FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CA/HRA/2020/0001 P**
Appellant	**:**	**Clark & Davidson Limited**
Respondent	**:**	**Liverpool City 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	**:**	**Judge J Holbrook** **Regional Surveyor N Walsh**
Date and venue of Hearing	**:**	**Determined without a hearing**
Date of Decision	**:**	**27 January 2021**

DECISION

DECISION

The decision notice dated 16 January 2020 is varied so that the specified period for which the Appellant's entry will be maintained in the Database is reduced from five years to two years.

REASONS

INTRODUCTION

1. Clark & Davidson Limited appeals to the Tribunal under section 32(1) of the Housing and Planning Act 2016 ("the 2016 Act"). The appeal concerns a decision made by Liverpool City Council on 16 January 2020 to make an entry in the database of rogue landlords and property agents (established and operated by the Secretary of State pursuant to section 28 of the 2016 Act and maintained by local housing authorities in England pursuant to sections 29 and 30 ("the Database")).

2. The appeal was received by the Tribunal on 7 February 2020 and, on 1 April, the Tribunal gave directions for the conduct of the proceedings. However, for reasons connected with the ongoing Covid-19 pandemic, the proceedings were subsequently stayed for several months and, following the lifting of the stay, compliance with the directions was completed in December: both parties have provided the Tribunal with written representations and documentary evidence in support.

3. We have determined this appeal following a consideration of those written representations and that supporting evidence, but without holding a hearing. Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed). In this case, the parties have given their consent. Moreover, having reviewed the parties' submissions, we are satisfied that this matter is indeed suitable to be determined without a hearing: although the Appellant is not legally represented, the issues to be decided are readily apparent, and the parties' competing arguments are clearly set out in the papers. The outcome of the appeal does not depend upon disputed questions of fact.

LAW AND GUIDANCE

Power to make an entry in the Database

4. By virtue of section 30(1) of the 2016 Act, 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.

5. An entry in the Database must be maintained for a specified period (of at least two years) and must be removed at the end of that period.

6. A person (including a body corporate) is a 'property agent' if that person is a letting agent or a property manager (as defined by sections 54 and 55 respectively of the 2016 Act). Broadly speaking, a person is a letting agent if they do things in the course of a business in response to instructions from persons seeking to find prospective tenants to let housing to, or from prospective tenants seeking housing to rent. And a person is a property manager if, in the course of a business, they take instructions from a client to arrange maintenance or other services in respect of premises, or to manage premises, on the client's behalf.

7. A list of offences which are 'banning order offences' is to be found in the Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018. The full list was annexed to the directions issued to the parties by the Tribunal on 1 April 2020. However, for present purposes, it is sufficient to note that the list includes the offence (under section 95(1) of the Housing Act 2004) of having control of or managing a house which is required to be licensed under Part 3 of that Act but is not so licensed. Such an offence is a banning order offence provided: (i) the offence was committed after 6 April 2018; and (ii) the sentence imposed was not an absolute or conditional discharge.

Information to be entered in the Database

8. Where an entry is to be made in the Database, the information to be included in the entry is prescribed by regulations[1]. In the present case, it would include the Appellant's name and registered address; addresses of housing let or managed by the Appellant; a description of each banning order offence; the period for which the entry is to be maintained; and the date for its removal from the Database.

Procedural requirements

9. A local housing authority must comply with certain procedural requirements before making an entry in the Database. Section 31 of the 2016 Act requires the local authority to give the person concerned a decision notice before the entry is made. This must be done within six months of the date on which the person was convicted of the banning order offence to which the notice relates. In addition to summarising the person's rights of appeal, the decision notice must:

- explain that the authority has decided to make the entry in the Database after the end of a 21-day notice period, and

[1] The Housing and Planning Act 2016 (Database of Rogue Landlords and Property Agents) Regulations 2018.

- specify the period for which the person's entry will be maintained.

10. The local authority must then wait until the notice period has ended before making the entry in the Database (and must further delay making the entry if the person appeals to the Tribunal during the notice period).

Appeals

11. By virtue of section 32(1) of the 2016 Act, a person who has been given a decision notice under section 31 may appeal to the Tribunal against:

    - the decision to make the entry in the Database, or

    - the decision as to the period for which the person's entry is to be maintained.

