UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 118 (LC)

UTLC No: LC-2022-583

Royal Courts of Justice,
Strand,
London WC2A 2LL

24 May 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING – BANNING ORDERS – assessment of seriousness of offence – whether level of fines imposed by magistrates a permissible guide – tribunal's use of own knowledge of fines – effect of banning order, whether applicable only to new lettings – ss.14, 15, 16, Housing and Planning Act 2016 – reg. 3, Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 – appeal dismissed

BETWEEN

NAOMI RACHEL KNAPP

Appellant

-and-

BRISTOL CITY COUNCIL

Respondent

Re: 102 Portway,
Seamills,
Bristol

Martin Rodger KC, Deputy Chamber President

12 May 2023

Charles Auld, instructed by Henriques Griffiths, for the appellant
Riccardo Calzavara, instructed by Bristol City Council Legal Services, for the respondent

The following case is referred to in this decision

Sutton v Norwich City Council [2021] EWCA Civ 20

Introduction

1. Under Chapter 2 of Part 2 of the Housing and Planning Act 2016 a local housing authority may apply to the First-tier Tribunal for a "banning order" against a residential landlord or a property agent or manager who has been convicted of a "banning order offence". The effect of a banning order is to prohibit that person from letting housing or engaging in letting agency or property management work in England. Banning order offences include certain offences in connection with the licensing and management of houses in multiple occupation (HMOs).

2. On 16 August 2022 the First-tier Tribunal (Property Chamber) (the FTT) made a banning order against the appellant, Naomi Knapp, banning her from letting housing or engaging in letting agency or property management work for a period of 5 years.

3. With the permission of the FTT, the appellant now appeals against the banning order. This is the first occasion on which this Tribunal has considered such an appeal.

4. At the hearing of the appeal the appellant was represented by Mr Charles Auld, and the respondent by Mr Riccardo Calzavara. I thank them both for their submissions.

The facts

5. The appellant has been a landlord in Bristol for more than 30 years and owns a portfolio of 29 properties held for residential letting. She has specialised in letting to tenants who might otherwise find it difficult to obtain private rented accommodation, including homeless, vulnerable or marginalised individuals. It has been her case, which I have no reason to doubt, that her motivation in letting property has been humanitarian rather than commercial.

6. 18 of the appellant's properties are required to be licensed as HMOs under Part 2 of the Housing Act 2004 (the 2004 Act). The local housing authority responsible for licensing is the respondent, Bristol City Council (the Council). Many of the appellant's properties became subject to licensing for the first time in July 2019 when new areas of the City were designated by the Council as being subject to additional licensing.

7. For a number of years the Council has been concerned about the quality of the appellant's management of her portfolio. At a meeting in September 2016 Council officers explained those concerns to the appellant and obtained a promise from her that she would improve the standards of her properties. That promise, and subsequent assurances, were found by the FTT not to have been kept. In particular, in order to avoid the revocation of her HMO licence the appellant had proposed that she should hand over management responsibility to a professional managing agent, Bristol Property Partnership (BPP), but on 1 September 2021 BPP informed the Council that it was discontinuing its relationship with her.

8. The Council's concerns led it to take progressively more serious enforcement action against the appellant in 2020 and 2021. The imposition of a financial penalty for licensing offences was followed by the service of notices of intention to refuse or revoke the appellant's HMO licences and then by successful prosecutions for management and licensing offences.

9. On 19 April 2021 the appellant pleaded guilty and was convicted of a total of eight charges in relation to three of her properties. All eight convictions were for banning order offences and all but one involved contravention of the Management of Houses in Multiple Occupation (England) Regulations 2006 (the HMO Management Regulations).

10. Two of the offences of which the appellant was convicted related to the absence of fire doors between kitchens and living space and most of the others related to individual items of disrepair or poor standards of maintenance or cleanliness. The sole licensing offence concerned a failure to comply with a licence condition requiring a bathroom to be fitted with an extractor fan. The sanctions imposed by the magistrates were fines of £2,000 each in respect of two of the offences and of £3,000 each in respect of the remaining six offences, giving a total of £22,000; the appellant was additionally ordered to pay £7,400 towards the Council's costs.

