Neutral Citation Number: [2021] EWCA Civ 20

Case No: C3/2020/0858

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Martin Rodger QC, Deputy Chamber President, and Peter D McCrea FRICS
[2020] UKUT 0090 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2021

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

- -

Between:

NICHOLAS SUTTON	**Appellant**
- and -	
NORWICH CITY COUNCIL	**Respondent**

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- -

The Appellant appeared in person
Marcus Croskell (instructed by **NP Law**) for the **Respondent**

Hearing date: 8 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Wednesday 13 January 2021 at 10:30am

Lord Justice Newey:

1. This is an appeal from a decision released by the Upper Tribunal (Lands Chamber) (Martin Rodger QC, Deputy Chamber President, and Peter D McCrea FRICS) ("the UT") on 20 March 2020. The appeal concerns penalties imposed on the appellant, Mr Nicholas Sutton, under section 249A of the Housing Act 2004 ("the 2004 Act") for breaches of the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 ("the 2007 Regulations") and non-compliance with improvement notices which the respondent, Norwich City Council ("the Council"), had served on Faith's Lane Apartments Limited ("FLAL") pursuant to Part I of the 2004 Act. The penalties all relate to Max House, 60 St Faiths Lane, Norwich, of which FLAL was the freehold owner. Mr Sutton was the sole director of FLAL and held 54.8% of its shares.

The legal framework

2. Part I of the 2004 Act introduced a new system for assessing the condition of "residential premises" and enforcing housing standards in relation to such premises. The expression "residential premises" is defined in section 1 in such a way as to include an "HMO", i.e. a "house in multiple occupation" within the meaning given in section 254 of the 2004 Act.

3. Sections 11 and 12 of the 2004 Act empower, and in more serious cases require, a local housing authority to serve an improvement notice in respect of a "hazard". By section 2, "hazard" means "any risk of harm to the health or safety of an actual or potential occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)". An improvement notice requires the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice: see sections 11(2) and 12(2).

4. Someone on whom an improvement notice is served may appeal to the First-tier Tribunal ("the FTT") in accordance with schedule 1 to the 2004 Act. In the absence of an appeal, however, an improvement notice normally becomes operative 21 days after it is served: section 15(2). In that event, the person on whom it was served commits a criminal offence if he fails to comply with it without a reasonable excuse: section 30. Where the recipient of an improvement notice is a body corporate, officers and managers may also be guilty of the offence if it was committed with their consent or connivance or is attributable to any neglect on their part. In that connection, section 251(1) provides:

> "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."

5. The 2007 Regulations were made under section 234 of the 2004 Act, which provides for regulations to "make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations– (a) there are in place satisfactory management arrangements; and (b) satisfactory standards of management are observed". A person commits an offence if he fails to comply with a regulation made under section 234, and section 251 once again applies. A company director thus commits an offence if the company commits an offence with his consent or connivance or the offence is attributable to any neglect on his part.

6. Regulations 2-11 of the 2007 Regulations apply to any HMO in England to which section 257 of the 2004 Act is applicable: see regulation 1(2). Such an HMO ("a section 257 HMO") is a building which has been converted into, and consists of, self-contained flats and in respect of which:

> "(a) building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and
>
> (b) less than two-thirds of the self-contained flats are owner-occupied".

As the UT noted in paragraph 50 of its decision, the evident object of section 257 was "to bring converted blocks of flats which do not satisfy modern building standards within the scope of regulation under the 2004 Act".

7. The relevant parts of the 2007 Regulations for present purposes are regulations 4, 5, 7, 8 and 10. Regulation 4 is in these terms:

> "The manager must 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 may be seen by all occupiers."

So far as material, regulation 5 provides:

> "(1) The manager must ensure that all means of escape from fire in the HMO are—
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> …
>
> (b) maintained in good order and repair.
>
> …
>
> (4) The manager must take all such measures as are reasonably required to protect the occupiers of the HMO from injury, having regard to—
>
> (a) the design of the HMO;

> (b) the structural conditions in the HMO; and
>
> (c) the number of flats or occupiers in the HMO….."

Regulations 7(3) states:

> "The manager must—
>
> (a) ensure that every fixed electrical installation is inspected and tested at intervals not exceeding five years by a person qualified to undertake such inspection and testing;
>
> (b) obtain a certificate from the person conducting that test, specifying the results of the test; and
>
> (c) supply that certificate to the local housing authority within 7 days of receiving a request in writing for it from that authority."

