First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2017/0050

Heard at Lincoln Court Hearing Centre
on 11th May 2018

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

A partnership of James Whiting, Kim Whiting, Spencer O'Leary, Sarah O'Leary, Nick O'Leary and Karen O'Leary trading as LETS4U

Appellant

and

NORTH KESTEVEN DISTRICT COUNCIL

Respondent

DECISION

1. The Appeal is allowed. The final notice dated 28th November 2017 served by North Kesteven District Council ("North Kesteven") on a partnership trading as Lets4u

(LETS4U") was wrong in law in concluding that LETS4U was engaged in lettings agency work and was therefore required in law to belong to a redress scheme.

REASONS

A. Background

2. LETS4U appealed against a final notice reference 513550 dated 28th November 2017 (the "Final Notice") served on it by North Kesteven, which is the enforcement authority for letting agents and property managers carrying on business in North Kesteven. The Final Notice is addressed to LETS4U at PO Box 1284, Lincoln LN5 QT. LETS4U is a trading name used by a partnership of James Whiting, Kim Whiting, Spencer O'Leary, Sarah O'Leary, Nick O'Leary and Karen O'Leary (the "Partnership"). The Final Notice requires LETS4U to pay a penalty charge of £5,000 in respect of its failure on 27th October 2017 to meet its duty under The Redress Scheme for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc. (England) Order 2014 (the "Order") to belong to an approved redress scheme whilst engaged in lettings agency work.

B. Legislation

3. The Order was issued in order to permit the exercise of the powers conferred by the Enterprise and Regulatory Reform Act 2013 (the "Act"). The sections of the Act and the Order that are referred to in this decision or that are otherwise relevant to this appeal are set out below in the Annex, which forms a part of this decision.

4. Where the relevant enforcement authority is satisfied on the balance of probabilities that a letting agency has breached its duties under the Order, it may impose a monetary penalty under article 8 of the Order. It does so by serving first a notice of intent, considering any representations made in response, and then serving a final notice on the letting agent concerned.

5. The Order provides that a letting agent upon whom a financial penalty is imposed may appeal to this tribunal. The permitted grounds of appeal are (a) that the decision to impose the financial penalty was based on an error of fact; (b) the decision was wrong in law; (c) the amount of the monetary penalty is unreasonable; or (d) the decision was unreasonable for any other reason. The tribunal may quash, confirm or vary the final notice which imposes the financial penalty

C. Guidance

6. The Act and the Order are the subject of Guidance for Local Authorities issued by the Department for Communities and Local Government in March 2015 (the "Guidance"). The Guidance is non-statutory but the relevant enforcement authority is expected to have regard to it when considering what fine is reasonable for a breach of the Order. The section of the Guidance that is of greatest relevance to this appeal is set out below:

"*The enforcement authority can impose a fine of up to £5,000 where it is satisfied, on the balance of probability that someone is engaged in letting or management work and is required to be a member of a redress scheme, but has not joined.*

………………..

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.)]

D. The Appeal

7. On 28th December 2017 LETS4U submitted a Notice of Appeal to North Kesteven setting out their grounds of appeal against the Final Notice. The main points of LETS4U's grounds of appeal are:
   - It was not obliged to be registered with a redress scheme as it was only managing and seeking tenants for properties that it owns.
   - It had raised this issue with North Kesteven as soon as they received the notice of intent and it had been led to believe that it would receive an answer on this issue before it would be required to join an approved redress scheme.
   - It had no objection to joining a redress scheme if it was required to do so.
   - LETS4U has licensed HMO properties, is a member of the Residential Landlords Association, is accredited under the Lincoln University landlords' scheme, uses the TDS scheme for its deposits and uses Your Move to check rents, undertake credit checks, guarantor checks and advertising for tenants.

