IN THE FIRST TIER TRIBUNAL **PR/2017/0016**

(GENERAL REGULATORY CHAMBER)

WITNEY PROPERTIES LTD

and

WEST OXFORDSHIRE DISTRICT COUNCIL

DECISION

Hearing 09 November 2017.

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 issued by the West Oxfordshire District Council ("the Council"), in which the Council imposed a financial penalty of £5,000 on the Appellant company for undertaking property management or letting agency work without being a member of a government approved redress scheme.

Legislation

[2] Article 3 of the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc.) (England) Order 2014 ("the 2014 Order") requires that any person engaged in letting agency work be a

member of an approved redress scheme for dealing with complaints in connection with that work.

A letting agent is defined in section 84 of the Consumer Rights Act 2015 ('the 2015 Act') 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.

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.

[3] 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.

[4] 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:

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

(b) the decision was wrong in law,

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

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

Final Notice

[5] In the present case the Final Notice dated 7 April 2017, addressed to Witney Properties Limited, stated that the Council was satisfied that on 7 April 2017 the appellant committed a breach of its duty to belong to an approved redress scheme, contrary to Article 3 of the 2014 Order.

The Appeal

[6] The Appellant appealed to the Tribunal on 5 May 2017. It was argued that the Appellant company was neither a letting agency nor a property management company under the definitions in the 2013 Act, as it takes an equitable interest in the properties by entering into a contract with the landlord to form a hierarchical arrangement wherein the Appellant company becomes the direct landlord to the tenants, and pays a guaranteed fee to the "superior landlord". The Appellant Company is the 'owner' of the property and acts under its own instructions for the duration of the agreement with the superior landlord in a situation analogous to a business lease. The Final Notice accuses the Appellant Company of being "engaged in property management and/or letting agency work" without specifying which one, and therefore the Council cannot be sure that it does fall into one or other category.

[7] As there has been no breach of the Act there should be no financial penalty. However, if such a breach were to be found, the Appellant argued that a £5,000 monetary penalty is unenforceable "due to the nature of its service". The Council had not stated the basis on which it decided to impose the maximum penalty, and it had not considered the fact that the Appellant Company had previously been a member of a Redress Scheme. That membership had been suspended "through no fault" of the Appellant company, and they have attempted to join a different Redress Scheme.

Council's Response

[8] The Council noted that the Appellant disclosed no contract, tenancy or any supporting document regarding its representations regarding its business model and interest in the properties. Conversely, the Council noted that the Appellant had advertised itself on 192.com as a letting agent, and previous companies owned by the Appellant Company's officers included 'Witney Rooms Lettings Shop' and 'Witney Rooms Agency'. The Council had sight of a contract between a property owner and the Appellant or a predecessor company of the Appellant's officers (the aforementioned Witney Rooms Agency) in which the company referred to itself as "the Agent" and contained certain provisions that indicated against its framing of the situation as a business lease

[9] The Appellant's legal analysis of its activities is flawed. A lease cannot be created out of an equitable interest, and therefore any validly constituted domestic tenancy must have been done by the Appellant acting as agent of the property owner and therefore engaging in lettings agency work. Any work undertaken in carrying out repairs or maintenance must also have been done as the landlord's agent, and this constitutes property management. The Council contends that the Appellant was engaged in both lettings agency and property management, and so the 'and/or' inclusion was justified.

[10] Even if the Tribunal were to find that there were valid head leases with every property owner, this would still fall within 'lettings agency' or 'property management' work:

> *Lettings agency* – in taking enquiries from prospective tenants, the Appellant is acting in response to instructions from such tenants in the course of a business;
>
> *Property Management* – the property owner retains an interest in their property being appropriately managed by the Appellant, who acts as a middleman between the owner and tenants.

[11] The Council also refutes that the monetary penalty is unenforceable. The Appellant did not elaborate on what the alleged unlawfulness was in regards to the service of the Notice. There is no legal requirement for the Council to state the basis on which it has reached its decision. The matters relied upon by the Appellant regarding its suspension from a Redress Scheme are, in the Council's view, an aggravating feature as it suggests misconduct sufficiently serious to justify a suspension.

Appellant's Response

[12] The Appellant responded to the Council's critique of the example contract, contending that the contract grants the company exclusive possession of the property for a term for a rent, and under *Street v Mountford* [1985] AC 809 this is a tenancy. Any references to 'the agent' or 'agency' refer to Mr Piotrowski acting on behalf of the tenant Witney Rooms. (The Tribunal finds that on reading the contract this is demonstrably

false.) When Witney Rooms let out parts of the property to occupiers, it was acting as a mesne landlord.

[13] Paragraph 3(3)(a) of the Schedule to the Redress Schemes etc Regulations requires the enforcement authority to include the reasons for imposing the penalty and include information about the amount to be paid. The Appellant argues that this must include adequate reasons for the level of fine, and without them the notice is invalid. Failure to provide adequate reasons also unfairly limits appellants' ability to understand decisions and challenge them. The notice received by the Appellant did not refer to the written or oral representations made by the officers and their solicitors to the Council, and did not explain whether they were accepted or rejected. It is the Appellant's belief that they were told by Ms April Paintain on behalf of the Council that they did not consider the Appellant to be a letting agent but rather a property management company. This is not the Council's current position, and no explanation has been forthcoming as to why this has changed.

[14] The level of fine was also unlawful, as the Council fettered its discretion and did not consider any extenuating circumstances or the proportionality of the sum. It also stated that reasons are required for the level of the fine.