Regulation 8 imposes a duty to maintain common parts, fixtures, fittings and appliances. By regulation 8(4):

> "The manager must ensure that—
>
> (a) outbuildings, yards and forecourts which are used in common by two or more households living within the HMO are maintained in repair, clean condition and good order…."

Regulation 10 reads:

> "The manager must—
>
> (a) ensure that sufficient bins or other suitable receptacles are provided that are adequate for the requirements of each household occupying the HMO for the storage of refuse and litter pending their disposal; and
>
> (b) make such further arrangements for the disposal of refuse and litter from the HMO as may be necessary, having regard to any service for such disposal provided by the local authority."

8. Under regulation 2(c) of the 2007 Regulations, "the manager" is defined ("uninformatively", as the UT noted in paragraph 51 of its decision), to mean "the person managing the HMO".

9. With effect from April 2017, the 2004 Act was amended by the Housing and Planning Act 2016 to include a new provision, section 249A. This is in these terms:

> "(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

> (2) In this section *'relevant housing offence'* means an offence under—
>
> (a) section 30 (failure to comply with improvement notice),
>
> … or
>
> (e) section 234 (management regulations in respect of HMOs).
>
> (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
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> (4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
>
> (5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—
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> (a) the person has been convicted of the offence in respect of that conduct, or
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> (b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.
>
> (6) Schedule 13A deals with—
>
> (a) the procedure for imposing financial penalties,
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> (b) appeals against financial penalties,
>
> (c) enforcement of financial penalties, and
>
> (d) guidance in respect of financial penalties.
>
> …
>
> (9) For the purposes of this section a person's conduct includes a failure to act."

10. By schedule 13A to the 2004 Act (as amended), a local housing authority must give a person on whom it proposes to impose a financial penalty under section 249A notice of its proposal (a "notice of intent"): see paragraph 1. If the authority ultimately decides to impose a penalty, it must give the person a notice (a "final notice") imposing the penalty: paragraph 6. A recipient of a final notice may, however, appeal to the FTT and by paragraph 10 such an appeal:

> "(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".

11. Paragraph 12 of schedule 13A to the 2004 Act requires a local housing authority to have regard to any guidance given by the Secretary of State about the exercise of its functions under schedule 13A or section 249A. Such guidance is to be found in "Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities", which was re-issued in April 2018. Paragraph 3.5 of this document says that local housing authorities "should develop their own policy on determining the appropriate level of civil penalty in a particular case". Paragraph 3.5 further explains that, to help ensure that the civil penalty is set at an appropriate level, local housing authorities should consider the following factors: "Severity of the offence", "Culpability and track record of the offender", "The harm caused to the tenant", "Punishment of the offender", "Deter the offender from repeating the offence", "Deter other from committing similar offences" and "Remove any financial benefit the offender may have obtained as a result of committing the offence". The level of the penalty should be high enough "to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities" and to be "likely to deter the offender from repeating the offence". Further, an important part of deterrence is "the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the civil penalty will be set at a high enough level to both punish the offender and deter repeat offending".

12. In accordance with this guidance, the Council adopted a "Financial Penalty Policy" in June 2017. After listing the factors identified in paragraph 3.5 of the Secretary of State's guidance, the policy states that the Council "will use a consistent approach which is based on the Magistrates' Court Sentencing Guidelines issued by the Sentencing Council". The policy next provides a matrix allocating offences to bands by reference to harm (high, medium or low) and culpability (very high, high, medium and low). At one extreme, a case involving low harm and low culpability falls within band 1a; at the other, a case of high harm and very high culpability would be placed in band 6. In respect of each band, the policy then gives a "Financial penalty range", an "Assumed starting point" and an "Adjustment increment". For band 5, for instance, the "Financial penalty range" is £14,000-£20,000, the "Assumed starting point" is £16,000 and the "Adjustment increment" is £2,000. The policy further explains that the Council "will apply the 'Totality Principle' in cases where more than one penalty has been imposed, with a view to ensuring that the total penalty or penalties properly reflect all the offending behaviour and are just and proportionate in all the circumstances". Finally, an appendix to the policy describes, and gives examples of, each level of culpability and harm.

13. Upper Tribunal Judge Cooke had to consider a comparable policy, adopted by Waltham Forest London Borough Council, in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), [2020] 1 WLR 3187, which involved appeals against penalties imposed under section 249A of the 2004 Act. Judge Cooke said in paragraph 54:

> "The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives

> of the policy and ask itself whether those objectives will be met if the policy is not followed."

Judge Cooke further discussed the weight which a Tribunal should attach to the local housing authority's decision when hearing an appeal against a penalty. In that regard, she said this is paragraph 62:

> "the court is to afford considerable weight to the local authority's decision but may vary it if it disagrees with the local authority's conclusion".

