IN THE FIRST TIER TRIBUNAL **PR/2018/0022**

(GENERAL REGULATORY CHAMBER)

HEATHCREST PROPERTY SERVICES LTD

(CICELY DAYES)

and

LONDON BOROUGH OF ISLINGTON

DECISION

Tribunal: Brian Kennedy QC

Appellant: Cicely Dayes (Litigant in person)

Respondent: Quentin Paterson & Sam Tyler.

DECISION OF THE FIRST-TIER TRIBUNAL:

The Tribunal refuses the appeal.

REASONS OF THE TRIBUNAL

Introduction:

[1] This decision relates to an appeal brought under Schedule 9 of the Consumer Rights Act 2015. It is an appeal against a Final Notice Ref NR200/TJ04/180006151 issued by the London Borough of Islington ("the Council"), in which the Council imposed a financial penalty of £8,000 on the Appellant for operating as a letting agent without being a member of an approved redress scheme and failures in regards to the obligations pertaining to fees.

Legislation:

(a) Section 83 of the Consumer Rights Act 2015 ('the 2015 Act') provides that:

(1) A letting agent must, in accordance with this section, publicise details of the agent's relevant fees.

(2) The agent must display a list of the fees –

(a) at each of the agent's premises at which the agent deals face-to-face with persons using or proposing to use services to which the fees relate, and

(b) at a place in each of those premises at which the list is likely to be seen by such persons.

(3) The agent must publish a list of the fees on the agent's website (if it has a website).

(4) A list of fees displayed or published in accordance with subsection (2) or (3) must include

(5) a description of each fee that is sufficient to enable a person who is liable to pay it to understand the service or cost that is covered by the fee or the purpose for which it is imposed (as the case may be),

(6) in the case of a fee which tenants are liable to pay, an indication of whether the fee relates to each dwelling-house or each tenant under a tenancy of the dwelling-house, and

(7) the amount of each fee inclusive of any applicable tax or, where the amount of a fee cannot reasonably be determined in advance, a description of how that fee is calculated.

(b) A letting agent is defined in section 84 as follows:

(1) In this Chapter "letting agent" means a person who engages in letting agency work (whether or not that person engages in other work).

(2) A person is not a letting agent for the purposes of this Chapter if the person engages in letting agency work in the course of that person's employment under a contract of employment.

(3) A person is not a letting agent for the purposes of this Chapter if—

(a) the person is of a description specified in regulations made by the appropriate national authority;

(b) the person engages in work of a description specified in regulations made by the appropriate national authority.

(c) Section 86 further defines ‘letting agency work’:

(1) In this Chapter “letting agency work” means things done by a person in the course of a business in response to instructions received from –

(a) a person (“a prospective landlord”) seeking to find another person wishing to rent a dwelling-house under an assured tenancy and, having found such a person, to grant such a tenancy, or

(b) a person (“a prospective tenant”) seeking to find a dwelling-house to rent under an assured tenancy and, having found such a dwelling-house, to obtain such a tenancy of it.

(2) But “letting agency work” does not include any of the following things when done by a person who does nothing else within subsection (1)

(a) publishing advertisements or disseminating information;

(b) providing a means by which a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or a prospective landlord;

(c) providing a means by which a prospective landlord and a prospective tenant can communicate directly with each other.

(3) “Letting agency work” also does not include things done by a local authority.

(d) The fees to which this Chapter applies are set out in section 85:

(1) In this Chapter “relevant fees”, in relation to a letting agent, means the fees, charges or penalties (however expressed) payable to the agent by a landlord or tenant –

(a) in respect of letting agency work carried on by the agent,

(b) in respect of property management work carried on by the agent, or

(c) otherwise in connection with –

(i) an assured tenancy of a dwelling-house, or

(ii) a dwelling-house that is, has been or is proposed to be let under an assured tenancy.

(2) Subsection (1) does not apply to –

(a) the rent payable to a landlord under a tenancy,

(b) any fees, charges or penalties which the letting agent receives from a landlord under a tenancy on behalf of another person,

(c) a tenancy deposit within the meaning of section 212(8) of the Housing Act 2004, or

(d) any fees, charges or penalties of a description specified in regulations made by the appropriate national authority.

(e) Further to the requirement to publish fees, the 2015 Act also imposes duties on letting agents engaged in letting agency or property management work to publish a statement of whether the agent is a member of a client money protection scheme (section 83(6)) and a statement indicating that the agent is a member of a client redress scheme and the name of that scheme (section 83(7)).

(f) Section 87 imposes a duty on the local weights and measures authority to enforce these provisions in its own area where it is considered on the balance of probabilities they have been breached. Breaches are considered to have occurred in the area of the local authority in which a dwelling house is situated to which any fees relate, but authorities can take enforcement action in the area of another local authority with the consent of that authority. Local authorities have the power to impose monetary penalties not exceeding £5,000 in the event of a breach.

