



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/31UC/HRA/2019/0001**

Appellant : **Orange Living Ltd (trading as Loc8me)**

Respondent : **Charnwood Borough Council**

Type of application : **Appeal against a decision to make an entry in the database of rogue landlords and property agents – section 32(1) of the Housing and Planning Act 2016**

Tribunal Members : **Regional Surveyor V Ward
Regional Judge D Jackson
R Chumley - Roberts MCIEH CEnvH,
J.P.**

Date of decision : **15 April 2020**

DECISION

BACKGROUND

- 1) The Tribunal received an appeal (under section 32(1) of the Housing and Planning Act 2016) (“the 2016 Act”) by Orange Living Ltd (trading as Loc8me) against a decision of the Respondent, Charnwood Borough Council, a local housing authority:
 - a) to make an entry in respect of the Appellant in the database of Rogue Landlords and Property Agents (“the Database”) pursuant to section 30 of the 2016 Act; and/or
 - b) as to the period for which the Appellant’s entry is to be maintained.
- 2) The appeal was notified to the Tribunal on 16 December 2019 whilst the Decision Notice was dated 25 November 2019. The Decision Notice stated that the entry was to be maintained for a period of two years.
- 3) The Applicant indicated within their application form that it was content with a paper determination. However, in Directions dated 6 January 2020 the Tribunal took a different view and directed an oral hearing.
- 4) On 18 March 2020, the Tribunal, in response to advice from Public Health England in relation to the coronavirus outbreak, issued Directions No. 2 varying previous Directions and vacating an oral hearing that had been fixed for 2 April 2020. The Applicant did not withdraw its consent to a paper determination following issue of Directions No.2. The Tribunal decided that it could deal with the application fairly and justly without a hearing because i), the Tribunal had the benefit of detailed written submissions from both parties, and ii), the application does not raise any disputed issues of fact requiring oral evidence. The Respondent subsequently indicated that they did not object to the determination of the appeal on the papers. Accordingly, applying the overriding objective in Rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal has determined this application under Rule 31(2) without a hearing having received the consent of both parties.

Submissions of the Parties

The Respondent

- 5) The Tribunal finds it convenient to initially detail the Respondent’s submissions.

- 6) A witness statement provided by Alison Simmons, employed by the Respondent Local Authority as the Head of Strategic and Private Sector Housing stated that on 3 October 2019, the Appellant was convicted of 4 Banning Order offences as defined by the Housing and Planning Act (Banning Order Offences) Regulations 2018.
- 7) On 17 October 2018, there was a fire at a 138 Forest Road Loughborough, a three-storey unlicensed, licensable House in Multiple Occupation (HMO) controlled by the Appellant. The subsequent report by the Fire and Rescue Service indicated that the only means of fire detection were standalone battery-operated detectors, some of which were without batteries. In addition, there were no fire doors to protect the means of escape from the second-floor bedroom. An inspection by an officer of the Respondent confirmed that 30-minute fire doors with intumescent strips on all doors leading onto the escape route and a mains interlinked smoke detection system were required. A search of Council Tax records indicated that the property had been occupied by 5 tenants, and therefore required a HMO licence since 2016. An incomplete application had been made in 2018.
- 8) Following this incident, the Respondent investigated remaining applications for properties in the control of the Appellant and found three more properties that were licensable yet unlicensed:
 - a) 39 William Street Loughborough. Unlicensed since October 2017.
 - b) 43 Fearon Street Loughborough. From July 2014.
 - c) 5 Arthur street Loughborough. From July 2012.
- 9) The Respondent took the decision to prosecute the Appellant for four offences under section 72 (1) and (6) of the Housing act 2004.
- 10) On 3 October 2019, the Appellant pleaded guilty to, and was convicted of, the offences at Leicester Magistrates Court. The fine imposed by the Magistrates was £20,000 per offence i.e. £80,000 plus costs of £3,690 i.e. £83,690 in total.
- 11) Under section 30 of the Act, Ms Simmons explained that the Respondent had given her the power to make an entry on the Database of Rogue Landlords and Property agents in respect of a person convicted of a banning order offence.
- 12) As part of her consideration of “culpability” and “serial offending”, Ms Simmons noted that on 4 April 2014, the Appellant company (then known

as Russo & Lakha Limited) was issued with a criminal caution under section 72 (1) as it had control of 1 Boyer Street Loughborough, a property that was licensable as an HMO but was not licensed.

