IN THE FIRST TIER TRIBUNAL **PR/2019/0040**

(GENERAL REGULATORY CHAMBER)

Between:

JANWING CLEANING SERVICES LTD t/a HOLMES

Appellant:

and

LONDON BOROUGH OF LAMBETH

Respondent:

DECISION

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal.

REASONS:

[1] INTRODUCTION:

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 London Borough of Lambeth ("the Council"), in which the Council imposed a financial penalty of £5,000 on the Appellant for failures to display a list of fees and a statement concerning membership of a client money protection scheme.

[2] LEGISLATION:

Fee Publicising

1. 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:

(a) 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),

(b) 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

(c) 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.

2. 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.

3. 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.

4. 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.

Client Money Protection Scheme

5. The Consumer Rights Act 2015 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)).
6. 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.
7. 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.

[3] FINAL NOTICE:

In the present case the Final Notice dated 30 April 2019 stated that the Council believed that on 13 March 2019 the Appellant had committed breaches of its duty to publish a list of relevant fees or any statement regarding membership of a client money protection scheme contrary to sections 83(1) and (6) of the 2015 Act.

[4] THE APPEAL:

The Appellant formally appealed to the Tribunal on 3 June 2019. It had sent a letter to the Tribunal on 22 May 2019 indicating an intention to appeal and made the following points:

a) the Appellant's business is predominantly involved in cleaning, but engages in "*the maintenance/ of three properties"*;

b) the Council officer who inspected the premises on 20 February 2019 was rude;

c) no fees are charged to tenants, and the landlords' fees are displayed both in the shop window and on a display board inside the property;

d) the business remedied a previous breach (regarding the obligation to belong to a redress scheme) quickly and thus avoided a penalty;

e) the nature of the business means that it does not hold any client monies and would have no need to belong to a client money protection scheme;

f) at the time of the inspections and the Final Notice, there was no statutory requirement to belong to a client money protection scheme; and

g) the business could not service the amount of the penalty.

[5] RESPONSE TO APPEAL:

The Council responded by noting, inter-alia, the following facts:

a) the enforcement action was not taken as a result of the inspection of 20 February, but rather the inspection of 13 March;

b) no enforcement action was taken in relation to the Appellant **not** being a member of a client money protection scheme, but rather its failure to publish a statement outlining whether or not the business was in fact a member of any such scheme;

c) when the Council officers visited the premises on 13 March, they could not see any notice of fees and charges, and furthermore the Appellant's staff could not find any notice either;

d) the amount of the penalty was in keeping with the Guidance for Local Authorities published by the Department for Communities and Local Government in March 2015, and the communication from the Ministry of Housing, Communities and Local Government from January 2019 to the effect that multiple breaches occurring concurrently should be dealt with as one single breach for the calculation of the penalty;

a. no accounts were furnished to the Council to show that the business would suffer undue financial hardship.

[6] TRIBUNAL DELIBERATIONS:

a) The Breach:

The Council case that the breach has been occasioned does not seem to be in dispute when the Appellant has conceded it engages in "*the maintenance/management of three properties"*; They have set out how that breach manifested itself in the witness statement of Nicole Terrieux, Consumer Protection Manager with the Respondent Council dated 14 August 2019 and the witness statement of Gareth Morris dated 13 August 2019.

The Council is not obliged to ensure that all businesses within its purview are fully aware of their statutory obligations: see *Metropole Properties Ltd v Westminster Council* PR/2016/0050. Where businesses choose to operate in a particular sphere, it is their obligation to inform themselves of their legal obligations and ensure that, at all times, they are operating in compliance with all relevant laws. The Council has shown evidence that it did attempt to inform the Appellant, but whether it did or did not is immaterial to the determination of whether an actionable breach of the legislation occurred. Detailed witness statements have been provided by the Council including a witness statement from Gareth Morris, a Trading Standards Officer with the Respondent Council, dated 13 August 2019, which supports the their Response to the Appeal.

On foot of the evidence provided, the Tribunal is satisfied that the Appellant was in breach as alleged.

b) Penalty:

To turn then to the question of whether the level of fine was justified. The Tribunal is aware of Guidance for Local Authorities published by the Department for Communities and Local Government in March 2015, in which it is stated that the expectation is that the imposition of the maximum fine should be the norm, save where there are clear extenuating circumstances. Local Authorities are obliged to consider this Guidance under s.87(9) of the Act.

The Council is not obliged to ensure that all businesses within its purview are fully aware of their statutory obligations: see *Metropole Properties Ltd v Westminster Council* PR/2016/0050. Where businesses choose to operate in a particular sphere, it is their obligation to inform themselves of their legal obligations and ensure that, at all times, they

are operating in compliance with all relevant laws. The Council has shown evidence that it did attempt to inform the Appellant, but whether it did or did not is immaterial to the determination of whether an actionable breach of the legislation occurred..

*The expectation is that a £5,000 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 makes during the 28 day period following the authority's notice of intention to issue a fine.*

The Respondent has produced a "Balance Sheet" which is not which is not authenticated as an audited account, Tax Return or otherwise acceptable verified statement as to their financial affairs and have failed to demonstrate extenuating circumstances.

[6] TRIBUNAL COCLUSIONS:

In the circumstances and for the reasons above, the Tribunal **r**efuses the appeal in its entirety.

Brian Kennedy QC 14 October 2019.

Promulgation Date 16 October 2019