FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/HBA/2022/0004**
Applicant	**:**	**London Borough of Barking and Dagenham**
Representative	**:**	**Mr Nick Ham (counsel) (Instructed by Barking & Dagenham Legal Services)**
Respondent	**:**	**NTM Limited (formerly known as All Seasons Lettings and Management Limited)**
Representative	**:**	**Mr Archie Maddan (counsel) (by direct access)**
Type of application	**:**	**Application for a banning order – section 15(1) of the Housing and Planning Act 2016**
Tribunal	**:**	**Deputy Regional Judge N Carr Regional Surveyor Ms H C Bowers BSc MRICS MSc Ms R Kershaw BSc**
Date of hearing	**:**	**22 November 2023**
Date of decision	**:**	**20 December2023**

DECISION AND REASONS

DECISION

1. The Tribunal declines to make a banning order.

REASONS

BACKGROUND

1. By application received on 22 November 2022, the Applicant local housing authority ("LHA") applies, under section 15(1) of the Housing and Planning Act 2016 ('the Act'), for a banning order against NTM Limited, formerly known as All Seasons Lettings and Management Limited ('the Respondent'). The LHA seeks a ban of 5 years duration. No application has been made in respect of the director, Mr Daniel Chowdhury.

2. By application dated 20 November 2023, the Respondent applied to the Tribunal to reflect its change of name to 'NTM Limited' in these proceedings. The grounds given were that the 'owner' of the name 'All Seasons Lettings and Management Limited' "*no longer permitted*" the Respondent to use that name. Despite that peculiar circumstance (given the company's registration at Companies House and Mr Chowdhury's identification as the sole director), of which there is no independent supporting evidence in spite of our request that it be provided, the company name has indeed been changed at Companies House. The name change is therefore reflected in this decision.

3. The LHA provided a 591-page bundle of documents, in addition to three video clips. References to those documents appear in square brackets below in the format **[A…]**. The Respondent provided a witness statement of 33 pages dated 22 April 2023 and delivered in two parts, and a further witness statement dated 6 June 2023 running to 9 pages, but in which the previous statement and exhibits were also incorporated such that there is a single Respondent bundle of 41 pages total. References to that document appear below in the format **[R…]**. The LHA made no reply. The Respondent provided a skeleton argument on 17 November 2023.

4. We read all of the documents, and viewed the video clips, prior to the hearing. Large parts of the LHA's evidence were withdrawn from our consideration throughout the hearing. Unhelpfully, that was only made clear at the very moment each of those parts was made subject to cross examination, such that neither we nor the Respondent were provided with a cogent list. If there is any part of the evidence below included or omitted by accident, the parties are asked to inform us immediately so that we can review our decision to remove reference to it or include consideration of it.

5. A hearing was convened face to face at 10 Alfred Place on 23 November 2023, after obtaining the parties' dates to avoid. In attendance were Mr Ham of counsel instructed by the LHA, accompanied by witnesses Mr Paul Mahoney (Housing Enforcement Officer, London Borough of Barking and Dagenham) and Ms Alexandra Cosgrove (Trading Standards Officer, London Borough of Newham). Mr Maddan of counsel attended by direct access for the Respondent, whose director Mr Daniel Chowdhury also attended as a witness. Observing was Ms Charlotte Ward of Barking and Dagenham, who we understand to be Mr Mahoney's manager and one of the decision makers in this case, though she provided no witness evidence.

Facts giving rise to the Application

6. On 1 March 2022, at the Romford Magistrates' Court, a memorandum of conviction shows that "All Seasons Lettings and Management" was convicted following guilty plea and sentenced to a fine of £1,050, for the following offence noted on the memorandum of conviction **[A36]**:

> *Between 01/09/2019 and 05/12/2019 at Dagenham, All Season Lettings had control of or managed a house at 151 Campden Crescent, Dagenham, RM8 2SJ which was required to be licensed under Part 3 of the Housing Act 2004 but was not so licensed.*
> *Contrary to section 95(1) and (5) of the Housing Act 2004.*
> *Between 01/09/2019 and 05/12/2019 at Dagenham, All Season Lettings the defendant had control of or managed a house at 151 Campden Crescent, Dagenham, RM8 2SJ which was required to be licensed under Part 3 of the Housing Act 2004 but was not so licensed.*

7. On 1 March 2022 at Romford Magistrates' Court, a memorandum of conviction shows that "All Seasons Lettings" was convicted following guilty plea and sentenced to a fine of £3,150 and ordered to pay a victim surcharge of £190, for the following offence noted on the memorandum of conviction **[A38]**:

> *Between 01/09/2019 and 19/05/2020 at Barking IG11 0NZ had control of or managed a house at 46 Farr Avenue, which was required to be licensed under Part 3 of the Housing Act 2004 but was not so licensed.*
> *Contrary to section 95(1) and (5) of the Housing Act 2004.*
> *Between 01/09/2019 and 19/05/2020 at Barking IG11 0NZ the defendant had control of or managed a house at 46 Farr Avenue, which was required to be licensed under Part 3 of the Housing Act 2004 but was not so licensed.*

8. The Respondent admits that, despite the misstatement of the company name on the second memorandum, it was so convicted.

9. On 23 August 2022, the LHA sent to the Respondent a Notice of Intention to seek a Banning Order ('the Notice of Intent') pursuant to section 16 of the Act, informing the Respondent it intended to seek an order banning the Respondent from letting and/or managing property for a period of 5 years. The reasons for seeking the order were given as follows **[A26]**:

> *The London Borough of Barking and Dagenham proposes to apply to the First-tier Tribunal for a Banning Order because you have been convicted of the following banning order offences as listed below:*
>
> • *All Season Letting and Management Ltd, in respect for banning order offences committed on 30/4/2020 at 46 Farr Avenue, Barking, IG11 0NZ, was convicted on 01/03/2022 at Romford Magistrates Court of a banning order offence under section 95 of the Housing Act 2004. A fine of £3,150 was given in relation 46 Farr Avenue, Barking, IG11 0NZ.*
> • *All Season Letting and Management Ltd, in respect for banning order offences committed on 30/4/2020 at 151 Campden Crescent, Dagenham,*

RM8 2SJ, was convicted on 01/03/2022 at Romford Magistrates Court of a banning order offence under section 95 of the Housing Act 2004. A fine of £1,050 was given in relation to 151 Campden Crescent, Dagenham, RM8 2SJ.

Schedule 1 of the Housing and Planning Act 2016 (Banning Order Offences) Regulations [2017] *set out the offences that are banning order offences under section 14(3) of the Housing and Planning Act 2016.*

10. The Respondent was given until 21 September 2022 to make any representations about the Notice of Intent, and did so on 16 September 2022 (though the response itself is undated) **[A30 *et seq*]**.

11. In summary, the Respondent relied on the low level of the offences as reflected in the fines, the fact that the 46 Farr Avenue offence was continuing for a period of only two months before a licence application was made, that in relation to 151 Campden Crescent, the period of the eight month offence had been accepted by the magistrates as having been in part caused by faults with the LHA's online system and difficulties with coping with the Respondent's workload caused by the onset of the covid-19 pandemic, and that all fines had been paid. Each property had been previously licensed.

12. The Respondent took the view that it was being picked on, as the first business being made subject by the LHA to a banning order application. Mr Chowdhury set out that the Respondent had no previous offences and was not on the database of Rogue Landlords, and that a banning order would have a very serious impact on it, putting it out of business. It recorded that it had over 600 properties in its portfolio, that there would likely be catastrophic consequences for its tenants if the Respondent was made subject to a ban, no doubt with a substantial impact on the LHA's own housing department, and particularly that the Respondent worked with the LHA and others in securing housing for the LHA's own housing clients, such that the LHA's own services would be disrupted. The Respondent had 20 full time employees who would lose their livelihood, the company would be unable to repay government backed loans which would then have to be repaid by the taxpayer, and employment and tax income to the local area would be lost. Mr Chowdhury set out that new systems had been introduced, and new managers put in place, under the direct management of Mr Chowdhury, such that there had been no repeat of any failure to licence offence since 2020. He concluded that it admitted its wrongdoing, but that the two offences did not justify a ban on letting, for all of the reasons set out.

13. Mr Paul Mahoney states in his witness statement that the representations were received on 16 September 2022 and considered on 22 September 2022, and the decision made to proceed with the banning order application on that date **[A55]**. He does not say in his witness statement by whom or on

what grounds, and there is no copy of any written record in the Applicant's bundle.

14. Mr Mahoney thereafter embarked on an evidence-gathering exercise, the chronology of which is recounted in his witness statement as follows:

    27-28 September 2022 – Mr Mahoney was copied into email correspondence with the London Borough of Camden about the Respondent's alleged illegitimate use of the London Landlord Accreditation Scheme logo.

    30 September 2022 – Mr Mahoney received an email from Charlotte Ward forwarding entries on the LHA's database in respect of properties said to be managed by the Respondent, noting 408 'complaints' against 81 properties.

    5 October 2022 – Mr Mahoney reviewed the Government's Guidance "*Banning orders for landlords and property agents under the Housing and Planning Act 2016: Guidance for Local Authorities*" ('the Guidance'). He then contacted Alexandra Cosgrove at London Borough of Newham, and Shamol Ali (Service Manager) at the London Borough of Redbridge.

    6 October 2022 – Ms Cosgrove contacted the Metropolitan Police (DC Bruce Upson) to introduce Mr Mahoney.

    10 October 2022 – Mr Adam Rulewski (the LHA's Deputy Principal – legal services) made an application for police disclosure.

    2 November 2022 – Mr Mahoney was copied into an email chain notifying that the London Borough of Enfield was investigating matters that were no longer relied on in the hearing before us. On the same day Mr Mahoney added the two convictions on which these proceedings are based to the Rogue Landlord database.

15. In its application dated 21 November 2022, signed by Mr Mahoney and sent by him on 22 November 2022, the LHA relied on the following grounds for the application **[A10]**:

    > *All Seasons Lettings and Management Ltd have been found guilty of two banning order offences which are failure to licence a property which requires licensing, Houisng* [sic] *Act 2004 Section 95.*
    > *All Seasons Lettings and Management Ltd operate throughout the East London area. Evidence gathered within the London Borough of Barking and Dagenham and from other London local authorities show that that All Seasons Lettings and Management Ltd are linked to poorly maintained properties which have fallen into disrepair as well as not mangaging* [sic] *anti - social behaviour in properties which are managed by them.*

There have been over 400 records on the internal database about complaints regarding properties which All Seasons Lettings and Management Ltd manage.
The London Borough of Newham have confirmed that they had multiple investigations regarding unlicensed properties with a further 8 cases still ongoing. Multiple statutory notices have been served and financial penalties have been served for failure to comply with licence conditions and failure to comply with an improvement notice.
A Prohibition Order has been served by the London Borough of Redbridge due to the poor condition of it [sic].
All Seasons Lettings and Management Ltd has been linked to intimidation and harrassment [sic] *of tenants and members of the public.*
It is considered by LBBD that, taking all evidence into account, All Seasons Lettings and Management Ltd are a risk to their tenants and are engaged in such conduct as to render it necessary to impose a banning order in order to protect tenants.

16. No evidence in support of that general summary was attached to the application, other than the Notice of Intent and the Respondent's representations in response.

17. Mr Mahoney's statement and the additional evidence in the bundle show that afterwards:

    1 December 2022 – he received an email from Ms Cosgrove in which were attached witness statements from her, and three others, in addition to the three video clips we were provided with. At the hearing before us, only one video clip, and a very small part of Ms Cosgrove's witness evidence, were relied on, reliance on the other two video clips and the evidence of the three other people being withdrawn.

    12 January 2023 – he made a disclosure request to London Borough of Redbridge regarding records of disrepair in respect of properties managed by the Respondent in that borough.

    16 January 2023 – Mr Mahoney received a response from Mr Wayne Jackson, Senior Enforcement Officer: Redbridge had received three complaints, one of which was subject to ongoing investigations. One Prohibition Order had been served and the HMO licence revoked – that was the property subject to ongoing investigations. The other two provided appeared to be in relation to dates in 2019 when requests for information had been made, resulting in one property being given an HMO declaration.

18. Directions were given by Ms Bowers and sent to the parties on 17 February 2023.

19. Continuing the chronology of Mr Mahoney's investigations:

In February 2023 – DC Upson's police disclosure was received – it is not said by whom or when, but DC Upson's statement is dated 22 February 2023. From the CRIS report provided, there are 12 incidents reproduced in Mr Mahoney's witness statement one of which was against the Respondent's employee and not relied on by the LHA at the hearing.

14 March 2023 – Mr Mahoney checked the Rogue Landlord database and found two entries for convictions (undated) for information offences, and one civil penalty (undated) for a section 72 licensing offence, in addition to the two subject offences he had entered himself. At the hearing it was agreed that the licensing civil penalty should not be on the database, as a successful appeal had been made against the penalty to the Tribunal, and the penalty cancelled, on the basis that the Respondent was not in control or management of the property concerned. Mr Ham maintained reliance on the two information offence convictions even though they were (a) spent, and (b) should not be on the database at all, given that there is no evidence that at the time the Respondent had been made subject to a financial penalty twice in the preceding 12-month period, and the information offences are not themselves banning order offences (as required by section 30 of the Act).