- 13) Ms Simmons took the decision to make the entry in accordance with section 31 of the Act.
- 14) In accordance with that provision, a Decision Notice was served on the Appellant on the 25 November 2019. The notice confirmed the 21-day period within which the appeal must be made and further confirmed the address of the Tribunal.

Submissions by the Appellant.

- 15) The Appellant accepts that it was convicted of the four offences outlined above.
- 16) The Appellant noted that section 30 (1) of the 2016 Act provides that a Local Housing Authority *may* make an entry in the Database. However, section 30 (7) of the 2016 Act states that a Housing Authority must have regard to the document entitled “Database of rogue landlords and property agents under the Housing and Planning Act 2016 - Statutory guidance for Local Housing Authorities” published by MCHLG (“the Guidance”).
- 17) The Appellant submits that the Respondent has not had proper regard to the Guidance.
 - a) There is no definition of “rogue” under the 2016 Act and the Appellant does not accept that it ever knowingly flouted its legal obligations. It was the Appellant who identified the unlicensed properties by making licence applications for all four on 1 October 2018 (i.e. before the fire of 17 October 2018) and in addition, a guilty plea was entered at the earliest opportunity. The Appellant submits that the Guidance makes it clear that the power was only intended for use against the very worst offenders who flout their legal obligations which has never been alleged against Appellant. Concerns were about the competency and management arrangements of the Appellant not whether they were a fit and proper person to hold a licence.
 - b) The Respondent has failed to consider the criteria for making an entry either in the Act or the Guidance. The Appellant accepts that the offences were serious but would reiterate that they had

made licence applications before the fire. In considering mitigation, the Respondent failed to take into account the Code of Conduct and Procedures document subsequently developed by the Appellant. The Appellant did not have a record of serial offending having only had one informal caution prior to 2019 and it is submitted that the Respondent was wrong to take into account the caution from 2014 particularly since the wording of the caution itself included the following; “the record of the accepted informal caution maybe made publicly available for a period of three years”.

- 18) The Appellant submits that the Respondent has not had proper regard to the Guidance.
- 19) A witness statement was provided by Raffaele Russo, the sole Director and Shareholder of the Appellant company – Orange Living Limited. The following information was provided:
 - a) The Appellant company was originally incorporated as Russo & Lakha in March 2008.
 - b) The company manages properties for internal and external landlords in Loughborough (650 properties) and Lincoln (200 properties); it has a client base of 300 landlords and 3200 tenants. The company offers Client Money Protection certified by the UK Association of Lettings Agents.
 - c) There are associate companies which operate in Hull, Nottingham, Cardiff and London.
 - d) The 2014 caution came about as the property concerned was a five-bedroom house in which six people were staying after two brothers moved in. The company accepted the caution on the understanding that it would only stay on file at the Respondent for 3 years.
 - e) In his statement, Mr Russo regrets the circumstances which gave rise to the convictions and further accepts that the properties should have been licensed even before the HMO definition changes in October 2018.
 - f) The internal systems of the company “missed” that licences were required in respect of the properties despite the fact that the

system used had the capability to flag up when a licence was required.

