UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 140 (LC) UTLC Case Number: LC-2021-415

Location: Liverpool Civil and Family Courts
(Remotely by Teams)

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – particulars of offence - adequacy of the local housing authority's statement of reasons for imposing a financial penalty – when does a local housing authority have "sufficient evidence" of a breach of the mandatory condition in paragraph 1(2) of Schedule 4 to the Housing Act 2004 to produce to the authority annually for their inspection a gas safety certificate obtained in respect of the property within the previous 12 months – proper approach to appeals on questions of fact

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)

BETWEEN:

MAHENDRA MAHARAJ

Appellant

-and-

LIVERPOOL CITY COUNCIL

Respondent

Re: 68 Fazakerley Road,
Liverpool,
L9 2AL

His Honour Judge Hodge QC

Heard on: 20 April 2022

Decision Date: 20 May 2022

Mr Nathan Goldstein (instructed directly) for the appellant
Ms Cecilia Pritchard (instructed by Legal Services, Liverpool City Council) for the respondent

The following cases are referred to in this decision:

Pinto v Welwyn Hatfield Borough Council [2022] UKUT 047 (LC)

Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48

Introduction

1. This is an appeal by Mr Mahendra Maharaj from a decision of the First-tier Tribunal ('**the FTT**'), dated 24 June 2021, confirming two final notices, dated 29 January 2020, issued by the local housing authority, Liverpool City Council, imposing financial penalties upon him for two offences of failing to comply with licence conditions under Part 3 of the Housing Act 2004 ('**the 2004 Act**') in respect of 68 Fazakerley Road, Liverpool L9 2AL ('**the property**'). The FTT refused permission to appeal on 4 August 2021 but permission to appeal was granted by the Deputy Chamber President (Martin Rodger QC) on 7 October 2021. When granting such permission, the Deputy Chamber President stated that:

> "The first ground of the proposed appeal raises an issue of general importance about the approach which should be taken by local housing authorities and first-tier tribunals to the specification in civil penalty notices of the particulars of the offence in respect of which the penalty is being imposed. The first ground is arguable for the reasons stated in the application. The second ground raises no issue of general importance but it is arguable that the first-tier tribunal did not give sufficient consideration to the applicant's explanation for the breach of the inspection condition or address its mind to the question whether he had a reasonable excuse for the breach.

2. The appeal was listed as an attended hearing in Liverpool but the day before the hearing the Tribunal converted it to a remote hearing by Teams when I was informed that counsel for the appellant had tested positive for COVID. The appellant was represented by Mr Nathan Goldstein (of counsel) and the respondent was represented by Ms Cecilia Pritchard (also of counsel).

3. As the hearing developed, it became apparent that this appeal also raises a second issue of general importance concerning the precise point in time at which a local housing authority has "sufficient evidence" of the breach of the mandatory condition in paragraph 1(2) of Schedule 4 to the 2004 Act, which requires a licensed landlord to produce to the local housing authority annually for their inspection a gas safety certificate obtained in respect of the house within the previous 12 months.

The factual and legal background

4. The appellant is a professional landlord with a substantial portfolio of rental properties, including some 78 in Liverpool, which he manages himself. Since 1 April 2015 the respondent had operated a citywide selective landlord licensing scheme which provided for the licensing of certain rental properties, including the property. This was the subject of a licence, granted to the appellant on the 4 July 2017, which imposed the respondent's standard-form conditions on the appellant as the licence holder. The material conditions relevant to these proceedings were General Condition 1.2 (which is a mandatory condition required by s. 90(4) and paragraph 1(2) of Schedule 4 to the 2004 Act) and General Condition 5.6 (which is a discretionary condition imposed under s. 90(3) of the 2004 Act). These General Conditions provide as follows:

General Condition 1.2 If gas is supplied to the property, the licence holder is to provide a to the local authority annually, a valid gas safety certificate obtained in respect of the property within the last 12 months (the first certificate must be provided within 12 months of the licence grant date, and every 12 months thereafter).

General Condition 5.6 The licence holder must ensure that the inspections of the property are carried out a minimum of every 6 months to identify any problems relating to the condition and management of the property. The records of such inspections must be kept for the duration of this licence. The records must contain a log of who carried out the inspection, date and time of the inspection and issues found, and action(s) taken. Copies of these must be provided to the Authority within 28 days on demand.