14. No one took issue with Judge Cooke's observations before us and I for my part see no reason to dissent from them.

Basic facts

15. Max House was built as an office building, but by 2015 work had been undertaken to convert it to apartments which were advertised as available to let. When the Council's housing team leader, Ms Ellen Spencer, visited the building in December 2017, she found 34 of its 47 apartments occupied.

16. 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. All the notices were addressed to FLAL. As the UT explained in its decision:

> "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."

17. By 17 September 2018, Ms Spencer had concluded that offences had been committed under section 30 of the 2004 Act in relation to five of the eight improvement notices and she arranged for the service of five notices of intent to impose financial penalties

on each of FLAL and Mr Sutton (as FLAL's director). In the event, by mistake, two notices were duplicated. Ms Spencer's intention was that notices should be served in respect of excess cold hazards in flats 101, 102 and 112, but no notices in respect of flat 112 were in fact served, FLAL and Mr Sutton both being sent two copies of the notice relating to flat 101 instead.

18. The UT summarised what happened next as follows in paragraph 23 of its decision:

> "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 [the] same sum on FLAL."

19. In the meantime, Ms Spencer had become satisfied that breaches of the 2007 Regulations justified the imposition of separate financial penalties. On 11 June 2018, notices of intent to impose such penalties were served, five on FLAL and five on Mr Sutton as its director. The notices alleged breaches of regulations 4, 5, 7, 8 and 10.

20. This time, Mr Sutton argued against the Council's proposals in written representations on behalf of both himself and FLAL. However, on 17 September 2018 the Council nonetheless served final notices on FLAL and Mr Sutton imposing financial penalties totalling £96,600 on each of them.

21. On 30 October 2018, the Council served a prohibition order in relation to Max House barring its use as residential accommodation with effect from 27 November. The building was subsequently emptied of its residents and, as a result, FLAL's rental income came to an end and it became unable to service its borrowing. On 16 August 2019, the company went into administration.

22. Well before this, Mr Sutton and FLAL had both appealed to the FTT against the Council's imposition of penalties on them. On 4 November 2018, the FTT transferred the appeals to the UT and they were heard by the UT in January 2020. FLAL by then being in administration, it was not represented. Mr Sutton appeared in person.

23. The issues before the UT were much more extensive than those we have to address. The conclusions which the UT reached in the course of its full and careful decision included these:

    i) Max House was a section 257 HMO;

    ii) The improvement notices were valid;

    iii) The Council had power to impose financial penalties on Mr Sutton personally;

    iv) The financial penalty notices were properly served;

    v) FLAL was the person managing the premises within the meaning of section 263(3) of the 2004 Act and the 2007 Regulations;

vi) The Council had proved each of the breaches of the 2007 Regulations alleged in the final notices beyond reasonable doubt;

vii) The improvement notices in respect of excess cold in flats 101 and 102, electrical hazards and fire safety hazards had not been fully complied with;

viii) FLAL had no reasonable excuse for its failures; and

ix) The offences were all committed with the consent or connivance of Mr Sutton.

24. With regard to penalties, the UT:

i) reduced those imposed on FLAL to £32,000 for breaches of the 2007 Regulations and £43,000 for non-compliance with the improvement notices and

ii) reduced those imposed on Mr Sutton to £50,000 for breaches of the 2007 Regulations and £49,000 for non-compliance with the improvement notices.

25. More specifically, the UT imposed the following penalties:

	Penalty on FLAL	**Penalty on Mr Sutton**	**Total of penalties**
Regulation 4	None	None	Nil
Regulation 5	£8,000	£12,000	£20,000
Regulation 7	£12,000	£18,000	£30,000
Regulation 8	£6,000	£10,000	£16,000
Regulation 10	£6,000	£10,000	£16,000
Improvement notice re flats	£6,000	£6,000	£12,000
Improvement notice re electrical installations	£23,000	£25,000	£48,000
Improvement notice re fire safety	£14,000	£18,000	£32,000

Total	**£75,000**	**£99,000**	**£174,000**

26. The main reason why the penalties imposed on Mr Sutton were higher than those imposed on FLAL was that the UT took into account the former's dealings with another property in Norwich called Hardwick House. The UT said this on the subject in paragraph 268 of its decision:

> "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."