20 March 2023 – Mr Mahoney wrote to the Respondent regarding an investigation of disrepair in two properties and asked for an update.

Mr Jackson of London Borough of Redbridge provided a witness statement dated 11 November 2022 – Mr Mahoney does not make clear in his statement when this was provided, but it is clear that it was not attached to the email of 16 January 2023 provided in the bundle **[A585]** in which Mr Jackson said matters remained under investigation. It was agreed at the hearing that the Respondent's appeal against the revocation of the HMO licence was struck out, for failure by the parties to comply with the Tribunal's directions, in around March 2023.

20. In accordance with Ms Bowers' directions, the Applicant sent its 591-page bundle, containing all of the above additional materials, to the Tribunal and to the Respondent on 23 March 2023.

21. As can be seen, save for the convictions on which this application is founded, the evidence in it all post-dates the Notice of Intent, and large amounts of it post-date even the application such that its contents exceed the grounds stated in the application form dated 20 November 2022.

22. In consequence the Respondent, in a letter to the Tribunal on 27 March 2023 and then in its response made on 22 April 2022 in accordance with directions, asked the Tribunal to hold a CMH at which the question of the admissibility and fairness of the additional evidence not raised in the Notice of Intent, and for additional time in the region of six months to investigate the additional criminal allegations to defend itself.

23. I refused that request on 23 May 2023, on grounds that "*this is not a 'prosecution' and it is my preliminary view that none of the allegations falls to be proven to the criminal standard. The Respondent is also aware of the offences relied on to underpin the application for a banning order (and accepts that they were committed, having pleaded guilty to them), even if it was unaware of the other materials put forward to seek to establish the Respondent's conduct*". Questions of the validity of the notice were properly to be considered at the full hearing. Given that the request had not been brought to the attention of a procedural Judge until the date of writing the letter, however, I vacated the hearing due to take place on 6 June 2023, and made an unless order for the Respondent's full response, the LHA's reply in the event of the Respondent's compliance, and a direction for dates to avoid.

24. In compliance with that order, the Respondent's second statement and additional pages were added to the Respondent's bundle on 7 June 2023. The LHA did not take the opportunity to put in any response as permitted by the extended directions. Dates to avoid were provided by both parties, but unfortunately when a new hearing date was confirmed the parties' dates had changed. The hearing was therefore finally fixed for 22 November 2023.

25. During the hearing, after the various concessions and withdrawals were made by Mr Ham during the course of cross examination, we were in the end asked by the LHA to consider that the following facts and matters ought to result in us exercising our discretion to make a banning order:

    (i) The two convictions of April 2022 for the section 95 offences **[A36 – 46]**;
    (ii) The illegitimate use of the London Landlord Accreditation Scheme logo on the Respondent's email, investigated by Camden **[A55 ¶5]** and **[A544-548]**;
    (iii) The 408 'complaints' against 81 properties associated with the Respondent in the LHA's area **[A553 – 571]**;
    (iv) The four entries on the Rogue Landlord database (including the two convictions themselves and two entries relating to information offences in Newham) **[A49-50]**;
    (v) A Prohibition Order and Revocation of Licence from Redbridge, the details of which are found in the witness evidence of Mr Jackson dated 11 November 2022 **[A138 – 140]**;
    (vi) A referral from the Property Ombudsman to Trading Standards in Newham on 4 December 2020, regarding an incident on an unknown date;
    (vii) The evidence gathered by Ms Cosgrove, but not the allegations currently under investigation and pending decision in the General Regulatory Chamber in pursuit of which that evidence was obtained, at **[A144 – 176]**;
    (viii) An allegation by Ms Cosgrove that, on 3 August 2022 when she attended at the Respondent's offices in the company of a police officer in order to issue financial penalties for conduct not relied on

in these proceedings, Mr Chowdhury was "very confrontational and argumentative" **[A113¶12]**;

(ix) The evidence provided by DC Upson, detailing information from the CRIS reports that the LHA argue demonstrate poor management practices in particular due to the presence of a large number of incidents in which cannabis operations have been found at addresses let by the Respondent **[A131- 137]**, and **[A194 – 535]** and **[A572]**.

26. Mr Ham did not separately address us on the duration and terms of the banning order we were invited to make.

LAW AND GUIDANCE

27. The statutory provisions relating to banning orders are contained within Chapter 2 of Part 2 of the Act.

28. In summary, an LHA may apply to the Tribunal for a banning order against a person who has been convicted of a banning order offence and who was a 'residential landlord' or a 'property agent' at the time the offence was committed.

29. Those expressions are defined in sections 54, 55 and 56 of the 2016 Act.

30. A 'property agent' means 'a letting agent or property manager'.

31. A letting agent is defined in section 54 of the 2016 Act as '*a person who engages in letting agency work (whether or not that person engages in other work)*', otherwise than under a contract of employment. 'Letting agency work' means things done by the letting agent in the course of a business, in response from instructions from *either* a prospective landlord (a person seeking another person to whom to let housing), *or* a prospective tenant (a person seeking housing to rent).

32. Residential Landlord means 'a landlord of housing' (section 56 of the 2016 Act).

33. Section 14 of the Act provides that if a banning order is made by the Tribunal, the person is banned from:

    (a) letting housing in England;

    (b) engaging in English letting agency work;

    (c) engaging in English property management work; or

    (d) doing two or more of those things.

34. Section 15 requires a local authority to give the person a Notice of Intent before applying for a banning order. The Notice of Intent may not be given

after the end of the period of six months beginning with the day on which the person was convicted of the offence to which the notice relates, and must by subsection (3):

(a) inform the person that the authority is proposing to apply for a banning order and why;

(b) state the length of each proposed ban; and

(c) invite the person to make representations within a period specified in the notice of not less than 28 days.

35. The LHA must consider any representations made during that notice period and must wait until the notice period has ended before applying for a Banning Order.

36. Section 17 provides that a ban must last at least 12 months but may contain exceptions to the ban for some or all of the period to which the ban relates. The exceptions may also be subject to conditions. In addition, a person who is subject to a Banning Order that includes a ban on letting may not make an unauthorised transfer of an estate in land to a prohibited person. Nor can a banned person hold an HMO licence or a licence under Part 3 of the Housing Act 2004 in respect of a house. In addition, an HMO licence or Part 3 licence must be revoked if a Banning Order is made against the licence holder. Interim and final management orders may be made in cases where a Banning Order has been made and a property has been let in breach of the Banning Order.

37. Section 14(3) defines a "Banning Order offence" as an offence of a description specified in regulations made by the Secretary of State. The relevant regulations are the Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 ("the 2018 Regulations") which sets out the Banning Order offences in the Schedule to the Regulations. The 2018 Regulations only apply to offences committed after the coming into force of the regulations, on 6th April 2018. One of the specified offences is the section 95 licensing offence in the Act.

38. Section 16(4) provides that in deciding whether to make a banning order against a person, and in deciding what order to make, the Tribunal must consider:

(a) the seriousness of the offence of which the person has been convicted;

(b) any previous convictions that the person has for a banning order offence;

(c) whether the person is or has at any time been included in the database of rogue landlords and property agents; and

(d) the likely effect of the banning order on the person and anyone else who may be affected by the order.

39. Section 30 sets out the discretion of a local authority to include an entry on the Rogue Landlord database in connection with a banning order offence (as opposed to a local authority's duty to enter onto the database a banning order). Section 30 sets out as follows:

(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 … may make an entry in the database in respect of a person who has, at least twice in 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.

40. Section 31 requires a local housing authority to give to the person against whom an entry on the database pursuant to the discretion in section 30 is to be made a decision notice explaining the decision, specifying the period for which the entry is to be maintained, and notifying that person of their right to appeal to the Tribunal against the decision.

41. Section 4 of the Rehabilitation of Offenders Act 1974 ('the 1974 Act') provides that no spent conviction is admissible before a judicial authority. Section 5 of the 1974 Act provides that a conviction in respect of which (only – section 6) a fine is imposed is spent, and a person considered rehabilitated, one year after the date of conviction provided no further offence has been committed.

42. Section 7 of the 1974 sets out the following in relation to the discretion of a judicial authority as regards spent convictions:

(3) If at any stage in any proceedings before a judicial authority in [England and Wales] … the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may

determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.

43. In *Hussain & Ors v London Borough of Waltham Forest* [2020] EWCA Civ 1539, the Court of Appeal were concerned with a case in which the local authority had revoked HMO licences held by Mr Hussain, relying on his spent convictions. The two questions before the court were whether the underlying conduct, resulting in a conviction that was now spent, was nevertheless admissible even if the conviction itself was not; and whether a local authority is a 'judicial authority' for the purposes of section 7(3) of the 1974 Act.

44. On the first issue the court found that even if a conviction was not admissible because spent, the underlying conduct that had led to the conviction was admissible. *Per* Hickinbottom LJ at paragraph 40:

"In my view, the wording of section 4(1)(a) and (b) is unambiguous: whilst, in proceedings before a judicial authority, (a) provides that evidence of the conviction and what might be termed "the prosecution process" is inadmissible, (b) concerns disclosure, extending that protection so that a rehabilitated person cannot be asked (nor is he or she required to answer) questions about the conviction or circumstances ancillary thereto including conduct constituting the offence for which he or she has been convicted."

45. It should be noted that, as the LHA is not able to impose, vary or revoke a banning order in this case, the section 7(3) question is one for us exclusively. The court's decision on the second question is therefore of no application in this case.

46. In a decision dated 15 February 2023, the Tribunal (Ms Bowers, Judge Sheftel and Mr Lewicki) were concerned with a case in which seven convictions for banning order offences were obtained on 1 October 2021 and therefore spent by the time the application for a banning order was considered at a hearing by the Tribunal – *London Borough of Newham v Jahangir Hussain* LON/00BB/HBA/2022/0001. The Tribunal determined that it was able to impose, and did impose, a banning order despite the fact that the convictions were spent, reasoning as follows:

"

22. The second preliminary matter was in regard to the nature of the spent convictions. When the application was made on 31 May 2022 the convictions were unspent. However, they became spent on 30 September 2022.

23. The Applicant's position is that it cannot be the intention of Parliament to exclude such evidence of the convictions when hearing an application for a Banning Order. The non-statutory MHCLG Guidance at paragraph 3.4 states that 'A spent conviction should not be taken into

account when determining whether to apply for and/or make a banning order". None of the convictions were spent when Newham decided to make the application. It is the Applicant's position that justice could not be done unless the Tribunal admits the evidence in relation to the convictions and that the Tribunal should admit the evidence in accordance with section 7(3) of the Rehabilitation of Offenders Act 1974 (the 1974 Act). The case of Hussain v Waltham Forest LBC [2020] EWCA Civ 1539 supports this principle. The convictions were recently spent, and it would not be in the interest of justice to exclude this evidence. Neither the offences nor the circumstances in which they were committed are subject to the protection of section 4 of the 1974 Act. As section 20 of the 2016 Act envisaged situations when convictions had been spent, then Parliament had the issue of spent convictions in mind and the statute would have explicitly excluded the making of Banning Orders if convictions had been spent. Section 20 (4) should not be used to imply that a Banning Order could only be made on the basis of an unspent conviction.

24. *Mr Bryant submits that the Tribunal should not take into account the convictions and should not make a Banning Order. A pre-condition to making a Banning Order under section 15 of the 2016 Act is that the Respondent "has been convicted". But those convictions were spent after 30 September 2022. It is for the Applicant to show at the hearing that there was a conviction for a Banning Order offence. Section 4 (1) of the 1974 Act provides that a person is "a rehabilitated person" if the conviction is spent and so the Respondent should be treated as a person neither having committed nor been convicted of a Banning Order offence. By section 4(1)(a) no evidence shall be admissible to prove that a person has committed or been convicted of an offence once it is spent. Mr Bryant considers Hussain v Waltham Forrest can be distinguished from the current case on the basis that the local authority was not obliged to prove the conviction but chose to do so.*

25. *It is accepted that the Tribunal may admit evidence under section 7(3) if justice cannot be done except by admitting the evidence. However, the Respondent's position is that justice can be done by declining to admit the evidence for the following reasons. Whilst not binding, the Tribunal should give weight to the MHCLG Guidance. It is clear that the Government thought it was unjust for spent convictions to be taken into account in making any Banning Order. This is supported by section 20(4) of the 2016 Act that sets out that if a conviction is spent then the Tribunal may vary or revoke a Banning Order. As such a Banning Order cannot be made once a conviction is spent as once made, the Respondent may immediately apply to have the Banning Order revoked. Under section 15(6) of the 2016 Act, the Applicant had six months from 1 October 2021 to give the Respondent a Notice of Intended Proceedings and as the Applicant waited until 29 March 2022, it took the risk that the convictions would be spent by the time the matter was*

heard. The offences took place in 2018 and that the offences are now 'stale'. The Respondent's evidence is that he has taken steps to and has "proactively reorganised the management structure of my properties …. to ensure that the reasons behind my 2021 convictions are not repeated" and as such he has improved his behaviour.