5. By s. 95(2) of the 2004 Act a licence holder commits an offence if he fails to comply with any condition of the licence; but, by s. 95(4) it is a defence if the licence holder had a reasonable excuse for failing to comply with the condition in question. The burden of establishing such a defence, to the civil standard, on a balance of probabilities, rests on the licence holder. As an alternative to prosecution, by s. 249A of the 2004 Act the local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that their conduct amounted to such an offence. S. 249A(6) incorporates Schedule 13A to the 2004 Act, which sets out: (a) the procedure for imposing financial penalties by a local housing authority, (b) appeals against financial penalties, (c) the enforcement of financial penalties, and (d) guidance in respect of financial penalties. As regards the procedure, paragraphs 1 to 3 deal with the notice of intent, paragraph 4 addresses the right to make representations, and paragraphs 5 to 8 deal with the final notice. So far as material to this appeal, these paragraphs provide as follows:

1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a 'notice of intent').

2 (1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

…

(3) For the purposes of this paragraph a person's conduct includes a failure to act.

3 The notice of intent must set out –

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

4 (1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ('the period for representations').

5 After the end of the period for representations the local housing authority must –

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a notice (a 'final notice') imposing that penalty.

7 The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8The final notice must set out –

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the notice.

Paragraph 10 deals with appeals and provides:

(1) A person to whom a final notice is given may appeal to the First-tier Tribunal against –

(a) the decision to impose the penalty, or

(b) the amount of the penalty.

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph –

(a) is to be a re-hearing of the local housing authority's decision, but

(b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

Paragraph 12 requires a local housing authority to have regard to any guidance given by the Secretary of State about the exercise of its functions under Schedule 13A or s. 249A.

6. S. 249A and Schedule 13A were inserted into the 2004 Act (with effect from 6 April 2017) by the Housing and Planning Act 2016. Mr Goldstein has referred me to the Guidance issued for local authorities under Schedule 9 to the 2016 Act in relation to the civil penalties introduced by that Act. As regards the burden of proof that is required, paragraph 3.1 provides:

> "The same criminal standard of proof is required for a civil penalty as for prosecution. This means that before taking formal action, a local housing authority should satisfy itself that if the case were to be prosecuted in the magistrates' court, there would be a realistic prospect of conviction.
>
> In order to actually achieve a conviction in the magistrates' court, the local housing authority would need to be able to demonstrate beyond reasonable doubt that the offence has been committed. Similarly, where a civil penalty is imposed and an appeal is subsequently made to the First-tier Tribunal, the local housing authority would need to be able to demonstrate beyond reasonable doubt that the offence had been committed."

7. On 8 November 2019 the respondent issued two notices of intent to impose financial penalties on the appellant, each for the alleged offence of failing to comply with a licence condition under Part 3 of the 2004 Act in respect of the property. One proposed a financial penalty of £3,375 for the breach of General Condition 1.2 of the appellant's licence. The basis of the offence was stated to be that on 5 June 2019 Adam Farey, a technical compliance officer with the respondent council, had written to the appellant requesting him to produce a copy of a valid gas safety certificate for the property within seven days. On 13 June 2019 the requested record had not been provided by the appellant, which was said to give rise to a contravention of General Condition 1.2 of the licence. The other notice of intent proposed a financial penalty of £5,625 for the breach of General Condition 5.6 of the appellant's licence. The basis of that offence was stated to be that on 5 June 2019 Mr Farey had written to the appellant requesting him to produce a copy of his records of inspection for the

property within 28 days. By 4 July 2019 the requested records had not been provided by the appellant, giving rise to a contravention of General Condition 5.6 of the licence. Final notices imposing the proposed financial penalties in respect of each of these two offences were issued on 29 January 2020.

8. By application dated 22 February 2020 the appellant appealed to the FTT against the imposition of both financial penalties on the grounds that he was not in breach of either condition, and that he had a defence in respect of his failure to inspect the property every six months. Directions were issued on 22 October 2020; and the matter was heard via video link on 21 June 2021. At the hearing, the appellant was represented by his agent, Mr Laurence Sweeney, and the respondent was represented by Ms Pritchard. For the appellant, the FTT heard evidence from the appellant and from Mr Sweeney. For the respondent, the FTT heard evidence from the tenant of the property, Mr Martin Hourston, and from the respondent's officer, Mr Adam Farey. A full transcript of the proceedings has been provided, running to over 180 pages, which I have read in full. I note that the FTT handed down their decision only three days after the hearing.

