr Sutton or anyone involved with the affairs of FLAL was aware of the problems of inadequate fire stopping concealed behind wall and ceiling finishes, or within service cupboards. They were, however, on notice that the building still had not been passed as compliant with Building Regulations, and they cannot therefore be absolved of significant responsibility. The decision to continue letting the building without obtaining Building Control sign off is an aggravating factor. In Mr Sutton's case the disregard of fire precautions at Hardwick House justifies treating him as the more culpable of the appellants.
276. These assessments place FLAL's offending in band 4 of the Council's policy matrix, and Mr Sutton's in band 5. We consider the appropriate penalties to be £12,000 in the case of Mr Sutton and £8,000 in the case of FLAL.

Regulation 7

277. We regard the breaches of regulation 7, concerning the failure to test the fixed electrical installations and the failure to produce an inspection and testing certificate, to be the most serious of all the breaches of the 2007 Regulations. The Council thought they merited the highest penalty for both appellants. We do not go so far, but we consider FLAL to have a high degree of culpability and Mr Sutton very high. We regard his involvement with Hardwick House and his attempt to divert attention from the absence of certification by claiming, despite having had ample time to check, that the relevant document had been supplied to Building Control, to be aggravating factors. We do not accept that Mr Sutton was unaware of the deficiencies of the electrical installations, which were reported to him by the caretaker and which he sought ineffectually to address by banning portable heaters.
278. The risk of harm to residents of the building was high. A large number of individuals were exposed to a continuous risk. There was ready access to the plant rooms (as was demonstrated in the video clips we were shown) and residents stored their own belongings, including bicycles, in proximity to the live fuse board. Frequent power outages resulted in either the caretaker or residents having to reset switches thereby coming into close proximity with the unsafe installations. Proper and timely testing would have revealed the deficiencies eventually identified by Facit Testing in January 2018 and would have enabled effective steps to be taken at a much earlier stage to limit the risks to occupiers.
279. Having regard to these factors, and the evidence as a whole, we impose a penalty of £18,000 on Mr Sutton and a penalty of £12,000 on FLAL. These penalties are not within the ranges specified by the Council's policy, but we consider them to be appropriate taking into account the further penalties which will be imposed for breach of the improvement notice requiring remediation of the electrical faults

Regulation 8

280. In respect of the failure to maintain the paving on the courtyard, contrary to regulation 8, the Council imposed financial penalties of £18,000 on both Mr Sutton and FLAL on the basis that each bore a very high degree of culpability for an offence which created a medium risk to individuals in the building. We have made our findings of fact in relation to the condition of the flagstones at paragraphs 174 to 176 above.
281. In the case of FLAL we consider this to be an offence attracting a high level of culpability (described in the appendix to the Council's policy document as involving "actual foresight of, or wilful blindness to, the risk of offending but risk nevertheless taken"). The company's employees were fully aware of the problem. So too must Mr Sutton have been. He was responsible for periodic inspections and asset management, and on his regular visits to the building, and in his conversation with the caretaker, he cannot have failed to become aware of the defective paving. The problem was one of long-standing. There is no evidence that any attempt was ever made to remedy it until after the Council intervened. Disregard of the safety of communal areas was a feature of the management of Hardwick House, where rubbish was allowed to accumulate on the means of escape and emergency lighting was inoperative. For that reason, we assess Mr Sutton's personal responsibility as very high.
282. In agreement with the Council, we assess the degree of harm associated with the defective paving to be medium. Because the problem was obvious it was relatively easy for anyone living in the building to avoid the risk of tripping on the flagstones either by taking care when entering the building or using an alternative route. We nevertheless accept that a vulnerable individual, such as Mr Fox, or anyone who was distracted or unobservant, could have suffered serious injury if they had tripped.
283. Having regard to their relative responsibility the penalty we impose on FLAL is £6,000 and the penalty we impose on Mr Sutton is £10,000.

Regulation 10

284. In relation to the failure, contrary to regulation 10, to ensure that sufficient bins were provided for the requirements of each household occupying the building the Council imposed a financial penalty of £18,000 on each appellant (assessing their culpability as very high and the risk of harm as medium). As the final notice recorded, the bins were unsightly, malodorous and could attract pests such as flies and rats as well as being a target for arsonists. There were in the open rather than in a bin store and putrid odours were reported to be apparent within the building in the summer of 2017.
285. Once again, we regard Mr Sutton's culpability in respect of this offence as greater than that of FLAL (very high in his case, and high in FLAL's). The problem was obvious and of long standing. It could easily have been remedied. Mr Sutton was aware of it but contented himself with the knowledge that the provision of bins was considered sufficient for a hotel. He ignored the fact that the building was no longer being used as a hotel. His culpability is aggravated by the occurrence of a similar build-up of rubbish reported by Mr Allison on the staircase at Hardwick House.

