First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2016/0006

Held on the papers

Before

JUDGE CLAIRE TAYLOR

Between

ALPINE REAL ESTATE LIMITED

Appellant

and

BIRMINGHAM CITY COUNCIL

Respondent

Decision

This appeal is allowed to a limited extent.

Legislation

1. Section 83(1) of the Enterprise and Regulatory Reform Act 2013 (the 'Act') provides:

> '(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:

> '(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. Section 84(1) enables the Secretary of State by order to impose a requirement to belong to a redress scheme on those engaging in property management work. Subject to certain exceptions, 'property management work':

> 'means things done by any person ('A') in the course of a business in response to instructions received from another person ('C') where-
>
> (a) C wishes A to arrange services, repairs, maintenance, improvements or insurance or to deal with any other aspect of the management of premises in England on C's behalf, and
>
> (b) the premises consist of or include a dwelling-house let under a relevant tenancy' (section 84(6)).

5. Pursuant to the Act, 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') was introduced. It 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.'

6. Article 5 imposes a corresponding requirement on a person who engages in property management work.

7. 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 Birmingham City Council ('the Council').

8. 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 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 £5000. The procedure for the imposition of such 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, its amount and information as to the right to make representations and objections. 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).

9. 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.

Final notice

10. In the present case, the final notice of 9 March 2016, stated that the Appellant, Alpine Real Estate Limited, which carried out lettings agency work and/or property management work, was required to be a member of a redress scheme, pursuant to the relevant legislation. However, the Appellant had not become such a member until 16 March 2016, despite being required to do so from 1 October 2014. The amount of the penalty was stated to be £5000. This had been specified by the Council in its earlier notice of intent of 20 November 2015 (according to the Council, deemed to be served on 23 November 2015), and it had received no representations from the Appellant giving any reason to reduce it prior to the final notice. In letter dated March 2016, the Appellant's director wrote to the Council explaining its case and stated that the notice of intent had never been received. The Council replied that the Appellant should pursue her appeal lodged with this Tribunal.

The appeal

11. Both parties were content for the appeal to be determined without a hearing and I am satisfied that, in all the circumstances, I can justly do so. I have read and considered all material presented to me, even if not specifically referred to below.

12. The Appellant has made various points to substantiate its case, which I have organised as grounds A, B and C for ease of reference. Gunpreet Kahlon, director of the Appellant stated that:

    Ground A

    a) The director had gone through an extremely bad year. In September 2014, she had separated from her partner and as a single mother of two very young children, it had been hard to focus on her work. In February 2015, her mother had a road accident and subsequently passed away. She said her whole world collapsed and she had rushed to India, where she had to stay for a long time to sort things out. By April 2016, she had just resumed her work after a gap of a year and a half. The two tragic events had forced her to loose her focus.

    Ground B

    b) Her company was very small and she did not make the amount of the fine in a whole year. She was struggling to work as a single mother and was on the verge of loosing the business, where the property market was also at its worst.

    Ground C

    c) She had checked her record and had never received the notice of November 2015. When she received the letter of 9 March 2016, she checked the legislation and registered her company with a redress scheme.

13. The Council's reply to the Appellant's case includes the following arguments which I have organised for ease of reference:

Meaning of Reasonable

a. Article 9(2) sets out the valid grounds of appeal. Two of these involve the Tribunal making a finding on what is 'reasonable'. The Council argues that the Tribunal's function or role in considering this is limited as follows:
    i. It is not to substitute its own decision but rather to assess whether the Council have erred or acted unreasonably in reaching its decision or in imposing the monetary penalty.
    ii. The Department for Communities and Local Government, '*Improving the Private Rented Sector and Tackling Bad Practice – A Guide for Local Authorities (2012)*' ('the Guide') makes clear that a £5000 penalty is the starting point.
    iii. The Tribunal's assessment of reasonableness in this context is akin to the '*Wednesbury* test' applied in the procedure known as 'judicial review'. The Council made reference to this approach being taken in *Regent Management Ltd v Jones [2011] UKUT 369 (LC)* at 35.
    iv. Accordingly, a £5000 penalty was within the bounds of reasonable decision-making.