11. In its evidence to the FTT, the Council acknowledged that, viewed individually, the offences of which the appellant had been convicted were "not of the most serious type of breaches in terms of potential harm" but maintained that they nevertheless gave rise to the potential for harm to the occupiers and were part of "a consistent pattern of poor management over an extended period of time."

12. On 29 September 2021, shortly after it had been informed that BPP was no longer involved in managing her properties, the Council gave the appellant notice that it intended to apply for a banning order for a period of 10 years. The Council explained its reasons and invited the appellant to make representations in response, which she did. The FTT found that those representations were considered by a number of Council officers before a report was prepared by Mr Riddell, the senior environmental officer in its private housing team. In the report Mr Riddell set out the history of the Council's dealings with the appellant, commented on her representations and explained his reasons for recommending that a banning order be applied for. That recommendation was then considered and approved by Mr Mallinson, the Council's private housing manager.

13. On 13 January 2022 the Council applied to the FTT for a banning order, relying on the eight convictions secured nine months earlier.

14. The Council's application was heard on 31 March 2022 and the FTT issued a preliminary decision on 6 June in which it concluded that a banning order was both necessary and proportionate to ensure that the appellant's property portfolio was managed to an appropriate standard. At a further hearing on 11 July it considered argument on the terms of the order before issuing a second decision on 9 August together with an order banning the appellant for a period of five years from letting housing or engaging in letting agency or property management work (or from being involved in any company carrying out those activities). The order stated that the ban on letting houses was not to come into force for six months in the case of existing tenancies and gave the appellant permission to apply for further directions if she was unable to bring any such tenancy to an end within that period. The ban in respect of existing tenancies, but not new tenancies, was suspended by this Tribunal while the appeal was pending.

The relevant statutory provisions

15. Part 2 of the 2016 Act is said by section 13(1) to be "about rogue landlords and property agents in England", although the headline term "rogue landlord" is not defined in the Act.

16. By section 15(1), a local housing authority in England may apply for a banning order against a person who has been convicted of a banning order offence.

17. Section 14(1) contains a definition of "banning order" which explains that such an order may, amongst other things, ban a person from "letting housing in England". For this purpose letting includes the grant of a licence but excludes the grant of a tenancy or licence for a term of more than 21 years (section 56).

18. Section 14(3) creates a power for the Secretary of State to define "banning order offence" by regulations. The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 came into force on 6 April 2018. Regulation 3 and Schedule 1 prescribe 14 different categories of banning order offences, the first five of which are specifically housing offences, including fire and gas safety offences. Offences under section 72, 2004 Act in relation to licensing of HMOs and offences under section 234(3), 2004 Act in relation to compliance with the HMO Management Regulations are prescribed as banning order offences unless the sentence imposed on the person convicted of the offence is an absolute discharge or a conditional discharge.

19. The HMO Management Regulations include detailed provisions requiring a person managing an HMO to maintain the common parts and external amenities, to ensure that means of escape from fire are free from obstruction and are in good order and repair, and to take all reasonable measures to protect the occupiers from injury. It is an offence to fail to comply with those requirements, but it is a defence that a person had a reasonable excuse for such a failure. On conviction a person is liable to an unlimited fine.

20. Other banning order offences listed in Schedule 1 to the 2018 Regulations include unlawful eviction and harassment of occupiers, the use of violence for securing entry, and failure to comply with an improvement notice, as well as a very wide range of non-housing offences when committed by a landlord against a tenant including immigration offences, fraud, violence and sexual assault, drugs offences, anti-social behaviour, criminal damage and theft.

21. Before applying for a banning order a local housing authority must give the person concerned notice under section 15(3) of their intention, inform her of their reasons for doing so and invite her to make representations. The authority must then consider any representations it receives during the notice period (section 15(4)). A notice of intended proceedings under section 15 may not be given more than six months after the date of the conviction to which the notice relates (section 15(6)).

22. The jurisdiction to make a banning order is conferred on the FTT by section 16, 2016 Act, which is in these terms:

16 **Making a banning order**

(1) The First-tier Tribunal may make a banning order against a person who—

(a) has been convicted of a banning order offence, and

(b) was a residential landlord or a property agent at the time the offence was committed (but see subsection (3)).

