FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Professional Regulation

Tribunal Reference: PR/2014/0002

Appellant: St Martin's Properties (UK) Ltd

Respondent: London Borough of Newham

Judge: Peter Lane

AMENDED DECISION NOTICE

The legislation

1. Section 83(1) of the Enterprise and Regulatory Reform 2013 provides that

> "(1) The Secretary of State may by order require persons who engage in lettings agency work to be members of a redress scheme for dealing with complaints in connection with that work which is either—
> (a) a redress scheme approved by the Secretary of State, or
> (b) a government administered redress scheme."

2. Section 83(2) provides that:-

> "(2) A "redress scheme" is a scheme which provides for complaints against members of the scheme to be investigated and determined by an independent person."

3. Subject to specified exceptions in subsections (8) and (9) of section 83, lettings agency work is defined as follows:-

> "(7) In this section, "lettings agency work" means things done by any person in the course of a business in response to instructions received from-
> (a) a person seeking to find another person wishing to rent a dwelling-house in England under a domestic tenancy and, having found such a person, to grant such a tenancy ("a prospective landlord");
> (b) a person seeking to find a dwelling-house in England to rent under a domestic tenancy and, having found such a dwelling-house, to obtain such a tenancy of it ("a prospective tenant")."

4. Pursuant to the 2013 Act, the Secretary of State has made the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) England Order 2014 (SI 2014/2359). The Order came into force on 1 October 2014. Article 3 provides:-

> "Requirement to belong to a redress scheme: lettings agency work
> 3.—(1) A person who engages in lettings agency work must be a member of a redress scheme for dealing with complaints in connection with that work.
> (2) The redress scheme must be one that is—
> (a) approved by the Secretary of State; or
> (b) designated by the Secretary of State as a government administered redress scheme.
> (3) For the purposes of this article a "complaint" is a complaint made by a person who is or has been a prospective landlord or a prospective tenant."

5. Article 7 of the Order provides that it shall be the duty of every enforcement authority to enforce the Order. It is common ground that, for the purposes of the present appeal, the relevant enforcement authority is the London Borough of Newham ("The Council").

6. Article 8 provides that where an enforcement authority is satisfied on the balance of probabilities that a person has failed to comply with the requirement to belong to a redress scheme, the authority made by notice required the person to pay the authority a monetary penalty of such amount as the authority may determine. Article 8(2) states that the amount of the penalty must not exceed £5,000. The procedure for the imposition of such a penalty is set out in the Schedule to the Order. This requires a "notice of intent" to be sent to the person concerned, stating the reasons for imposing the penalty and its amount and giving information as to the right to make representations and objections within 28 days beginning with the day after the date on which the notice of intent was sent. After the end of that period, the enforcement authority must decide whether to impose the monetary penalty, with or without modification. If it decides to do so, the authority must serve a final notice imposing the penalty, which must include specified information, including about rights of appeal (article 3).

7. Article 9 of the Order provides as follows:-

> "Appeals
> 9.—(1) A person who is served with a notice imposing a monetary penalty under paragraph 3 of the Schedule (a "final notice") may appeal to the First-tier Tribunal against that notice.
> (2) The grounds for appeal are that—
> (a) the decision to impose a monetary penalty was based on an error of fact;
> (b) the decision was wrong in law;
> (c) the amount of the monetary penalty is unreasonable;

(d) the decision was unreasonable for any other reason.

(3) Where a person has appealed to the First-tier Tribunal under paragraph (1), the final notice is suspended until the appeal is finally determined or withdrawn.

(4) The Tribunal may —
(a) quash the final notice;
(b) confirm the final notice;
(c) vary the final notice."

The final notice

8. In the present case the final notice dated 12 November 2014, addressed to the appellant, stated that Mr Meredith Howell-Morris, an authorised officer of London Borough of Newham ("the Council"), believed that the appellant had committed a breach of its duty under the 2014 Order, in that it had failed, as a letting agent, to comply with its duty to belong to an approved redress scheme. From 1 October 2014 to 3 November 2014 the appellant failed to become a member of the scheme. A notice of intent was issued to the appellant on 3 November 2014, regarding the proposed monetary penalty of £5,000, as well as giving details of the breach. The details were that when Mr Howell-Morris visited the appellant's premises on 3 November, the appellant was not a member of the scheme, notwithstanding that it had been advised to join such a scheme by letter dated 22 September 2014, as well as by a visit and further letter on 10 October of 2014. The appellant, however, did join the approved redress scheme on 3 November, having paid its membership on 13 October. The Council considered that the appellant had committed "a technical breach due to an administration error" and so decided to reduce the penalty from the maximum of £5,000 to £500.

The appeal

9. The appellant appealed to the Tribunal. Both parties were content for the matter to be determined without a hearing.

10. The appellant's grounds of appeal assert that the failure arose from difficulties regarding information over the appellant's insurance policy. On 23 October 2014, the Property Ombudsman informed the appellant that the Ombudsman was unable to process the appellant's application as the Ombudsman required the appellant's insurance policy schedule. This was supplied the following day but on 30 October the Property Ombudsman again contacted the appellant to say that the schedule supplied was insufficient, in that the appellant needed professional indemnity cover of not less than £100,000 with a policy excess of less than £500. The appellant contacted its broker. It was, however, not until 3 November 2014 that the broker contacted the appellant by telephone with a quotation from an insurance company, which the appellant agreed to, paying for the insurance

the same day. The policy documents then arrived from the Property Ombudsman.

11. As well as putting forward this sequence of events, the appellant submitted that the notice of 12 November 2014, although dated that day, was not hand delivered to the appellant until 12 December 2014. The notice stated that there was a deadline to appeal or pay the penalty charge of 9 January 2015. However, the notice also stated that the appellant was required to make payment or appeal within 28 days, which should be calculated from 12 December 2014.