26. *As accepted by both parties the MHLCG Guidance is non-statutory. Whilst the Tribunal have taken it into account, we do not consider it to be a tool of interpretation of the 2016 Act. Given the steps that need to be taken by a Local Authority in proceeding with a Banning Order and the length of time before any matter could come before a Tribunal for determination, it would seem extraordinary that convictions that were spent at the time of a hearing could not be taken into account. We consider that section 20 sits alone and describes a scenario when a conviction is unspent at the time of making a Banning Order but subsequently becomes spent. We do not agree that section 20 implies that the convictions need to be unspent at the time of making the Banning Order. It is accepted that in contrast to Hussain v Waltham Forest, in this case one of the 'ingredients' of section 16 of the 2016 Act is that the Respondent, is a person who has been convicted of a Banning Order offence. However, we consider that the crucial part about whether the fact that the Respondent has been convicted can be admitted is dealt with by section 7(3) of the 1974 Act. The Tribunal is a judicial authority and by section 7(3) is satisfied that for justice to be done in our consideration of this application for a Banning Order, we need to know about Mr Hussain's convictions. Therefore, we admit the evidence relating to the convictions that were spent on 30 September 2022. However, the fact that the convictions are spent is a factor we take into account when making our determination below."*

47. Permission to appeal against that decision was granted by the Tribunal in March 2023. We made enquiries with the Upper Tribunal on 21 November 2023 to see what progress had been made in that appeal. We were informed none had been received.

48. It appears that we were given incorrect information, as on 6 December 2023 the Upper Tribunal (Judge Elizabeth Cooke) upheld the decision of the FTT: *Jahangir Hussain v London Borough of Newham* [2023] UKUT 287 (LC).

49. In paragraph 42 of the recent decision of the Upper Tribunal in *Irvine v Metcalf and others* [2023] UKUT 283 (LC), Deputy President Martin Rodger KC set out as follows at paragraph 72: "*A failure to licence an HMO is always a serious matter, although generally of lesser significance than the other housing offences listed in section 40(3), 2016 Act. Where there is little or no evidence that licensing would have been conditional on changes being made to the condition of the property the particular failure may be regarded as lower in the scale of seriousness".*

50. The MHCLG (as DLUHC then was) provided the Guidance, published in April 2018, which is non-statutory in nature **[A82 *et seq*]**. The stated intention of the Guidance is to help local authorities understand their new powers to ban landlords from renting out properties in the private sector. Its recommendations are not mandatory, but it is good practice for an LHA to follow them, and the Tribunal may take them into account when coming to its own decision.

51. The Guidance notes the Government's intention to crack down on a "*small number of rogue or criminal landlords [*who*] knowingly rent out unsafe and substandard accommodation*" and to disrupt their business model.

52. Paragraph 1.7 of the Guidance states that banning orders are aimed at "*Rogue landlords who flout their legal obligations and rent out accommodation which is substandard. We expect banning orders to be used for the most serious offenders*".

53. Paragraph 3.1 of the Guidance states: "*Local housing authorities are expected to develop and document their own policy on when to pursue a banning order and should decide which option it wishes to pursue on a case-by-case basis in line with that policy. Our expectation is that a local housing authority will pursue a banning order for the most serious offenders.*"

54. At paragraph 3.3 of the MHCLG Guidance are set out the factors that an LHA should take into account when deciding whether to seek a banning order. They are:
    - **The seriousness of the offence**: the Guidance sets out that all banning order offences are serious. The LHA should consider the sentence imposed by the Court for the banning order offence: the more severe the sentence, the more appropriate a banning order is likely to be. This factor is said to go to both the making of and the duration of a banning order;
    - **Previous convictions/rogue landlord database**: it is stated that the LHA should check the rogue landlord database to ascertain whether the landlord has committed other banning order offences or received civil penalties in respect of banning order offences. "*A longer ban may be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities.*" Landlords are running a business and should be aware of their legal obligations.
    - The **effect of a banning order** on the person or on any person that may be affected by the order, including:
        - **The harm caused to the tenant**: this is said to be a very important factor, and the greater the harm or potential for harm (which may be 'as perceived' by the tenant), the longer the ban should be. It is suggested that offences related to health and

safety, for example, could be considered more harmful that other offences (the example given is fraud);

- **Punishment of the offender**: a banning order is draconian, and any ban ought to be proportionate to the severity of the offence and whether there is a pattern of previous offending. It is important that it is set at a high enough level to remove the worst offenders from the sector, to have a real economic impact, and demonstrate the consequences of non-compliance.
- **Deterrence of the offender from repeat offending**: '*The ultimate goal is to prevent any further offending*'. This might be achieved by preventing the most serious offenders from operating in the sector again. The length of the ban should be long enough to be a likely deterrence to the offender from repeating offences;
- **Deterrence of others from similar offending**: this can be demonstrated through the realisation of others that the LHA is pro-active in seeking such orders, and at such a level to punish and deter repeat offending.

55. The Guidance at paragraph 3.4 states that '*A spent conviction should not be taken into account when determining whether to apply for and/or make a banning order*".

56. At paragraph 5.2, the Guidance specifically indicates that the Tribunal is not bound by but may have regard to the Guidance (the word 'may' clearly being permissive). At 5.3, the Guidance specifically reserves the decision on the duration of any banning order to the Tribunal (though it must be minimum 12 months).

57. In *Maharaj v Liverpool City Council* [2022] UKUT 140 (LC), the Upper Tribunal (His Honour Judge David Hodge KC) was concerned with a case in which he was considering the requirements of a notice of intent given pursuant to schedule 13A of the Act (the local authority's decision to impose a financial penalty). In finding that the notice was deficient, he stated as follows:

17. …By paragraph 3(a) of Schedule 13A, the notice of intent must set out "the reasons for proposing to impose the financial penalty". Those reasons must be sufficiently clearly and accurately expressed to enable the recipient landlord to exercise the right conferred by paragraph 4 to "make written representations to the local housing authority about the proposal to impose a financial penalty", thereby enabling it to decide whether to impose a financial penalty on the landlord and, if so, the amount of such penalty (as required by paragraph 5). Similarly, by paragraph 8(b) of schedule 13A, the final notice must set out "the reasons for imposing the penalty". These too must be sufficiently clearly and accurately expressed to enable the recipient landlord to decide whether to exercise the right of appeal to the FTT conferred by paragraph 10 against the decision to impose the penalty or the amount of that penalty… The Tribunal does not regard the reasons for imposing a financial penalty, or proposing to do so,

merely as giving a factual background to the offence; they should be treated as providing particulars of the offence.

18. … Local housing authorities must bear firmly in mind that the imposition of a financial penalty is an alternative to a criminal prosecution; and it must be treated with the same level of seriousness and transparency. Having read the whole transcript of the proceedings, the Tribunal is satisfied that Ms Pritchard had put to the appellant in clear terms during the course of his cross-examination the basis of the offence that was actually found by the FTT of failing to supply a valid gas safety certificate on an annual basis. However, that was not the case that had been set out in either the notice of intent or in the final notice; these documents had identified the offence, but the particulars of offence were the failure to produce a copy of a valid gas safety certificate by 13 June 2019, when the appellant had been requested to do so within seven days by Mr Farey's letter dated 5 June 2019. These particulars did not constitute the offence alleged, and they were therefore defective. To adopt old-fashioned legal terminology (which was not even recognised by my computer spell-check), they were demurrable. They did not give the appellant proper notice of the offence alleged against him and which the FTT found had been made out to the criminal standard of proof. Paragraph 10 (3) of Schedule 13A to the 2004 Act may permit the FTT to determine an appeal "having regard to matters of which the authority was unaware"; but, in the Tribunal's judgment, it does not permit the FTT to determine an appeal on the basis of reasons for imposing a financial penalty that have not been set out in the local housing authority's final notice… The Tribunal does not regard this point as a mere technicality because it gives rise to the risk that a landlord might be found guilty of a non-existent offence, or of one that has not been properly identified to the landlord; and because, in the present case, it has fed seamlessly into the FTT's second error, which was to fail to identify the fact that the offence which it did find to have been proved was in fact time-barred.

58. In *Knapp v Bristol City Council* [2023] UKUT 118 (LC), the Deputy President (Martin Rodger KC) dismissed Ms Knapp's appeal against the Tribunal's decision to impose a banning order on her. Amongst his findings, the Judge concluded that the level of a fine imposed on a person did not 'speak for itself' but neither is the Tribunal obliged to reopen the facts and circumstances behind the fine to come to its own decision. It is entitled to use its own general experience of fines imposed in other cases, as a specialist Tribunal, to calibrate the offences on which the application relies on a scale of seriousness, to assist it in determining whether the offences are sufficiently serious to lead to a banning order being imposed (paras 42 – 43). At paragraph 52:

"the FTT is not required to "determine" or "assess" the seriousness of the offence but instead is required by section 16(1) to "consider" its seriousness. The material provided by the parties will form the basis of that consideration, but the weight which the FTT places on different aspects of that material is a matter for it. In my judgment it would certainly be

entitled to disregard or give limited weight to the level of fines imposed if it considered that they were an inadequate or incomplete reflection of the seriousness of the offence, or if it simply disagreed with the magistrates' assessment. But the FTT would also be entitled to give considerable weight to that assessment, as it did in this case. There is nothing in the Act which directs the FTT to adopt one approach or the other when it "considers" the seriousness of the offence and provided it has done so when determining whether to make a banning order it will have carried out the exercise Parliament intended…

57. … the proposition which the FTT rejected was an extreme one, namely, that no weight whatsoever should be given to the sentence imposed and that it should in effect "reopen the case before the magistrates". In my judgment the FTT was right not to entertain the invitation to begin with a blank canvass and assess for itself whether the offences were serious."

ISSUES

59. The **issues** for the Tribunal to consider are:

    (i) Whether the Respondent has been convicted of a banning order offence and, if spent, the extent to which any such conviction may well-found the imposition of a banning order;

    (ii) Whether the LHA has given the Respondent a Notice of Intent that complies with section 15 of the Act;

    (iii) Whether to make a banning order (and, if so, what order to make) having regard to the matters set out in section 16(4) and the MHCLG Guidance.

DECISION

(i) Has the Respondent been convicted of a banning order offence and, if spent, can it well-found the imposition of a banning order?

60. The Respondent concedes that the convictions on which the banning order application is founded are banning order offences. Rather it is said that, given the passage of time, the Respondent must be considered rehabilitated (absent any reoffending), such that both the fact and circumstances of those convictions are to be treated as not having occurred.

61. Section 4(1) of the 1974 Act makes it clear not only that a person (a term apt also to describe a corporate entity) is a 'rehabilitated person' if the conviction is spent (and so should be treated as having neither committed nor been convicted of a Banning Order offence), but that also by section 4(1)(a) no evidence shall be admissible to prove that a person has committed or been convicted of an offence once it is spent. More than that,

section 4(1)(b) prevents a person being asked, and having to answer, *"questions about the conviction or circumstances ancillary thereto including conduct constituting the offence for which he or she has been convicted"* (*Hussain & Ors v Waltham Forest*).

62. That seemingly absolute proscription is, however, tempered where 'justice cannot be done' without a judicial authority admitting the convictions and/or the evidence in respect of which they were obtained – section 7(3) of the 1974 Act.

63. On the day before the hearing, I caused a copy of *Jahangir Hussain* to be sent to the parties.

64. As Mr Maddan accepted on the day of the hearing, and given then information we had received from our enquiries, absent any binding authority from the Upper Tribunal (an appeal before which does not appear to have been pursued, despite permission having been given), we were likely to find the Tribunal's decision in *Jahangir Hussain* highly persuasive.

65. Mr Maddan argued that section 20 of the Act would not exist were it not intended that, as the Guidance states, banning orders should <u>not</u> be sought or made in respect of spent convictions. He recognised, however, that the Guidance has no legislative force. He sought to persuade us it would be, as a general rule, unjust for the now spent convictions to be admitted before us, as that would undermine the Respondent's right to rehabilitation under the 1974 Act. The Respondent had not engaged in any conduct with the intent of deliberately delaying the Tribunal process. The LHA should have been aware that, by 30 April 2023, the convictions on which the application is founded were spent. He reserved his right to respond to any argument made by Mr Ham in connection with why that right to rehabilitation should be undermined in this case.

66. Mr Ham stated that he had only looked at the papers relatively recently, but insofar as he was prepared for the argument, firstly the LHA had made its application when the convictions were unspent and in accordance with the statutory time limits which required the LHA to serve Notice of Intent before making any such application. It would be a "*dangerous loophole*" if, due to the passage of time between the making of an application and the hearing of it, the Tribunal became prevented from making a banning order due to the effect of section 4 of the 1974 Act regardless of whether there had been deliberate delay on the part of the Respondent. Parliament had neither prescribed that a banning order case must be heard within a particular period of time (as it has done in other Acts), nor specified that the LHA was prohibited from relying on a spent conviction, and had it so intended it had the opportunity to do so. The Guidance was non-statutory, and while paragraph 3.4 **[94]** reads that a spent conviction should not be taken into account in applying for or making a banning order, it was necessary for us to consider the convictions in order to do justice. This was a paradigm case in which section 7(3) of the 1974 Act should be applied. The convictions

were the whole grounds of the application, spent only because of the passage of time in waiting for a hearing, and the passage of time cannot extinguish a valid application. To allow it to do so would make a nonsense of the legislation. Mr Ham relied on the Tribunal's decision in *Jahangir Hussain*.