(2) A banning order may only be made on an application by a local housing authority in England that has complied with section 15.

(3) Where an application is made under section 15(1) against an officer of a body corporate, the First-tier Tribunal may make a banning order against the officer even if the condition in subsection (1)(b) of this section is not met.

(4) 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.

23. It is common ground in this appeal that the power to make a banning order is discretionary and arises only if the three conditions in section 16(1)(a) and (b) and (2) are met. It is also agreed that while the four matters listed in section 16(4) must be considered, they are not the only matters which may be taken into account. In deciding whether to make an order, and what order to make, the FTT must therefore in every case consider the seriousness of the offence, any previous convictions for a banning order offence, whether the respondent has been included in the database of rogue landlords and property agents, and the likely effect of the banning order on the respondent and on any other person who may be affected.

24. A banning order must specify the length of the ban being imposed, which may not be less than 12 months (section 17(1)-(2)). A banning order may include exceptions to the ban for some or all of the period to which it relates (section 17(4)). Some examples of possible exceptions given in section 17(4):

"A banning order may, for example, contain exceptions –

(a) To deal with cases where there are existing tenancies and the landlord does not have the power to bring them to an immediate end, or

(b) To allow letting agents to wind down current business."

25. Section 28(1) requires the Secretary of State to operate a database of rogue landlords. An entry must be made in that database whenever a banning order is made against a person and maintained for so long as the order remains in force (section 29).

26. Once a banning order is made it has a number of important consequences for the person concerned. They are banned from letting housing and publicity is given to that ban by the inclusion of their name in the public database of rogue landlords, which may be consulted by prospective tenants or local housing authorities. They may also be banned from being involved in any company that carries out the same activity (section 18(1)). They will commit a criminal offence if they breach the order (section 21) and will be liable to imprisonment or a fine, to repeated financial penalties under section 23, and to rent repayment orders under section 40. A banned person may not transfer an estate in land to an associated person unless authorised by the FTT (section 27).

27. A person subject to a banning order cannot be granted an HMO licence or a licence in respect of a house subject to selective licensing (sections 64(3), 66(3C) and 88(3), 89(3C), 2004 Act). The further consequence of these prohibitions is that the same person may not give notice to terminate an assured shorthold tenancy under section 21, Housing Act 1988 (sections 75(1), 98(1), 2004 Act).

28. If a property is let in breach of a banning order, a local housing authority will generally be required to take over management by making an interim management order under Part 4, 2004 Act. When determining whether a property is let in breach of a banning order exceptions permitted under section 17 are to be disregarded (section 101(6C), 2004 Act).

29. There is a right of appeal to this Tribunal against a banning order made by the FTT (section 53, 2016 Act). The FTT itself has power to revoke or vary a banning order if the underlying convictions have been overturned on appeal or have become spent (section 20).

Non-statutory guidance

30. In April 2018 the Department of Housing, Communities and Local Government issued non-statutory guidance entitled "Banning Order Offences under the Housing and Planning Act 2016 (the Guidance). The Guidance is aimed at local housing authorities, but paragraph 5.2 correctly notes that tribunals may also have regard to it.

31. In a Foreword to the Guidance the object of the new legislation is said to be to "crack down" on rogue landlords and "disrupt their business model". The view is expressed that "… the small minority of rogue landlords […] who knowingly flout their legal obligations, rent out accommodation which is substandard and harass their tenants should be prevented from managing or letting housing". Paragraph 1.7 explains that the government expected banning orders "to be used for the most serious offenders", an expectation repeated elsewhere in the document.

32. Local housing authorities are required by the Guidance to develop their own policies on banning orders. To assist that task factors are identified at paragraph 3.3 which should be taken into consideration when an authority is considering whether to apply for an order. Unsurprisingly they include the factors identified in section 16(4). When considering the seriousness of an offence the Guidance also refers to the sentence which will already have been imposed following conviction and suggests: "the more severe the sentence imposed by the Court, the more appropriate it will be for a banning order to be made".