12. On such an appeal (which must be made before the end of the notice period specified in the decision notice), the Tribunal may confirm, vary or cancel the decision notice.

Relevant guidance

13. Section 30(7) of the 2016 Act requires the Secretary of State to publish guidance setting out criteria to which local housing authorities must have regard when deciding whether to make an entry in the Database and when deciding the period for which the entry will be maintained. Such guidance ("the Statutory Guidance") was duly published by the Ministry of Housing, Communities and Local Government in April 2018: *Database of Rogue Landlords and Property Agents under the Housing and Planning Act 2016 – Statutory Guidance for Local Housing Authorities*.

14. The Statutory Guidance explains that the 2016 Act introduced a range of measures to help local housing authorities tackle rogue landlords and drive up standards in the private rented sector, and that these measures include establishing and operating a database of rogue landlords and property agents. It describes the Database in the following terms:

> "The database is a new tool for local housing authorities in England to keep track of rogue landlords and property agents. Database users will be able to view all entries on the database, including those made by other local housing authorities. The database can be searched to help keep track of known rogues, especially those operating across council boundaries and will help authorities target their enforcement activities."

15. It goes on to state that:

> "Local housing authorities should always consider whether it would be appropriate to make an entry on to the database when a landlord has

> been convicted of a banning order offence … The database is designed to be a tool which will help local housing authorities to keep track of rogue landlords and focus their enforcement action on individuals and organisations who knowingly flout their legal obligations. The more comprehensive the information on the database, the more useful it will be to authorities. Such information will also encourage joint working between local housing authorities who will be able to establish whether rogue landlords operate across their local housing authority areas."

16. Presumably, these principles apply just as much to rogue property agents as they do to rogue landlords.

17. Paragraph 3.3 of the Statutory Guidance lists the following criteria to which local housing authorities must have regard when deciding whether to make an entry in the Database:

- Severity of the offence;
- Mitigating factors;
- Culpability and serial offending;
- Deterring the offender from repeating the offence; and
- Deterring others from committing similar offences.

18. Local housing authorities must also have regard to the first four of these criteria when deciding the period to specify in a decision notice (see paragraph 3.4 of the Statutory Guidance).

19. Liverpool City Council must obviously have regard to the Statutory Guidance when making relevant decisions. However, it also has its own documented policy ("Liverpool's Policy") to guide it in this regard: *Private Sector Housing Banning Order / Database of Rogue Landlord and Property Agent Policy (April 2019)*. Liverpool's Policy states that the Council will monitor convictions for banning order offences and will give consideration to whether it is appropriate to make an entry in the Database on a case by case basis having regard to the criteria set out in the Statutory Guidance. We say more below about the application of Liverpool's Policy.

BACKGROUND FACTS

20. Clark & Davidson Limited, the Appellant in this case, is an estate agency business based in Bootle, Liverpool. The business was established about 20 years ago and its sole director is Mr Jeremy Clark. We understand that the activities of the business include residential lettings and management services provided to private sector landlords in respect of a substantial number of houses in the Liverpool area (and particularly in Sefton).

21. At all material times Liverpool was subject to a citywide selective licensing scheme for the purposes of Part 3 of the Housing Act 2004. A person therefore committed an offence (under section 95(1) of that Act) if they were in control of or managed a house which was required to be licensed under Part 3 but which was not so licensed.

22. Following an investigation in 2019, Liverpool City Council prosecuted the Appellant for controlling or managing seven unlicensed houses in Liverpool and, on 17 October 2019, the Appellant pleaded guilty at Liverpool Magistrates' Court to seven offences under section 95(1). It was ordered to pay a fine of £750 for each offence. The Appellant also pleaded guilty to two additional offences under the 2004 Act of failing to provide the Council with documents which had been requested (by notices served pursuant to section 235) during the Council's earlier investigation. It was fined £1,000 for each of these additional offences and was also ordered to pay costs and a victim surcharge.

23. During the investigation which preceded the criminal prosecution, Liverpool City Council had sent the Appellant various letters pointing out the need for the houses in question to be licensed, (and warning of the offence under section 95(1)), but it received no response to any of these letters and no licence applications were made. Nor did the Council receive any response to section 235 notices requiring the Appellant to produce documents relating to the houses in question. In April 2019, the Council had also written to the Appellant inviting attendance at an interview under caution to discuss the possibility of offences having been committed. Again, however, no response was received.