67. In reply, Mr Maddan submitted that what Mr Ham invited us to find was that as a general rule section 7(3) should be applied in any case before the Tribunal in which an application has been brought on unspent convictions that became spent prior to the hearing. That could not be correct; there had to be discretion for the Tribunal to take into account the seriousness of the offences engaged. Coming around from his previous view, it must, he suggested, be correct that the Tribunal must deal with the facts of each particular case on its merits when considering the exercise of its section 7(3) discretion. In this case that meant that we could legitimately deviate from the decision in *Jahangir Hussain*, as section 7(3) was neither necessary nor made out.

68. We agree with Mr Ham. In this case, the application was made while the convictions remained unspent. It is a feature of the legislation that, in any case in which a company is the 'person' prosecuted for a banning order offence, a fine is the only penalty that it is open to the criminal court to impose. All fines are spent one year later, provided there is no repeat offending.

69. It may be, of course, that because (as the Guidance says) the banning order jurisdiction is to be used in respect of "*the most serious offenders*", what was anticipated was that there would be repeat offending, or the imposition of sentences other than fines, which resulted in convictions remaining unspent. That is not the case here, as Mr Maddan rightly points out. However, we set against that the scenario, familiar to us from other cases, in which a company has been convicted of eight or nine offences on the same occasion, in respect of which fines of significant levels were imposed for all of the offending behaviour (being the only sentence available for bodies corporate), in which there were no further offences in the subsequent 12 months. If Mr Maddan were right, it would therefore mean that none of that serious offending behaviour could be taken into account because all the convictions would have become spent in the same way as has happened in this case if, for any reason, there was a delay in the process of dealing with the application. We do not consider that the question is therefore as simple as 'no further offending in the twelve-month period after conviction equates to not a serious offender, convictions spent and section 7(3) never capable of satisfaction'.

70. While we have some sympathy for Mr Maddan's point in respect of these particular offences and the resulting low-level fines, the seriousness of the offences seems to us to be a matter that we can (and indeed must) properly take into account elsewhere in our decision. Would justice be done if we refused to admit the two convictions which are the very foundation of this

application, such as to deprive the Applicant of its opportunity to put forward its case only because the two convictions have become spent due to no fault on any part? We do not think so. We consider that it is appropriate to exercise our discretion to admit the convictions, and the facts relating to them, on this occasion. The Respondent is clearly able to answer the allegations and take any point on the severity of those offences when it comes to the exercise of our discretion under section 16(4). We are now aware, of course, that the Upper Tribunal has upheld that course. We therefore admit the convictions pursuant to section 7 of the 1974 Act.

71. We decline to take the question as one of principal, partly because, as Mr Maddan himself stated, the parties were not in a position to fully argue the effect and intention of the 1974 legislation (which is itself widely acknowledged to be fraught with difficulties), and partly because it seems to us that in any event the application of section 7(3) must be a question for the discretion of any particular judicial authority on a case-by-case basis. Whether 'justice can be done' in any case is a highly fact-specific question. That accords with Mr Maddan's submission that *Jahangir Hussain* was decided 'on its own facts'.

(ii) Does the Notice of Intent comply with section 15 of the Act?

72. Section 15(3)(a) makes it a mandatory requirement that the LHA give to a person in respect of whom it intends to seek a banning order notice of that intention, and the reasons "why".

73. As set out above, the Notice of Intent was given on 23 August 2022. The only 'reasons' given in the Notice of Intent were the two convictions.

74. Mr Mahoney stated that 22 September 2022, after receiving the representations made by the Respondent, the decision was made to make the banning order application **[A55]**.

75. On the day before the hearing, I caused a copy of *Maharaj* to be sent to the parties.

76. We asked the parties to take as a preliminary issue the question of whether the Notice of Intent was defective, in that it did not explain the reasons why the LHA considered that a banning order should be made.

77. Mr Ham sought to distinguish *Maharaj*. Schedule 13A was, in his view, a very different beast. In that jurisdiction, the LHA makes the decision itself to impose a penalty. It therefore acts in a quasi-judicial role. A person 'stands convicted' by the LHA unless they appeal. In the banning order jurisdiction, only the Tribunal can impose a banning order. The Notice of Intent was only to inform the person concerned of an intention to make an application. The Tribunal makes a judicial decision which may then be subject to appeal. It was therefore much less important than that in schedule 13A proceedings. As the sample Notice of Intent attached to the

Guidance made clear, all that had to be included were the gateway convictions for the banning order offences. The full reasons are 'you have been convicted of banning order offences'. There was no need to add anything more. The Notice of Intention did not have to contain the reasons for the subsequent application.

78. In respect of the Respondent's right to make representations, Mr Ham considered these "*useful to an extent*" at the stage that the Notice of Intent was served, but not serving the same purpose as someone against whom a financial penalty was proposed to be imposed. The stage was of no real importance. There was no decision "*adverse*" to the Respondent to be made by the LHA.

79. Mr Maddan submitted that alike the schedule 13A jurisdiction, section 15 required that the LHA give reasons for its intention – whether expressed as 'reasons for imposing a financial penalty' or 'why' the LHA intended to seek a banning order, the requirement was the same and the difference in wording no more than semantic. The intention of the statute was plainly that the recipient of a notice be enabled to understand <u>why</u> a particular action was to be taken, such as to elicit representations in respect of those reasons. Failure to do so could – and in *Maharaj*, did – result in a judicial authority being led into error. The statute provided for a complete process. The Respondent should not be put into a position where what was said on the Notice of Intent bore no more than a passing relationship to the "*rag-tag and bob-tail collection of anything they could lay their hands on*" that the Respondent had received months later in this case, which on detailed examination included much that the LHA ought not to have put before us in any event (for example, the civil penalty said to have been imposed on the Respondent and included on the Rogue Landlord database, in which the Respondent had successfully appealed as it was neither the manager or landlord of the property in question).

80. In this case, the convictions were not obviously serious enough to justify a banning order, and it was obvious given the subsequent conduct of the application that the LHA did not make the application on the basis of the two convictions alone. Put simply the Notice of Intent was deficient. The LHA had taken the view it was sufficient simply to cite the gateway offences, and had not explained how they passed the section 16 threshold. In ignoring the statute the LHA sought to get away with bolstering their case after the event. The LHA should have at least gone through the consideration in section 16(4) of the Act, or if other material was relied on the reasons should have been included in the Notice of Intent. At the very least the grounds of the application should be what appeared in the Notice.

81. The only reason that the Respondent had been given for the intention to make the application were the two offences. Mr Chowdhury had given a full response to the reasons he had been given. The LHA was a statutory creature, making decisions that required justification of how they were made and when, whether that be in a judicial or prosecutorial capacity. The

Notice of Intent had to serve the purpose of informing the Respondent of the reasons for its intention, such as to justify any subsequent decision. A decision to seek a banning order was just as important a decision as whether to impose a financial penalty. The material relied on by the LHA now was said to be to argue 'for the making of an order'. It was relied on in a foundational capacity. The LHA was statutorily obliged to explain why a banning order was sought, and in Mr Maddan's submission that must include the material that is ultimately presented to the Tribunal relied on in a foundational capacity.

82. The Guidance was, as acknowledged by all in the hearing, inherently contradictory in places. It was non-statutory. The example Notice of Intent was not a binding document. It envisages an LHA relying solely on convictions. That was not the case here. Mr Maddan submitted that having looked at the gateway offences and considered that they were insufficient, the LHA had, after the representations stage, sought to widen the scope of the conduct relied on to justify the decision made *ex post facto*. That gave rise to an article 6-type point where a party was being subjected to a statutory enforcement process in which their business might be shut down. That was the very reason why such a party was entitled to make representations. The Notice of Intent, and right to make representations in light of it, went both to the Respondent's statutory rights and to the LHA's proper exercise of its decision-making powers. The decision crystallises the 'why'. It requires the LHA to nail its colours to the mast and tell the Respondent 'this is why we want to ban you from business'. Were the LHA permitted to proceed on the basis that it had until now, moving the goalposts every time the matter was reviewed, that would make a nonsense of the requirement for a Notice of Intent and the right to make representations. The LHA could avoid pinning its colours to the mast right up until the day of the hearing – as it had here. Ambush was not the mechanism of the Act – the first principle was 'explain why'. The 'why' when the Notice of Intent was given was not the 'why' now – the Respondent had been presented with an entirely different case, with no attempt to explain why this had been thought the appropriate course to take when the decision was made. An LHA was not simply entitled to ignore or amend a statutory procedure. To permit it to do so would do damage to the statutory regime and an injustice to the Respondent. It would nullify the entire point of a representations stage. It could not be correct that the representations stage has teeth for a schedule 13A and not for section 15.

83. Mr Maddan concluded that the very point was being played out before us at the hearing. The inclusion on the Rogue Landlord database of the civil penalty that had been subject to a successful appeal and that should therefore never have been included in the first place was no longer relied on by the LHA, which had only been conceded moments before. The Respondent ought to have had the opportunity to make representations on it previously, if it was relied on. It was an example of the shifting case that the Respondent was being required to meet by ambush.

84. We heard oral evidence. As stated above, Mr Mahoney does not say in his witness statement by whom or on what grounds the decision was made on 22 September 2022 to pursue a banning order, and there is no copy of any written record in the Applicant's bundle. In his oral evidence, he confirmed that he, Charlotte Ward, and another individual made the decision at a meeting. There was no note or minute taken of the meeting, and no record kept of how the decision was come to or what taken into account. He confirmed that at the date of the meeting the LHA's banning order policy was contained in its general Enforcement Policy, and the LHA did not have a matrix that accompanied that general Enforcement Policy to assist it's authorised officers in making a decision. The same is true of the new Banning Order policy, made in or around February 2023. No copy of either policy was provided. While Mr Ham pointed out that such a matrix is not mandatory for banning orders, we note that it is not mandatory under *any* of the provisions of the Act, but it is often used by local authorities under the various jurisdictions to demonstrate the serious, fair and objective decision making they have made.

85. According to Mr Mahoney's witness statement, he did not review the Guidance until 5 October 2022 (though it is plain that he or another person must have previously obtained the example Notice of Intent from its annexe, on which the LHA's Notice of Intent was modelled). He told us that it was at that point he began to liaise with other local authorities, and, given that accords with the chronology in his witness statement, we infer that none of the evidence from those authorities now relied on was before the decision makers on 22 September 2022. It also appears from his chronology that the list of 'complaints' was not available at that time, it having been sent on 30 September 2022 **[A552]**.

86. Mr Mahoney did not elaborate on the reasons for coming to the decision to apply for a banning order on 22 September 2022 in his oral evidence. He did, however, make clear that he was of the view that the low-level conduct on which the two convictions were founded was not itself sufficient to make a banning order. Whilst Mr Ham endeavoured to row-back from that concession in his closing submissions, it was Mr Mahoney's clear evidence that it was other conduct that resulted in the LHA deciding that a banning order application should be made, though he did not tell us what other conduct the LHA had in mind when the decision was made.

87. Mr Ham also sought to suggest that the key date was the date of the application to the Tribunal. More (but, we note, not all) was then known about other evidence, as is shown by the general application contents, although again we note mismatches, for example given that the date that the information about the Prohibition Order was given by Mr Jackson was in January 2023 **[A585]**, there is no explanation for how it came to be included in general terms on the application in November 2022. What we do know, having identified the case with the parties at the hearing, is that at the date that the LHA included the licence revocation from Mr Jackson's

evidence in its bundle, there was a live appeal against that revocation with the Tribunal.

88. As set out in the chronology of Mr Mahoney's investigations above, and lacking any other evidence or clarification from Mr Mahoney, it appears none of the other conduct was not available to the decision makers at the date the decision to pursue a banning order was made, i.e. 22 September 2022. It therefore appears that it was also not available at the date the Notice of Intent was given, such that it could not be included on it.

89. Although we cannot agree with an allegation of ambush, given that by the time of the hearing the other matters on which the LHA relied had been in the possession of the Respondent since the third week of March, and the Respondent was given permission for an additional reply by 6 June 2023, nevertheless that is not the key question. That, it seems to us, is this: on what basis, in light of what seemed to be the only evidence available to the decision makers at the time, was the decision made to pursue a banning order?

90. It must have been on the basis of more than just the two convictions which alone appear on the Notice of Intent, which on Mr Mahoney's evidence are conceded to be insufficiently serious for a banning order to be made. However, even after the hearing we were no better position to understand the reasons for the decision on 22 September 2022 than the Respondent was when it received the Notice of Intent.