8. North Kesteven submitted a response to the appeal in which they stated that they had received a complaint from a tenant who was renting a property from LETS4U within North Kesteven on 20th October 2017. North Kesteven had checked LETS4U's website and found no details of any redress scheme membership. North Kesteven believe that LETS4U is engaging in lettings agency work as defined in the Order even though they understand the services that are provided by Your Move to LETS4U. They concluded that LETS4U are required to belong to a redress scheme. North Kesteven described the process that they had been through before issuing a notice of intent dated 27th October 2017 (the "Notice of Intent") in which they explained that they regarded LETS4U as carrying on lettings agency work and property management

work without being a member of a government approved redress scheme. They described the representations that they had then received from LETS4U and the decision that they had taken to issue the Final Notice and attached the correspondence that had been sent by the parties during the process. They explained that their legal department had decided that LETS4U was carrying out lettings agency work and therefore needed to belong to a relevant redress scheme.

9. The representations submitted by LETS4U in response to the Notice of Intent stated, amongst other things, that LETS4U is a family run business that manages its own properties and not those of other landlords. The family members owning the business were listed. It had 27 properties in the Lincoln and North Kesteven areas and these were targeted at students or let as homes in multiple occupation. They had appropriate licences and registration. They provided a list of LETS4U's properties.

E. ***The Hearing***

10. The hearing of the appeal took place on 11th May 2018. Mr Spencer O'Leary and Mr James Whiting represented LETS4U. North Kesteven was represented by Mr Phillip Jennings from their Legal Dept. and Mr Christopher Gallimore a Housing Enforcement Officer. I am grateful to both parties for the clear manner in which they expressed their view and for their polite and focused dealings with each other during the hearing.

11. On the day of the hearing North Kesteven submitted a witness statement from Mr Gallimore. Mr Gallimore set out the procedure that North Kesteven had followed in issuing the Notice of Intent and the Final Notice and summarised the contents of the correspondence between North Kesteven and LETS4U. He provided copies of the Act and the Order.

12. It was common ground between the parties at the hearing that on 27th October 2017 LETS4U was letting out residential properties in North Kesteven under domestic tenancies and was not a member of a redress scheme approved under the Act. Mr Jennings confirmed that North Kesteven was not arguing that LETS4U were carrying out property management work on 27th October 2017 and did not challenge LETS4U's assertion that they owned all of the properties that they let to domestic tenants. I find that the evidence supports these conclusions and in the light of the agreement of the parties, I do not think it necessary to set out the evidence in full on these issues in this decision.

13. Mr O 'Leary opened the hearing and set out the basis for LETS4U's appeal. He stated that there were in essence two grounds for the appeal: Firstly, he stated that LETS4U was not carrying out lettings agency work as it was only letting out properties that it owned. Secondly, he stated that they had been led by North Kesteven to believe that they would receive an answer on the issue of whether they were carrying on lettings agency work and therefore had to join a redress scheme before they had an obligation to join an approved redress scheme. Therefore, he argued that North Kesteven did

not follow due process in issuing the Final Notice before providing LETS4U with an answer on the question of whether they were carrying on business in lettings agency work.

14. Mr Jennings agreed that these were the only issues in dispute. Mr Jennings stated that LETS4U had been given enough time in which to register with a redress scheme. He disputed that LETS4U had been given the impression in their phone call with Mr Gallimore that North Kesteven would not proceed to impose a penalty before taking further steps to clarify their position on the representations submitted by LETS4U. Both Mr Jennings and Mr Gallimore accepted that the Notice of Intent dated 27th October 2017 had given LETS4U 28 days to make representations and that an e-mail dated 15th November from Mr Gallimore had sought further clarification from LETS4U of their representations. No response was given to LETS4U once the clarification was received. North Kesteven had considered the contact that had taken place and the representations they had received and decided to issue the Final Notice. Mr Gallimore of North Kesteven was questioned by Mr O'Leary on the contents of his witness statement and on the procedure followed by North Kesteven leading up to the issue of the Final Notice.