24. On 16 January 2020, Liverpool City Council decided to make an entry in the Database in relation to the Appellant for a specified period of five years. It sent the Appellant a decision notice to that effect on 17 January 2020.

GROUNDS OF APPEAL

25. Mr Clark, on behalf of the Appellant, asks the Tribunal to cancel the decision notice. It is not entirely clear whether the appeal is just against the Council's decision to make an entry in the Database or whether it is also against the decision to maintain that entry for five years, but we have assumed that it is against both.

26. Mr Clark asserts that the Appellant worked hard to ensure that selective licences were in place for the properties it manages. He says that steps were taken to make landlord clients of the business aware of the statutory licensing requirements and that the Appellant worked closely with landlords, and with Sefton Council in particular, to get 165 licence applications processed.

27. It is accepted that selective licences should have been obtained for the seven houses in Liverpool to which the offences in question relate. In relation to one of those houses, Mr Clark says that the failure to obtain a

licence resulted from a genuine mistake about whether the house was within a selective licensing area. He says that the other six houses were all owned by a landlord with whom the Appellant had "struggled with contact", but who had assured the Appellant that it was in the process of applying for licences.

28. Mr Clark also says that he was shocked to discover the circumstances which had led to the Council's enforcement action in this case. He says that the situation arose out of failures by a long-standing member of staff to follow office procedures, but that measures have since been put in place to ensure that there can be no repetition of such failures.

29. Mr Clark argues that the decision to make an entry in the Database is not a true reflection of the Appellant's business (which, he says, constantly pushes its clients to better and upgrade their properties). He considers that the decision is harsh bearing in mind that a substantial penalty for the offences under section 95(1) of the 2004 Act has already been imposed on the Appellant by the magistrates' court.

DISCUSSION AND CONCLUSIONS

The Tribunal's approach

30. In determining the appeal against a local housing authority's decision to make an entry in the Database, the Tribunal should stand in the shoes of the local authority and take a fresh decision on the evidence before it, giving appropriate weight to the authority's decision as the body tasked by Parliament with deciding whether to make an entry in the Database. It is therefore appropriate for us to have particular regard, not only to the Statutory Guidance, but also to Liverpool's Policy (see paragraph 19 above). If Liverpool City Council has applied both the Statutory Guidance and its own Policy in this case, the Tribunal should give weight to the assessment it has made of the Appellant's conduct in reaching its own decision. Nevertheless, whilst the Tribunal should afford great respect (and thus special weight) to such a decision by a local housing authority, it must be mindful of the fact that it is conducting a rehearing, not a review: the Tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

31. It is for the local housing authority to demonstrate that the power to make an entry in the Database arises on the particular facts of the case. Once it has done so, however, the burden of proof rests with the Appellant (as the party seeking to disturb the status quo) to show that an entry should not be made in the Database (or that it should be maintained for a shorter period of time).

Power to make an entry in the Database in relation to the Appellant

32. On the basis of the evidence outlined so far, we are satisfied that:

- The Appellant has been convicted of seven banning order offences (namely, the offences under section 95(1) of the Housing Act 2004 mentioned at paragraph 22 above).

- By virtue of its property letting and management activities, the Appellant was a 'property agent' at the time when those offences were committed.

- Liverpool City Council has given the Appellant a decision notice (a copy of which we have inspected) which complies with the requirements of section 31 of the 2016 Act.

33. We are therefore satisfied that Liverpool City Council has power under section 30(1) of the 2016 Act to make an entry in the Database in relation to the Appellant.

Exercise of discretion to make an entry in the Database

34. In determining that the circumstances of this case were serious enough to require an entry to be made in the Database, Liverpool City Council noted that:

- As a residential property management company, the Appellant should have been aware of the need to licence the properties in question and should have taken reasonable steps to do so.

- Letters had been sent to the Appellant advising that the properties concerned were unlicensed, how to apply for the licences and the penalties for failing to comply, but this had not resulted in licence applications being made or in any contact from the Appellant.

- The Appellant had not engaged with the Council's housing team throughout the investigation or post-conviction.

- Notices issued to the Appellant under section 235 of the Housing Act 2004 had also been ignored.

- The Appellant and its director (Mr Clark) had been invited for interview, but had not attended or contacted the Council.