33. Other considerations identified in paragraph 3.3 as relevant to the authority's decision to apply for a banning order include previous convictions or civil penalties for banning order offences; inclusion on the database; a history of non-compliance with obligations and legal responsibilities; harm to the tenant; punishment of the offender; and deterrence of the offender and others. The view is expressed that the length of a ban should be proportionate to the severity of the offence and whether there is a pattern of previous offending", and that the order should have a "real economic impact on the offender".

34. The Council has introduced its own policies on banning orders, including a general Private Housing Enforcement Policy in 2016, and a specific policy on applications for banning orders in March 2020. The FTT considered those policies and concluded that the Council had acted in accordance with them in this case.

The appeal

35. The appellant was granted permission to appeal on six grounds, not all of which were pursued at the hearing. The most important of those grounds concerned the requirement in section 16(4)(a), 2016 Act, that in deciding whether to make a banning order against a person, and what order to make, the FTT must consider the seriousness of the offence of which the person has been convicted. The appellant submitted that the FTT had not complied with this requirement but instead had referred simply to the fine imposed by the magistrates (which it assessed as being at the high end of the available range of sanctions) and took that as a measure of the seriousness of the offence. What it should have done, according to the appellant, was to disregard the fine and make an assessment of its own of the seriousness of the offence based on the evidence presented to it.

36. The other issue of general significance raised by the appeal is one of statutory interpretation. The appellant's case is that the ban on "letting housing" contemplated by section 14(1), 2016 Act is no more than a prohibition on the act of letting itself and is not a prohibition on being a landlord, and that it therefore extends only to the creation of new tenancies and not to the continuation of existing relationships.

37. The appellant's other grounds of appeal suggest a miscellaneous catalogue of errors by the FTT. These raise no issues of wider importance so I will describe them later in this decision.

The role of this Tribunal

38. In *Sutton v Norwich City Council* [2021] EWCA Civ 20, Newey LJ reviewed authorities casting light on the approach which an appellate court or tribunal should take to an appeal against an assessment of a civil penalty imposed under section 249A, 2004 Act. He said this, at [30]-[31]:

> "Where the decision of a lower Court or Tribunal involved evaluation or the exercise of a discretion, an appellate Court or Tribunal is not entitled to interfere merely because it might have come to a different conclusion. In *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, Lord Fraser said at 652 that an appellate Court should interfere with an exercise of discretion only if it considers that the

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

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

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

39. The appeal in *Sutton* did not concern a banning order or the HMO Management Regulations but was against substantial civil penalties imposed for breaches of a different part of the network of regulations governing the licensing and management of HMOs. Nevertheless, the description of the function of an appellate tribunal when considering an appeal against a discretionary or evaluative decision of a lower tribunal is exactly in point. It follows that it is not for this Tribunal to consider whether the offences of which the appellant was convicted were sufficiently serious to justify the making of a banning order – that was the FTT's job. In the absence of some error of law I may only set aside or interfere with the FTT's decision if I am satisfied that there is some identifiable flaw in its reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of its conclusion.

Issue 1 - The seriousness of the offences

40. On behalf of the appellant Mr Auld made three points about the FTT's approach to the requirement in section 16(4)(a) that it consider the seriousness of the offence. He first suggested that the FTT had wrongly treated all banning order offences as sufficiently serious to justify the making of an order. Secondly, he submitted that the FTT had been wrong to rely on its own experience in forming the view that the level of fines imposed for these

offences indicated that they were serious. Finally, and more fundamentally, he submitted that it was the duty of the FTT to "assess" the seriousness of the breaches of the HMO Management Regulations on the basis of the evidence placed before it. It had been wrong, as Mr Auld put it, for the FTT to "delegate to the Magistrates Court the decision whether the offences were serious or not". Had it carried out its own assessment Mr Auld suggested that the FTT "should have concluded that the offences were not sufficiently serious to justify the making of a banning order."

