MISC/2478/2018

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This appeal by G Crawford Management Services Ltd, succeeds to a limited degree. I set aside the decisions of the First-tier Tribunal made on 9th July and 12th September 2018 but I substitute my own decision to similar effect but for the penalty.** This is that G Crawford Management Services Ltd ("the appellant company") was and remained (for the relevant period) in breach of the requirements of The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 ("the 2014 Order"). A financial penalty of £3000 is imposed.

2. In accordance with the provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 I give all necessary permissions and I accept jurisdiction and waive any failure to comply with procedural requirements that would otherwise prevent me from dealing with these appeals and making the above order. That parties have agreed that I should approach this matter in that way.

3. I held an oral hearing of this appeal on 27th March 2019 at Field House (London). The appellant company was represented by Thomas Jefferies of counsel, instructed by DWFM Beckman, solicitors. The respondent is the London Borough of Tower Hamlets ("the Authority") and was represented by Miles Bennett of counsel. I am grateful to them for their assistance.

The Legal Framework

4. So far as is relevant to this appeal, and subject to provisions and exceptions which I need not reproduce here, section 84 of the of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act") provides:

> 84(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 –
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> (a) a redress scheme approved by the Secretary of State, or
> (b) a government administered redress scheme.
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> 84(6) In this section "property management work" means things done by any person ("A") in the course of a business in response to instructions from another person ("C") where –
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> (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. The 2014 Order was made pursuant to the provisions of and powers in the 2013 Act and took effect from 1st October 2014. Article 5 provides:

> 5(1) A person who engages in property management work must be a member of a redress scheme for dealing with complaints in connection with that work.

The redress scheme must be one that is approved or designated by the Secretary of State (Article 5(2)).

6. Article 7 imposes a duty on every enforcement authority to enforce the 2014 Order within its area. It is agreed that for the purposes of this appeal the London Borough of Tower Hamlets is the enforcement authority.

7. Article 8 provides:

> 8(1). 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 ("a monetary penalty") of such amount as the authority may determine.
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> (2) The amount of the monetary penalty must not exceed £5000.

Article 8(3) and the Schedule to the 2014 Order set out the procedure to be followed. A notice of intent must be sent to the person stating the reasons for imposing the penalty, the amount and information as to the right to make representations and objections. After the end of the period allowed for this the authority must make its final decision, notified to the person in a final notice, which must also include specified information about the rights of appeal.

8. Article 9 provides the rights of appeal:

> 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.
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> (2) The grounds for appeal are that –
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> (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.

Background

9. There is no significant dispute about the basic facts. The Lockesfield Place Estate (sometimes referred to as the Lockes Field Estate) consists of 91 residential properties, 89 of which are leasehold. Lockes Field Management Co Ltd was the head leaseholder but subsequently became the freeholder. The shareholders are the leaseholders. Until 10th October 2017 one of the residents, GC, was a Director of this company and, since 2009, had been carrying out administrative work in connection with its maintenance of the estate. From 10th October 2017 she ceased to be a Director (of Lockes Field Management Co Ltd) and that company decided to transfer management to external agents.

10. On 5th August 2013 G Crawford Management Services Ltd had been formed for the purpose of GC being remunerated for her work. At the hearing before me I was told that it was done in this way in order to avoid GC being treated as an employee for tax and/or national insurance contribution purposes. At the relevant time the remuneration was £10,000 annually. GC was the sole director and shareholder of this, the appellant company. Neither of the companies was a member of a redress scheme. In a letter of 9th August 2017 sent to the Authority on Lockes Field Management Co Ltd headed notepaper, and stating that she was writing on behalf of Lockes Field Management Co Ltd, GC stated:

> "I do not undertake any work of any description in connection with the Lockesfield Place Estate in the name of G Crawford Management Services Ltd. Everything I do, whether it be arranging for routine maintenance or insurance, is done in the name of Lockes Field Management Co Ltd and on their behalf. I am therefore not trading or operating in any capacity under G Crawford Management Services Ltd.

11. As a matter of law it is not clear that her conclusion was correct, in view of the fact that the remuneration for the relevant work was payable to and paid to G Crawford Management Services Ltd. In any event, after she cased being a Director of Lockes Field Management Co Ltd on 10th October 2017 she (and/or G Crawford Management Services Ltd) carried on providing administrative and office services to Lockes Field Management Co Ltd (possibly limited to the period of transition to external management agents).