F. Submissions on the issues in dispute- Whether LETS4U are engaged in lettings agency work?

15. I asked Mr O'Leary to clarify the status of LETS4U and the ownership of the properties that they let out, maintained and managed. He stated that LETS4U is a partnership between the individuals listed in paragraph one above and that LETS4U is a brand name of the Partnership. He said that there is a partnership agreement in place and the Partnership is registered with HMRC. All of the properties that they managed and let out were owned by the Partnership, but were registered in Mr O'Leary's name. LETS4U did not undertake any work for any other landlords. They had properties in North Kesteven, Lincoln and Bristol. Mr O'Leary was not certain, and did not acknowledge, that LETS4U was carrying on a business as it accounted to HMRC for its income as revenue from property rather than trading activities. LETS4U used other parties, mainly "Your Move" in order to find prospective tenants and to undertake checks on tenants and handle deposits.

16. On this issue Mr Jennings stated that LETS4U met the definition of "lettings agency work" in section 83 (7) (b) of the Act as their business involved advertising their property and doing things in response to instructions received from people seeking to find somewhere to rent. Mr Jennings stated that dealing with instructions from prospective tenants included responding to enquiries about a property, taking the prospective tenants to go and see the property, entering into a tenancy agreement and requesting deposit guarantees. Mr Jennings referred to the guidance on the Act issued by the Dept. of Communities and Local Government in October 2014 and entitled "Letting Agents and Property Managers – Which Government approved redress scheme do you belong to" He gave copies of this guidance to the tribunal and to LETS4U and referred to the section which read as follows

"Does the requirement apply to landlords?
Landlords are not explicitly excluded from the requirement but are not generally caught by the definitions give above as they are not acting on instructions from another party."

G. ***Findings:*** *Whether LETS4U are engaged in lettings agency work?*

17. Subject to specified exceptions in subsections (8) and (9) of section 83 of the Act, 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').'

18. It is clear from the facts in this case that LETS4U are not doing things in response to instructions received from prospective landlords. LETS4U is the landlord of all of the properties that they are letting. North Kesteven asserts that LETS4U are doing things in response to instructions received from prospective tenants. I note that both the Guidance and the guidance referred to by North Kesteven in paragraph 16 above contain the same phrase explaining that Landlords "*are not generally caught by the Act as they are not acting on instructions from another party*". I have examined the evidence to see if there is a reason to conclude that LETS4U is acting on the instructions of prospective tenants. LETS4U advertise their properties and they have direct contact with the prospective tenants and enter into tenancy agreements directly with them. The work done by Your Move is set out above and I conclude that Your Move provides services to LETS4U that assist them in marketing and letting their properties.

19. I find that the actions of LETS4U in response to prospective tenants that Mr Jennings referred to; responding to enquiries for tenants about a property, arranging viewings, entering into tenancies and taking deposits and deposit guarantees, are all actions that LETS4U are taking on their own behalf in order to find tenants for their properties. It would be artificial to construe these actions as deriving from instructions received from prospective tenants when LETS4U are acting on their own account in letting properties and not doing so in response to requests or instructions from prospective tenants. I have not found any basis in the Act or the Order for such an artificial construction. The actions taken by LETS4U are consistent with those of a landlord offering their premises to prospective tenants and taking steps, in their own interests and of their own volition, to arrange tenancies of their properties. As a consequence of this finding and on the basis of all of the evidence provided to me, I find that LETS4U were not engaging in lettings agency work on 27th October 2017.

20. In the light of this conclusion it is not necessary for me to determine the issue of whether North Kesteven should have provided LETS4U with an answer on the question of whether they were carrying on business in lettings agency work before they issued the Final Notice.

H. ***Decision***

21. In reaching a decision in this case I have had regard to all of the oral submissions at the hearing and also to the written submissions, evidence and other documentation contained in the hearing bundle.

22. By virtue of Article 9 of the Order, the Tribunal may quash, confirm or vary a Final Notice.

23. The Final Notice served on LETS4U contained an error of law in concluding that LETS4U were carrying out lettings agency work on 27th October 2017 and accordingly I quash the Final Notice.

24. The Appeal is allowed.

Peter Hinchliffe
Judge of the First-tier Tribunal
26th May 2018
Promulgation Date 1 June 2018

ANNEX

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 section 84 (6) provides that;

   " '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."

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.

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.