- g) After a compliance audit in August 2018, it was noted that the four properties were without licences. Accordingly, licensing applications were made by 1 October 2018.
 - h) Full and frank admissions were made in the interview under caution which was voluntarily attended by Mr Russo and guilty pleas were entered at the earliest opportunity to the licensing offences.
 - i) Since October 2018, the company has reviewed its procedures extensively, introducing internal and external audits and has employed a new branch manager and has paid for them to become ARLA accredited. The company has invested £135,000 in salaries for new compliance roles including an Operations Manager and new Property Managers.
 - j) The Respondent's assertion that the company offered an ad hoc approach to licensing is not accepted by Mr Russo although he does accept that there were shortcomings prior to October 2018.
- 20) In his witness statement, Mr Russo also submits that the Respondent has not had proper regard to the Guidance.
- a) With respect to a consideration of the severity of the offence, Mr Russo reiterates the extensive measures put in place by the company since October 2018 that should be considered in mitigation.
 - b) Except for the caution in in 2014, the company had traded without blemish.
 - c) It is accepted by Mr Russo that the conviction has had a sobering effect on the company in various ways including financial hence has deterred the Appellant from offending again.
 - d) It is also accepted that the conviction serves as a warning to competitor companies and the Appellant has voluntarily approached competitors so that they too may share from the experience.

- e) The Respondent failed to consider the Code of Conduct and Procedures document developed by the Appellant. The Appellant did not have a record of serial offending having only had one informal caution prior to 2019 and it is submitted that the Respondent was wrong to take into account the caution from 2014 particularly since the wording of the caution itself included the following; “the record of the accepted informal caution maybe made publicly available for a period of three years”.

21) In summary, the Appellant invited the Tribunal to consider the improvements made as a company, the assertion that the Respondent did not follow the Guidance in making the entry and accordingly invites the Tribunal to cancel the Decision Notice.

The Law

22) The relevant law is contained within the Appendix to this decision.

The Tribunal’s Decision.

23) Initially, the issues for the Tribunal to consider are:

- a) Whether the Appellant has been convicted of a ‘banning order offence’, being one of the offences described in the Annex to these directions.

The offences committed by the Appellant are banning order offences as prescribed by the Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 (SI 2018/216) falling within item 3.

- b) Whether the offence was committed at a time when the Appellant was a ‘residential landlord’ or a ‘property agent’ (see the definitions in section 56 of the 2016 Act).

The Appellant is a property agent as defined by paragraph 56 of the 2016 Act.

- c) Whether the Respondent has met the procedural requirements in section 31 of the 2016 Act.

There has been no challenge to the procedural requirements contained within section 31 which, in any event, in the opinion of the Tribunal appear to have been complied with.

24) The Tribunal then considered the criteria in section 3.3 of the Guidance and whether the Respondent had had sufficient regard to the same.

a) Severity of the offence.

The Guidance states that the more serious the offence, the stronger the justification for including the offender on the database. The Tribunal considers that this was a serious offence. Whilst it accepts the premise that it was never intended that all offences result in an entry on the database, the Tribunal would take the view that this type of offence should result in a database entry.

b) Mitigating factors.

The Guidance gives mitigating factors as personal issues, health problems or bereavements. There was no evidence of any factors of this type in this matter. The measures taken by the Appellant after the incident do not in the opinion of the Tribunal mitigate the original offence.

c) Culpability and serial offending.

The Appellant has no history of serial offending as the 2014 caution is not taken into account by the Tribunal as it is a spent conviction under the Rehabilitation of Offenders Act 1974.

d) Deter the offender from repeating the offence.

The Respondent was justified in considering that stronger measures were required particularly since the Appellant operates in several areas as the database information will be available to other local housing authorities. This was one of the goals of the legislation.

e) Deter others from committing similar offences.

The Tribunal considers that the entry was fully justified on this ground; as noted above, if the Respondent failed to act on these

offences, other agents may be encouraged to flout the regulations.