9. It was common ground that the supporting documents sent to the respondent with the appellant's original licence application had included a gas safety certificate for the property, dated 8 February 2017. In essence, the appellant's case before the FTT was: (1) that on 6 June 2019 he had posted to the respondent three gas safety certificates for the property, dated 8 February 2017, 29 March 2018, and 17 February 2019, along with blank, but signed, inspection records for the property; and (2) that he had been unable to inspect the property because he been unable to gain entry to it as the tenant, Mr Hourston, had not provided him with access to the property.

The FTT's Decision

10. The FTT set out the background to the appeal at paragraphs 1 and 2 of its decision dated 24 June 2021. The FTT summarised the applicable statutory provisions at paragraphs 3 to 6, expressly noting (at paragraph 3) that:

> "The Respondent must issue a Notice of Intent before the end of 6 months beginning on the date when the Respondent has evidence that an offence has been committed, or at any time when the offence is continuing."

The FTT described the alleged breaches, and the resulting appeal, at paragraphs 7 and 8. They referred to a number of preliminary points raised by Mr Sweeney on the appellant's behalf at paragraphs 9 to 14, all of which they dismissed. None of them are relevant to the present appeal. The FTT summarised the case for the appellant and the respondent on condition 1.2 at paragraphs 15 to 18 and 19 to 23 respectively. The parties' respective cases on condition 5.6 were set out at paragraphs 24 to 27 and 28 and 29. The FTT set out their findings at paragraphs 30 to 37 as follows:

> "30. Prior to endorsing any financial penalty, the Tribunal is required to be satisfied beyond reasonable doubt that the relevant offence has been committed. The Tribunal is entitled to proceed on the basis that the Applicant has put his best case and all relevant evidence before the Tribunal. After carefully consideration [sic]

of all the evidence and the representations of Mr Sweeney and Ms Pritchard the following facts have been established.

31. Mr Hourston was a reliable and truthful witness, despite having made a mistake about the date of a gas safety certificate in one of his witness statements. He was concerned, in giving evidence, to make it clear that he had been ill, and that his memory of events was not always complete.

32. By contrast, Mr Maharaj's evidence contained contradictions and was not supported by the documents he should have been able to produce and rely on.

33. There is no reason to believe that any of the Respondent's communications were not received by Mr Maharaj. He responded to them by email and did not point out to the licensing team either that they ought not to be contacting him by email, or that they were still addressing letters to his old London address.

34.On Mr Maharaj's own evidence, if he attempted to send copies of gas safety certificates and inspection records to the Respondent on 6 June 2019, the envelope was inadequately franked and would not have been delivered. The inspection records he says he sent on that date included post-dated documents, which were either not sent or give rise to the inference that no attempts were actually made, or intended, to inspect the Property.

35. The gas safety certificate dated 29 March 2018 was not supplied to the Respondent at that time to comply with the condition requiring that such certificates be copied to the Respondent annually. The Tribunal makes no finding as to whether the gas safety certificate dated 17 February 2019 was sent to the Respondent on 14 March 2019, but notes that this was not claimed by the Applicant prior to the hearing.

36. The Tribunal finds that the Applicant had opportunities to arrange to inspect the Property, either when Neil at N8 Developments Ltd made contact with Mr Hourston or by delivering a letter to the Property. He did not do so. He did not report to the Respondent's licensing team his alleged difficulties in trying to inspect the Property. He did not produce any file copies of letters sent to Mr Hourston, and did not try to recover from the Property any of the unopened letters he said he had sent there. He did not produce any other evidence of attempts to inspect, such as documents evidencing the sending of recorded delivery letters, or dated photographs of any fruitless visits to the Property, or notes of any inspection of the exterior of the Property.

37. Mr Hourston did not deliberately or consistently deny Mr Maharaj access to the Property for the purposes of the 6 monthly inspections."

The FTT's conclusion (at paragraph 38) was that it was satisfied beyond reasonable doubt that the appellant had committed the offences for which the penalty notices were issued; and that he had not made his case for a defence under s. 95(4) of the 2004 Act. At paragraph 39, the FTT recorded that the appellant had not raised any argument relating to the

respondent's procedures in applying the penalties, or the amounts of those penalties, which were therefore confirmed.

