IN THE FIRST TIER TRIBUNAL **PR/2019/0013**

(GENERAL REGULATORY CHAMBER)

GOLDMARQUE SOLUTIONS LTD t/a LETTING GENIE

and

MILTON KEYNES COUNCIL

Decision

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 the Consumer Rights Act 2015 ("the 2015 Act). It is an appeal against a Final Notice issued by Milton Keynes Council ("the Council"), in which the Council imposed a financial penalty of £1,250 on the Appellant for failure to display a list of fees or details of membership of any redress scheme.

Legislation

Fee Publicising

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.

Client Money Protection Scheme

6. The Consumer Rights Act 2015 also imposes duties on letting agents engaged in letting agency or property management work to publish 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:
   (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.

Final Notice

9. In the present case the Final Notice dated 4th January 2019 stated that the Council believed that between 21st September 2018 and 13th October 2018 the Appellant had committed breaches of its duty to publicise a list of fees and details of membership of any redress scheme contrary to sections 83(3) and (7) of the 2015 Act.

The Appeal

10. The Appellant appealed to the Tribunal on 4th February 2019 and made the following points:

a) the Council refused to provide details of the complaint made to Trading Standards regarding its website, and as such denied the Appellant a right of reply;

b) the Council failed to take adequate consideration of the mitigating circumstances, including efforts taken to construct the new website that led to reduced access to the existing website and increased the costs of amending it;

c) the Council at no stage suggested that the existing website be taken down if compliance could not be met;

d) the website displayed the logo of the Property Ombudsman on the homepage, and while the Appellant had transferred membership to the Property Redress Scheme, there was never a break in membership;

e) the Appellant never received guidance from Trading Standards about its obligations under the 2015 Act;

f) the Appellant misunderstood its obligations in regards to uploading properties to Rightmove, as it thought that mere contact details would be sufficient.

11. The Council responded, noting the following facts:

a) the manner in which the complaint came to the Council does not have any bearing on whether in fact the website was compliant with the 2015 Act, which was self-evident and not dependent on any right of reply;

b) it is not the Council's responsibility to advise the Appellant to close the website – it advised the Appellant of its legal obligations and suggested taking legal advice as to how to comply with those obligations;

c) the fact that it was not cost effective for the Appellant to make changes to the old website does not relieve it of its obligations under the 2015 Act;

d) the efforts made by the Appellant to ensure the compliance of his new website are admirable and have resulted in a significant diminution of the fine imposed but do not negate the fact that the non-compliance existed between the dates in question.

TRIBUNAL FINDINGS

12. On the evidence there was no issue on the facts. There has been no material error of fact or law that would render the Council's decision to impose a penalty for non-compliance. The technical difficulties that the Appellant encountered when dealing with the old website are mitigating factors, not exculpatory ones. In particular it is noted that the website displayed the logo of a redress scheme of which the Appellant was no longer a member: this is evidently a breach of s83(7), which imposes an obligation to

display a statement concerning *current* membership. Considerations as to cost are no reason to demur from statutory obligations. The breaches are therefore made out.

13. 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. Guidance from the Ministry of Housing, Communities and Local Government from January 2019 suggests that multiple breaches occurring at the one point in time should be treated as one breach for the purposes of determining the maximum level of penalty. The Council's mitigation of the fine is, in our view, generous, and the Tribunal sees no reason to interfere with it.

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

Brian Kennedy QC 30 August 2019.

Promulgation Date 3 September 2019