91. Although we have sympathy with the LHA, who have used the example attached to the Guidance and therefore thought that what they had provided was sufficient, we are satisfied that cannot be the correct approach. It must be the case that the reason the Notice of Intent is to set out the 'why', is both to enable a person, against whom a decision by a public body to pursue a banning order may be made, to know what they are alleged to have done and to have the opportunity to either correct their conduct or to persuade an LHA that the conduct is not sufficient to pursue an application, and to enable the LHA thereafter to carefully think about that response, before making a decision which will involve the expense of public money and resource.

92. We reject Mr Ham's submission that the Notice of Intent is of little importance beyond indicating the gateway banning order offences, and the right to reply even less so. A decision to pursue a banning order is plainly a decision adverse to a Respondent – it will result in time, money and work to defend a case in which potentially their entire business will be closed. To what other purpose would the right to reply be embedded in the legislation, other than to ensure that the LHA takes a serious decision in light of all the evidence available to it including the response by the Respondent? It seems to us it might be properly contextualised in terms of, for example, a decision by the Legal Aid Agency to grant litigation funding, or the CPS to pursue a prosecution. As a public body, an LHA ought to satisfy itself on the basis of

both a merits and a public interest test that seeking a banning order would be a reasonable approach in light of all of the evidence available to it at the time the decision is made. That is clearly what the Guidance envisages when it tells a local authority at paragraph 3.3 what it ought to consider.

93. If one were to think of a parallel jurisdiction in the county court like anti-social behaviour ('ASB'), as we invited Mr Ham to do in the hearing, an LHA has to give a statutory notice setting out the grounds on which it will rely in going to court to seek a possession order. It is a warning shot across the bows, to encourage a resolution of the behaviour on which it relies, and to make it clear why possession proceedings will be instituted. If the behaviour is resolved, it may be that no possession proceedings will ensue. If it is not resolved, or if the conduct set out in the notice is serious enough that it is incapable of resolution, the possession action is commenced. It is, alike this application, for the judicial authority to make the decision whether to make the order, not the LHA. The notice is the foundation of the proceedings. Additional evidence is permitted later in support of the content of the notice, and often additional matters are put into evidence as they occur through the course of the time it takes to come to a hearing, but the foundation of the proceedings, remains the contents of the notice. If the notice omits the reasons, it is invalid.

94. The individual in receipt of the notice in ASB proceedings is entitled to the full grounds, but not entitled to make a reply. In this jurisdiction, Parliament has made a deliberate decision to give the Respondent the right to reply to the grounds that will be relied on in making a banning order application, by ensuring that the Notice of Intent contains the reasons 'why'. We consider that the reason for that is the very significant effect the making of a banning order will inevitably have on the person against whom it will be made, their business, their employees, their tenants, potentially local authority resources, and so on.

95. We are therefore unable to agree with Mr Ham that the right to respond is no more than a 'useful' but ultimately irrelevant step, or that unlike schedule 13A proceedings the LHA does not need to set out its stall in the Notice of Intent because it is not the ultimate decision maker. The Notice of Intent is an important step to enable a person against whom it is proposed to apply for a banning order to firstly set out any reason it considers that the LHA has not made the right assessment, or to tell the LHA about any improvement they have made in their business practices that might result in a banning order application no longer being justified on the LHA's own analysis, or to convince the LHA that the desired result (such as improved housing standards) is in the process of being achieved, or potentially more generally to give that person an opportunity to address the conduct complained of such that by the time of the hearing of any such application it has taken steps to put in place proper systems for better housing management such that a banning order is no longer appropriate. It may be that, because of the seriousness of the conduct, the person is unable to take

steps to address it at all, or at least sufficiently to prevent the making of a banning order.

96. Nor do we agree with Mr Ham that the reasons in the Notice of Intent need go no further than the convictions themselves. The fact of conviction is less likely to be relevant to the LHA's assessment of whether a banning order should be sought than the circumstances of the conviction. We are satisfied that that assessment would need to be set out in the notice. That is particularly so in this case.

97. At paragraph 3.3 the Guidance makes clear that the LHA should take into account a list of particular factors before deciding whether to apply for a banning order. It our view, the person against who it is proposed that such an application be made is entitled to know what the LHA's analysis of those factors are when invited to make their representations. The existence of a banning order offence is the gateway that entitles the LHA to consider whether or not to seek a banning order. It is not the reason for the decision, the circumstances behind it are. The reason 'why' should be treated with just the same level of "*seriousness and transparency"* as is required by schedule 13A.

98. In this case the Notice of Intent contains a statement of the banning order offences of which the Respondent was convicted. It gives no reasons why those offences are considered serious, makes no mention of inclusion on the Rogue Landlord database, and sets out no analysis of the competing effect of the making of a banning order on anyone, as paragraph 3.3 of the Guidance sets out the LHA should take into account. For those reasons, we consider that the Notice of Intent does not comply with section 15(3)(a) of the Act, and is to be treated as invalid.

(iii) Should a banning order be imposed and if so, in what terms?

99. If, however, we are wrong in that conclusion, we go on to consider the question firstly, whether a banning order should be imposed, and, if it arises, in what its terms should be made.

100. Section 16 sets out that we must take into account:

(a) The seriousness of the offences;
(b) Any previous convictions for banning order offences;
(c) Any entries against the Respondent on the Rogue Landlord database; and
(d) The likely effect of making a banning order on the Respondent and anyone else who might be affected.

101. We will further set out in (e) our consideration of the other materials relied on.

(a) The seriousness of the offences

102. Mr Chowdhury explained in the representations made on receiving the Notice of Intent **[A30-34]**, and maintained at the hearing that in respect of both of the offences, the failure was to renew their licences on a new scheme being adopted by the LHA. The properties had each been previously licensed. There was a failure in the Respondent's systems that meant these two properties were missed, out of a portfolio of over 600. The offences had also occurred whilst the LHA had introduced a new online system in September 2019, which had had a large number of bugs that meant the Respondent's attempts to use it had been unsuccessful, and April 2020, when the Respondent was endeavouring to deal with the impact on its business of the global pandemic. The LHA had made no objection to the licenses that it had subsequently applied for. One offence had persisted for three months, and the other for eight months. The Respondent had pleaded guilty at the first opportunity, without even seeing the witness statements of Mr Ryan Dunne, which the Respondent had not seen until the LHA's disclosure in this case **[A42-46]**. There had been no associated aggravating features, and there had been neither prosecutions nor any other steps taken in respect of the condition of those properties, nor any breach of licence conditions. The Respondent had put in place new online systems to ensure that the problem did not reoccur. There had been no deliberate intention on the part of the Respondent to flout its responsibilities. The Magistrates had accepted the Respondent's explanation and had imposed very low-level fines in consequence, of £1,050 in respect of the three-month offence and £3,150 in respect of the eight-month offence, which the Respondent had paid in full.

103. Mr Mahoney stated he could not take issue with anything that had been said. He had not worked for the LHA at the time. All that the Respondent relied on was entirely possible. He accepted that there had been no aggravating features. He accepted that the offences were not the worst; they were, as Mr Maddan put it to him, "*bread and butter*" failure to re-licence offences. He also accepted that, "*if you zone*[d] *in on the offences*", they were not sufficiently serious to justify the seeking of a banning order.

104. He felt that by just putting the offences in the Notice of Intent the LHA had complied with the Guidance. He, Ms Ward, and Lisa Pigeon (who had now left the LHA) "*were aware of ASL's other conduct*" at the time. He did not identify what conduct it was that he was referring to.

105. We have already set out above that we consider that the Notice of Intent is defective in that regard. The question at this stage, however, is whether these two convictions are sufficient to support the making of a banning order.

106. It is plain that Mr Mahoney himself considers the answer to that question to be no. Although all banning order offences are serious – they are on the list of such offences because Parliament has decided they are serious enough to potentially engage the banning order jurisdiction – there seems to us

nothing out of the ordinary in these offences that indicates that the Respondent is flouting or has flouted its legal responsibilities. We accept the Respondent's explanation of what happened in the commission of the offences, and we accept that the Magistrates' view of the Respondent's culpability and seriousness of offending was reflected in the fines imposed. We have been given no reason to depart from the Magistrates' assessment of the two offences. The level of criminality involved is, in our assessment, low, and there are no aggravating circumstances for the offences themselves presented to us.

(b) Previous convictions for banning order offences

107. Mr Mahoney accepted that the Respondent did not have previous convictions for banning order offences.

(c) Entries against the Respondent on the Rogue Landlord database

108. Mr Mahoney did not check the Rogue Landlord database until 14 March 2023 (as shown on the printout at **[A49-50]**). The final two entries on that database are for the index offences **[A50]**.

109. It was conceded that the civil penalty added by Newham (the third entry on **[A49]**) was not reliable, due to the fact that the penalty had been successfully appealed. Mr Mahoney stated that must be "*Havering's error*", it was nothing to do with the LHA. He had included it as he was following the directions.

110. Mr Mahoney stated in cross examination it was not for him to check whether the entries on the database were correct. He was entitled to make the assumption that what had been entered on the database was correct. Mr Maddan suggested to him that if the Notice of Intent had included the information, Mr Chowdhury could have pointed out that the information was inaccurate. Mr Mahoney said that if the Guidance had told him to include it, he would have done so. He claimed that the first time he knew that the information was inaccurate was at today's hearing.

111. The LHA maintained reliance on the two information offences, under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 and section 236 of the Housing Act 2004, included on the database. Mr Mahoney conceded that they were not banning order offences. They had been included because the directions required it. He did not know what date they related to because that was not shown on the database, and accepted that they were probably spent. He agreed that the only banning order offences on the database were for the two index offences.

112. Section 30 of the Act does not allow of the inclusion on the database of an offence that is not a banning order offence. The only exception is that provided for in section 30(2), in which the local authority is given the power to record in the database civil financial penalties. The precondition that attaches to that power is the imposition on the offending person of at least two financial penalties the preceding 12 months, and the civil penalty may

be entered only if the period for appeal against it has expired or any appeal against it been disposed of (section 30(3)).

113. The two convictions in question are therefore neither for banning order offences, or for permitted civil penalties meeting the requirements. They should not be on the database at all.

114. We therefore consider that there are no relevant previous entries on the Rogue Landlord database to be taken into account at this stage.

(d) Likely effect of imposing a banning order

115. Despite the contents of paragraph 3.3 of the Guidance, and paragraph 2(ix) of the directions of 23 February 2023 requiring the LHA to include in its bundle "a full statement of the reasons for making the application, including proposals as to the duration of the order", none of the LHA's evidence has been addressed to this question. No answer to the Respondent's reply to the Notice of Intent has been made at any stage before or in these proceedings.

116. In closing, Mr Ham addressed the issue only very briefly. In response to the effect on the Respondent, he stated "*if the Tribunal makes a banning order, the Tribunal has the power in section 17 to allow the Respondent time to deal with its affairs by suspending its operation or excluding certain aspects from it. I accept that as there are existing tenancy agreements arrangements will need to be made*". He did not address the effect on anyone else, or go through the matters raised by paragraph 3.3 of the Guidance, save to try to suggest that despite his client's own evidence, the two offences were serious enough for a banning order to be made absent any other evidence whilst simultaneously inviting us to look at the evidence as a whole when considering whether to make a banning order.

117. Doing the best we can from the evidence presented to us, the inference we draw is that the LHA did think at the time of the Notice of Intent that the Respondent presented a threat to its tenants, though the particular convictions relied on do not show that to be the case, and we continue not to know what they had in mind at the time. The internal email correspondence gives an indication of what they have concluded about the Respondent:

[A544] in response to Camden, in which Camden explains that the Respondent is not LLAS registered but that one of its staff is accredited, and that Camden will be contacting the Respondent, Ms Ward replies: "… *although we have a lot of concerns about this company, I couldn't quite believe anyone would be brazen enough to use your logo when not actually accredited…*"

[A572] Mr Rulewski describes the Respondent as "*exploitative*" and states to DC Upson that the LHA has already prosecuted them for "*some offences*".

118. Drawing the inference from the number of investigations made by Mr Mahoney subsequent to the Notice of Intent, it must be concluded that the

LHA considers that the Respondent poses a threat of harm to tenants, and commenced the investigations to endeavour to prove it.

119. Mr Chowdhury's evidence regarding the impact on the Respondent, its employees, its tenants, its landlord clients, the local area, the loans the company owes the government (that it took to maintain its business during the course of the pandemic), and the people on the LHA's own list to whom it owes a housing duty and in respect of whom it has entered into contracts with the Respondent, is unchallenged and remains unaddressed save for what Mr Ham said in closing.