The appeal

27. Mr Sutton applied to the UT for permission to appeal on a variety of grounds. While otherwise refusing such permission, the UT granted it in respect of the grounds concerning penalties, noting that the imposition by local housing authorities of civil penalties as an alternative to prosecution for conduct amounting to a housing offence was recent and had not yet been considered by the Court of Appeal. With one exception, accordingly, the issues before us relate exclusively to the penalties which the UT imposed rather than whether the relevant misconduct had been proved. The exception concerns regulation 10 of the 2007 Regulations. As I understand it, the permission to appeal granted to Mr Sutton is wide enough to allow him to challenge the UT's finding that regulation 10 was breached.

28. The grounds of appeal in respect of which Mr Sutton has permission to appeal have respectively the headings "Penalties inconsistently applied" and "Penalties not applied in accordance with case law". So far as the former is concerned, it is said that the penalties imposed by the UT "are far in excess of any Tribunal Decisions to date applying to all Local Housing Authorities" and "are not consistent with any Financial Penalties levied by Norwich City Council". Under the latter heading, Mr Sutton addresses in turn the penalties he challenges after first citing *R v Rollco Screw and*

Rivet Co Ltd [1999] 2 Cr App R (S) 436 ("*Rollco*") in support of the proposition that the correct approach was to ask (i) what financial penalty the offence merited and (ii) what financial penalty the corporate and personal defendants could reasonably be expected to meet.

29. I find it convenient to follow a similar course. I shall therefore address the "Penalties inconsistently applied" ground of appeal before considering general principles relating to penalties as between companies and their directors and then individual penalties in turn. At the outset, however, I shall say something about the circumstances in which an appellate Court/Tribunal is entitled to interfere with a civil penalty imposed by a lower Court/Tribunal.

The approach of an appellate Court/Tribunal

30. Where the decision of a lower Court or Tribunal involved evaluation or the exercise of a discretion, an appellate Court or Tribunal is not entitled to interfere merely because it might have come to a different conclusion. In *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, Lord Fraser said at 652 that an appellate Court should interfere with an exercise of discretion only if it considers that the judge of first instance "has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible". In *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043, Lord Clarke spoke at paragraph 23 of an appellate Court interfering with a value judgment based on the evaluation of a number of different factors only "if satisfied that the judge erred in principle or was wrong in reaching the conclusion which he did". In *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, Lord Carnwath said this at paragraph 64 in the context of a challenge to a proportionality assessment:

> "The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation."

31. A Tribunal's decision as to what civil penalty it should impose for either a breach of the 2007 Regulations or failure to comply with an improvement notice involves, as I see it, both evaluation and discretion. An appellate Court/Tribunal is not, accordingly, entitled to overturn a penalty just because it thinks it would have imposed a different one. To interfere, the Court/Tribunal must conclude that the decision under appeal was an unreasonable one or is wrong because of "an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".

"Penalties inconsistently applied"

32. I can dispose of this ground of appeal very shortly. As I have mentioned, it proceeds on the basis that the penalties imposed by the UT "are far in excess of any Tribunal Decisions to date applying to all Local Housing Authorities" and "are not consistent with any Financial Penalties levied by Norwich City Council". However, Mr Sutton did not develop the point in his submissions and we were not referred to any materials which could support it. We were neither taken to any other Tribunal decisions nor given details of any other penalties imposed by the Council. This ground of appeal cannot succeed, therefore.

Penalties as between companies and their directors

33. *Rollco* involved challenges by a company and two directors to sentences imposed on them for offences under the Health and Safety at Work Act 1974. At 441, Lord Bingham CJ, giving the judgment of the Court of Appeal (Criminal Division), referred to submissions on behalf of the company "that a period for payment of a fine of the length contemplated in this case is well beyond anything which the court should sanction and that there is for this purpose no distinction to be drawn between a personal defendant on whom a fine is imposed and a company" and continued:

> "We return to consider later the period in this particular case, but address at once the question of principle. … We would nonetheless be inclined to accept that with a personal defendant, with a fine hanging over him, there are arguments for keeping the period of that continuing punishment within bounds. It appears to us that those arguments are much weaker (if indeed they apply at all) when one is considering a corporate defendant. There is not the same sense of anxiety as is liable to afflict an individual, and it appears to us to be acceptable on proper facts and in appropriate circumstances for a fine to be payable by a company over a substantially longer period than might be appropriate in the case of an individual. We would, however, accept a further submission made by [counsel for the appellants] to the effect 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 proper approach to a case of this kind in principle seems to us to be to pose two questions. First: what financial penalty does the offence merit? Secondly: what financial penalty can a defendant (whether corporate or personal) reasonably be ordered to meet? That second question inevitably raises the question of time.

