



**First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation**

Appeal Reference: PR/2017/0009

Held on the papers

Before

JUDGE CLAIRE TAYLOR

Between

ASHLEY CHARLES LTD

Appellant

and

READING BOROUGH COUNCIL

Respondent

Decision

This appeal is allowed.

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 Reading Borough 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. (See Paragraph 3 of Schedule to the Order).
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.

10. The Schedule to the Order provides as follows:

“Final notice

- 3.(1) After the end of the period for making representations and objections, the enforcement authority must decide whether to impose the monetary penalty, with or without modifications.
- (2) Where an enforcement authority decides to impose a monetary penalty on a person, the authority must serve on that person a final notice imposing that penalty.
- (3) The final notice must include—
- (a) the reasons for imposing the monetary penalty;
 - (b) information about the amount to be paid;
 - (c) information about how payment may be paid;
 - (d) information about the period in which the payment must be made, which must not be less than 28 days;
 - (e) information about rights of appeal; and
 - (f) information about the consequences of failing to comply with the notice. “

11. 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 organisation 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.)

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

Final notice

13. In the present case, the final notice of 30 January 2017, stated that the Appellant was not a member of a redress scheme from 7 to 24 November 2016, and had committed a breach of duty under articles 3 of the Order. The amount of the penalty was stated to be £5,000. The fine of £5,000 had been specified by the Council in its earlier notice of intent of 22 November 2016. On 24 November 2016, the Appellant was registered as a member of a redress scheme.

The appeal

14. The Appellant appealed to the Tribunal. Both parties were content for the matter to be determined without a hearing. 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.
15. The Appellant¹ made various points in the Notice of Appeal as follows (which I have organised purely for ease of reference):
- a) The amount of the monetary penalty and the decision is unreasonable. The losses of the business were no longer sustainable. If they had had £5,000, they would still be in business. The last member of staff left at the end of October 2016, because the wages could not be paid. Their lease runs out on April 2017. Their end of tax year is March 2017, at which point the company will be wound up having made a loss.
 - b) As of the end of September 2016 they effectively stopped trading. They no longer advertised in the local newspapers, and served notice on advertising on national property portals like Rightmove etc. There were postings on social media because they had used an external company to do these and had had to serve three months notice.

¹ Whilst it is understood that Mr Hettiaratchy is the director of Ashley Charles Ltd, no individual is identified in Notice of Appeal before me and it is undated. It was received by the First-tier Tribunal on 24 February 2017.

- c) As had been explained to the Council, they had been trying to sell the business and an ex-employee was going to buy it. They expected a sale to be completed by the end of November 2016. However by the new year, it had become obvious that the employee could not raise the funds.
 - d) Within an hour of Mr Evans notifying them during their phone-call that they were in breach, they had joined the redress scheme he had advised them to join. Within an hour of receiving Mr Evans' letter that our website was in breach they took all the content of the website offline.
 - e) The only thing they were doing was managing properties. They were not looking or advertising for new business. They had no properties on for sale or to let. As far as they were concerned, they had to ensure the tenants' deposits were covered by a dispute service, and they were covered by 'My deposits' until they sold their good will. The public were not going to find the website unless they were specifically looking for Ashley Charles Ltd. When people look for something on the net i.e. estate agents.
 - f) Previously, since 2004, they had never been in breach of any regulations. Trading Standards have never contacted them over any issues.
 - g) Since 2007 they have been a multi award-wining agency based on clients voting for them.
16. The Appellant also provided accounts showing an abbreviated balance sheet for 2016 and 2015. This showed a negative balance for capital and reserves. The total assets less current liabilities were shown as a negative balance. They were stated as -£8,857 for 31.3.15, and -£42,583 for 31.3.16.
17. The Appellant set out details of various awards for service as estate agents.
18. The Council's Response is presented in the form of a Witness Statement from Senior Tradings Officer Paul Evans, as well as information provided in the Bundle. The Council's case includes the following arguments:
- a) On 10 October 2016, a letter with associated guidance, was sent to the Appellant advising that a visit was scheduled for 19 October 2016.
 - b) A couple of days later, Mr Hettiaratchy called advising that he could not make the day of the scheduled visit and in any case he was selling the business. He said this would be sometime in the new year. Mr Evans him that would check the compliance of the company's website revert.
 - c) He found a number of breaches when checking the website.

- d) He contacted the Property Ombudsman who advised him that the company's membership had lapsed.
- e) Where the Appellant states that as of the end of September 2016 they effectively stopped trading, it is unclear what this means. Mr Hettiaratchy only informed him that he was selling the business implying that the company was still active.
- f) Ashley Charles emailed the Property Ombudsman on 14 October 2016, stating they were in the process of selling parts of the business, and it would then stop trading as an estate agent. This also implies that the business was going to be active until the proposed sale of the business.
- g) On 8 November, Alexandra Bryan, took photos for the Council of the outside of the premises of Ashley Charles. This showed advertising within the window display of the company effectively seeking business.
- h) On 17 November, Alexandra took screenshots that clearly demonstrate activity and forms of seeking business on social media.
- i) On 22 November, he served a notice of intent.
- j) On the 24th November, Mr Hettiaratchy contacted him stating that Ashley Charles was no longer trading and therefore questioned the need to belong to a redress scheme. Mr Evans asked him if he was still advertising. He said that he was not on Rightmove, Zoopla and had just taken down his website down. However, he confirmed that he was still managing properties. Mr Evans advised that he then would still need to belong to a redress scheme. Mr Hettiaratchy suggested he would renew his membership. Mr Evans advised that the notice of intent would still stand but that he had an opportunity to make written representations.
- k) The Appellant states in his grounds of appeal that within an hour of Mr Paul Evans notifying us on the phone on 21 November that they were in breach they joined the redress. The date is clearly incorrect.
- l) On the 9 January 2017 Yasmin Ahmad, Private Sector Housing Team Manager for Reading Borough Council, Anne McMahon, Principal Environmental Health Officer and Mr Evans met to evaluate the Mr Hettiaratchy's representations sent following the notice of intent. All agreed that the notice was served correctly and that the representation made, whilst very unfortunate, did not give rise to the notice being quashed or reduced. It was noted that Mr Hettiaratchy had many years of experience in the property industry and was totally aware of his legal obligations. The decision to impose a final notice was agreed. Reference was made to the

Department of Communities and Local Government guidance, and the expectation that the £5000 monetary penalty would be imposed.

