IN THE FIRST TIER TRIBUNAL **PR/2017/0012**

(GENERAL REGULATORY CHAMBER)

MARCUS JAMES t/a Marcus James (UK) Limited

Appellant

and

LONDON BOROUGH OF NEWHAM

Respondent

JUDGMENT

Hearing: 14 August 2017 at Field House, London.

Appearances:

Jamil Sadiq & Lina Sadiq as as Litigants in person for the Appellant

Ryan Thompson of Counsel for the Respondent.

Subject Matter: The Appeal is against a decision of the Respondent to impose a penalty on the appellant pursuant to a final determination on 22 March 2017. The Appellant "would like that a penalty charge be withdrawn".

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal.

REASONS:

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 FLP/MHM/MJ issued by the London Borough of Newham ("the Council"), in which the Council imposed a financial penalty of £10,000 on the Appellant company for failure to display information required by statute on the Appellant's website.

Legislation

2. 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.

3. 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.

4. 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.

5. 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.

6. 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)).

7. 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.

8. 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

9. In the present case the Final Notice dated 23 March 2017, addressed to Marcus James T/A Marcus James Builders Ltd and Roomshare Limited, stated that the Council believed that on dates between 18 July 2016 and 20 January 2017 the appellant had committed breaches of its duty to publicise fees, fee information and details of any client money protection scheme on its website and in its premises contrary to section 83(3), (4) and (6) of the 2015 Act.

The Appeal

9. The Appellant appealed to the Tribunal on 18 April 2017. Whilst it did not explicitly rely on any of the four grounds for appeal, it did take issue with some of the factual circumstances relied upon by the Council in the Final Notice, and stated that any breaches were as the result of honest misunderstandings and ignorance of the legal requirements.

Chronology

10. Meredith Howell-Morris, Trading Standards Officer for the Council, issued the Final Notice and provided a witness statement to the Tribunal detailing the chronology of the Council's dealing with the Appellant. On 26 May 2015, the Council wrote to all agents within the Borough advising them of their legal obligations under the 2015 Act. On 18 July 2016, Mr Howell-Morris visited the Appellant's premises and found that they were not displaying fees or charges, were not a member of a redress scheme, and did not display whether they were a member of a client money protection scheme. These issues were explained to Ms Lina Sadiq, and a non-compliance notice was left at the premises.

11. Ms Sadiq, in the Notice of Appeal, accepted this, but stated that as the Appellant was a new company "all this...is new to us" and she did not understand what was required. She stated that she complied with all aspects of the notice as far as she understood them to require were complied with within four days.

12. Mr Howell-Morris conducted another visit to the premises on 15 September 2016. He found that fees, charges and membership of a redress scheme were now displayed, there was still no notice displaying client money protection information. He further informed Ms Sadiq that website checks would be conducted in the near future.

13. Ms Sadiq claims that during Mr Howell-Morris's visit she asked him if anything else was required under the legislation, and he only replied that she could display on advertisements what type of property license was held. She claims that he did not explain that a Client Account is not the same as a client money protection scheme, and that was an honest misunderstanding on the company's part.

14. On 21 December 2016 the Council sent a letter to the Appellant clarifying the legislative requirements regarding the displaying of fees, client money protection information, and redress schemes.

15. Mr Howell-Morris checked the website of the Appellant on 20 January 2017 and found no mention of fees or charges. On foot of this he visited the premises on the same day and noted that there was no information displayed regarding client money protection schemes. As a result, he issued a Notice of Intent to impose a monetary penalty of £5,000 for each offence of failing to display a list of fees and fee information on the website and of failing to display details of any client money protection scheme.

16. Ms Sadiq stated that certain certificates were in the premises, but had been temporarily removed to facilitate electrical work. Mr Howell-Morris accepts that he was shown various certificates, but they did not include any information regarding a client money protection scheme. She advises that upon learning of the non-compliance she made immediate contact with her IT engineer to rectify the website non-compliance and applied to become a member of CMP. Mr Howell-Morris provided evidence that the Appellant had not actually become a member of CMP until 25 January 2017.