> Addressing the first of those questions with particular reference to the instant case, we note that the total penalty imposed on the company and the directors together amounted to £50,000. We have to ask ourselves whether that sum represented an appropriate penalty to be imposed for this offending. In considering that question we have to bear in mind the glaring public need for effective sanctions in a field such as this where the health and the safety of the public are so very obviously at risk. The situation is the more important when, as here, the ill-effects of exposure to brown asbestos may take very many years to appear. In the interim of course no individual can know whether he will ultimately suffer or not.
>
> We consider that the division of £40,000 attributed to the company and £10,000 to the directors was an appropriate split. We also consider that the total sum divided between the two was appropriate recognition of the gravity of this offending."

34. Mr Sutton argued that *Rollco* shows that, where a company and a director have both committed an offence, the right course is first to ask "what financial penalty does the offence merit?" and then to apportion the figure between the company and the director. After all, "what financial penalty does the offence merit?" was identified in *Rollco* as the first of the two questions posed and the Court proceeded to say that "the division of £40,000 attributed to the company and £10,000 to the directors was an appropriate split" and that "the total sum divided between the two was appropriate recognition of the gravity of this offending".

35. Even so, I do not myself find it altogether easy to interpret the *Rollco* judgment. When the Court specified the two questions that were raised, it was not obviously dealing with how penalties on a company and its directors should relate to each other. The questions ("what financial penalty does the offence merit?" and "what financial penalty can a defendant (whether corporate or personal) reasonably be ordered to meet?") were apt in the context of any particular defendant, corporate or individual, and regardless of whether there was any other defendant.

36. *Rollco* was cited by Lord Bingham CJ himself in *R v Snaresbrook Crown Court ex p Patel* [2000] COD 255 ("*Patel*"), a decision of the Divisional Court. In that case, fines had been imposed both on a company and on its sole director and majority shareholder. In response to an invitation from counsel to lay down guiding principles in respect of the imposition of double fines, Lord Bingham (with whom Klevan J agreed) said this:

> "18. … In my judgment there can be no guiding principle independent of the facts of a given case. In *R v Rollco Screw & Rivet Co Ltd and others* [1999] 2 Cr App R(S) 436, 441, the court said:
>
> 19. '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.'
>
> 20. That seems to me to be a proper approach to this matter. It is also in my judgment right that the corporate vehicle through which an individual carries on business with the benefit of limited liability should bear a penalty. There is no conventional ratio which governs the relationship of the fine imposed on an individual and the fine imposed on a company. It all depends on the facts."

37. Rather more recently, there was reference to *Rollco* in *R v Western Trading Ltd* [2020] EWCA Crim 1234 ("*Western Trading*"), where fines had been imposed on a company and an individual who was a shareholder and the sole director in respect of breaches of a listed building enforcement notice and a planning enforcement notice. Having noted that factors relevant to the level of penalty to be imposed for alteration of a listed building without consent had been mentioned in *R v Duckworth* [1994] 16 Cr App R (S) 529, Bean LJ, giving the judgment of the Court of Appeal (Criminal Division), said this about the "two defendants issue":

> "15. It seems to us that within the parameters of the relevant Sentencing Guidelines there are three approaches which might be taken to the imposition of fines in a case such as this, where one Defendant is a small company and the other is a director of that company. The first is, as this court appears to have done in the *Rollco* case, to form a view as to the appropriate total penalty before deciding how to apportion it between the defendants. The second, in a case where the direct financial benefit sought to be obtained or cost sought to be avoided is that of the company, is to take that factor into account in the way described in *Duckworth* in the case of the company, and then consider what penalty should be imposed on the director as having been the controlling mind of the company causing it to commit the offence and seeking thereby to achieve the financial benefit or avoid the cost for the company. The third is simply to sentence each defendant separately as if he, she or it stood alone; but this would in cases of actual financial benefit infringe the principle set out in *Rollco* that the court must avoid imposing double punishment; and neither Mr Andrew Smith QC for the Appellants nor Mr Joseph Millington for the Respondent suggested that it would be the right course to adopt in a case of this kind. Putting the matter another way, insofar as the purpose of a fine or fines is, in accordance with the General Guideline quoted above, to remove an actual financial benefit, that benefit should only be removed once.
>
> 16. Mr Smith accepted that the second approach is consistent with the Sentencing Guidelines as well as with the reported cases such as *Duckworth*. We consider that it is the one we should adopt in this case in considering whether or not the fines

> of £25,000 imposed on each Appellant by the judge were excessive."