11. The FTT's decision dated 4 August 2021, wherein they refused permission to appeal from their decision to confirm the respondent's final notices imposing financial penalties on the appellant, provides further clarity as to the true basis for its substantive decision. Addressing the breach of condition 1.2, paragraphs 6 to 9 are as follows:

> "6. The Tribunal found as a fact that the Applicant failed to supply a gas safety certificate for the year ending 4 July 2018 within the time limit required by the Licence condition 1.2, and further found that this was the basis of the offence for which a civil penalty was payable. This finding was therefore different from the failure referred to in the Respondent's Final Notice as the basis of the offence. In evidence Mr Farey confirmed that the Respondent did not receive the 2018 gas safety certificate by 13 June 2019, but also said that if the certificate had been received then as requested, although late, the Respondent would have overlooked the Applicant's earlier failure to produce it.
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> 7. The Tribunal has considered whether to review its decision in regard to the imposition of a financial penalty for breach of 1.2 of the Licence condition, and has determined that a review is not appropriate.
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> 8. Paragraph 10(3) of Schedule 13 to the Housing Act 2004 provides that on an appeal against the imposition of a financial penalty the Tribunal is to re-hear the decision to issue a Final Notice. The Tribunal has to decide whether to confirm, vary or cancel the Final Notice. The Tribunal is not bound by the wording of the statement of reasons in the Final Notice, but it is obliged to consider whether it is satisfied beyond reasonable doubt that an offence has been committed, in this case under section 95(2)(b) of the Housing Act 2004, i.e. that there was a breach of Licence condition 1.2. It was so satisfied, and permission to appeal is therefore refused.
>
> 9. Alternatively, the Tribunal had power to vary the Final Notice so that the statement of reasons was amended to set out the basis of the offence as found by the Tribunal. However, the Tribunal did not consider that such a variation was required in the circumstances."

As regards the breach of licence condition 5.6, paragraphs 10 to 12 of the decision are as follows:

> "10. It was common ground that the Applicant had not inspected 68 Fazakerley Road every 6 months, and was therefore in breach of Licence condition 5.6. Section 95(4)(b) of the Housing Act 2004 provides a defence where a landlord can show that he had a reasonable excuse for failing to comply with the condition. At the hearing the Applicant relied upon this sub-section, saying that the tenant would not allow him access to the property.

> 11. The Tribunal preferred the evidence of the tenant Mr Hourston to that of the Applicant, which was found to be contradictory and unsupported by documents he would have been expected to produce. The Applicant speculated that the tenant's reasons for not answering the door to him when he visited the property were that there were accumulating arrears of rent, and that the property was in a squalid state. Mr Hourston told the Tribunal that except when he was ill in the early part of 2019 he generally opened the door to visitors if he was in, and that he had not at that time been asked to pay the rent over and above his housing benefit. He said that he had not had a visit from the Applicant.
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> 12. For the reasons set out in its decision, the Tribunal concluded that the Applicant had not made the efforts to visit the property that he claimed to have made. The actions of the tenant had not prevented him from carrying out 6 monthly inspections, and therefore he had not had the reasonable excuse for breach of condition 5.6 that he claimed to have had."

12. It is clear that the basis on which the FTT found the appellant to be in breach of licence condition 1.2 was that he had failed to supply a gas safety certificate for the year ending 4 July 2018 within the time limit required by that licence condition, i.e. by that date. The FTT expressly made no finding as to whether the gas safety certificate dated 17 February 2019 had been sent to the respondent on 14 March 2019.

The appeal hearing

13. In his written skeleton argument in support of the appeal, dated 20 April 2022, Mr Goldstein stated that he understood that the nature of the appeal was in effect a re-hearing of the appellant's challenge to the penalty notices and consequently it was anticipated that a number of witnesses were required to give oral evidence and be cross-examined. At the outset of the appeal hearing, Ms Pritchard indicated that that was also her understanding, and it was for that reason that she had not prepared a written skeleton argument. I referred both counsel to paragraph 5 of the Order of the Deputy Chamber President granting permission to appeal, which provided that the appeal would be a review of the decision of the FTT and would be conducted in accordance with the Tribunal's standard procedure (under which no evidence is heard but the Tribunal determines whether the decision which is being challenged is correct based upon the evidence that was before the FTT). I also referred counsel to an exchange of emails between the respondent and the Tribunal's case officer in November 2021 in which the latter had confirmed that the appeal would be by way of review, which was the usual procedure adopted on appeals; and that if the respondent wished to request a re-hearing it might do so, but that such an application would only succeed if there were some good reason for the Tribunal to adopt an approach in the present case which was different from its usual approach. I pointed out that no such request had ever been made, and that there had been no challenge to the Deputy President's direction that the appeal would proceed by way of a review of the FTT's decision rather than a re-hearing. Having given both counsel an opportunity to take instructions, they confirmed that they were content to proceed by way of review. Since this was not the way in which counsel had anticipated that the appeal would proceed, I granted an adjournment of about an hour to allow them to adapt their intended submissions accordingly. I also drew the attention of counsel to the recent decision of the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 (now reported at [2022] 4 WLR 48) as providing a helpful summary of the correct