- m) The fixed notice included the following:
- a. The Property Ombudsman allowed Ashley Charles Ltd a substantial period of time to renew and become compliant.
 - b. Ashley Charles Ltd had joined the Property Redress Scheme. Ashley Charles Ltd are now compliant but would not be had it not been for Mr Evans' advice. Within the period of non-compliance tenants and landlords of Ashley Charles Ltd would have been left with no mechanism of complaining to an independent body to seek redress, despite Ashley Charles Ltd still advertising the Property Ombudsman logo.

19. In support of the Council's case, it produced an email from the Property Ombudsman. This confirmed that Ashley Charles Ltd had not renewed its membership fee due in August 2016. After reminders, membership ceased on 7 November 2016.

Findings

20. It is clear that the Appellant failed to comply with the legislation set out above insofar as it failed to be a member of a redress scheme whilst managing properties. The Appellant does not seem to have disputed this. Therefore, there was a legal basis for the Council to serve a notice of intent. There is also no suggestion that there was a procedural irregularity making the final notice void. The issues before me are whether, in all circumstances (as found by me), the amount of the penalty was unreasonable; or the decision to fine the company was unreasonable for any other reason. On making a finding, I may quash, confirm or vary the final notice.²
21. On these issues, I prefer the evidence and submissions of the Appellant. I consider the fine unreasonable in the circumstances and highly disproportionate. This is because:
- a. The Appellant has produced Accounts showing that it has no funds.
 - b. The Appellant had not been able to afford to pay staff and had let them go.
 - c. As at the time of the Notice of Appeal, the Appellant states that the company was shortly to be wound up having made a loss.
 - d. The Appellant was not a member of a scheme for less than 3 weeks. The Appellant clearly responded promptly to the notice of intent and extremely quickly re-joined the scheme after having discussed

² See paragraph 9.

what was needed with Mr Evans. It had no history of poor management or complaint.

22. I have seen no reason not to accept the accounts and that the business was about to be wound up having made a loss. In particular, the Council has not disputed this or addressed the point.
23. The Appellant did state that at the time of the notice of intent, it was managing properties and was trying to sell its business. Although it still had a presence online, and advertised in its window, it was not receiving business and does not seem to have been very actively looking for any. The adverts seem reasonable for a business that was seeking to sell as a going concern.
24. The Council states that as the agent was experienced, it should have complied with the regulations. Mr Evans states that he had originally intended to visit the premises. He would then have met with the Appellant and presumably discussed the obligations. This never happened. It seems that once the notice of intent was served, the Mr Hettiaratchy contacted him and they did discuss the necessary obligations. The director immediately rectified the matter.
25. I am not satisfied that the Council is correct to rely on the Guide to support a fine of £5,000. It seems to have taken an overly restrictive approach.
26. Paragraph 11 above quotes the Guide. It makes clear the expectation that £5,000 should be considered the norm. However, 'norm' does not mean that it is a fixed and absolute amount. The Guide states that it will be up to the enforcement authority to decide what extenuating circumstances there might be, taking into account any representations from the agent.
27. Likewise, the legislative process indicates that the Council ought to consider the particular circumstances of the case and when to exercise its discretion. (Paragraph 8 above summarises the procedure for the imposition of a penalty is set out in the Schedule to the Order. The notice of intent is required to set out the right to make representations and objections. The Council must then decide whether to impose the monetary penalty, with or without modification.)
28. I am not satisfied that the Council properly considered whether there were extenuating circumstances. It has not shown any policy that it applies when considering representations and what (if anything) it might consider extenuating circumstances.
29. The Guide specifically seems to suggest examples of extenuating circumstances. These are, if the penalty would be disproportionate to the

turnover/scale of the business or would lead to an organisation going out of business. Both seem extremely pertinent here.

30. It also states that the authority might give a lettings agent or property manager a grace period in which to join one of the redress schemes rather than impose a fine. Whilst the Council refers to the Property Ombudsman as having given the Appellant time to renew, that body is totally separate from the Council. The Council does not seem to have given any such grace period. There seems to have been no warning made between the time Mr Hettiaratchy contacted Mr Evans to state that he could not make the inspection meeting on 19 October and the issuance of the notice of intent. Further, Mr Hettiaratchy has shown to be proactive in contacting Mr Evans in response to communications. He joined a scheme straight after a conversation with Mr Evans who had informed him that he had obligations related to managing properties. The Council is not required to give a grace period, but in the circumstances, it might have been beneficial to do so. Had it done so, it seems likely that the Appellant would have complied.
31. Even if the Council properly considered the extenuating circumstances, based on the information now before me, I consider that the fine is completely disproportionate. Having considered all the evidence and submissions, I find that a decision to fine would not be appropriate and that the Appellant is not required to pay any amount.

Decision

32. Accordingly, I allow the appeal.

Dated
Promulgation Date

Judge Claire Taylor
25 September 2017
25 September 2017