12. Following a complaint from a leaseholder of two of the properties the Authority entered into correspondence with the appellant company and GC about the non-membership of a redress scheme and on 12th October 2017 the Authority served on the appellant company notice of intent to impose on it a penalty of £5000 for breaching on that day the requirement to belong to an approved redress scheme. On 14th December 2017 a Final Notice was served, confirming the notice of intent. On

22nd January 2018 an appeal against that notice was lodged with the First-tier Tribunal. GC, who signed the form, indicated that she herself was the appellant and that "a penalty notice has been issued against me". That was incorrect. The notice had been issued against G Crawford Management Services Ltd, which was the proper appellant. This confusion between GC personally and the appellant company (separate persons in law) has persisted throughout these proceedings. The grounds of appeal in essence amounted to an argument that the appellant company was not engaged in property management work but was a residents' management company.

The First-tier Tribunal

13. The First-tier Tribunal considered the appeal by a judge sitting alone without an oral hearing and in its decision of 9th July 2018 (promulgated on 19th July 2018) confirmed the Final Notice. It referred to the appeal having been brought under the Consumer Rights Act 2014 (which it had not been), stated that the penalty had been imposed in respect of operating as a letting agent (which it had not been) and quoted the law in respect of displaying fees (which was not relevant). However, the judge did consider briefly the grounds of appeal and concluded (paragraph 18) that the actions of the appellant company "are clearly property management work".

14. On 7th August 2018 the appellant company applied to the First-tier Tribunal to set aside its decision and review and allow the appeal, or to give permission to appeal to the Upper Tribunal, or to reduce the penalty. The grounds were that the wrong statutory provisions had been considered and that on a proper construction of the appropriate statutory provisions the appellant company was not carrying out property management in the course of business.

15. On 12th September 2018 the (same) First-tier Tribunal judge signed two documents. The first was headed "Ruling On Application For Permission to Appeal" and stated that permission to appeal was refused, although it did not specify the decision in respect of which permission to appeal was being refused. It continued:

> "I have considered in accordance with rule 44 … whether to review the Tribunal's decision and have decided to undertake a review. I am satisfied that there was an error of law in the Decision. The Tribunal has reviewed the decision and the references have been corrected accordingly. A fresh decision has been issued with the full reasoning of the Tribunal."

16. The other document was headed "Review Decision". This stated that "The Tribunal refuses the appeal". The judge acknowledged that the earlier decision had "referred to the incorrect legislation" and said that "the references have been corrected accordingly". He found again that "the actions taken by the Appellant, in the view of the Tribunal, are clearly property work" (paragraph 18) and concluded (paragraph 20): "Accordingly the Application for permission to Appeal sought on a review of the merits is refused".

The Review Provisions

17. Section 9 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act) deals with the powers of the First-tier Tribunal to review its own decisions. Section

9(1) creates a general power (subject to certain exceptions); section 9(2) provides that the power is exercisable at the tribunal's own initiative or on application; section 9(3) authorises rules to be made (including rules limiting the circumstances in which the general power may be exercised); so far as is relevant, other provisions of section 9 provide as follows:

> 9(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following –
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> (a) correct accidental errors in the decision or in a record of the decision;
> (b) amend reasons for the decision;
> (c) set the decision aside.
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> 9(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either –
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> (a) re-decide the matter concerned, or
> (b) refer that matter to the Upper Tribunal.
>
> 9(8) Where a tribunal is acting under sub-section 5(a) … it may make such findings of fact as it considers appropriate.

18. Relevant provisions of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 provide as follows:

> 43(1) On receiving an application for permission to appeal the Tribunal must first consider … whether to review the decision in accordance with rule 44 (review of a decision).
>
> 44(1) The Tribunal may only undertake a review of a decision –
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> (a) pursuant to rule 43(1) (review on an application for permission to appeal); and
> (b) if it is satisfied that there was an error of law in the decision.
>
> 45. The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things.

What Happened Here?