Ground A

b. Where the Appellant continued to trade during the director's absence, there should have been systems in place to deal with regulatory compliance and the factors set out would not have prevented an employee from registering with a scheme.
c. The director had not produced proof as to the number of employees, an airline ticket or death certificate.
d. The company should have been registered with a redress scheme prior to the events that the director described.

Ground B:

e. The assertion that the property market was at its worst is unsustainable given press reports on lettings in the city.
f. There is no evidence provided to substantiate the director's claims of not making £5000 in a whole year. The company's details show savings in excess of £7000 in 2013/14 and no profit and loss accounts have been provided to show the income and savings of the company and director's salaries.

Ground C:

g. The notice of intent had been sent by second class post and by s.233 Local Government Act 1972 and s7 Interpretation Act 1978, notice was deemed served by 23 November 2015 and there was an irrebuttable presumption in favour of service.
h. It is not clear whether the director had checked with her employees as to whether the company had received the letter, where on her case she was in India during the period so would not have been present when the notice was received.

i. In any event, the requirement to become a member of a redress scheme had been in place for over a year, and no basis for non-compliance had been provided. On 16 September 2015, the Council had issued a press release reminding letting agents and property managers to ensure they were members of a redress scheme.

Findings

14. The valid grounds of appeal in Article 9 include consideration of whether the penalty or decision to fine has been reasonable. As regards the interpretation or application of 'reasonable', I am not persuaded by the Council's arguments on this point. It is accepted that the Tribunal may either quash; confirm or vary the final notice in part according to what is reasonable within the confines of Article 9 of the Order. The nature of the appeal in this jurisdiction is that it is a full appeal of the decision of the Council considering the law and facts. The Council seeks to argue that the word 'unreasonable' in Article 9(2) should be read in the 'Wednesbury sense' so as to allow the Tribunal to interfere only to the extent that the amount of the penalty or Council's decision was so unreasonable that no reasonable local authority could have concluded as such. The Council finds support in its approach by referring to the Upper Tribunal decision of, *Regent Management Ltd v Jones [2011] UKUT 369 (LC)* at 35 However, this applies different legislation under a different jurisdiction.

15. I do not accept that the powers of this jurisdiction are so limited. In considering this, I adopt the reasoning of this Tribunal when considering a case within the same jurisdiction, which stated:

> *"16. Ms Cafferkey submitted that the word "unreasonable", as used in article 9 of the Order meant unreasonable in the "Wednesbury" sense; that is to say, that the Tribunal could interfere only if the amount of the monetary penalty was so unreasonable that no reasonable local authority could have imposed it or that the decision was otherwise unreasonable in this sense.*
> *17. I see no reason to interpret the expression in this sense and strong reasons why I should not do so. If Parliament had intended the right of appeal to the Tribunal to be restricted in this way, one would expect article 9 to say so in plain terms. As is stated in Jacobs: Tribunal Practice and Procedure (3rd edition) at 4.122, the general approach of the courts to the scope of an appeal against a decision based on the exercise of judgment is that the judgment must be exercised afresh on appeal (Secretary of State for Children, Schools and Families v Philliskirk [2009] ELR 68; Stepney Borough Council v Joffe [1949] 1KB 599).*
> *18. The proper approach, I find, lies not in restricting the Tribunal's function in the drastic and blunt-ended way that a Wednesbury approach would produce but, rather, in affording due weight to the views of the Council, as the body statutorily entrusted with the enforcement function. This was the approach of the Court of Appeal in R (Hope and Glory Public House Ltd) v City of Westminster Magistrates Court [2011] EWCA Civ 31."*
>
> *Letting International Ltd v London Borough of Newham (PR/2015/0001)*

16. The Department for Communities and Local Government, '*Improving the Private Rented Sector and Tackling Bad Practice – A Guide for Local Authorities (2012)*' ('the Guide') states:

    a. 'The expectation is that a £5000 fine should be considered the norm and that a lower fine should only be charged if the enforcement authority is satisfied that there are extenuating circumstances. It will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the lettings agent or property manager makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; nevertheless an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue which could be considered is whether a £5,000 fine would be disproportionate to the turnover / scale of the business or would lead to an organization going out of business. It is open to the authority to give a lettings agent or property manager a grace period in which to join one of the redress schemes rather than impose a fine.' (See page 53 of the Guide.)