120. We concluded in part ***(ii)*** above that the Notice of Intent is invalid. We may be wrong in that, and an alternative conclusion is that the Notice of Intent is valid but only enables the LHA to rely on the matters of which it has given the Respondent notice, i.e. the two convictions. If that were the correct interpretation, we would conclude that the offences are not sufficiently serious, considering the impact on the Respondent, to lead us to make a banning order, bearing in mind that the Guidance states that the intention is that banning orders are to be reserved for the most serious offenders who flout their legal obligations and let out unsafe or substandard accommodation. The offences were failures to re-license with no aggravating features beyond the fact there were two of them in short succession. The Respondent has given an explanation for how they came about, and what was done to improve their systems so the offences do not reoccur. There is no indication that the accommodation concerned was unsafe or substandard or that the Respondent had not complied with the relevant regulations. As in *Irvine v Metcalfe*, "*there is little or no evidence that licensing would have been conditional on changes being made to the condition of the property* [and] *the particular failure may be regarded as lower in the scale of* seriousness". The fines were, in the experience of the Tribunal, at the very lowest end of the scale, reflecting that lower scale of seriousness. There are no other banning order offences to be taken into account, and, for the reasons set out above, no other relevant entries on the Rogue Landlord database. The LHA had failed to set out any balancing act of the factors it is told it should have regard to in paragraph 3.3. of the Guidance. Doing our best to fill that gap, we consider that when looking at the offences relied on, there is no evidence of harm caused to the tenants, though there is evidence that the LHA considers that is caused additional administrative burden by this Respondent. The imposition of a banning order would be draconian considering the level of the wrongdoing, and the very significant negative effect of such an order on the Respondent and others including the LHA's own housing department, and the positive effect on others negligible. We consider that the Guidance makes clear that the imposition of a banning order is to be made with the stated aim of removing the worst offenders from the marketplace in mind. On the basis of two re-licensing offences, we consider that the Respondent does not meet that definition. We would conclude a banning order should not be made.

(e) <u>The additional evidence</u>

121. Whether that second potential conclusion might also be wrong is a question that arises from the fact that although section 16 tells us what we must take into account, it does not proscribe taking any other matters into account. The LHA has presented a raft of other evidence in support of the banning order that does not fall into the prescribed categories.

122. The Notice of Intent does not rely on any other conduct, and the evidence relied on at the hearing, although regarding conduct pre-dating the decision to pursue a banning order on 22 September 2022, appears not to have been sought or obtained by the LHA until after that decision had already been made. Mr Mahoney says that is what the Guidance tells the LHA to do.

123. It remains unknown what other matters the LHA had in mind when issuing its Notice of Intent and making its decision on 22 September 2022.

124. It is said by Mr Maddan that the LHA should not be permitted to rely on that subsequent evidence to found the making of a banning order. At best, it ought to go to the terms or duration of any such banning order as we were to decide to make, if the matters relied on in the Notice of Intent pass the threshold in accordance with section 16(4). The LHA should not be permitted to shore up a weak application for a banning order, made in respect of convictions that on their own concession do not justify its imposition, by adding evidence about matters that with reasonable diligence could have been obtained before the giving of the Notice of Intent, and of which the Respondent had no notice until the LHA's bundle arrived at the end of March 2023. To do so would be to enable the LHA to rely on an entirely different case than that of which the Respondent was given notice.

125. We are inclined to agree, for all of the reasons set out in part (ii) and (a) – (d) above. Further, it seems to us a correct proposition that material that pre-existed the Notice of Intent and which could have been obtained with reasonable diligence ought to have been obtained by the LHA in advance of the giving of the Notice of Intent, to inform it of the merits and public interest in pursuing a banning order. It seems to us that such material has a different status from evidence of further conduct engaged in by the Respondent after the decision to apply for a banning order was made, since any such further conduct will have been engaged in despite the required warning shot across the bows. The LHA would not with reasonable diligence have been able to obtain it beforehand, for obvious reasons.

126. However, in case we are wrong in that too, we go on to consider the additional evidence as we were invited by the LHA to rely on.

(i) London Landlord Accreditation Scheme logo

127. As set out in the evidence **[A545]**, Camden investigated the use by the Respondent on its email signature of the London Landlord Accreditation Scheme ('LLAS') logo. At the time of the email, on 28 September 2022, Ms Alomankeh advised Ms Ward that she would be contacting the Respondent to advise on the guidance around use of the LLAS logo. This is all the

information that Mr Mahoney put in his witness statement of 21 March 2023, no update having apparently been obtained by him as to whether the matter was taken further. In his oral evidence, Mr Chowdhury stated that as soon as Ms Alomankeh had contacted the Respondent to explain the rules, they had taken the logo off their outgoing emails. They had misunderstood the guidance around its use, and immediately corrected their error.

128. We are satisfied that the Respondent inappropriately used the LLAS logo. We have not been given any information how long for. We are told that the error was immediately corrected once it was brought to Mr Chowdhury's attention. This item therefore has little weight in the question of whether a banning order should be made.

(ii) 408 'complaints' against 81 properties associated with the Respondent in the LHA's area

129. The LHA produced a schedule of 'complaints' in respect of properties with which we are told the Respondent's name was associated with the licence **[A556 – 571]**.

130. As Mr Mahoney conceded, the schedule had no dates against the entries, no record of actions taken, no record of when it is said that the Respondent was the licence holder, and no record of when (if at all) the Respondent was given notice of the matters recorded. Mr Mahoney could not provide this information. Mr Mahoney could not say how far the record went back – he stated unprompted that the record might go back to 2014, when the first licensing scheme was introduced in the borough. When Mr Maddan suggested that it might even go back as far as 2005, Mr Mahoney agreed it was possible but improbable for LHA records to go back as far as 20 years.

131. The majority of the complaints had been closed. It was not known when, or what involvement the Respondent had had in facilitating the closure. Closed meant that no further action was being taken in respect of them. There was a suggestion that, due to its staff turnover, there were items that had been closed because they were, in effect, stale, and Mr Mahoney suggested that might also be true of some of the open ones.

132. Mr Mahoney initially gave evidence that in respect of every single item on the list, the Respondent would have been notified of the complaint because that was the process. We asked whether that was the case for example in respect of a noise complaint, which did not appear to be a management issue. Mr Mahoney stated that he did not know as noise ASB was not dealt with in housing. It might be that abatement notices were served by the environmental health team. That, he conceded, would not be served on the Respondent. If something happened repeatedly that might result in action against a landlord as there was a trigger in the licence, but that had not happened in any of these cases. He then conceded that he could not say for certain which if any of the items on the list had been notified to the Respondent, and although they thought it highly unlikely, he could not say if that was right or wrong.

133. Mr Mahoney accepted that items like 'lack of crossover' (by which we understood the reference to be to the lowering of a curb for vehicular access, with which Mr Mahoney agreed) were not a management issue. In terms of noise nuisance, he would expect agents to reduce anti-social behaviour by proper management of the property. Hosting a house-party during covid lockdown, for example, was unlikely to be an issue with the Respondent's management of its portfolio, and neither was a neighbour's fence falling down. He accepted that if the Respondent was not notified, any management function he relied on would not be engaged. Mr Mahoney also accepted that in terms of items recorded as 'disrepair' or 'pests' in a property, until a landlord had notice of the issue, it had no obligation to address it, and that there was no evidence of any action taken against the Respondent in respect of disrepair.

134. Mr Mahoney's evidence was that he could not point to particular management regulations that were engaged, and they were not on the schedule. Mr Maddan suggested to him that we were unable to go behind the list to draw any conclusions without the evidence. Mr Mahoney stated that the LHA relied more broadly on the fact that it was unusual to have so many complaints regarding one agent. He had included the list just trying to highlight the poor management of the Respondent. He accepted that the LHA had provided no evidence enabling such a comparison to be engaged in, stating that he hadn't produced the document he only drew out the parts he wanted to rely on.

135. He could not tell us what other portfolios were as big (though he said that there were some), how many complaints they had received, or what was the composition of those other portfolios in terms of housing type and household constitution, or indeed the nature of complaints in any such other portfolio. His evidence was that when it came to knowing bad companies from good, the LHA knew bad from the number of complaints. The number of complaints had been brought to the LHA's attention for the Respondent in a way that no other agents had. He didn't know how many properties the Respondent had in Barking and Dagenham off the top of his head; he did not really think that relevant to the banning order application.

136. He agreed that the two banning order offences were the only prosecutions recorded in the schedule. There was no record on the schedule of any civil penalties or informal action. The only information was 'open' or 'closed'.

137. In cross-examination, of the 81 properties identified, it was Mr Chowdhury's unchallenged evidence that in respect of 21 of them he identified to us, the Respondent had not held them in its portfolio for periods between 18 months up to four years previously. He said that the various complaints on the list had not been brought to the Respondent's attention. As a whole, no dates had been given, no background provided, and the Respondent didn't know where to begin in order to answer the unknown allegations being

made against it. If complaints had been brought to its attention, the Respondent would have dealt with them otherwise the LHA would have pursued its enforcement options.

138. What the LHA asks us to do in this case is to consider ourselves satisfied, on the balance of probabilities, that any of the 'complaints' remaining after removing the 21 properties identified had been brought to the Respondent's attention, regardless of no evidence being presented of when those entries were made, by whom, somehow demonstrate that the Respondent has engaged in conduct that in in breach of some unidentified management standard or landlord obligation. They ask us to infer, then, that somehow these complaints have not been appropriately resolved, such that they represent an established breach. We asked Mr Mahoney how we could come to any conclusion that on a like-for-like comparison against some other unidentified landlord with a portfolio of similar scale, absent any refined detail of the nature of the portfolio and of its tenure, we could be satisfied on the balance of probabilities that the Respondent was out of the ordinary and, in some unidentified way, 'worse'. Mr Mahoney leant on the principle of, to put it colloquially, 'there is no smoke without fire'.

139. We do not accept that that is the proper way in which to deal with this list of 'complaints'. It is for the LHA to demonstrate the relevance of the matters listed to its application. It has focussed so far on the conceptual wood, it has ignored the trees that need to be planted to create it in reality. Unfortunately, we must deal with the individual trees before deciding if they make up a wood – that is the only fair way in which to test the question of whether a banning order should be made. It must be based on solid evidence. The information provided to us does not allow us to do so. It is at seed stage. We need a sapling, at least, to draw conclusions on the balance of probabilities.

140. Ultimately, this is a case in which the Respondent is an agent or rent-to-rent landlord in an area of high ASB, such that the LHA has imposed selective licensing. We agree that such an agent/landlord is to be expected to be proactive in taking steps to manage the behaviours of its occupiers/tenants, but large parts of the evidence are about the activities of those occupiers/tenants and not the Respondent's want of management.

141. The LHA has not proven that there is a breach of any identified or identifiable management function (or indeed, other blameworthy conduct) arising from its schedule, and we can therefore give it no weight.

(iii) <u>The information convictions</u>

142. In closing, Mr Ham relied on the two information offences, despite accepting that they were probably spent. He rather assumed that section 7(3) also applied to them, and did not agree that we would need to make a separate assessment of whether those offences were admissible, so did not address us on it. He agreed we had no information about the circumstances in which the convictions were obtained.

143. As we indicated to Mr Ham at the hearing, we do not accept that just because we have exercised our discretion pursuant to section 7(3) of the 1974 Act to permit reliance on the very offences founding this application, the information offences automatically come in. There is a clear and obvious difference in the significance of the information offences. It was for the LHA to make the application. It did not do so.

144. We have already concluded that the information offences are not properly included in the Rogue Landlord database. If and insofar as Mr Ham's argument was that the spent information offences ought nevertheless to be taken into account as generally supportive of the making of a banning order, he would need to overcome the proscription against reliance on them enshrined in section 4(1)(a) and (b) of the 1974 Act by persuading us that justice could not be done without admitting them. He has made no attempt to do so. Just because the foundational offences have passed that high threshold, it does not automatically follow that these other offences do.

145. Given that the entries are both in respect of 56 Beckton Road in prosecutions taken by Newham, that Newham has been heavily involved in these proceedings, and that it is clear from the Respondent's witness statement provided on 6 June 2023 that it has been the Respondent's position for at least five months prior to the hearing that the convictions are spent, we would have expected the LHA to make use of the information and connections open to it to investigate these two additional offences, and make a reply setting out its stall.

146. We do not consider that, in an application for something as draconian as a banning order, it is for the applying authority to simply choose not to investigate a clear assertion by the Respondent that the offences on which the LHA relies are not relevant or permissible, if it maintains reliance on those offences. That is particularly the case where a database such as that in respect of rogue landlords is not subject to oversight, but wholly reliant on local authorities' entries on and maintenance of it being accurate and up-to-date.

147. We are not satisfied that justice requires us to allow the LHA to rely on these offences, in respect of which it has made no attempt to obtain even the date of conviction let alone the underlying circumstances. The Respondent must be considered rehabilitated in respect of them, and we give them no weight.

(iv) Prohibition order and revocation of licence by Redbridge

148. The LHA relied on the statement of Mr Jackson dated 11 November 2022 **[A138 – 140]** and the email sent by Mr Jackson on 16 January 2023 **[A585]**. As observed above, the witness statement was not attached to that email, and it appears that it did not come into the LHA's possession until an unidentified date after that email, despite the earlier date on it. Mr Jackson did not attend for cross examination.

149. It was admitted by Mr Mahoney that the Statutory Nuisance Notice and Community Protection Notice mentioned by Mr Jackson in his statement would not have been served on the Respondent. The LHA distanced itself from those allegations.

