IN THE FIRST TIER TRIBUNAL **PR/2019/0024**

(GENERAL REGULATORY CHAMBER) **PR/2019/0025**

WEX & CO

and

LONDON BOROUGH OF BRENT

DECISION

HEARING: FIELD HOUSE LONDON ON 13 AUGUST 2019.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal.

REASONS OF THE TRIBUNAL

Introduction

1. This decision relates to the above-related appeals brought under Schedule 9 of the Consumer Rights Act 2015 and Article 9 of The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc.) (England) Order 2014. The related appeals are against the Final Notices issued by **London Borough of Brent** ("the Council"), in which the Council imposed two financial penalties of **£2,500 each** on the Appellant for failure to be a member of a redress scheme, and both in the premises and on the website failure to publish details of a client money protection scheme or a full list of fees.

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

(5) 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),

(6) 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

(7) 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 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:
    (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.

Redress Scheme

9. Section 84(1) of the Enterprise and Regulatory Reform 2013 provides that
    "(1) The Secretary of State may by order require persons who engage in property management 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."

10.Section 84(2) explains that ‘redress scheme’ means the same as outlined in Section 83(2), which states:-

> “(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.”

11.Subject to specified exceptions in subsection (7) of section 84, property management work is defined as follows:-

> “(6) In this section, “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.

12. Pursuant to the 2013 Act, the Secretary of State has made 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”). The Order came into force on 1 October 2014. Articles 3 and 5 of the Order provide that a person who engages in letting agency or property management work must be a member of a redress scheme designated or approved by the Secretary of State for dealing with complaints in connection with that work.

13. Article 6 provides specific exclusions of certain actions from the definition of ‘property management’ for the purposes of the legislation.

14. 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 London Borough of Tower Hamlets.

15. 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 may 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 £5,000. The procedure for the imposition of such a 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 and its amount and giving information as to the right to make

representations and objections within 28 days beginning with the day after the date on which the notice of intent was sent. 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 (article 3).

Final Notice

16. In the present case the Final Notices dated 25th January 2019 stated that the Council believed that on 13th December 2018 the Appellant had committed breaches of its duty to be a member of a redress scheme, and both in the premises and on the website to publish details of a client money protection scheme or a full list of fees contrary to sections 82(2) and (3) of the 2015 Act, and Articles 3 and 5 of the 2014 Regulations. In regard to the redress scheme, the Council stated that the matter was "*aggravated"* by the expulsion of the Appellant company from two redress schemes in the past and nevertheless the Appellant still held out on its website and at its premises membership of a redress scheme.

The Appeal

17. The Appellant appealed to the Tribunal on 15th March 2019 and, taking first the matter of the redress scheme, stated that it was not delisted from its redress scheme by choice, and rather than intentionally falsely advertising membership when none existed, the statements at the premises and on the website were left *in situ* while the decision was challenged so as to not *"air our dirty laundry in public"*.
18. The Appellant accepted that the full list of fees was not displayed, but stated that there were the most important tenants' fees displayed and this should have mitigated the wrongdoing. It was submitted that the Appellant did not understand the legislative requirements and had never received any guidance from the Council. No specific submissions were made in regards to the failure to display details of a client money protection scheme. General submissions were made about the inability of the company to pay such a fine and the personal difficulties faced by the Appellant.
19. The Council responding by noting the following facts:
    a) whether or not the Appellant agreed with the decision to rescind its membership of the redress schemes, the fact remains that the Appellant was not in fact a member of the schemes that it claimed it was. Following the provisional decisions

to expel the Appellant, it was formally expelled from both schemes by February 2018. It was still claiming membership in December 2018;

b) Contrary to the Appellant's assertions, in December 2018 there was only one tenant fee noted on the website. Subsequent to the Notice of Intent, the Appellant added a further fourteen tenant fees, and a full set of landlords fees;

c) The Appellant was sent a detailed advice letter in relation to its obligations under the legislation on 8 September 2017, and in any event there is no requirement for an enforcement authority to ensure that all agents are fully aware of the statutory requirements: (see *Metropole Properties Ltd v Westminster Council* PR/2016/0050;)

d) The penalty is proportionate to the breaches and in keeping with the official guidance that the maximum amount of the fine is the norm, and that multiple breaches occurring at the same time should be treated as a single breach for the purposes of calculating a fine

TRIBUNAL FINDINGS

20. The Appellant requested a hearing. Mr Michael Wexler appeared for the Appellant Company, and Mr Gordon of Counsel represented the Council. Mr Wexler accepted that the Appellant Company had breached its obligations, but denied that it was intentional. He claimed that he had not received notification of his expulsion from the redress scheme because it had been sent to an email address he did not use. However, under cross-examination by Mr Gordon he conceded that he had used the email address in question to send his appeal against the fine, and received other emails sent to that address. He also denied having received the advice letter in 2017.

21. The only issue on the facts was the intention of the Appellant. This is a somewhat moot point, as breach of the statutory obligations was accepted. However, the breaches in this case were not of a minor or inconsequential nature. The claims of membership of redress schemes were misleading. The Tribunal accept the representations on behalf of the Council that the misleading claims could have led to consumers entering into arrangements or transactions that they would not otherwise have done. The Tribunal reiterates the comments of Judge Peter Hinchliffe in the *Metropole Properties* case; where businesses choose to operate in a particular sphere, it is their responsibility to be informed of their legal obligations. It is not for the enforcement authorities to take active steps to make every business under their purview aware of all the applicable legislation. Nevertheless, the Tribunal took into consideration the witness evidence of

Denise Power, a Trading Standards Officer employed by the Respondent Council and . is satisfied that the Council did make efforts to inform the Appellant of the obligations in 2017.

22. 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 fines have been limited in accordance with the communication from the Ministry of Housing, Communities and Local Government from January 2019 to deal with multiple breaches occurring at the same time. The Tribunal has considered the company accounts. It is clear that while the company is not in good health, the nature of the breaches is serious, and the Council has already limited the amount of the penalty. There is therefore no justification to reduce the penalty.
23. In the circumstances and for the reasons above, the Tribunal refuses both appeals in its entirety.

Brian Kennedy QC 30 September 2019.

Promulgation Date 3 October 2019