FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Professional Regulation

Tribunal Reference: PR/2015/0004

Appellant: ETB Property Services Ltd

Respondent: London Borough of Islington

Judge: Peter Lane

DECISION NOTICE

The legislation

1. Section 83(1) of the Enterprise and Regulatory Reform Act 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 may by notice require 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 21 January 2015, addressed to the appellant, stated that the appellant failed to comply with the duty to belong to an approved redress scheme. On 21 May 2014, a letter setting out general advice, including the requirement to join such a redress scheme, was sent by the Council to all agents in its area. A reminder was sent to the appellant on 18 November 2014. A notice of intent was issued by the Council to the appellant on 10 December 2014. The appellant did not join a redress scheme until 22 December 2014.

The appeal

9. The appellant appealed to the Tribunal against the final notice. Both parties were content for the matter to be determined without a hearing and in the circumstances I consider I can properly determine the issues without one.

10. In its grounds of appeal, the appellant contends that the Council's letters of 21 May 2014 and 18 November 2014 were "neither addressed to the appellant nor delivered". The appellant was said to have "acted promptly" in that it joined a redress scheme on 22 December 2014. The appellant had decided to cease operation of its business at 607 Holloway Road N19 4DJ at the end of February 2015. The grounds seek the quashing of the penalty of £5,000, imposed by the final notice.

11. In its response, the Council states that it was under no legal obligation to remind the appellant that it was required to join the redress scheme. Reference is made to the signed witness statement of Jill McCabe, an employee of the Council, who confirmed that she sent a letter of reminder on 18 November 2014 to the appellant at 605-607 Holloway Road, London, N19 4DJ. That this was done is confirmed by a spreadsheet (exhibit JN3).

12. The response continues that the appellant has wrongly assumed that the penalty is based on its having failed to comply with the Council's letters, whereas the penalty is based on the fact that the appellant did not comply with its legal requirement to belong to a redress scheme from 1 October 2014 until 22 December 2014. As well as a reminder, a representative of the Council visited the appellant's premises on 10 December 2014, when the appellant could not provide proof that it was a member of a redress scheme.

13. The appellant's alleged ignorance of the significance of such a scheme is, according to the Council, undermined by the fact that a company having the same director as the appellant, ETB Management Ltd, has been a member of a redress scheme since 7 May 2014. The fine of £5,000 was said by the Council to be proportionate and in accordance with statutory provisions and guidance issued in October 2014 by the Department for Communities and Local Government, whereby the maximum penalty of £5,000 is to be regarded as the norm, unless there are found to be extenuating circumstances. The Council contends that there are no such circumstances.

Discussion

14. The appellant's bald assertion that it received neither of the letters sent to it by the Council is unsupported by any statement of truth, unlike that of Ms McCabe. I accept her evidence that the reminder letter of November 2014 was sent to the appellant at its relevant address. I find on the balance of probabilities that that letter was delivered, in the ordinary course of post.

15. In any event, I agree with the Council that there was no legal requirement on it to send such letters to letting agents. Those agents, as professionals, can be expected to be aware of the law, as it directly impacts upon their businesses.

16. The Council gave a generous period, terminating on 1 December 2014, during which it was decided that penal action would not be taken against letting agents who had not, by that date, become members of a relevant scheme. I have had regard to everything said by the appellant, but I agree with the Council that it is not possible to detect any material extenuating circumstances to excuse the failure to join a scheme until 22 December. Although the departmental guidance does not have the force of law, it was, in all the circumstances, reasonable for the Council to adhere to it.

17. In conclusion, in all the circumstances, I find that the decision to impose the penalty was not based on an error of fact or wrong in law and further find that the amount of the monetary penalty is not unreasonable.

Decision

18. This appeal is dismissed.

Peter Lane

Chamber President

Dated 21 July 2015

Promulgated 23 July 2015