Witness Evidence

Jaroslaw Piotrowski

[15] Mr Piotrowski is a Director of the Appellant Company. He described the nature of the business of the company as "providing accommodation to individuals" by establishing agreements with property owners that grants exclusive possession to the Appellant company with express permission to sublet the property. Mr Piotrowski explained how, following these agreements, he arranges for the properties to be renovated and furnished, and the property owners receive a fixed monthly sum regardless of whether the Appellant Company has found tenants to occupy the properties. All agreements with tenants are between the tenants and the Appellant Company, and the property owner has no involvement in these arrangements. He denied placing the advertisement on 192.com and claimed that he only became aware subsequent to an interview with the Council that it was placed by a former employee choosing pre-defined categories that were as close

to the business activity as possible. He stated that this was done without his knowledge or approval.

Mr Piotrowski explained that in 2016 he was imprisoned for matters unrelated to his property dealings, and his wife became director of the company. It was during this time that a number of disputes occurred with 'superior landlords', one of who complained to the Redress Scheme. It was due to this landlord's obstruction that the Appellant Company was unable to comply with the Redress Scheme's order and was consequently suspended.

Anna Piotrowska

[16] Mrs Piotrowska explained that she is married to Mr Jaroslaw Piotrowski, and became a director of the Appellant Company when her husband received a custodial sentence. She was a director from 23rd October 2015 to 14th June 2017. She adopted the evidence of her husband's witness statement, and added that landlords do not pay any money to the Appellant company, who locates tenants to occupy the properties as separate rooms rather than as a single unit.

Tahir Akram

[17] Mr Akram gave evidence that he owned three houses in Witney, which he lets to the Appellant Company under contracts for a five-year period. He takes no interest in the tenants or maintenance of the properties and leaves all that to the Appellant Company.

The Issues

[18] The Issues for the Tribunal are as follows:

(i) Is the Appellant engaged in "lettings agency work" for the purposes of the 2014 Order and 2013 Act?

(ii) Is the Appellant engaged in "property management work" for the purposes of the 2014 Order and 2013 Act?

(iii) Has the Respondent given adequate reasons?

(iv) Is the monetary penalty unreasonable?

[19] The Tribunal find the evidence in this appeal supports the Respondents submissions and supporting reasons in this appeal and find Section 83(7)(b) applies to the Appellant Company when acting in the course of business and according to the contractual arrangements under which it has been engaged, it effectively does things in response to instructions received from a prospective tenant seeking to find a dwelling-house to rent under a domestic tenancy and, in having found such a dwelling house, on occasions obtains such a tenancy of it.

[20] The Appellants witnesses have described the Appellants business model in terms of "locating tenants". The evidence clearly demonstrates that the Appellants take instructions form prospective tenants, arrange viewings and sometimes enters into tenancy agreements with the prospective tenants. Those prospective tenants who are not ultimately granted a tenancy and who wish to raise a complaint would not be in a position to do so and would have no access to the approved redress scheme, which would defeat the purpose of the legislation. The Tribunal also accepts that the scale of the Appellants business operations distinguishes it from a small landlord. On the facts and the evidence before the Tribunal about the conduct and extent of the Appellants business operations the Tribunal is satisfied that the activities undertaken in respect of prospective tenants by the Appellant falls within the definition of "lettings agency work" as defined in section 83(7)(b) of the 2013 Act. The Tribunal therefore finds the Appellant is engaged in "lettings agency work".

[21] Similarly the evidence before the Tribunal supports the Respondents case that the Appellant Company is engaged in property management work relating to the premises it sub lets including dwelling houses let under short-hold assured tenancies [section 84(6)(b) of the 2013 Act.] The evidence confirms inter-alia that (a) the Appellant issues possession proceedings against sub-tenants following specific instructions form the head landlord, under the head tenancy agreement, (b) the appellant has contracted with subtenants to *"keep the structure of the property and water, gas and electricity installations in good repair"* and to *"insure the property"*, whereas these are obligations of the head landlord under the head lease. The Tribunal accepts the submission that the Appellant could only be undertaking these tasks on behalf of and under the instructions of the Head Landlord as the Head Landlords agent and under the terms of the Head Tenancy as signed by the Appellant Company. It is clear from the documentation before the Tribunal that the

Appellant Company was under express contractual obligations and undertook other tasks which could only be consistent with management of premises let under a relevant tenancy on behalf of the Head Landlord.

[22] The Tribunal agree that the relevant legislation is intended to cover any persons undertaking the specified activities (i.e. “lettings Agency Work” or “Property Management Work” a the time the 2014 Order came into force and the Appellant has failed to demonstrate that they come under any of the exemptions as to what constitutes “property management work” set out in the 2013 Act or the 2014 Order.

[23] The Tribunal is satisfied that the Appellant Company was engaged in property management work as envisaged by the relevant legislation as referred to above for the reasons set out above.

[24] The Respondent has provided its reasons for its findings during the course of this appeal and the Appellant has not been denied an opportunity to consider and challenge those reasons, which they have done to the best of their ability throughout the course of this appeal. In the circumstances, the Respondents Decision was not based on an error of fact or Law.

[25] The £5,000 fine is considered the norm and a lower fine is usually only considered if the enforcement authority, or on appeal, is satisfied that there are extenuating circumstances. Neither the Respondent nor this Tribunal have been provided with any details of extenuating circumstances, which would warrant the norm fine being imposed in this case. The Tribunal finds the fine is reasonable in the circumstances and has not been provided with any reasons it should be reduced in this case.

[26] Accordingly the Appeal is refused.

Brian Kennedy QC 15 February 2018.

Promulgation Date 15 February 2018