approach to be taken to appeals on issues of fact. When the hearing resumed, Mr Goldstein addressed the Tribunal for about an hour and 20 minutes, either side of the luncheon adjournment. Ms Pritchard then responded for about 45 minutes; and there followed a dialogue between the Tribunal and counsel during which Mr Goldstein made reference to the recent decision of the Tribunal (Judge Elizabeth Cooke) in *Pinto v Welwyn Hatfield Borough Council* [2022] UKUT 047 (LC) on the issue of what amounts to "sufficient evidence of the conduct to which the financial penalty relates" for the purposes of the six months' time limit for the giving of a notice of intent to impose a financial penalty. The appeal hearing concluded at about 4.00 pm.

Licence condition 1.2

14. For the appellant, Mr Goldstein submits that the challenge to the financial penalty imposed for breach of licence condition 1.2 raises two issues: the first is a technical, or formal, argument relating to the terms of the penalty notice; and (should the Tribunal find against the appellant on this first point) the second is a factual argument as to whether the appellant had in fact provided the gas safety certificate to the respondent on or about 6 June 2019.

15. In both the notice of intent and also in the final notice imposing a financial penalty for breach of licence condition 1.2, the respondent had stated, as the basis of the offence, that the failure to produce a copy of a valid gas safety certificate by 13 June 2019, when requested to do so within seven days by Mr Farey's letter dated 5 June 2019, had given rise to a contravention of this particular licence condition. In its decision dated 24 June 2021 the FTT had concluded that it was "satisfied beyond reasonable doubt that the applicant committed the offences for which the penalty notices were issued". The basis for this finding was not apparent from the FTT's original decision, and it only became clear when the FTT issued its later decision, dated 4 August 2021, stating that it had "found as a fact that the Applicant failed to supply a gas safety certificate for the year ending 4 July 2018 within the time limit required by the Licence condition 1.2, and further found that this was the basis of the offence for which a civil penalty was payable". Mr Goldstein submits that there was no basis upon which a financial penalty could lawfully have been imposed on the appellant under s. 249A of the 2004 Act as the original charge formulated by the respondent was materially flawed: the failure to provide a gas safety certificate by 13 June 2019 could not constitute an offence since the failure to provide a gas safety certificate within seven days of being requested to do so was not one of the conditions of the appellant's licence. Further, the alternative basis upon which the FTT appear to have based their decision - the failure to provide a gas safety certificate for the year ending 4 July 2018 - was contrary both to the terms of the penalty notice and to the way in which the respondent had put its case throughout. Moreover, had the charge been formulated in this way, it would have been apparent that the six months' period for giving notice of intent had expired on 4 January 2019, so that any proceedings for that offence were effectively time-barred, because no notice of intent had been given until on or about 8 November 2019. Clearly, Mr Goldstein submitted, it would have been apparent to the respondent whether or not a gas safety certificate had been provided to it by each anniversary of the date when the landlord was first granted a licence for the property.

16. For the respondent, Ms Pritchard submits that in both the notice of intent and also in the final notice, it was made very clear that the basis of the offence was a contravention of general licence condition 1.2, which was set out in full. The essence of the respondent's case was clearly stated to be the failure to supply a valid gas safety certificate on an annual

basis; and that case had been put to the appellant in clear terms in the course of cross-examination. The basis of the offence stated in the two notices is not the offence itself but merely "gives a factual background" to the offence. Alternatively, by paragraph 10(3) of schedule 13A to the 2004 Act, the appeal to the FTT had been a re-hearing of the respondent's decision, and might be "determined having regard to matters of which the authority was unaware". As for the submission that the respondent had had sufficient evidence of the breach of licence condition 1.2 on or shortly after 4 July 2018, that would involve the proposition that a local housing authority is required to check its data-base on each anniversary of the grant of a landlord's licence, and give notice of intent within six months thereafter, which would impose an unreasonable burden upon such authorities. From a practical point of view, it made sense, and would reduce the burden on local housing authorities, to treat time as starting to run for the giving of notice of intent only when a landlord failed to respond to a notice to produce a valid gas safety certificate.