19. Mr Jefferies (with the support of Mr Bennett at the hearing before me) challenged the validity of the 12th September 2018 decision. The judge was satisfied that his 9th July 2018 decision had been made in error of law. Therefore he should have set it aside and considered afresh all of the arguments and submissions (or referred the

matter to the Upper Tribunal) under section 9(5). He had failed to set the earlier decision aside, or to give fresh consideration, especially in relation to the appropriate penalty. Further, there had been no power to "correct" errors of law; the correction power under section 9(4)(a) was exercisable on review but only in respect of "accidental" errors (which these were not), and correction of the earlier decision under section 9(4)(a) did not enable its setting aside under section 9(5). The decision as corrected would have stood.

20. I broadly agree with this approach and I do not know what was meant by paragraph 20 of the 12th September 2018 decision: "Accordingly the Application for permission to Appeal sought on a review of the merits is refused". Permission to appeal to the Upper Tribunal depends on whether there is an arguable error of law – it does not depend on the factual merits.

21. The decision of 12th September 2018 was itself made in error of law and I set it aside. However, since it did not set aside the decision of 9th July 2018, the earlier decision remained in existence. That was also made in error of law (as everyone, including the First-tier Tribunal judge, agrees) and I also set that aside. That leaves the Authority's original decision standing, with the company's appeal against it undetermined. Where the Upper Tribunal sets aside a decision of the First-tier Tribunal, section 12(2)(c) of the 2007 Act empowers the Upper Tribunal to re-make the decision, and that is what I am doing in this appeal. There is no significant dispute on the background facts and I see no advantage in referring this matter back to the First-tier Tribunal, where it would be considered by a judge sitting alone.

The Appeal to the Upper Tribunal

22. The essence of the company's grounds is that the services that it provided did not fall within the definition of property management in section 84 of the 2013 Act because they were not carried out "in the course of a business" as required by section 84(6). It was argued that the 2013 Act does not define "business" but "it should be construed so as to exclude the provision of services by an individual or company which does not offer or provide those services to any other client" and that the legislation is aimed at letting agency and property management businesses which "almost always have multiple clients". I do not accept this. A totally independent trader or professional partnership or limited company might in fact have one or one main customer, to whom it charges a fee for each separate task or from whom it receives a retainer. It would be absurd to say that by definition such an enterprise is not a business no matter how extensive the work or how large the fees.

23. It was said that section 86(2) excludes employees who carry out property management work for their employers and there is no reason to draw a distinction between an employee and an individual who provides the same services through a wholly owned personal services company with no other employees. However, the point here is that the employer would be required to belong to a redress scheme and there is no need to add a personal burden on their employees.

24. The appellant company has argued that its approach is supported by government guidance. The October 2014 Department for Communities and Local Government (DCLG) document "Letting Agents and Property Managers: Which Government

approved redress scheme do you belong to?" is non-statutory guidance which is not a binding interpretation of the law. Pages 6 and 7 include the following:

> What do we mean by "in the course of business"?
>
> The requirement to belong to a redress scheme only applies to agents carrying out letting or property management work 'in the course of business'. The requirement will therefore not apply to 'informal' arrangements where a person is helping out rather than being paid for a role which is their usual line of work. Some examples of 'informal' arrangements which would not come under the definition of 'in the course of business are set out below.

25. The examples given include: helping out by looking after rented properties on behalf of a friend or family member and not getting paid or only getting a thank you gift; a friend helping the landlord with maintenance or decoration on an ad hoc basis; a handyman or decorator who is employed by the landlord when needed; a landlord looking after the property of another landlord who is away and does not get paid for it; a joint landlord who manages property on behalf of the other joint landlord(s). The document continues:

> Whilst it is not possible to cover all eventualities in this note one of the key issues to consider when deciding what could be considered an "informal arrangement" is whether the person doing the letting or property management work is helping out an individual as opposed to offering their services to anyone who wants to use and pay for them.

26. I observe that although the appellant company is, in part, relying on the above, what happened in this case could not be described as an "informal arrangement". There was a highly structured formal system with a significant payment for the services. The document states further:

> Does the requirement apply to resident management companies?
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> Resident management companies are not explicitly excluded from the requirement although, in many cases, these are not caught by the legislation. resident management companies can arise in different circumstances, but where the residents' management company owns the freehold and operates the block itself there is no requirement for the company to join a redress scheme. This is because, under the definition, property management work only arises where one person instructs another person to manage the premises and, in this case, the person who owns the block (and is responsible for its management) and the person managing the block are one and the same.
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> Likewise, where a resident management company does not own the freehold but is set up and run by the residents and manages the premises on behalf of the residents this would also be excluded as the work is only in respect of the residents' own premises and would not be operating in the normal course of business.