38. In the circumstances, I do not consider that there is any rule that, when deciding what civil penalties to impose on a company and one or more of its directors under section 249A of the 2004 Act, a Court or Tribunal is bound to ask itself first what penalty the offence merits overall and then how that penalty should be apportioned. Whether or not *Rollco* might have been thought to support such an approach, the Court did not proceed on that basis in *Western Trading*, and in *Patel* Lord Bingham eschewed any "guiding principle independent of the facts of a given case". Equally, there is no rule as to how the penalty imposed on a company should relate to the penalty/penalties imposed on a director or directors. As Lord Bingham said in *Patel*, "It all depends on the facts".

39. On the other hand, *Rollco*, *Patel* and *Western Trading* all testify to the need to beware of double punishment. An individual with an interest in a company may be worse off to the extent of some or all of a fine imposed on the company and a Court must have that in mind when deciding what, if any, fine to impose on the individual personally. *Rollco*, *Patel* and *Western Trading* were criminal cases, but the point must apply with equal force in the context of civil penalties under section 249A of the 2004 Act.

40. With a solvent one-man company, the importance of avoiding double punishment will loom large: the owner of the company might be expected to be the poorer by the total of the penalties imposed on himself and the company. In a case of that kind, the penalty on the owner-director should not be determined without regard to that imposed on the company and appropriate adjustments should be made when using a "Financial Penalty Policy" such as the Council's. If, say, a "Financial Penalty Policy" indicated a particular "Financial penalty range" for the relevant offence, a penalty of that size should not be imposed on the owner-director personally without considering the implications for him of any company penalty and the appropriate penalty might very well be smaller than any figure in the specified range. In that particular scenario, the Court/Tribunal could find it helpful to ask itself the questions: what total penalty is merited and how should the figure be divided between company and owner? That said, the Court/Tribunal might also wish to ensure that the penalty on the owner-director confirmed 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" (to quote from *Rollco* and *Patel*).

41. Different considerations would arise if a director held only a proportion of the company's shares or the company were insolvent. The extent to which a director-shareholder stands to be affected by a penalty imposed on the company depends of course on the size of his shareholding. Where the company is already insolvent, there may be no risk of double punishment: his shares being worthless, a director-shareholder should be no worse off as a result of a penalty on the company unless, say, it somehow served to increase his exposure on a guarantee he had given for company indebtedness. More difficult assessments may be called for where a company is of doubtful solvency or where penalties are also being imposed on other directors, who may themselves perhaps own shares.

42. In the present case, the UT was fully conscious of the danger of double punishment. It observed in paragraph 250 of its decision that, since Mr Sutton was a director of

FLAL and owner of 54.8% of the company, Lord Bingham's warning against double punishment was relevant. In the light of that, the UT concluded in paragraph 251 that the penalty imposed on each of FLAL and Mr Sutton "should have been fixed having regard not just to the statutory maximum penalty but also to the penalty being imposed on the other". The UT continued:

> "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."

43. This passage suggests, in my view, that the UT was in fact adopting an approach which was overly generous to Mr Sutton. The risk that a penalty imposed on FLAL might go unpaid was, I think, something that could properly be taken into account because it bore on the potential for double punishment.

44. The UT next addressed a submission by Mr Sutton to the effect that he was the "main loser" out of the development at Max House and had "already suffered enough financially" (see paragraph 254 of the decision). As to that, the UT said this in paragraph 257:

> "[Mr Sutton] 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."

In that connection, the UT had said in paragraph 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."

45. These observations were, as it seems to me, entirely legitimate.

46. It is also relevant at this stage to refer to the fact that section 249A(4) of the 2004 Act stipulates that the "amount of a financial penalty imposed under this section … must not be more than £30,000". There is thus a cap on the size of penalty that can be imposed on any particular person in respect of an offence. However, there is no bar on the aggregate of penalties imposed on two or more persons exceeding £30,000. The £30,000 cap relates to the "financial penalty on *a* person" (emphasis added) which can be imposed pursuant to section 249A(1). In principle, therefore, £30,000 penalties could be imposed on both a company and one or more of its directors.

The individual penalties

Regulation 5

47. The breach of regulation 5 alleged in the relevant final notice was that the required measures to protect the means of escape from fire and smoke were not in place on 19 December 2017. The UT was in no doubt that on that date there were serious and extensive breaches of regulations 5(1)(b) and 5(4): see paragraph 159 of the decision. Coming on to penalty, the UT said:

> "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."