17. On 23 January 2017 the Appellant appealed the Notice of Intent. In a letter to the Council, Mr Jamil Sadiq claimed partial compliance with some of the issues raised in the visits, but claimed not to have received correspondence as a letterbox had been stolen in December 2016. He also claimed to have had IT issues owing to an employee unexpectedly leaving the country. The Council queries the purported impact of this, given Ms Sadiq's claims to have immediately contacted her IT engineer on 20 January 2017 to rectify the issue.

18. The Council responded on 24 February 2017 to the effect that it would postpone the issuing of a Final Notice for ten working days to allow the Appellant to submit additional information such as a police crime number of Companies House accounts. Ms Sadiq replied on behalf of the Appellant on 7 March 2017 but did not provide any additional information as *per* the Council's advice, but claimed that it had in fact complied with all legal requirements. As a result, Mr Howell-Morris visited the premises on 22 March 2017 and issued a final notice.

19. Upon receipt of the Notice of Appeal, the Council raised concerns about the identity of the Appellant. Checks with Companies House reveal that 'Marcus James' or 'Marcus James Limited' do not exist; however, two linked companies are registered at the premises of the Appellant, one being Marcus James Builders Limited (incorporated on 18 April 2016) and the other being Roomshare Limited (incorporate on 12 July 2016). Roomshare Limited has a stated business of 'management or real estate on a fee or contract basis' with Jamil Mohammed Sadiq as sole director. Marcus James Builders Limited lists Jamil Mohammed Sadiq as 'managing director', Lina Sadiq as co-director and has no identified nature of business. The Council issued notices against Marcus James as a trading identity and each limited company, but it queries, which entity is actually trading or whether Mr Sadiq is acting as a sole trader or in partnership with Ms Sadiq.

20. The Council contends that between July 2016 and January 2017 the Appellant was afforded ample time to remedy the breaches that were clearly explained. Regarding the plea that it was a newly established company, the Council notes that the Appellant's website holds it out as a "family run business with over 100 years experience between us" and that they "currently manage a vast range of properties". The Respondent argues that Appellant cannot on the one hand advertise itself as experienced and simultaneously claim naivety. It is, the Respondent argues, incumbent upon the Appellant to discharge its legal duties, and if it has no knowledge of the requirements upon it then the failing is more fundamental and significant than an isolated breach.

TRIBUNAL FINDINGS

21. 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 Appellant to date has not disclosed its accounts or given anything more than bare assertions that the imposition of a penalty would cause it to fall into debt. However this Tribunal sought and gave time for the Company accounts to be produced. When produced the accounts demonstrated a profit and no evidence of specific circumstances of hardship or grounds for leniency was produced. The Respondent's Counsel took instructions and confirmed that had these accounts been produced they would not provide evidence that would allow a reduction on the fine imposed. The Tribunal has not been persuaded that the Respondent was unreasonable in assessing the quantum of the fine in all the circumstances and accordingly upholds the sum of the fine imposed.

22. The Tribunal heard sworn evidence on behalf of the Respondent from Meredith Howell-Morris who adopted his witness statements of 17 May and 12 July 2017. It fully supported the Respondents case and cross-examination was by way of criticism of this witness's ability to warn the Appellants that they were continuing to be non compliant. This amounted not to a defence but a complaint that that they had not been "properly advised and instructed". The Tribunal accept the Respondents submission that the onus on compliance rests with the Appellant and there is no duty on the Respondent to assist or otherwise ensure that the Appellant takes all necessary steps to be compliant.

23. The Tribunal heard sworn evidence on behalf of the Appellant from Infan Ayub, an employee of the Appellants at all material times and still working for them.. He confirmed that he met Meredith Howell=Morris on each of the occasions he visited the Appellants premises and confirmed that he, Mr Howell Morris, had explained what was necessary to be complaint..

24. On the evidence therefore there was no issue on the facts. The Appellants case is that that had been mis-led and did not realise they were non-compliant. The evidence from the witnesses who gave evidence did not support this. However even if there was uncertainty or the Respondents witness had not clearly set out what further steps were required, the offence is effectively one of strict liability

25. In the circumstances and for the reasons above, the Tribunal refuses the appeal in its entirety.

COSTS

26. The Council has not applied for costs.

Judge Kennedy QC
21 August 2017.
Promulgation date 23 - 08 - 2017