150. Of the matters relied on in Mr Jackson's statement, the key parts are in lines 20 – 31 and 36 – 56 (there being no paragraph numbers). It is unclear from lines 56 – 63 whether Mr Jackson has any personal knowledge of the matters set out in his statement.

151. In respect of the Prohibition Order, it is a matter of agreement that it was made on 30 November 2021 and not appealed. It is said in Mr Jackson's statement that it was made on the basis of five category 1 hazards: excess cold (no heating or hot water); fire (smoke and heat detector heads removed, absent or non-self-closing fire doors); overcrowding (ten unrelated occupants in a five bedroom property); falls associated with stairs and steps (damaged handrails and spindles both internally and externally); and electrical hazards (exposed live mains cables following the illegal extraction of electricity). The context of the Prohibition Order is that in October 2021, the police had notified Redbridge that the property had been subject to an investigation, and arrests been made, for the illegal cultivation of cannabis and extraction of electricity.

152. We are told that the Prohibition Order required works to be done, but no copy of the order has been provided to us and so we are unsure what. It is said by Mr Jackson that some works were done by 5 January 2022, but insufficient to revoke the Prohibition Order. No description of what was done or what remained to be done is included. It is said that the Respondent had therefore committed the offence of breach of Prohibition Order. It is not said whether there was a prosecution taken or civil penalty imposed, and perhaps that is why Mr Jackson says in his later email that investigations are ongoing.

153. Mr Jackson refers throughout to All Seasons Lettings Limited. That is a different company registered at companies house, with a different Mr Chowdhury as director. It is nevertheless admitted by Mr Chowdhury that it was the Respondent that was involved. Mr Jackson also refers throughout to the Respondent being the agent of a Mr Chad Miah (as opposed to acting in its capacity as landlord in a rent-to-rent chain as appears to be its principal business model), and it was Mr Miah who was in fact the licence holder. The licence was revoked due to breaches of its conditions on a date that is not recounted, and the conditions relied on not set out. No copy of that document is provided. After being refused entry without a warrant by the Respondent, Redbridge obtained a warrant of entry from the Redbridge Magistrates' Court on 5 August 2022. When they executed that warrant on 31 August 2022, six unrelated persons were found to be in occupation, and asserted that they made rent payments to the Respondent. At 11 November 2022, when he signed his witness statement, matters remained subject to

active investigations. The LHA provided no update regarding what had happened by the date of the hearing, a year later.

154. Mr Chowdhury, in his second witness statement **[R39-40]** states that the version of events as recounted by Mr Jackson are wholly denied. The works have been done. A complaint was made against Mr Jackson. An appeal against the licence revocation had been made to the Tribunal. Redbridge had not replied to directions so the Respondent had effectively been successful. Mr Jackson had acknowledged himself that the property was not being used as an HMO.

155. At the hearing, we sought the details of the appeal against license revocation from the Tribunal's case management system. The basis of the appeal was that the property was let to a single family and was therefore not an HMO. It appears that the appeal was made in April 2022, and was struck out on 29 March 2023 on grounds that neither party had complied with directions. It was apparent at the hearing that Mr Chowdhury had not appreciated that the consequence was that the licence revocation stood. It is also apparent that at the time of both Mr Jackson's witness statement and the Applicant's bundle in these proceedings, it was a live appeal. It is unclear why Redbridge had served the notice on the Respondent in any event, as it was not the licence holder.

156. Mr Ham did not cross-examine Mr Chowdhury regarding his evidence in his witness statement, and the LHA had not taken the opportunity to reply to its contents. It is plain that the Respondent was not the landlord of the property in question, and Mr Jackson did not identify what if any action was being taken against it.

157. We must be careful, where it is said both in November 2022 and January 2023 that investigations remain ongoing, not to go beyond the facts that we have been presented with. We have been presented with no updating information. The LHA has not disputed Mr Chowdhury's assertions in his witness statement, which it could have done by obtaining further evidence from Mr Jackson addressing the contents. It has not produced Mr Jackson as a witness. Mr Chowdhury was not cross-examined on the truth of what he says in his statement.

158. We are presented with a difficult balancing act. We have not been assisted by the Applicant in its approach to these proceedings. We do know that the Prohibition Order made in November 2021 was not appealed. We do not know the current status of that Prohibition Order – from Mr Chowdhury's evidence it would appear, at least, that it has been revoked. We have no evidence that any action was taken against the Respondent, in addition to Mr Chad. We have not been assisted by the live evidence of Mr Jackson, which may be because these matters are ongoing. Imposition of a Prohibition Order is not a banning order offence.

159. On balance, although we have real concerns about what is recounted, we have not been put in a position to make any finding other than that a Prohibition Order was made. We do not have evidence in connection with the Respondent's contractual responsibilities as the agent for Mr Chad. We do not have evidence of separate action being taken against the Respondent in connection with its breach of management functions. We do not even know whether the investigations have been resolved. It also seems to us we cannot put any weight on the revocation of licence matter, given that the Respondent was not the licence-holder and we have no evidence of just what the agency agreement with Mr Chad required the Respondent to do. It seems to us that that is just one of the documents that that Mr Jackson or the LHA ought to have made available with his witness statement, in order for us to make safe findings.

160. In light of that, we are able to put little weight on the fact of the Prohibition Order being imposed, and none on the revocation of licence.

(v) Referral from the Property Ombudsman to Trading Standards in Newham on 4 December 2020

161. As set out above, on 4 December 2020, The Property Ombudsman ('TPO') referred an incident on an unknown date to Ms Cosgrove in Newham's Trading Standards department, on grounds that it showed evidence that warranted Trading Standards' intervention. It appears that the property owner Ms Olga Katongo (and therefore the person with whom the Respondent had a rent-to-rent agreement) was the person who made the reference to TPO, hence why it was thought to be outside their terms of reference and referred to Ms Cosgrove **[A142-143]**.

162. We were provided with a video clip. In it, an intimidatingly large group of men, some of whom were wearing covid facemasks and others of whom were hooded, the main protagonist of whom was wearing an All Seasons Lettings and Management branded sweatshirt, was recorded outside the doorway of an unidentified location that from TPO's referral seems to have been a property let by the owner to the Respondent. The man in the branded sweatshirt is filmed talking at volume and aggressively to an unidentified tenant holding a baby inside the property, saying "*fuck you and fuck your family too*" and "*you see this* [pointing to sweatshirt], *it's got my company name on it and I don't give a fuck*" and repeatedly asking to enter the house **[A110¶2]** and **[video clip 1]**, and **[142]**.

163. The context of the video is not known. It is however clear that the behaviour is, and is designed to be, intimidating.

164. Mr Ham put to Mr Chowdhury that he had told the individuals concerned to engage in that behaviour, or procured it in some way (for which we could identify no evidential foundation). Mr Chowdhury denied knowing why the group was there, or having instructed anyone to behave in that way. He agreed that the video showed an unpleasant incident, in which the man was

aggressive, and proudly displayed his sweatshirt. He said that the man had been sacked for gross misconduct between 18 months and two years ago for his conduct in and around the office. He had similarly stated that to be the case in his second witness statement **[R40]**. He stated in that witness statement that the first time he had seen the footage or heard about this incident was when the LHA produced its bundle.

165. Again, the LHA did not challenge Mr Chowdhury's evidence in a reply or any other evidence.

166. The incident was a demonstrably unpleasant one. What Mr Ham asked us to infer from it was that the culture of the Respondent's organisation permitted its employees to engage in bully-boy tactics. They weren't doing it for fun, they were proudly referring to their branded clothing. It was suggestive of a culture in which the Respondent dealt roughly with those who did not comply.

167. We cannot accept Mr Ham's submission. The only evidence is of this one incident. The LHA do not dispute that the Respondent did not know about this incident until March 2023. By then, the individual concerned had been out of the Respondent's employ for nearly a year. We consider it would be unsafe to draw the inferences Mr Ham invites us to make from a single incident on an unknown date that certainly occurred before November 2020, and the main protagonist of which met with the sack for gross misconduct for other behaviour that caused the Respondent to take action. There is no evidence of 'a culture of bully boy tactics' against tenants.

168. Repugnant as we find the behaviour in the video, we find we cannot place much weight on it for those reasons.

(vi) <u>The evidence gathered by Ms Cosgrove</u>

169. The LHA relied on various documents obtained by Ms Cosgrove in the course of her investigations in respect of matters before the General Regulatory Chamber that have not yet been decided. Mr Ham informed us that the specifics of those matters were no longer relied on, but the evidence obtained was. The evidence that was put to Mr Chowdhury is at **[A144 – 176]** and ¶¶3 and 13 of her witness statement **[A100 – 115]**. Amongst that evidence is the questionnaire returned by Ms Katongo referring to the incident in (v) above.

170. The first piece of evidence put to Mr Chowdhury was the questionnaire provided by Ms Katongo **[A170 – 176]**. In it, Ms Katongo alleges that she was provided with no contract by the Respondent, and only met Mr Chowdhury at the property on an unidentified date when some renovations were being finished, but did not talk to him as "*he avoided me for the whole duration despite me constant calling and texting*". She had 'given' the Respondent the property for two years on the basis of "*Full management and Guaranteed Rent*". She had a copy of a tenancy agreement with the tenants, but no longer any contact details for them as she had "*reported*

them for benefit fraud and they ran away from the house". It was not provided with the questionnaire in the bundle. She claimed that tenants were put in the property without her knowledge and that the agreement was a 'no deposit' agreement because it was a guaranteed rent arrangement. She claims he was responsible to collecting a deposit. At the last box in **[A173]**, Ms Katongo sets out that she had engaged the Respondent as she had needed an agent "that could help with cosmetic finishing" at the property who would then collect the cost from rentals. She outlined a dispute over the amount of money the work carried out by the Respondent had cost.

171. Mr Chowdhury stated that Ms Katongo's account was not believable. No landlord would give them a property without an agreement.

172. That was the only question related to the contents of the questionnaire that Mr Ham put to him, beyond linking the video evidence in (v) above to Ms Katongo's property. In his written evidence Mr Chowdhury had set out that the Respondent had agreed to take over renovations at the property when Ms Katongo had run out of money to complete it. The sums for completing the renovations had been taken out of the guaranteed rent paid to her and paid to her builders per the parties' agreement. It was the builders and Ms Katongo who were responsible for agreeing the works and the costs for them, not the Respondent. The sums the Respondent had been required to pay were over £10,000. Ms Katongo reneged on the agreement with the Respondent and took over the tenancy directly, cutting the Respondent out. Ms Katongo had been rude and aggressive, at one time attending at the Respondent's offices with a large man to intimidate them, such that the Respondent had called the police.

173. None of this account was challenged by Mr Ham, and no reply or evidence in response provided by the LHA or Ms Cosgrove.

174. The second document that was put to Mr Chowdhury was a TPO referral made to Ms Cosgrove raising its concerns about the Respondent's fitness to practice and potential regulatory breach, leading TPO to consider that "*there is doubt on the fitness to practice*" of the Respondent [**A144 – 147]**. In it, TPO sets out a table of complaints during the period 17 September 2018 to 25 January 2021, reproduced at **[A148-152]**, and the conclusions it has drawn from them. TPO's main concerns notified to Trading Standards were, in addition to the matter that table, 29 complaints between November 2018 – February 2021 that had not progressed through TPO process, raising various issues surrounding failures to rent or to surrender property, address or investigate complaints. In TPO's view those complaints, in which it had made no determination, when viewed together with the 11 on the table, demonstrated a "*pattern of behaviour by ASL with the prospect of continuation and potential escalation if action is not taken*". Action, as we now know, is being taken by Ms Cosgrove.

175. Of the complaints in the table, one had not been resolved at the time the referral was made (45761). In another (50851), representations had at the

time been made against the decision. Mr Chowdhury explained that there had been an issue with the format in which their response had been delivered to TPO, so that in effect they had made representations after the decision had been made because the process for replies had changed. There had been no further issues since now that the new process was understood.

176. No evidence was provided to demonstrate what had happened in respect of those two cases.

177. Mr Ham put it to Mr Chowdhury that there had been a failure by the Respondent to pass on rent received from tenants to the landlords concerned, as evinced in paragraphs 10 and 11 of TPO's referral. In fact, he said, Universal Credit payments were being made, and the Respondent was receiving rental monies and then providing excuses to its landlords why it would not pass on those monies.

178. Mr Chowdhury denied this. He stated that during the period of lockdown, there were a large number of people out of work and who couldn't pay their rent. They might be receiving furlough support, or nothing at all. The Respondent had taken a holistic look at its whole business model and taken the view it was no longer feasible to pay its landlord clients in advance at that time. It had let landlords know by a standard letter. A lot of those properties were now back to receiving rent in advance in accordance with the original agreements. They had had to make a decision at a time when it was difficult to manage their way through the obstacles that covid presented. They weren't trying to pocket money that they weren't entitled to. If they had been doing so, Mr Chowdhury was sure that the Respondent would have been subject to civil claims.