48. Mr Sutton took issue with the UT's allocation of the breach to the "high" harm category. This, he said, was inconsistent with a "Housing Health and Safety Rating Survey" (or "HHSRS") report which Ms Spencer prepared in respect of an assessment on 5 February 2018. That report placed the relevant defects in hazard band F making them a "category 2" hazard. On that basis, Mr Sutton argued, the breach did not fall to be treated as "high" harm under the Council's "Financial Penalty Policy" but was rather on the cusp of low and medium.

49. The short answer to this point is that the categorisation in the HHSRS report was not determinative. By the time it came to issue the relevant final notice in September 2018, the Council itself assessed the harm as high. In any event, the UT was not bound by any views of the Council but had to determine the level of harm for itself in the light of all the evidence before it. The fact that Ms Spencer had put the defects in hazard band F in February 2018 does not begin to show that the UT was wrong to classify the harm as high or even that the Council was wrong to do so in its final notice. Nor is there any other good reason for impugning the UT's classification.

50. Mr Sutton's other main submission in relation to the regulation 5 penalties was that the penalty identified by reference to the Council's "Financial Penalty Policy" ought to have been apportioned between himself and FLAL in line with the approach which he said was adopted in *Rollco*. As I have said, however, I do not consider there to be any rule obliging a Court or Tribunal to ask itself first what penalty the offence merits overall and then how that penalty should be apportioned. It is incumbent on a Court or Tribunal to be alive to the risk of double punishment, but the UT can be seen to have been so. The "Financial penalty range" and "Assumed starting point" given in the Council's "Financial Penalty Policy" were respectively £6,000-£12,000 and £8,000 for band 4 and £14,000-£20,000 and £16,000 for band 5. The penalty which the UT

imposed on FLAL (£8,000) thus corresponded to the relevant "Assumed starting point", but Mr Sutton's penalty (£12,000) was £2,000 below the bottom of the material "Financial penalty range" and £4,000 less than the "Assumed starting point". £4,000 represents, of course, 50% of the FLAL penalty.

Regulation 7

51. The breach of regulation 7 alleged in the relevant final notice was failure to supply test certificates in respect of electrical installations. Ms Spencer had been alerted to potential electrical problems when she inspected Max House on 19 December 2017 and she then repeatedly asked for an electrical inspection to be provided but none ever was. The Council commissioned its own inspection, by Facit Testing Limited, and as the UT explained in paragraph 167 of its decision:

> "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)."

The UT concluded in paragraph 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."

52. With regard to penalty, the UT said:

> "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."

53. Mr Sutton once again took us to an HHSRS report from February 2018. The report in question referred to electrical hazards in hazard band G which, accordingly, constituted category 2 hazards. That classification, Mr Sutton said, was inconsistent with treating the risk of harm as high, as both the UT in its decision and the Council in its final notice did. As, however, I have said, the UT was not bound by the HHSRS reports and was entitled to make its own assessments on the totality of the evidence, and there is no basis for rejecting the UT's classification.

54. Here, too, Mr Sutton maintained that the penalty identified by reference to the Council's "Financial Penalty Policy" ought to have been apportioned between himself and FLAL in line with the approach which he said was adopted in *Rollco*. For the reasons given earlier, however, I do not accept that submission and the UT can be seen to have taken into account the danger of double punishment. The UT's assessments of harm and culpability put Mr Sutton in band 6 according to the Council's "Financial Penalty Policy". On that footing, the applicable "Financial penalty range" and "Assumed starting point" were respectively £22,500-£30,000 and £25,000 in Mr Sutton's case. The penalty which the UT in fact imposed on Mr Sutton (£18,000) was thus £4,500 beneath the material "Financial penalty range" and £7,000 under the "Assumed starting point". The £7,000 equates to about 58% of FLAL's £12,000 penalty.

Regulation 8

55. The relevant final notice asserted that regulation 8 had been breached because the pavement in the forecourt was not in good order. It was said that "the flagstones were not merely loose but they see-sawed when trodden on", that the surface variations increased the likelihood of tripping and that the fact that the area was unlit at night also increased the chances of falling.

56. The UT concluded in paragraph 176 of its decision:

> "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."

57. With regard to penalty, the UT said this:

> "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."

58. Mr Sutton expressed incredulity at the UT's assessments of both the level of harm (medium) and his level of culpability (very high). Once again, however, there is no good reason for us to interfere with the conclusions which the UT reached on the evidence and it is evident that the UT paid proper regard to the need to avoid double punishment. The UT's assessments of harm and culpability put Mr Sutton in band 5 according to the Council's "Financial Penalty Policy". That being so, the applicable "Financial penalty range" and "Assumed starting point" were respectively £14,000-£20,000 and £16,000. However, the penalty which the UT imposed on Mr Sutton (£10,000) was £4,000 outside the relevant "Financial penalty range" and £6,000 smaller than the "Assumed starting point". In fact, the penalties imposed on Mr Sutton and FLAL were in aggregate no greater than band 5's "Assumed starting point".