17. On this "technical" ground of appeal, the Tribunal prefers the submissions of Mr Goldstein to those of Ms Pritchard. In the Tribunal's judgment, the FTT fell into error in two respects when it upheld the final notice imposing a financial penalty for the alleged breach of licence condition 1.2. First, the FTT fell into error in treating the final notice, and the antecedent notice of intent, as disclosing any breach of that licence condition. By paragraph 3(a) of Schedule 13A, the notice of intent must set out "the reasons for proposing to impose the financial penalty". Those reasons must be sufficiently clearly and accurately expressed to enable the recipient landlord to exercise the right conferred by paragraph 4 to "make written representations to the local housing authority about the proposal to impose a financial penalty", thereby enabling it to decide whether to impose a financial penalty on the landlord and, if so, the amount of such penalty (as required by paragraph 5). Similarly, by paragraph 8(b) of schedule 13A, the final notice must set out "the reasons for imposing the penalty". These too must be sufficiently clearly and accurately expressed to enable the recipient landlord to decide whether to exercise the right of appeal to the FTT conferred by paragraph 10 against the decision to impose the penalty or the amount of that penalty. In the Tribunal's judgment, those reasons must be directly referable to the condition of the licence in relation to which it is said that there has been a failure to comply on the part of the landlord; and those reasons must identify clearly, and accurately, the particular respects in which it is said that there has been non-compliance on the landlord's part. The Tribunal does not regard the reasons for imposing a financial penalty, or proposing to do so, merely as giving a factual background to the offence; they should be treated as providing particulars of the offence.

18. In the present case, the offence alleged was the breach of licence condition 1.2 and the particulars of offence should have specified "the failure to supply a valid gas safety certificate for the year ending 4 July 2018 within the time limit required by licence condition 1.2, namely by 4 July 2018". That was the offence that the FTT found to have been proved beyond reasonable doubt; and that should have been the offence that was identified to the appellant in the notice of intent and in the final notice. Local housing authorities must bear firmly in mind that the imposition of a financial penalty is an alternative to a criminal prosecution; and it must be treated with the same level of seriousness and transparency. Having read the whole transcript of the proceedings, the Tribunal is satisfied that Ms Pritchard had put to the appellant in clear terms during the course of his cross-examination the basis of the offence that was actually found by the FTT of failing to supply a valid gas safety certificate on an annual basis. However, that was not the case that had been set out in either the notice of intent or in the final notice; these documents had identified the offence,

but the particulars of offence were the failure to produce a copy of a valid gas safety certificate by 13 June 2019, when the appellant had been requested to do so within seven days by Mr Farey's letter dated 5 June 2019. These particulars did not constitute the offence alleged, and they were therefore defective. To adopt old-fashioned legal terminology (which was not even recognised by my computer spell-check), they were demurrable. They did not give the appellant proper notice of the offence alleged against him and which the FTT found had been made out to the criminal standard of proof. Paragraph 10 (3) of Schedule 13A to the 2004 Act may permit the FTT to determine an appeal "having regard to matters of which the authority was unaware"; but, in the Tribunal's judgment, it does not permit the FTT to determine an appeal on the basis of reasons for imposing a financial penalty that have not been set out in the local housing authority's final notice. In the Tribunal's judgment, it was not properly open to the FTT, by waving an imaginary magic wand, to transform conduct specified in the final notice that was not properly a breach of licence condition 1.2 into an offence by redefining that conduct in terms that did constitute such a breach. The Tribunal does not regard this point as a mere technicality because it gives rise to the risk that a landlord might be found guilty of a non-existent offence, or of one that has not been properly identified to the landlord; and because, in the present case, it has fed seamlessly into the FTT's second error, which was to fail to identify the fact that the offence which it did find to have been proved was in fact time-barred.

19. Any breach of licence condition 1.2, as at 13 June 2019, which is the date identified in the notice of intent and the final notice, could only relate to the licence year ending 4 July 2018 because the notice for the licence year ending 4 July 2019 was not then overdue. However, by paragraph 2(1) of Schedule 13A to the 2004 Act, notice of intent must be given before the end of the period of six months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates. In ***Pinto v Welwyn Hatfield Borough Council*** [2022] UKUT 047 (LC) the Tribunal decided that, read in context, the words "sufficient evidence" in paragraph 2(1) mean "sufficient evidence to impose a financial penalty", which, in the light of s. 249A, had to mean evidence that was sufficient to prove the commission of the offence to the criminal standard of proof beyond reasonable doubt. If the words meant only "sufficient evidence to serve a notice of intent", it would not be possible to know what would be "sufficient"; and if such an unspecified lower standard of proof were intended, then a local housing authority would have to guess the point from which time ran. That interpretation was consistent with a fair process. Once the authority had sufficient evidence to prove the offence beyond reasonable doubt, it should start the process, and to wait for more than six months after that point would be unfair to the offender. Conversely, it would be unfair to the authority to put it under time pressure to serve a notice of intent before it could be sure that the offence had been committed. The opportunity to make written representations was to enable the landlord's point of view to be considered, first because they had a right to be heard and, importantly, because their evidence might put things in a different light and change the authority's mind. However, paragraph 2 of Schedule 13A did not say that the local housing authority had to be sure. It said only that there had to be "sufficient evidence" for it to be sure. That meant that if there was an abundance of evidence, the six-months period would start to run even if the local authority's officers had not directed their attention to that evidence. Neither counsel sought to challenge the correctness of that approach.