12. In the light of the appellant's grounds, the Tribunal issued a case management note on 12 May 2015 stating that, before the appeal could be determined without a hearing, certain directions had to be given concerning those grounds. The directions noted that article 3(3)(d) of the 2014 Order states that "the final notice must include.... Information about the period in which the payment must be made, which must be not less than 28 days". The final notice appeared not to comply with this statutory requirement; moreover 9 January 2015 was not the correct deadline for appealing or paying the penalty. The Council was, accordingly, directed not later than 25 May 2015 to file with the Tribunal and serve the appellant with submissions as to the effect of these failures on the validity of the notice. Any written reply by the appellant to those submissions was directed to be filed and served not later than 8 June.

13. The Council complied with these directions. No response was made by the appellant. The Council's response, settled by Ms Cafferkey of Counsel, observes there is no legislative requirement for the final notice to be dated. It is common ground that the notice was served on 12 December 2014. That date is given expressly on the second page of the notice and the appellant acknowledged that it had received the notice on that date. Counsel points out that the notice on the second page contains a box headed "WHAT THIS NOTICE REQUIRES YOU TO DO", which says that:-

> "This notice requires you to carry out one of the following within the period of 28 days from the day after this notice is served:
> A. Pay the penalty charge of £500; or
> B. Appeal to the First-tier Tribunal, General Regulatory Chamber within 28 days.

14. Thus, it is submitted, the notice served on the appellant "does comply with the statutory requirement in terms of the advice it provides about the period for paying the fine: it advises the recipient to pay the penalty charge notice 'within the period of 28 days from the day after the notice is served"'. The effect, it is said, is that the recipient of the notice has been given "information about the period in which payment must be made", which period is not less than 28 days from the date of which the notice is served. That is what the statutory requirements demand.

15. Ms Cafferkey accepts, on behalf of the Council, that the date of 9 January 2015 given as the appeal deadline on the notice is not a date within 28 days of the notice sent to the appellant; but she contends that nothing turns on this. The date of 9 January 2015 does not invalidate the notice. In all the circumstances, the Council submits that no reasonable person would have construed the notice as meaning that they had anything less than 28 days from the date of service in which to pay the fine.

16. Ms Cafferkey says that the test for considering whether a notice is acceptably clear is the "reasonable recipient" test, as articulated in the case of Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749. In that case, a tenant had served a notice which specified 12 January 1995 as the expiration of his notice, instead of 13 January 1995. Despite the error in the date given, the notice was held to be valid. The question was how the "reasonable recipient", being a reasonable person in the circumstances of the server, and the recipient understood the notice. In the case of the present appeal, Ms Cafferkey submits that the reasonable recipient would have known that the date of the notice was, in fact, 12 December 2014.

17. In the alternative, were the Tribunal to be of the view that the notice did not comply with the statutory requirements, Ms Cafferkey submits that this does not mean the notice is rendered entirely "invalid". It is necessary in this context to consider the statutory requirements and their purpose, and then ascertain whether substantial compliance with those requirements is enough to achieve their purpose. This is the approach identified in R v Secretary of State for the Home Department ex parte Jeyeathan [2000] 1WLR 354:-

> "… the right approach is to regard the question of whether a requirement is directory or mandatory is only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance….
>
> (1) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance?
>
> ….
>
> The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely depending on dividing requirements into mandatory …. or directory… (Woolf LJ)

18. In Newbold v Coal Authority [2014] 1 WLR 1288 it was held that:-

> "In all cases one must construe the statutory or contractual requirement in question. It may require strict compliance with a requirement as a condition of its validity… against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally it may be that even non-compliance with a requirement is not fatal. In all such cases it is necessary to consider the words of the statute … in the light of the subject matter, the

> background, the purpose of the requirements, if that is known … and the actual possible effect of non-compliance on the parties. We assumed that Parliament in the case of legislation … would have intended as sensible … commercial result.

19. Ms Cafferkey adds that regard must be had to the fact that the particular statutory requirements with which we are concerned are intended to be regulatory. They are intended to permit the local authority to regulate the private rented sector. They are not the kind of notices which have the effect of divesting an individual of property rights and therefore should not demand rigid application. According to her, the statutory purpose underlying the relevant requirements has, in fact, been achieved and the appellant has not been prejudiced in any way.

20. I consider that Ms Cafferkey's submissions are correct. The notice did, in fact, comply with the relevant legislative requirements, for the reasons she gives. Whilst it is unfortunate that the notice also erroneously stated that the appeal deadline was 9 January 2015 (as was the deadline for paying the penalty), I find that the appellant has not in any way been materially prejudiced by that statement. The appellant has not paid the fee and has appealed. Thus, even if I were to have held that the notice did not comply with the statutory requirements, in the circumstances the failure would not have been material. At worst there has been substantial compliance by the Council. I agree that the legislative purpose, namely to regulate the private rented sector, is significantly different from errors in notices which can have the effect of divesting a person of property rights.

21. On the facts, it is manifest that the appellant failed to comply with the statutory requirements. The appellant was not registered by 29 October 2014, as required. The necessary insurance information, enabling the appellant to become a member of a redress scheme, was not supplied until 3 November 2014.

22. Accordingly, looking at article 9 of the 2014 Order, the Council has not based the decision to impose a monetary penalty on any error of fact. The decision is not wrong in law. In all the circumstances, I do not consider that it can in any sense be said that the monetary penalty is unreasonable. The penalty imposed is only 10% of the £5,000, which government guidance indicates ought ordinarily be imposed, in the absence of mitigating circumstances. The penalty was, in my view, entirely reasonable.

23. This appeal is dismissed.

Peter Lane
Chamber President

Dated 14 July 2015

Promulgated 15 July 2015