27. Similar non-statutory guidance is given in Annex C of the March 2015 version of the DCLG Guide for Local Authorities on Improving the Private Rented Sector and Tackling Bad Practice.

28. In my view this guidance does not assist the appellant company – which is not really a residents' management company (that would be Lockes Field Management Co Ltd) but a separate company set up specifically to channel payment for the relevant work.

Definitions of "Business"

29. Both parties cited Rolls v Miller (1884) 27 Ch D 71 where the Court of Appeal had to construe a covenant in a lease to the effect that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever without the written consent of the lessor or his assigns. It was held that a charitable institution where working girls were provided with board or lodging was a business whether or not payment was taken from them. Lord Justice Cotton said (at 85),

> "I cannot read the two words "trade" and business as synonymous. There may be a great many businesses which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit – whether profit is actually obtained or not, must of course be immaterial – is certainly material in considering whether what was being done is, or is not, a business, yet, in my opinion, it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances, does not necessarily make a thing a business which if there was no payment would not be a business".

Agreeing with this, Lord Justice Lindley said (at 88):

> "When we look into the dictionaries as to the meaning of the word "business", I do not think that they throw much light upon it. The word means almost anything which is an occupation as distinct from a pleasure – anything which is an occupation or a duty which requires attention is a business – I do think we can get much aid from the dictionary. We must look at the words in the ordinary sense, and we must look at the object of the covenant …".

I take from this that payment (such as that received by the appellant company) is not determinative – but it is relevant (or "material"); it depends on the context.

30. The Authority cited several statutory definitions in different areas of the law – but since they differ from each other they are of no assistance here.

31. The company pointed out that there was an alternative remedy under section 27A of the Landlord and Tenant Act 1985 in respect of any complaint about the reasonableness of service charges, and a decision in such a case involving Lockes Field Management Co Ltd had been made on 7th August 2017 by the Property Chamber of the First-tier Tribunal in LON/ooAC/LSC/2016/0441.

Substantive Conclusions

32. G Crawford Management Services Ltd (the appellant) was established to minimise liability for tax and national insurance purposes. That might have been a legitimate purpose but the company must also take on any concomitant liabilities. Tenants/leaseholders might well have had complaints about anything done by the appellant. It cannot be doubted that, as a matter of law, if any of the activities of the appellant was done "in the course of a business", then there was a duty to belong to a redress scheme. The payment here (£10,000 annually) was a significant amount. The arrangement was a long way from what was envisaged by the DCLG guidance. The fact that there was (and was only ever intended to be) only one client or customer did not prevent the activities being done in the course of a business. There was a separate company formally established to provide particular services at a significant fee. On the facts of the present case I doubt that any reasonable tribunal could decide that what was being done here was other than "in the course of a business" and I find that it was being done in such course.

The Financial Penalty

33. The March 2015 DCLG Guide for Local Authorities on Improving the Private Rented Sector and Tackling Bad Practice is non-statutory guidance but the parties have referred to it. Section 3 of Annex C to the Guidance states at pages 53 – 54 in relation to the penalty for breach of a requirement to belong to a redress scheme:

> "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 £5000 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.

34. As I said in Reading Borough Council v Ashley Charles Limited MISC/3568/ 2017 this might be seen as helpful advice and it is open to an enforcement authority (or, on appeal, the First-tier Tribunal – or the Upper Tribunal remaking the decision of the First-tier Tribunal) to adopt this as its general approach, provided it is not regarded as a legally binding statement of law or practice and the authority considers whether to depart from it in an appropriate case. I take account of the facts that the appellant was in the process of disengaging from its activities, that there was genuine and reasonable doubt about the meaning of the legal requirements and that a penalty of £5000 represents a considerable proportion of the company's annual turnover of

£10,000. In my view a penalty of £3,000 (representing a 40% discount from the maximum) was and is appropriate and that is the amount that I order.

H. Levenson
Judge of the Upper Tribunal
23rd April 2019