41. The first of these criticisms can be disposed of quickly. The part of the FTT's decision against which it is directed was a discussion of a submission recorded at paragraph 101 to the effect that the banning order offences identified in the 2018 Regulations should be ranked in order of seriousness with contraventions of the HMO Management Regulations at the bottom of the range. The FTT said that it understood the appellant's case to be that "convictions for offences under the 2006 Regulations were not sufficiently serious to merit the imposition of a banning order". It then referred to statements made in Parliament when the 2018 Regulations were introduced, and to a statement in the Guidance that "all banning order offences are serious". Despite these references it is clear that the FTT did not consider that all banning order offences merited a banning order. At paragraph 104 it stated that "as a starting point, the respondent's convictions for banning order offences, including her breaches of the 2006 Regulations, should be treated as serious offences which *might* warrant a banning order." That direction demonstrates two matters which undermine Mr Auld's submission: first, that the FTT had in mind the particular offences of which the respondent had been convicted ("her breaches"); and secondly that it regarded those convictions as "a starting point" which "might" justify a banning order. In my judgment that direction, and the rejection of the proposition that breaches of the HMO Management Regulations would never be serious enough to merit a banning order, were legally correct and involved no error of law or other flaw.

42. The second complaint is that the FTT relied on its own experience of penalty levels without informing the parties what that experience was or allowing them the opportunity to comment on it. The context of this complaint is that the level of the fines was debated during the hearing. The Council contended that they were set at a high level notwithstanding being discounted for guilty pleas while the appellant herself regarded them as "excessive". Mr Auld had suggested that the level of fines "reflected low to medium culpability". In resolving this dispute the FTT said that it had applied its "general knowledge and expertise" when accepting the Council's submission that the fines were "at the upper level". It also considered that the seriousness of the offences was "aggravated" by the fact that the appellant committed similar offences at three different properties between July and September 2020. It adopted the language of the Guidance when, at paragraph 111, it said that a total fine of £22,000 for the offences was "a severe sentence which reflected the seriousness of the respondent's offending."

43. In my judgment there was nothing inappropriate in the way the FTT made its assessment. As a specialist tribunal dealing regularly with housing enforcement cases it is to be expected that the FTT panel (and the panel in this case was particularly experienced) would have come across many examples of fines imposed by magistrates for housing offences. Making use of that experience to calibrate the offences in this case on a scale of seriousness was part of the FTT's everyday function. Both parties limited their observations on the level of the fines

to bare assertions, and neither advanced any evidence or referred to any sentencing guidelines or to the levels of fines imposed for other offences. In those circumstances there was little the FTT could do other than explain that, based on its own experience, the fines were at the high end for housing offences. That did not involve reliance on specific evidence which had not been referred to at the hearing, nor was it a fact-finding determination, either of which would have required that the parties be given an opportunity to comment. Rather, it was an example of a specialist tribunal making use of its general (rather than specific) knowledge and expertise accumulated in determining similar cases and deploying it quite appropriately to come to a judgment on an issue in dispute.

44. In order to understand the appellant's third point under this ground of appeal it is necessary to refer in more detail to the FTT's decision.

45. The parties' rival positions on the approach the FTT should take to its consideration of the seriousness of the offences were recorded at paragraphs 80 and 84 of the decision.

46. The Council contended that the seriousness of the offences should primarily be measured by the amount of the fines imposed by the magistrates, and that a total penalty of £22,000 for eight offences "reflected the serious nature of the offences". It also referred to events predating those which gave rise to the prosecutions, and to subsequent enforcement action, all of which were recorded in some detail in paragraph 83. Apart from those matters putting the offences themselves in context, the Council appears to have based its case on the seriousness of the offences on the record of the convictions themselves and on the quantum of the fines.

47. In contrast, Mr Auld is recorded as submitting that "it was for the Council to demonstrate that the appellant had committed the most serious offences", which was a "high hurdle" which it had not cleared. He argued that some breaches of the HMO Management Regulations were trivial and that the offences of which the appellant had been convicted were "minor and cosmetic" with the possible exception of the two missing fire doors. The respondent's evidence about these contraventions was referred to in paragraphs 87 to 89 where reference was also made to the Council's recognition that, individually, the convictions were not of the most serious offences in terms of their potential to cause harm.

48. Mr Auld also directed the FTT to the decision of a different panel, *Telford and Wrekin Council v Hussain*, in which a landlord had been convicted of banning order offences for which fines of only £180 for each offence had been imposed by magistrates. The FTT in that case had said that:

> "the severity of the sentence is not a determinative factor for the present purposes. It is for the tribunal to assess the seriousness of the offences based on the evidence available to it."