286. We consider the level of harm to individuals to be medium, and we interpret harm in this context as including not just the risk of personal injury but also the degradation of the physical environment. The refuse area was unsightly and unpleasant and contributed to the poor residential conditions for the large number of individuals and families living at Max House.
287. For this offence we impose penalties of £6,000 on FLAL and £10,000 on Mr Sutton.

Improvement notices in respect of individual flats

288. Our conclusions on the degree to which there was compliance with the improvement notices served in relation to the individual flats are at paragraphs 187 to 192 above. To recap, six of the improvement notices served on 12 February 2018 identified excess cold in individual flats as the relevant hazard. Within the time permitted by the notices for remedial work, none of the work specified in in relation to flat 101 was carried out, and in relation to Flat 102 while the window had been replaced no heating was installed.
289. The penalties imposed on both Mr Sutton and FLAL in respect of each of the improvement notices was the maximum permitted, £30,000. We consider that level of penalty to have been disproportionate.
290. The Council's penalty matrix identifies the level of culpability as high where a clear requirement to take action has been ignored, such as where an improvement notice has not been complied with. We do not dissent from that as a general rule, but it is necessary to consider the degree of non-compliance and any explanation offered for it.
291. In relation to windows, in five of the six flats where replacement of single glazed windows by double glazing was specified, the work was completed in time. There were particular difficulties with access to the flat where the windows were not replaced, and the work was eventually done. Most of the replacement heating specified in the improvement notices was also provided in time, and those where the work had not been done were not without heating altogether (fixed panel heaters were fitted, and the cost of utilities was included in the rent). This is not a case of the Council's stipulations being ignored, but rather of the appellants not completing the required work within the time allowed despite having made good progress with it and related work. In the circumstances, we do not regard Mr Sutton's track record at Hardwick House to be a relevant aggravating factor; he appears to have appreciated the need to comply with the notices, and to have made efforts to do so.
292. As to the risk of harm, we consider these offences to fall into the medium risk bracket. Ms Spencer considered the excess cold hazard to be a category 1 hazard. Given that there was some heating, which was available at no additional cost to the tenant, we find this conclusion surprising, but there was no appeal against the improvement notices themselves. There is no evidence that the occupants of the two flats in question were particularly vulnerable.
293. Although two improvement notices were not complied with, and therefore two separate offences were committed, those offences were so similar that we do not consider separate penalties are required. For an offence exposing residents to a medium level of harm, for

which there is a high level of culpability, the band 4 range on the Council's matrix is from £6,000 to £12,000, with an assumed starting point of £8,000. Adopting that starting point we consider the appropriate penalty to be one of £6,000 in the case of each appellant, which gives significant credit for the extent to which the other notices were complied with.

Improvement notice in respect of electrical installations

294. The Council's assessment was that the offences of failing to comply with the notice concerning electrical testing were at the highest level of seriousness and culpability on the part of both Mr Sutton and FLAL, and justified the imposition of the maximum permitted penalty of £30,000 each. Our own findings are at paragraphs 161 to 171 and 193 to 197 above. It is not necessary for us to repeat them.
295. We regard these offences as the most serious, because the condition of the installations exposed individuals and residents generally to a high risk of harm over a prolonged period and because of the appellants' dilatory approach to complying with the notices. The only work we can be sure was undertaken within the period allowed by the notice was the remediation of the most serious code 1 breaches, which we accept was done as soon as they were notified to Mr Sutton.
296. The penalty we impose on Mr Sutton is higher because of his record of disregarding the safety of electrical installations at Hardwick House. That penalty is £25,000. The penalty we impose on FLAL is £23,000. We appreciate that, if the value of FLAL's assets exceeds its liabilities so that funds are eventually available for distribution among its shareholders, the total cost to Mr Sutton will be above £36,000 which would exceed the maximum of £30,000 for a single offence. We nevertheless consider that his personal responsibility for an offence of this seriousness requires to be recognised by a substantial penalty, and ought not to be diluted by the possibility (which such limited evidence as there is suggests is remote) that he will also be punished in his capacity as a shareholder for the company's separate offence.

Improvement notice in respect of fire safety

297. Once again, the Council regarded the offences on the part of both Mr Sutton and FLAL in failing to comply with the notice concerning fire safety as meriting the highest available penalty. We have made our own findings of fact at paragraphs 151 to 171, and 198 to 202 above. For the reasons we have already given in relation to the separate but related offences of breaching regulation 5 (see paragraph 275 above), and because no actual harm eventuated to any of the residents of the building, we do not consider that these offences can be classified as being at the very top of the scale of seriousness. Nevertheless, significant failures to comply fully with an improvement notice requiring extensive measures to protect a large number of residents against the risk of fire are undoubtedly a very serious matter. In Mr Sutton's case his culpability is aggravated by the disregard of fire precautions at Hardwick House.
298. The evidence concerning the extent of the progress made to comply with the notice is not impressive. The notice was served in February, and in August the incorrectly fitted or

broken fire doors mentioned in it were found still to be present. Mr Bray's letter of 28 September 2018 identified the same issues of inadequate compartmentation and protection of escape routes which had featured in the original notice. The overloaded electrical systems were a significant cause of the prohibition order in October. Mr Sutton told us that his contractors were working their way round the building, addressing the various defects, but the evidence suggests that PPS were not instructed until just before, or just after, the expiry of the time for compliance with the notice. The only component of the notice which appears to have been largely complied with was the directions to provide suitable fixed heating in individual flats to reduce the use of portable heaters.