20. In the Tribunal's judgment, it would have been apparent to the respondent whether or not the landlord had provided it with a gas safety certificate for the property by each anniversary

of the date the landlord was first granted a licence for the property and thus, in the case of the licence year ended 4 July 2018, on or shortly after that date. I reject Ms Pritchard's submission that it would impose an unreasonable burden upon local housing authorities to require them to check their data-base on each anniversary of the grant of a landlord's licence and, in the event of any failure to provide a gas safety certificate for a property, to give notice of intent within six months thereafter. A condition in the terms of licence condition 1.2 is considered of such importance that it is a mandatory standard condition which must be included in all landlords' licences. It should be properly policed; and this can be readily done by diarising it on the landlord's data-base. Applying the approach of this Tribunal in *Pinto*, the Tribunal is satisfied that the respondent had "sufficient evidence" to prove the commission of any offence of a breach of licence condition 1.2, to the criminal standard of proof beyond reasonable doubt, on or shortly after 4 July 2018. It follows that the six months' period for giving notice of intent had expired on or shortly 4 January 2019, so that any proceedings for the offence of breaching licence condition 1.2 were effectively time-barred when notice of intent was given on or about 8 November 2019. In paragraph 3 of its June decision the FTT had noted that the respondent must issue a notice of intent before the end of six months beginning on the date when it had evidence that an offence had been committed. Had the final notice clearly specified the particulars of offence, in terms of a failure to supply a valid gas safety certificate for the year ending 4 July 2018 within the time limit required by licence condition 1.2, namely by 4 July 2018, the FTT might well have appreciated the fact that the notice of intent had been given some ten months late, and refused to confirm this particular final notice on that basis. The clear lesson for local housing authorities is that they should put in place appropriate machinery to ensure that landlords duly comply with conditions in terms of the mandatory condition required by s. 90(4) and paragraph 1(2) of Schedule 4 to the 2004 Act.

21. For these reasons, the Tribunal allows the appeal from the FTT's decision to confirm the final notice in respect of the breach of licence condition 1.2 and it quashes the resulting financial penalty of £3,375.

22. That decision means that it is unnecessary for the Tribunal to consider the appellant's alternative challenge to the FTT's decision on the facts relevant to its finding that the respondent had proved the offence under licence condition 1.2.

Licence condition 5.6

23. Mr Goldstein recognises that the appeal against the FTT's decision to confirm the final notice that imposed a financial penalty of £5,625 for the respondent's breach of General Condition 5.6 of his licence raises a wholly factual issue. Speaking with the agreement of Males and Snowden LJJ, at paragraph 2 of his judgment in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 Lewison LJ described as "well-settled" the following principles which govern the approach that an appeal court should take when it considers an appeal on pure questions of fact:

> "(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

24. Mr Goldstein accepts that the appellant did not inspect the property as required under licence condition 5.6, but he relies upon the statutory defence under s. 95(4) that he had a "reasonable excuse" for failing to comply with that condition on the basis that the tenant, Mr Martin Hourston, had refused him entry to the property in order to carry out the inspections. Mr Goldstein recognises that the appellant bears the burden of proving his defence to the civil standard of proof on a balance of probabilities. The issue turns largely on the FTT's assessment of the credibility of the appellant and of Mr Hourston. Mr Goldstein submits that the FTT should have concluded, on the balance of probabilities, that the appellant had been unable to access the property in order to carry out the six-monthly inspections, and so he can avail himself of the statutory defence. Mr Goldstein says that Mr Hourston clearly had a vested interest in not co-operating with the appellant given the condition in which he left the property, which had resulted in the appellant having to take legal action to evict him. In addition to evicting Mr Hourston, the appellant had also obtained a money judgment against him for £24,204.35 plus costs which was the subject of enforcement proceedings. Mr Goldstein also relies upon: (1) the observations about Mr Hourston and the property made by Mr Sweeney, the civil enforcement officer acting on behalf of the appellant, who had visited the property on 20 December 2019, noting in particular that he had mental health problems and was an alcoholic, and that Mr Hourston had accepted that he had not provided the appellant with access to inspect the property; (2) Mr Hourston's signed retraction statement dated 20 December 2019 conceding that he was unable to look after the property and had not provided access to the appellant's gas engineers; (3) the fact that the appellant's contractors and gas engineers had been unable to