179. Mr Ham referred Mr Chowdhury to paragraph 17 of TPO's referral. He asked why Mr Chowdhury refused to pay the awards made against the Respondent until TPO gave it a final notice – did that not evidence the Respondent's non-cooperation? Mr Chowdhury denied this. He stated that all awards against it had been paid by the Respondent. The Respondent had merely been asking for time to pay in instalments as there was limited cashflow due to the impact of the pandemic. The Respondent had paid every sum in full.

180. Mr Ham asked Mr Chowdhury to consider paragraph 24 of the referral from TPO. He suggested that it was clear that TPO had formed a dim view of the Respondent. Mr Chowdhury stated that this was not notified by TPO to them. The first time that the Respondent had seen this referral was in March 2023, it was never forwarded to it. TPO had renewed its membership twice since this referral.

181. Mr Ham did not further question Mr Chowdhury on the contents of **[A144 – 152]**.

182. In Ms Cosgrove's oral evidence, Mr Maddan had sought to draw out the distinction out between a 'guaranteed rent' arrangement and a 'rent-to-rent' arrangement. We understand that there are some finer points to be drawn out before the General Regulatory Chamber regarding whether a guaranteed rent or rent-to-rent agreement is commercial, consumer or something else in nature. Ms Cosgrove agreed that the guaranteed rent model is commonly referred to in this jurisdiction as rent-to-rent. That did not mean that the landlords were acting in the course of a business – they could be accidental landlords for example by inheriting a property. She agreed that such an arrangement was not an assured shorthold tenancy, and was commercial in the sense that it was for gain. In her view this ought to make a difference to the way we viewed the allegations made by landlords in respect of the Respondent's behaviour. She conceded that the only agreement she had seen **[A167 – 169]** was not an agency agreement.

183. Ms Cosgrove pointed out that all of the matters raised by TPO concerned properties outside of Newham. She (or her housing department, strictly), could not investigate them. She agreed that the disputes covered by the TPO could be characterised as civil disputes, arising from contractual arrangements between landlords. She had not received responses from any of the individuals, identified by TPO to her, whose complaints appears in TPO's table, save for those exhibited.

184. There is no doubt that the evidence shows that, at least in November 2021, TPO had concerns about the Respondent's conduct in the sector at least vis-à-vis the landlords with whom it entered into rent-to-rent arrangements. The last recorded complaint on the table was from January 2021. There is no updating evidence showing a continuation of the TPO's misgivings, and it would appear there is at least some force in the TPO's having renewed the Respondent's membership twice.

185. There are a number of things with this evidence about which we have concern. Firstly, it is all now two years old (and the last complaint on the list older than that). We are told, and the LHA has not disputed, that the TPO's concerns have not been raised with the Respondent. The main issue that concerns us about this evidence, however, is that it all relates to disputes between landlords, rather than substandard or unsafe accommodation that causes "harm to the tenant", as envisaged by the Guidance. We have no doubt that there has been some unpleasantness in these contractual arrangements between the Respondent and its landlords. That is demonstrated by the findings of TPO. We cannot give weight to those complaints that the TPO has not in fact investigated and concluded, as the Respondent has not had the fair opportunity to answer specific allegations against them, and paragraph 11 of TPO's referral therefore does not assist us. What we have therefore is nine or ten closed civil disputes over a period of four years pre-dating November 2021, in respect of which we are told, and we have no evidence to show other than, the awards have been paid.

186. We do not consider, however, that when the test that the LHA ought to have in mind at paragraph 3.3 of the Guidance when weighing the factors relating to a banning order is considered, this is relevant conduct. We give it no weight.

(vii) allegation by Ms Cosgrove that, on 3 August 2022 Mr Chowdhury was "*very confrontational and argumentative*".

187. We can deal with this matter briefly.

188. We have conflicting evidence in this case. Mr Chowdhury says that he did not behave rudely and aggressively. Ms Cosgrove says that he did.

189. Ms Cosgrove was at the Respondent's offices to deliver two or three financial penalties that are the subject of the General Regulatory Chamber proceedings. In order to do so she told us she routinely attends with a police officer. Ms Cosgrove could not tell us exactly what it was that Mr Chowdhury did or said on this occasion. She said simply that Mr Chowdhury's demeanour was confrontational, and he got angry with her when she would not disclose to him the details of the complaints received on which the penalties were founded. She could not, she told us, give those out.

190. We are prepared to believe that Mr Chowdhury did get frustrated and confrontational when Ms Cosgrove attended to deliver penalties to the Respondent in the company of a police officer, particularly when told that Ms Cosgrove could not tell him why. It seems to us that that is no doubt the unfortunate but unavoidable reaction she experiences frequently as part of what is no doubt a difficult duty, and part of the reason for a police presence. We have sympathy with this difficult task, which no doubt heightens confrontational aspects of an individual's character. We find it hard to believe that Mr Chowdhury was simply sanguine when she arrived at the Respondent's premises in pursuit of that task. It should be noted that such behaviour towards a Trading Standards officer endeavouring to simply do their job is neither to be condoned or accepted.

191. We do not, however, consider that is a matter we should take into account when considering whether to make a banning order, for the reasons recited in paragraph 185 above.

(viii) The evidence provided by DC Upson

192. The final material that the LHA relied on was a series of incidents obtained from police CRIS reports, all of which have been no further actioned for one reason or another (generally for want of evidence or a suspect), which the LHA say demonstrate the Respondent's failure to properly manage its properties.

193. DC Upson's evidence sets out from the CRIS reports nine incidents in which the police were called to properties held by the Respondent, where 'cannabis farms' (to use a term from the CRIS reports that encapsulates the apparatus, plants, irrigation/lighting set up and other paraphernalia) had

been set up and (in some cases) the local electrical network illegally redirected for that purpose.

194. In respect of one of those reports, the record shows that Respondent was not the responsible agent **[A134]**. In terms of the others, Mr Chowdhury claims that the Respondent called the police themselves in respect of their suspicions. The incidents were recorded on various dates between 6 August 2020 and 15 October 2021.

195. Various of the CRIS reports record the Respondent attending at the scene with keys for access. In some cases, the locks had been changed.

196. It is submitted by the LHA that this demonstrates the Respondent's lack of appropriate management of the properties in its portfolio. Mr Mahoney's evidence was that if the properties were being managed properly these issues would not arise. It hadn't occurred to him that the incidents were predominantly during the course of the various lockdowns or tier restrictions/firebreaks throughout the course of the pandemic, but that was in any event no excuse for someone not properly managing their properties. Agents were still allowed to carry out inspections during that period, and the LHA still required the properties to be safely managed. He was not suggesting that the Respondent ought to have made random checks; rather that planned checks ought to have been made.

197. Mr Mahoney accepted that the individuals concerned would have the opportunity to move or hide the cannabis farms if given notice of a planned check, but health and safety regulations required that the whole property was checked and the LHA expected that to happen. It could happen safely during covid – the Respondent and tenants could have remained distanced, the windows could have been opened to mitigate the risks of infection. It was "*not usual for one agent to come up like this before*".

198. Mr Maddan asked Mr Mahoney where the connection was? Mr Mahoney stated he was looking at the evidence as a whole. The connection was the management of the properties. Mr Maddan asked whether Mr Mahoney was suggesting that during covid the Respondent would be able to ensure that there were no illegal activities in any of their premises? Mr Mahoney said no, but when you looked at the evidence in its entirety there were a lot of issues with this agent.

199. In his second witness statement, Mr Chowdhury accepted that the incidents had occurred. However, he asserted, the Respondent was the victim as they had to rectify all the damage done by the illegal activities. It had cost the Respondent tens of thousands of pounds. The incidents were during the national lockdowns, and they had been unable to perform their duties as usual because of legislation brought in occasioned by the pandemic. Criminals knew this and had taken advantage. No reply was made to that evidence.

200. In cross-examination, Mr Ham put it to Mr Chowdhury that throughout the pandemic, property transactions continued and there were regulatory exemptions made that permitted agents to continue to operate. Mr Chowdhury replied that Newham had given the Respondent notice to close its offices, and that they had had to fight to keep it open to continue to serve their tenants. Mr Ham suggested that the Respondent had been able to access materials online. Mr Chowdhury asked when? They had had to react to the advent of new ways of working just as everyone else had. Their system now was much more robust than 18 months ago when it simply wasn't as good.

201. Mr Ham started to suggest to Mr Chowdhury that the evidence he had given about incidents being in lockdowns was untrue. We stopped him, on grounds that no evidence had been put before us identifying the precise periods that Mr Ham was talking about. The LHA had not put in any evidence in its reply identifying the particular periods. As he acknowledged himself, we all had different recollections of when lockdowns, tier restrictions, firebreaks and so forth occurred. Unless we could all find a precise list, the line of questioning would be unfair.

202. We all endeavoured to find a precise list. We were unable to: the only 'list' that purported to be definitive did not even contain the Christmas 2020 lockdown that was put in place four or five days before 25 December 2020, after Downing Street's various parties had taken place, or any reference to tier restrictions at all.

203. Mr Ham put it to Mr Chowdhury that the Respondent was nevertheless still permitted to inspect. Mr Chowdhury said not necessarily; social distancing had to be maintained. If a tenant said they or one of their family had covid, they could not go in. There was no automatic right of access in selective licenses – they couldn't 'just go in'. No doubt the LHA would consider that also inappropriate conduct. The number of properties affected was not a high proportion given the Respondent's portfolio and how long they had been in operation. They had attended at one of the properties (14 Parsloes) because they had permission, but it was easy for someone at the time to just say they had covid and take advantage of the pandemic. They had no reason to suspect they should be inspecting these particular properties. There had not been repeat incidents after, and neither was there a record of this kind of problem before, the pandemic. They would have to make an appointment to inspect, and if they had been told 'no' they couldn't just turn up. Mr Chowdhury conceded that they would have documented all attempts to gain access, but that no one had asked.

204. We can see the force in Mr Chowdhury's evidence. It remains the case today, in our experience of for example breach of covenant applications where a landlord needs evidence of internal disrepair or reconfiguration, that in some quarters there remains reliance on covid to avoid inspections. We also have sympathy with the position that, unlike the LHA, the Respondent is not entitled to "just turn up" and spot check. We do not know

how long the offending behaviour in these premises was continuing. The police have closed their investigations for lack of evidence. We do not know how this particular form of unlawful use of the Respondent's portfolio would have come to the attention of it absent reporting from neighbours or other agencies including the police.

205. The LHA makes a general allegation that because these properties were being made use of for cannabis farms, the Respondent has in some way failed in its management responsibilities. No reliance is placed on an identified duty. As we have already said above, it does not appear to us a safe proposition to continue simply on the basis that there are a lot of reports and therefore the Respondent has done something wrong. We would need at least to make a finding on the balance of probabilities that the Respondent had fallen short in some way.

206. For those reasons, we do not consider we are able to place any weight on the matters raised by the CRIS reports.

Conclusion

207. In closing, Mr Ham asked us not to consider the separate items relied on by the LHA individually, but rather to look holistically at everything that had been presented to us as tending to show that the Respondent was indeed, as Mr Mahoney had said, a 'bad' agent.

208. We pointed out to Mr Ham that, especially in respect of evidence that had been previously untested, we would need to come to a conclusion on the balance of probabilities. It seemed to us that what he was inviting us to do ignored that fundamental requirement for the LHA's case to be made out.

209. Mr Ham invited us to apply some different standard and to look at the evidence as a whole. We suggested to him that the approach he was asking us to take was incorrect – firstly, in respect of evidence that was untested, it was for the LHA to demonstrate its case on the balance of probabilities. Secondly, what he was asking us to engage in was conjecture on the basis of some kind of 'no smoke without fire' principle, which could not be a legally correct proposition.

210. Mr Ham submitted that the invitation he made was more refined than that. He was simply asking us to look at the evidence in totality and to conclude that in totality, on the balance of probabilities, the evidence indicated an insufficient approach by the Respondent to its responsibilities as an agent or rent-to-rent landlord such that a banning order was justified, by dint of the sheer volume of it.

211. We cannot agree with Mr Ham. He makes an extraordinary proposition. There is no lower standard. It would not be proper to draw an adverse inference against the Respondent based only on the volume of material,

regardless of the evidential quality of it. The LHA has an obligation to identify the allegations made against the Respondent with sufficient precision that it can be demonstrated on the balance of probabilities, and the Respondent can properly respond to it. The LHA has, as we have found above, not done so for the vast majority of the evidence presented in its bundle.

212. The LHA had notice of the problem. The Respondent had said so in its witness statements in both April and June 2023. The LHA had an opportunity to put forward a reply to the Respondent's statement, in which it could have corrected the position (though of course it would have required permission to rely on new evidence that did not arise technically in reply). At the very least such evidence might have led to a proper fact-finding exercise. We cannot make findings of fact when presented with such a paucity of evidence.

213. Respectfully, we cannot identify a 'more refined' approach from Mr Ham's submission than a simple invitation for us to look at the volume of evidence and decide that there must be something rum in this, and therefore that must score against the Respondent. That is not the appropriate way in which to approach a case with potential very significant consequences to a Respondent, and we decline to do so.

214. For all of the alternative reasons we have given above, we decline to make a banning order.

Judge N Carr
20 December 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).