Mr Auld submitted to the FTT that that was the approach which it should follow.

49. The FTT disagreed with Mr Auld's suggested approach. It explained that his proposition that the appellant's offences were "minor" down-played the importance of the HMO

Management Regulations. They applied to all HMOs whether requiring to be licensed or not (with few exceptions) and were designed to push up standards and to be the means by which poor day to day management was addressed in the statutory scheme as a whole.

50. The FTT next referred to "a more fundamental difference":

> "Counsel argued that the tribunal should make its own assessment of the seriousness of the offences based on all the circumstances and not be swayed by the sentence imposed by the magistrates which, in Counsel's view, had no weight in law because the penalty imposed by the magistrates was no more than their opinion.
>
> "The tribunal demurs from the approach advocated by Counsel. Effectively, Counsel was inviting the tribunal to re-open the case heard by the magistrates and start with a blank canvass. This cannot be correct on various levels. First the respondent had an opportunity to challenge the facts before the Court but chose to plead guilty. Second the respondent had the right to appeal to the Crown Court against the sentence but decided not to pursue it. The tribunal observes that the respondent was legally represented throughout the Court proceedings. Third the legislation and the 2016 Guidance give weight to the sentence in determining the seriousness of the offence. This is supported by the wording of the 2018 Regulations which exclude housing offences carrying a sentence of an absolute or conditional discharge from being banning order offences, and by the wording of [3.3] of the 2016 Guidance which states: "The more severe the sentence imposed by the Court, the more appropriate it could be for a banning order to be made."

51. The FTT said that it was not assisted by the *Telford and Wrekin* case, pointing out that the very low fines imposed in that case had required the panel to consider for itself whether the offences were sufficiently serious to warrant a banning order. It went on:

> "Where this Tribunal differs from the other tribunal is the scope of the enquiry to confirm or otherwise the seriousness of the offences as indicated by the sentence imposed by the magistrates. This tribunal maintains that it is not correct as part of its enquiry into the seriousness to re-open the case before the magistrates and undermine the conviction and sentence particularly where the offender has participated fully in those proceedings."

52. Mr Calzavara pointed out that 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. That is enough to dispose of this ground of appeal.

53. Additionally, however, I draw a number of further conclusions from the FTT's decision.

54. First, contrary to Mr Auld's submission, it did not base its consideration of the seriousness of the offences exclusively on the levels of fines imposed on the appellant. While it did not refer to the facts of the offences themselves in the same detail as it devoted to the other evidence of the quality of the appellant's management, that was because it took the facts relevant to the offences as having been admitted by the appellant by her guilty plea. It clearly had the facts of the offences in mind.

55. Secondly, in concluding that the offences were serious, the FTT was accepting the submission made on behalf of the Council. The Council is the body responsible for the enforcement of housing standards and the prosecution of offences and is ideally placed to comment on the relative severity of different penalties imposed by magistrates. The FTT was entitled to give weight to the Council's view of the level of the fines.

56. Thirdly, the FTT also gave weight to the Guidance and to the Council's policy, both of which treated the sentence imposed as a guide to the relative seriousness of offences. As the FTT itself pointed out, by excluding from the definition of a banning order offence any offence for which the sentence imposed was an absolute or conditional discharge, the 2018 Regulations also recognise that the level of penalty imposed is an appropriate reference point.

57. Fourthly, 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. The appellant's evidence sought to place the blame for her contraventions of the HMO Management Regulations on other people and circumstances (the tenants occupying the HMOs, the quality of her contractors' workmanship, the difficult of obtaining contractors due to Brexit and the Covid pandemic, and on advice given by the Council itself). Any of those matters could have provided grounds for the statutory defence of reasonable excuse and a submission to the magistrates that no offences had been committed at all. The time to determine whether the elements of the offence were proven was at the criminal trial, not when the FTT came to consider the seriousness of the offences.

58. I therefore reject both the proposition that the FTT were not entitled to have regard to the fines imposed by the magistrates, and the proposition that, in doing so, the FTT in this case impermissibly sub-contracted the necessary consideration of the seriousness of the offences to the magistrates.