Regulation 10

59. Regulation 10 was alleged to have been breached as a result of failure to provide sufficient bins as at 19 December 2017. The UT concluded in paragraph 183 of its decision:

> "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."

60. With regard to penalty, the UT said:

> "284. … 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."

61. Mr Sutton disputed not only the level of penalty imposed on him but that there had been any breach of regulation 10. In this connection, he pointed out that the UT had itself said in paragraph 180 of its decision:

> "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."

62. However, the finding of breach was one that was properly open to the UT. The fact that the bins were not overflowing on 19 December 2017 did not prove there to be a sufficient number of bins, and the UT was entitled to infer from the fact that bins were found to be overflowing on subsequent days that the provision had not been adequate on 19 December. Further, there is no basis for impugning the UT's assessment of harm and it clearly took the risk of double punishment into account. Once more, the UT's assessments of harm and culpability put Mr Sutton in band 5 according to the Council's "Financial Penalty Policy", yet the penalty which the UT imposed on him (£10,000) was £4,000 below the base of the relevant "Financial penalty range" and the total of the penalties imposed on him and FLAL did not exceed the band 5 "Assumed starting point".

Electrical installations improvement notice

63. 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 notice required remedial action to be commenced by 19 March 2018 and completed by 29 June 2018. The UT found, however, in paragraph 197 of its decision:

> "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."

64. With regard to penalty, the UT said:

> "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 series 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."

65. Mr Sutton criticised the UT for assessing the risk of harm as high, referring both to the HHSRS report mentioned in paragraph 53 above and to the appendix to the Council's "Financial Penalty Policy", which, as he pointed out, gave "Failure to comply with an improvement notice served under section 12 of the Housing Act 2004 (category 2 hazard)" as an example of medium harm. However, the UT was, in my view, entitled to conclude that the appropriate level of harm was high. After all, aside from the C1 defects (which the UT accepted were dealt with quickly), the Facit report had identified numerous "Potentially dangerous", "Urgent remedial action required" C2 defects as well as many C3 defects and the only work which the UT could be sure had been undertaken within the period allowed by the notice was the remediation of the C1 breaches.

66. Mr Sutton also complained that the penalty imposed on him for failure to comply with the improvement notice was duplicative of that imposed for breach of regulation 7. However, the penalty for breach of regulation 7 related to the position on 19 December 2017, the improvement notice penalty to the distinct failure to comply with the notice following its service on 12 February 2018.

67. Finally, Mr Sutton invoked *Rollco* and argued that penalties amounting to no more than £30,000 should have been apportioned between himself and FLAL. However, it is plain from paragraph 296 of its decision that the UT was very well aware of the scope for double punishment and it gave adequate reasons for the approach it adopted.

Fire safety improvement notice

68. One of the improvement notices served on 12 February 2018 referred to category 2 fire safety hazards at Max House. The notice required remedial action to be commenced by 19 March 2018 and completed by 29 June 2018. As, however, the UT said in paragraph 202 of its decision, it was satisfied that the improvement notice was not complied with by that latter date.

69. With regard to penalty, the UT said:

> "297. … 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."

70. Mr Sutton, first, stressed the overlap between the fire safety and electrical issues; secondly, argued that the harm should been assessed as medium rather than high; and, thirdly, relied on *Rollco*. However, the UT expressly noted the need to guard against the imposition of double punishment as regards the electrical defects and explained that it had taken account of the overlap with the notice concerning electrical installations when allocating the fire safety default to a band. Further, the UT was, as it seems to me, entitled to approach matters on the basis that there had been "significant failures to comply fully with an improvement notice requiring extensive measures to protect a large number of residents against the risk of fire" and so to view non-compliance with the fire safety improvement notice as giving rise to a high level

of harm. Finally, the UT did not have to ask itself first what penalty the offence merited overall and then how that penalty should be apportioned, and there is no reason to doubt that here, as elsewhere, the UT had due regard to the risk of double punishment.

Conclusion

71. The UT said in paragraph 302 of its decision that it was satisfied that the substantial penalties it was imposing were "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". It continued:

> "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."

72. In my view, the penalties which the UT imposed cannot be impugned. I would dismiss the appeal.

Lord Justice Moylan:

73. I agree.

Lord Justice Underhill:

74. I also agree.