299. We leave out of account the requirement in this notice to complete the remediation and testing of the electrical circuits and installations in the building. The failure to carry out that work has already been penalised and it is necessary to guard against the imposition of double punishment.
300. We therefore put these offences in band 5 of the Council's policy matrix, attracting penalties of up to £20,000. Had it not been for the overlap with the notice concerning electrical installations we would have placed it in band 6. The penalty we impose on Mr Sutton is £18,000 and on FLAL £14,000.

Conclusion on level of penalties

301. In aggregate the penalties we have imposed on FLAL for breaches of the 2007 Regulations total £32,000, and those we have imposed on Mr Sutton total £50,000. For non-compliance with the improvement notices the total penalties imposed on FLAL come to £43,000 and those on Mr Sutton, £49,000.
302. We are satisfied that these substantial penalties are necessary to reflect the seriousness of the offences and are proportionate to the risks to which the large numbers of residents of Max House were exposed over a lengthy period. We do not think that, in aggregate, these sums are excessive or unjust, and we have taken account of the overlap between the circumstances of certain offences, and the fact that Mr Sutton may be penalised both in his individual capacity and in his capacity as a shareholder. We believe that the imposition of a significantly greater aggregate penalty on Mr Sutton properly reflects his responsibility for the conduct of the affairs of the company, his personal knowledge of the condition of the building, his responsibility for the occurrence of similar problems at Hardwick House and his greater ability to pay.
303. Mr Sutton referred in his written submissions to a large number of decisions by the FTT in other appeals where significantly lower penalties were imposed for a variety of offences. We have considered those decisions, each of which depends on the particular facts of the individual case. This jurisdiction is in its early stages and individual decisions demonstrate little consistency. As we have explained, we consider the better guide to an appropriate level of penalty is the policy adopted in the area concerned by the local housing authority. In this case the Council did not follow its own policy or applied it in a way which imposed disproportionate penalties without proper consideration of the facts. We have been guided

by the Council's policy and where we have departed from it we have explained why we have done so.

Ground 12 – Was the prohibition order invalid?

304. The final ground of appeal was against the making of the prohibition order. The basis of the appeal was that the fire safety and electrical problems in the building were not as serious as the Council suggested, PPS had been engaged to address them and was doing so as quickly as possible and, in any event, "guests" had all been informed by FLAL that they were required to leave the building to enable further work to be undertaken.
305. No evidence was called by Mr Sutton to contradict the evidence of Mr Bray and Mr Impleton concerning the condition of the fire and electrical installations in the building. The appellants' pleaded case on both aspects of the design and workmanship of the installations was not substantiated. Despite the deficiencies in the fire detection and alarm system which caused the Council to carry out emergency works in October 2018 (see paragraph 207 above) the appellants' grounds of appeal maintain that the Council had "degraded" a system designed to operate on a policy of full evacuation in the event of a fire. They asserted that there was no fire risk from the condition of the electrical installations and that any overloading problems were due to occupiers using portable heaters: "the property has full time management and any power cut due to the fuses blowing is immediately resolved." There were said to be no fire separation issues. We reject those suggestions which are contradicted by the evidence we have heard and the facts we have already found. They assume levels of workmanship which were not achieved, and reflect the fiction that Max House was a hotel, with staff on site to conduct a full evacuation in the event of a fire in any part of the building. The reality was that the building was the permanent home of numerous families and individuals and, after April 2018, was unstaffed.
306. In our judgment the Council was clearly entitled to make a prohibition order under section 20 or 21, Housing Act 2004. The HHSRSS survey undertaken by Ms Spencer on 10 October classified the fire hazards as category 1 and the electrical hazards as category 2. There is nothing in the evidence we have heard which causes us to doubt those assessments.
307. We therefore dismiss the appeal against the prohibition order.

Disposal

308. The appeals are allowed in part. We reduce the penalties imposed on FLAL to £32,000 for breaches of the 2007 regulations, and £43,000 for non-compliance with the improvement notices. We reduce the penalties imposed on Mr Sutton to £50,000 for breaches of the 2007 regulations, and £49,000 for non-compliance with the improvement notices.

Martin Rodger QC

Peter D McCrea FRICS

Deputy Chamber President

20 March 2020