(g) The procedure for the imposition of monetary penalties and the rights of appeal are set out in Schedule 9 of the 2015 Act. The local authority is required to issue a 'notice of intent' to issue such a penalty within six months from the date the authority had sufficient evidence of a breach. The notice must set out the amount of the proposed financial penalty, the reasons for proposing to impose the penalty, and information about the right to make representations within 28 days of the sending of the notice. At the end of that period the authority must decide whether to impose a penalty and the amount of that penalty. The final notice must set out that amount, reasons for the imposition of the penalty and information regarding how to pay and how to appeal. Anyone served with such a notice has the right to appeal within 28 days, on one of four grounds:

(1) the decision to impose a financial penalty was based on an error of fact,

(2) the decision was wrong in law,

(3) the amount of the financial penalty is unreasonable, or

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

(h) Section 84(1) of the Enterprise and Regulatory Reform 2013 provides that

"(1) The Secretary of State may by order require persons who engage in property management 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."

(i) Section 84(2) explains that ‘redress scheme’ means the same as outlined in Section 83(2), which states:-

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

(j) Subject to specified exceptions in subsection (7) of section 84, property management work is defined as follows:-

> “(6) In this section, “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.

(k) 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”). The Order came into force on 1 October 2014. Article 5 of the Order provides:-

> “Requirement to belong to a redress scheme: property management work
>
> 3.—(1) A person who engages in property management 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.”

(l) Article 6 provides specific exclusions of certain actions from the definition of ‘property management’ for the purposes of the legislation.

(m) 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 London Borough of Tower Hamlets.

(n) 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).

Final Notice:

[2] In the present case the Final Notice dated 24 April 2018 stated that the Council believed that on 6 March 2018 the Appellant had committed breaches of its duty to publicise fees and details of any client money protection scheme on its website and in its premises contrary to section 83(3), (4), (6), and (7) of the 2015 Act, and Articles 3 and 5 of the 2014 Order.

The Appeal:

[3] The Appellant appealed to the Tribunal on 18 May 2018, alleging that the level and circumstances of the fine are "unfair and disproportionate". Ms Dayes stated that she did not know of the requirement to be a member of a redress scheme, and that any tenant was advised in writing of all fees prior to viewings and any payment. She claimed that correspondence did not reach her of the Council's concerns, and she feels that she was not given adequate opportunity to comply before the fine was issued. If the Tribunal were to uphold the fines, she stated that she would have to make redundancies and it would jeopardise the future of her business. She stated that the profit for year 2016/17 was in the region of £6,000.

[4] Ms Tyler of the Council's Trading Standards department provided a witness statement. A complaint was received regarding the Appellant's business practices on 18 December 2017. The Appellant was using a mail forwarding address, but the Council could not find a website for the business, and Companies House recorded the

registered address for the business to be the mail forwarding address. A mail forwarding company confirmed that the Appellant was a client, and provided details of Ms Dayes to the Council. A website was found on 21 February 2018, but it did not display the required information concerning fees and redress schemes. Ms Tyler sent a message through the 'Contact Us' page outlining the concerns, and received no response.

[5] On 1 March 2018 Ms Tyler checked the website again and the required information was still not displayed. She also confirmed with the approved redress schemes, and was informed that the Appellant Company was not a member of any of the schemes. A Notice of Intent was issued on 6 March 2018, and fines of £25,000 were imposed. Mr Fordham of the Council provided evidence that Ms Dayes had contacted the Council on 29 March 2018 stating *"I find the fine amount of £25,000 excessive and I would like to know how a fine can [be] avoided all together*". More information was requested from Ms Dayes (e.g. business turnover) but none was forthcoming; nevertheless, because of the size of the Appellant business, on 17 April 2018 the fines were by reduced at an internal review to £8,000, and the Final Notices were issued. The Council imposed £2,000 for each of the four breaches: failures to display fees, failure to include the statutory fee information, no redress scheme and no client protection scheme. This was expressed in the Final Notices as £5,000 for the redress schemes, and £3,000 for the fees breaches. As of 11 May 2018, Ms Tyler was aware that the Appellant was still not a member of any redress scheme, and as of 27 June 2018 still had not displayed the redress scheme details and fees on the website.

[6] Ms Dayes responded saying that she had become aware of the issue on 6 March 2018, and had immediately made efforts to join the Property Ombudsman's redress scheme. However, she was hindered by compulsory HMRC checks, and "for some reason" focussed solely on the Ombudsman rather than exploring other redress scheme options. She provided an invoice proving that she had been a member of the Property Redress Scheme since 4 May 2018.

[7] At hearing the Appellant accepted that the law was against her, and conceded that the only real issue was mitigating the fine. She did not produce evidence or hardship, or accounts to prove turnover/profits; indeed, she conceded that she did not know what her profits were, but estimated them to be around £7,000. It was explained that

Appeals are time-consuming and costly to the public purse, and she provided nothing whatsoever to dislodge the conclusions of the Council, or cast doubt upon the propriety and fairness of its approach. The Council, however, indicated that they would permit payment of the fine over a 12-month period, provided that Ms Dayes does not involve them in any further appeals of this decision. This is a very fair and reasonable approach and was acknowledged by the Appellant..

[8] In the circumstances and for the reasons above, the Tribunal refuses the appeal in its entirety.

Brian Kennedy QC 21 September 2018.

Promulgation Date 25 September 2018.