Issue 2 – The scope of the order

59. Mr Auld submitted that the FTT had no power to ban the appellant from continuing to manage properties which she had previously let and where the tenancies or licences were

continuing. He contended that section 14(1)(a), 2016 Act empowers the FTT to ban the granting of any new tenancy or licence but not to ban a person from being a landlord under an existing tenancy.

60. The relevant part of section 14(1) defines a banning order as an order which bans a person from "letting housing". Mr Auld suggested that this language was ambiguous and was capable of bearing more than one meaning. To ban someone from "letting" could include prohibiting them from being a landlord or it could be limited to prohibiting them from entering into new landlord and tenant relationships. However, he submitted, as a matter of practicality Parliament cannot have intended that the effect of a banning order would be immediately to ban its subject from being a landlord; it was not possible for a person lawfully to terminate a tenant's occupation of property, or to divest themselves of ownership without a substantial period of notice, and Parliament could not have intended to criminalise a person for being in a situation which could not be avoided.

61. There are at least two substantial objections to Mr Auld's argument.

62. First, the effect of a banning order is dealt with in section 17 in terms which make it clear that it may have immediate effect in relation to existing tenancies. It is for that reason that a power to make exceptions is provided, including exceptions "to deal with cases where there are existing tenancies, and the landlord does not have the power to bring them to an immediate end" (section 17(4)(a)). There would be no need to include a provision such as that if, in principle, banning orders could not apply to existing tenancies. The availability of an exception for existing tenancies also answers Mr Auld's suggested practical difficulty for a banned landlord who may be required to extricate themselves from existing tenancies with little or no notice. It is to be expected that exceptions will be made for existing tenancies (as was done in this case, where the FTT delayed the prohibition for a period of 6 months). A banning order may also allow a landlord to apply to the FTT if she has been unable to end her relationship with current tenants within the time permitted.

63. Secondly, as Mr Auld acknowledged, as a matter of language a ban on "letting housing" is capable of including a prohibition on being a landlord in respect of any tenancy, whether current at the time of the ban or not. The question therefore arises whether one of the available meanings is more consistent with the objectives of the legislation? It is clear from the list of banning order offences, and from statements in the Government's Guidance, that banning orders are intended as a response to serious criminality. It is very difficult to imagine that the protection for tenants which this part of the statute is obviously intended to provide was meant only to benefit prospective tenants of a rogue landlord and not the current tenants against whom the banning order offences may well have been committed. There is no logical reason why existing tenants and tenancies should not be within its scope or that only new tenants should be protected.

64. Nor do I accept Mr Auld's submission that the possible exception provided for by section 17(4)(a) may be intended simply to deal with cases where a fixed term tenancy is in existence when a banning order is made so that the landlord has no power to terminate it until the expiry of the contractual term. Mr Auld suggested that a prohibition on new lettings would bite in such a situation when the contractual term expired and was replaced by a statutory

continuation. I agree that an exception could be made to any banning order allowing fixed term tenancies to expire, but that possibility does not seem to me to be a reason for giving the power to make exceptions an extremely restricted reading. The statute clearly contemplates that banning orders may have the effect of banning a landlord from continuing to be a landlord under an existing tenancy, whatever the characteristics of that tenancy.

65. Nor should it be thought that the only course open to a landlord against whom a banning order has been made is to give notice terminating all tenancies with which they are concerned. Such a landlord could alternatively dispose of their interest in the property altogether by selling it subject to the tenancy or by granting a lease for a term of more than 21 years. If the existing tenancies are in an HMO, one consequence of the making of a banning order is that the local housing authority will come under a duty to revoke the landlord's licence (section 70A(1), Housing Act 2004). Once an HMO licence is terminated the landlord against whom a banning order has been made will be unable to give notice under section 21, Housing Act 1988 to terminate any assured shorthold tenancies in the HMO (see paragraph 27, above). It is difficult to reconcile these restrictions and prohibitions with an intention that a banned landlord may nonetheless remain a landlord, perhaps indefinitely, and I therefore reject this ground of appeal.