35. Although the Council assessed the risk of harm associated with the individual offences as low, the Appellant's culpability was therefore assessed as medium (because the offences were committed in consequence of a failure to take reasonable care). Whilst recognising that the Appellant had no previous convictions for banning order offences – and had not previously been the subject of housing enforcement action

– the Council determined that making a Database entry was nevertheless appropriate in order to deter the Appellant and others from committing similar offences in the future.

36. We agree with Liverpool City Council's assessment in this regard. Whilst we acknowledge that many of the properties managed by the Appellant were properly licensed, there was no reasonable excuse for failing to ensure that the seven properties concerned were similarly licensed. Property agents cannot simply leave the question of licensing for their landlord clients to worry about – they must themselves ensure that all the properties they let or manage are appropriately licensed. The Appellant failed to do this. We note what Mr Clark says about the failings in this case arising out of the actions (or inactions) of one member of his staff. However, this does not detract from the fact that the Appellant has important statutory duties, and also has responsibility for supervising its employees to ensure compliance with those duties. Not only did the Appellant fail to have the necessary supervisory systems in place, but it also failed to respond appropriately when the licensing irregularities were pointed out to it by the Council on multiple occasions. Indeed, it is the Appellant's persistent and prolonged refusal to engage with the Council which is the most notable feature of this case and which, in our view, justifies the making of an entry in the Database. The fact that a substantial fine has already been imposed on the Appellant for the offences in question does not mean that the additional step making an entry in the Database is unduly harsh: whilst it is certainly intended to have a deterrent effect, the primary purpose of such an entry is not to punish the person it concerns, but to assist local housing authorities in carrying out their enforcement functions.

Specified period for which the entry is to be maintained

37. The decision notice issued by Liverpool City Council specified that the Appellant's entry in the Database will be maintained for five years. In determining that five years was the appropriate period, the Council noted not only the lack of engagement by the Appellant discussed above, but also the fact that "the offending occurred over a prolonged period of time and across numerous properties". Although the Council found that a specified period of four years might otherwise be appropriate, it concluded that the need for its action to have a strong deterrent effect in this case justified increasing the specified period to five years.

38. Whilst the likely deterrent effect on the offender is an important consideration, it is also important that the specified period for which an entry in the Database is to be maintained should be proportionate in the circumstances. On the particular facts of this case, we consider that the decision to specify a period of five years was both disproportionate and was also in excess of the period which the application of the Statutory Guidance and Liverpool's Policy requires.

39. The Statutory Guidance has this to say about the interaction between the severity of a banning order offence and the period for which a resulting entry in the Database should be maintained:

> "The severity of the offence and related factors, such as whether there have been several offences over a period of time, should be considered. Where an offence is particularly serious and/or there have been several previous offences; and/or the offence(s) have been committed over a period of time, then the decision notice should specify a longer period of time. Where one or more of those factors are absent, it may be appropriate to specify a shorter period."

40. The Statutory Guidance is echoed in Liverpool's Policy, which goes on to state that an assessment of the severity of the offence should take account of the culpability and harm factors already mentioned. The greater the seriousness of the offence, the longer the specified period should be.

41. It is true that the Appellant in this case has been convicted of several banning order offences (albeit it was the same offence on each occasion). However, it is hard to describe these offences as being 'particularly serious', even when they are taken in aggregate. This finding is reflected in the Council's own assessment of culpability and harm (see paragraph 35 above). According to the court record, most of the offences were committed during a period of about eight months. However, given that all seven offences were the subject of a single prosecution, and given the absence of any previous convictions, it would be harsh on this occasion to treat the Appellant as a persistent or recalcitrant offender. We therefore find that the appropriate period to specify for the Appellant's entry to be maintained in the Database is two years. We consider that this would be both proportionate and would also be likely to have a suitable deterrent effect on the Appellant.

OUTCOME

42. Our findings in this appeal lead us to conclude that it is appropriate for Liverpool City Council to make an entry in the Database relating to the Appellant but that the specified period for which that entry will be maintained should be reduced to two years.

43. Accordingly, the Council may now proceed to make the entry in the Database. In so doing, the Council must ensure that the information included is that described at paragraph 8 above.

Signed: J W Holbrook
Judge of the First-tier Tribunal
Date: 27 January 2021