17. This Guide is not statutory, but is important and I have had it in mind when considering what is reasonable.

Ground A

18. As stated above, the only valid 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; or (d) the decision was unreasonable for any other reason.

19. As regards Ground A, I accept that the director has had a very challenging time that in turn made focusing on her work difficult. Contrary to the Council's assertion she has said this started in September 2014, which is before the obligation to become a member of a redress scheme came into force on 1 October 2014.

20. However, the only potentially relevant grounds in relation to these arguments would be that the amount of the penalty or decision was unreasonable. It is difficult to see from the facts before me related to Ground A why this would indicate that the decision or penalty was unreasonable. The Council asserts that the company has employees and the Appellant has not disputed this. The Appellant has not explained the dates that she was out of the country and the Emirates Skywards statement on page 204 does not assist to corroborate what she has said. However, it seems from what she had said that the pressures on her lasted for quite some time, and likewise, the Appellant had not been compliant with the legislation for a considerable time. The director of the company is responsible to ensure its compliance with

regulation and in her absence or period of 'lost focus', there should have been systems in place to deal with regulatory compliance.

21. The points made in Ground B suggest an argument by the Appellant that the amount of the monetary penalty is unreasonable in the broader circumstances. I prefer the Council's arguments that the company has not provided anything to substantiate that it has not made £5000 in a whole year; that its business would fail as a result of paying the penalty and that the property market is at its worst. Whilst I have been provided with abbreviated accounts and balance sheets for the years to 31 December 2014 and 2015, in the absence of profit and loss accounts it is not possible to see the full picture. In particular, the current assets (including cash at bank) less current liabilities shows a negative balance for 2015. However, the shareholders' funds for 2015 are stated as £2,155,466, which seems to indicate relatively high net assets. The profit and loss account entry indicating the profit is low at £1,700 but it is not clear what dividend or salary payments have been made. In the absence of further details, these accounts do not appear to indicate that the penalty of £5000 is unaffordable.

22. As regards Ground C, the arguments made by the Appellant might indicate that she argues any or all of the following:

    a. The Notice of Intent was never validly served such that an error in the Council's compliance with the required procedure relating to the imposition of a penalty; ('error of service') or
    b. Even if validly served, she had not received it and had she done so she would have immediately become a member of a redress scheme; and/or in those circumstances her arguments (as set out in her letter to to the Council sent in March 2016) should have been considered by it. ('mitigating factors').

23. As regards an error of service, I accept that the Council's submissions that having posted the notice it was properly served.

24. As regards mitigating factors, I am less persuaded by the Council's arguments. It claims that the Appellant states that she was in India and as such would not have been present when the notice of intent was received. I am not clear from what I have seen that this is correct. In any event, if, as the Council has claimed, the company has employees, they would have been able to communicate with the director the contents of the notice of intent had they received it. The Council used an ordinary second-class post such that no one was required to sign receipt for the document and it might more easily have been mistaken for something less important and mislaid. Taking all factors into account including the difficulties the Appellant was undergoing, I am satisfied that she either never saw the notice or did not focus on it; and had she done so she would have become a member of a redress scheme at an earlier point. That said, there would still have been a considerable period that the Appellant was not a member of a redress scheme where it was for the

company to be aware of the legislation relevant to it at an earlier point. Given matters as a whole, in the circumstances, I am satisfied that the Appellant should have been accorded a discount of £800.

Decision

25. Accordingly, I allow the appeal to the extent that the appropriate penalty is £4,200, rather than £5,000.

Claire Taylor
Judge

Dated **22 December 2016**
Promulgation Date