Other grounds of appeal

66. The remaining grounds of appeal are weak.

67. Mr Auld took issue with the FTT's statement that the appellant had "flouted" her legal obligations. He submitted that "flouting" could not provide sufficient grounds for making a banning order. He also suggested that the FTT's finding was inconsistent with its conclusion that the appellant had "no understanding of the scope of [HMO] Regulations", since someone who did not understand their legal obligations could hardly be said to "flout" them. This appears to me to be a point of no substance. The FTT did indeed state, in the first line of its decision, that the appellant had "flouted her legal obligations". It then proceeded over the following 45 pages to explain what it meant by that expression. By adopting the language of the Guidance the FTT was not in any sense modifying the statutory scheme or substituting the Guidance for the conditions in section 160. Nor can it seriously be suggested that a landlord who has been convicted of a number of housing offences and who has no understanding of the legal context in which they operate their business is not exactly the sort of landlord against whom banning orders were intended to be deployed.

68. Mr Auld next argued that the FTT had failed to deal with a point he had made about paragraph 11(2) of the HMO Management Regulations. This provides that any duty imposed by the Regulations to maintain or keep the property in repair is to be construed as requiring a standard of maintenance or repair that is "reasonable in all the circumstances, taking account of the age, character and prospect of life of the house and the locality in which it is situated." It was suggested to Mr Riddell, the Council's housing officer, in cross examination that he was unaware of this part of the Statute, and Mr Auld suggested that this cast doubt on the conclusions of the magistrates. There are a number of answers to this criticism. First, the appellant pleaded guilty to the offences of which she was charged and it follows that any suggestion that the condition of her properties did not amount to a breach

of the HMO Management Regulations is not open to her. Secondly, the transcript of the FTT hearing shows that Mr Riddell confirmed that he did have regard to regulation 11(2) when inspecting residential property (which is hardly surprising since it simply repeats in statutory form what is already implied at common law). Finally, the FTT is not required to deal with every point made in submissions and its refusal of Mr Auld's invitation to conduct an investigation into the detailed facts of the offences, rather than relying on the facts admitted by the appellant, meant that this point fell by the wayside. I dismiss this ground of appeal for those reasons.

69. Mr Auld next argued that the FTT had been wrong to take into account the appellant's track record of failing to implement proposals for improving the standard of management of her properties which she had made in order to buy off earlier threats of enforcement action. This ground of appeal is manifestly hopeless. Section 16(4) contains a non-exhaustive list of matters which the FTT may take into consideration. Three of those matters relate directly to the conduct of the people concerned and to enforcement action taken against them. If relevant evidence is available, it is obviously relevant for the FTT to consider what any previous dealings with a local housing authority suggests about a landlord's willingness to comply with her legal responsibilities. In this case the FTT was therefore entitled to have regard to the appellant's history of failing to comply with promises she had made (as when she had agreed to hand the management of her properties over to BPP but was then found to have by-passed and ignored them).

70. The next point taken by Mr Auld was, in effect, a challenge to the FTT's finding of fact that the decision to seek a banning order had been made by Mr Mallinson, having read the report of Mr Riddell, which had been discussed by him with a number of his Council colleagues. Mr Auld submitted that the Council had not approached the consideration of the appellants' representations with an open mind because all relevant decisions had been taken by Mr Riddell who was, in effect, judge and jury in his own cause. The short answer to that submission is that the FTT heard the evidence of Mr Riddell about his involvement and considered the documents, including the decision document signed by Mr Mallinson, before finding that the final decision had been Mr Mallinson's and that the Council had given proper consideration to the appellant's representations. It is not open to this Tribunal to go behind those findings of fact which the FTT was entitled to make.

Conclusion

71. For these reasons I dismiss the appellant's appeal on all grounds.

72. That leaves the question whether the banning order made on 16 August 2022 should come immediately into effect in relation to the appellant's existing tenancies. The FTT allowed a period of 6 months for the appellant to make alternative arrangements before the order would come into force in relation to existing tenancies and it seems to me that that approach should be continued for the time being. I therefore lift the stay on the FTT's order but substitute 1 December 2023 as the date on which it will apply to existing tenancies. The appellant may apply to the FTT by not later than 6 October 2023 for any further consideration of this requirement. It should not be assumed by the appellant that the full effect of the banning order will be postponed beyond 1 December 2023.

Martin Rodger KC

Deputy Chamber President

24 May 2023

Right of appeal

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