- f) The inclusion of the company on the database will deter reoffending and deter others from offending

25) In summary:

- a) The Respondent followed all the required procedural steps and the Guidance issued by MHCLG.
- b) The Banning Order offences which acted as the "trigger" were serious matters. There only needs to be only one trigger offence but in this case, there were 4. These were offences of operating 4 non-licensed. "licensable" HMO's. One of the non-licensed periods was 6 years (i.e. spanned the period of two licences). At the Magistrates Court each of the 4 offences attracted a £20,000.00 fine after an early guilty plea. This level of fine in the Magistrates Court is very high so the justice(s) must have heard evidence to justify it.
- c) The Appellant is a reasonably large concern. A company of this size should know the relevant law, its responsibilities and duties and comply with them. Clerical errors should not occur to lead to these prosecutions. It is clear from the notes of Mr Russo's PACE interview that he clearly did not really understand what a HMO licence was. On page 101 of the Respondent's bundle he talked about a "non- HMO" and a "HMO required property" and then "it didn't need to be regulated" and then .."it turned into a regulated HMO".
- d) No mitigating factors of note were advanced.
- e) The Respondent proposed to maintain the entry for a two-year period which is the minimum under section 31 (2) (b) which the Tribunal considers appropriate.

Decision

- 26) The Tribunal confirms the Decision Notice and the decision of the Respondent to make an entry on the database for a period of two years.

Appeal

- 27) A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V Ward

APPENDIX

Relevant sections of the Housing and Planning Act 2016 are as follows:

30 Power to include person convicted of banning order offence

(1) A local housing authority in England may make an entry in the database in respect of a person if—

- (a) the person has been convicted of a banning order offence, and
- (b) the offence was committed at a time when the person was a residential landlord or a property agent.

(2) A local housing authority in England may make an entry in the database in respect of a person who has, at least twice within a period of 12 months, received a financial penalty in respect of a banning order offence committed at a time when the person was a residential landlord or a property agent.

(3) A financial penalty is to be taken into account for the purposes of subsection (2) only if the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.

(4) Section 31 imposes procedural requirements that must be met before an entry may be made in the database under this section.

(5) An entry made under this section—

- (a) must be maintained for the period specified in the decision notice given under section 31 before the entry was made (or that period as reduced in accordance with section 36), and
- (b) must be removed at the end of that period.

(6) Subsection (5)(a) does not prevent an entry being removed early in accordance under section 36.

(7) The Secretary of State must publish guidance setting out criteria to which local housing authorities must have regard in deciding—

- (a) whether to make an entry in the database under this section, and
- (b) the period to specify in a decision notice under section 31.

31 Procedure for inclusion under section 30

(1) If a local housing authority decides to make an entry in the database in respect of a person under section 30 it must give the person a decision notice before the entry is made.

(2) The decision notice must—

(a) explain that the authority has decided to make the entry in the database after the end of the period of 21 days beginning with the day on which the notice is given (“the notice period”), and

(b) specify the period for which the person's entry will be maintained, which must be at least 2 years beginning with the day on which the entry is made.

(3) The decision notice must also summarise the person's appeal rights under section 32.

(4) The authority must wait until the notice period has ended before making the entry in the database.

(5) If a person appeals under section 32 within the notice period the local housing authority may not make the entry in the database until—

(a) the appeal has been determined or withdrawn, and

(b) there is no possibility of further appeal (ignoring the possibility of an appeal out of time).

(6) A decision notice under this section may not be given after the end of the period of 6 months beginning with the day on which the person—

(a) was convicted of the banning order offence to which the notice relates, or

(b) received the second of the financial penalties to which the notice relates.

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(a) was convicted of the banning order offence to which the notice relates, or

(b) received the second of the financial penalties to which the notice relates.

32 Appeals

(1) A person who has been given a decision notice under section 31 may appeal to the First-tier Tribunal against—

(a) the decision to make the entry in the database in respect of the person, or

(b) the decision as to the period for which the person's entry is to be maintained.

(2) An appeal under this section must be made before the end of the notice period specified in the decision notice under section 31(2).

(3) The Tribunal may allow an appeal to be made to it after the end of the notice period if satisfied that there is a good reason for the person's failure to appeal within the period (and for any subsequent delay).

(4) On an appeal under this section the tribunal may confirm, vary or cancel the decision notice.