gain access to the property; and (4) the fact that Mr Hourston had failed to respond to the court and provide the required information arising from the appellant's attachment of earnings application.

25. Ms Pritchard emphasised that the Tribunal should be slow to interfere with the FTT's findings of fact where it had heard the witnesses being tested under cross-examination. She relied upon the guidance in ***Volpi*** as a useful, and important, summary of the applicable principles. Ms Pritchard referred to the following salient points that had emerged during the case: (1) The appellant was a professional landlord, with over 78 properties in the Liverpool area alone, and more in other parts of the country. (2) He claimed that he had attempted to inspect the properties in compliance with his licence conditions and had travelled to Liverpool to do so, but no evidence had been produced of any original or copy letters to the tenant to arrange inspections, or of any other communications requesting inspections to take place. (3) It was apparent that those acting on behalf of the appellant had been able to gain access to the property and to speak to the tenant, extending to arranging for him to sign letters on behalf of the appellant and to speak to him by phone. The gas safety certificates produced by the appellant demonstrated that his contractors had been able to gain access to the property. (4) In addition, representatives of the respondent had been able to gain access to the property on a number of occasions and had secured the co-operation of the tenant. (5) Mr Hourston had been candid in his evidence that he had experienced some issues, but he had always co-operated with requests concerning the property, except on occasions when he had been unwell. He denied that he had ever been asked by the appellant to give him permission to inspect the premises; indeed, he said that the very first time he had seen the appellant was during the remote FTT hearing. (6) The appellant had produced blank (except for the date) inspection records, which he claimed he had sent to the respondent on 6 June 2019, although two sets of the records had been dated after 6 June, thereby calling into question the reliability of that documentary evidence. Ms Pritchard emphasised that it had been for the appellant to prove the defence of reasonable excuse, on the balance of probabilities; and, for a professional landlord, the appellant's evidence had been sadly wanting in many respects. The FTT had been best placed to assess the evidence it had heard. The FTT's findings in relation to the evidence, at paragraphs 31, 32, 36 and 37 of their June decision, were conclusions that were proper for the FTT to make, bearing in mind the evidence it had heard.

26. On this particular issue, the Tribunal prefers the submissions of Ms Pritchard to those of Mr Goldstein. The Tribunal rejects Mr Goldstein's submissions. The Tribunal has read through the whole of the transcript of the proceedings before the FTT. Having heard them both give evidence, the FTT was fully entitled to prefer the evidence of Mr Hourston to that of the appellant. The FTT's finding that the tenant did not deliberately, or consistently, deny the appellant access to the property cannot properly be characterised as a decision that no reasonable tribunal could have reached. The FTT's conclusions were rationally supportable; and its decision cannot properly be described as plainly wrong. Indeed, although that is not the proper test, it is almost certainly the decision that the Tribunal would have reached having considered the evidence. In cross-examination, the appellant accepted that according to his gas safety certificates, the tenant had allowed the gas engineer access to the property in each of the years 2017, 2018 and 2019: see the transcript at page 623 of the hearing bundle. The FTT was fully entitled to find that the appellant had not made out the defence of reasonable excuse on the balance of probabilities. The Tribunal notes that the FTT's

decision is dated 24 June, only three days after the actual hearing, and the evidence would therefore still have been fresh in the FTT's mind.

27. For these reasons, the Tribunal dismisses the appeal from the FTT's decision to confirm the final notice in respect of the breach of licence condition 5.6, and it affirms the resulting financial penalty of £5,625.

Conclusion

28. For the reasons set out above, the Tribunal: (1) allows the appeal from the FTT's decision to confirm the final notice in respect of the breach of licence condition 1.2 and it quashes the resulting financial penalty of £3,375; but (2) dismisses the appeal from the FTT's decision to confirm the final notice in respect of the breach of licence condition 5.6 and it affirms the resulting financial penalty of £5,625.

His Honour Judge Hodge QC

20 May 2022

Right of appeal

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