FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Professional Regulation

Tribunal Reference: PR/2015/0005

Appellant: Askwith Alliance Ltd

Respondent: Sheffield City Council

Judge: Peter Lane

DECISION NOTICE

The Legislation

1. Section 83(1) of the Enterprise and Regulatory Reform 2013 provides that:-

> "(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 that:-

> "(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. 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 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."

5. 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 Sheffield City Council ("The Council").

6. 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 required 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).

7. 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.

The Final Notice

8. In the present case the final notice dated 17 April 2015, addressed to the appellant, stated that from 1 October 2014 it had been a requirement for persons who are engaged in property management work or letting agency work (subject to certain exclusions) to be a member of a designated government administered, or government approved, redress scheme for dealing with complaints in connection with that work. The notice stated that Sheffield City Council was satisfied that the appellant had been engaged in such work but that at the time a notice of intent had been sent to the appellant, it had not been a member of such a scheme. The final notice stated that the Council was imposing a monetary penalty of £5,000 on the appellant. The notice of intent, dated 8 January 2015, also notified the appellant of the alleged infringement and of the intention to issue a monetary penalty of £5,000, subject to any representations the appellant might make within 28 days.

The Appeal

9. The appellant appealed to the Tribunal, following receipt of the final notice. The grounds of appeal contended that the appellant "registered with the government redress scheme on 4 December 2014 and registration confirmed and accepted as of 28 January 2015". The amount of the monetary penalty was said to be unreasonable. I note at this point that, subsequent to representations being received from the appellant, the council reduced the penalty from £5,000 to £4,000; and then to £3,500, in view of the possible effects of the penalty on the appellant's business, having regard to accounts supplied for the year ends 31 July 2012 and 31 July 2014. The grounds contended that following receipt on 4 December 2014 of a letter from the Council dated 2 December 2014, regarding the requirement to belong to a redress scheme, the appellant took action to register with the Property Ombudsman.

10. An oral hearing of the appeal took place on 8 September 2015 at Sheffield Employment Tribunal. The appellant was represented by Mr El-Hakam, the appellant's director. The Council was represented by Ms Littlewood. I am grateful to them for their submissions. I heard evidence from the appellant and from Mr Hickling and Ms Nicholas, officers of the Council.

11. Since the appellant was not professionally represented, I explained the nature of the proceedings and, at Mr El-Hakam's request, the Council presented its evidence first, followed by the appellant, with closing submissions from the Council and (finally) the appellant.

12. Mr Hickling adopted his written statement. He is the Legal and Policy Officer in the Council's Private Housing Standards Team. Part of this role involves the enforcement of the 2014 Order. In January 2015, Ms Nicholas informed Mr Hickling that Askwith Alliance Ltd was failing to comply with the requirement to belong to a redress scheme. Mr Hickling was aware that the notice of intent was sent by first class post on 8 January 2015. This required any representations or objections to be provided by 6 February 2015. In April 2015, Mr Hickling reviewed the case. Since the appellant had not made representations, Mr Hickling was satisfied to serve the final notice imposing a monetary penalty. He prepared and signed the final notice, which was served by first class post. Having then received representations, the Council decided to reduce the monetary penalty from £5,000 to £4,000, notwithstanding that the representations and been received outside the normal period. Having considered information regarding the scale of the appellant's business, it was subsequently decided to reduce the penalty further to £3,500.

13. There was no cross-examination.

14. Later in the proceedings, it became necessary to recall Mr Hickling in order to deal with the issue of whether the Council had operated a "grace period". Mr Hickling said that the Council did not operate any formal policy of conferring a "grace period". However, in practice, the Council had not taken enforcement action in respect of persons who were not members of a relevant scheme during the period 1 October 2014 to 1 January 2015.

15. There was no cross-examination of Mr Hickling on this issue.

16. Ms Nicholas is employed by the Council as a Tenancy Relations Officer in the Private Housing Standards Team. As such, part of her work involves assisting in the enforcement of the 2014 Order. Ms Nicholas confirmed her statement in which she stated that she signed a series of letters on behalf of Mr Hickling dated 2 December 2014 providing information to residential property managers and letting agencies about the requirements of the Order. This included a letter to the appellant. She subsequently collated evidence in relation to managers and agents who were believed not to be complying with the requirements of the order. This involved checking the databases of the three government-administered or approved redress schemes, as well as a further database and various company websites.

17. Having discovered that the appellant was not registered, she agreed with Mr Hickling that she would serve the appellant with a notice of intent. On 8 January 2015 she prepared and signed such a notice and served it by first class

post, by personally posting it in the letter box outside her offices. She clearly remembered this because it was posted along with two other notices and they were the first notices of intent that she had served.

18. Mr El-Hakam gave evidence. He referred to page 30 of the appeal bundle, where we find it stated:-

> "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. In fact the Council did not rush into enforcing the regulations immediately after the regulations came into force on 1 October 2014, and it was not until early January 2015 that the Council began to issue formal notices. This gave an extra three months for agents to become aware of the regulations and to become members of a scheme, and was one month after the information letters sent out by the Council dated 2 December 2014"

19. Mr El-Hakam contended that, in the appellant's case, the Council had in effect declined to exercise the grace period in its favour, although the Council had done so for others. If one took account of the grace period and assumed that it ended on 12 January 2015 (when the notice of intent was served), the appellant had only been in default for the period 12 to 27 January, a period of some two weeks. The Council had afforded itself ten working days to respond to the appellant's communications; whilst the appellant was expected to respond immediately.

20. The appellant referred to the email exchange at page 61 of the bundle, where Mr Hickling had enquired of the Ombudsman. Mr Hickling made reference to the fact that, according to emails sent by the appellant, it first made contact with the Ombudsman on 4 December 2014 but did not become a member of the scheme until 28 January 2015. It was noted that reminders had been sent by the Ombudsman to the appellant on 24 December 2014 and 7 January 2015 and that on 12 January 2015 an outstanding deed poll (required as part of the registration process) was sent by the appellant to the Ombudsman. The same day the Ombudsman informed the appellant that the deed poll was incomplete. A corrected deed poll was submitted on 19 January. On that day the Ombudsman requested payment. On 23 January the appellant emailed to object to being required to pay for 15 months.

21. The Ombudsman replied that "there was no delay in processing the application" and the Ombudsman indicated that, depending upon the individual company, they would anticipate that most applications would be completed within one or two weeks.

22. Mr El-Hakam told me that the reason why he had begun the dialogue with the Ombudsman in early December, but then disengaged until the second week in January, was the appellant's severe financial hardship. Mr El-Hakam said that he did not have the £60 required to pay the Ombudsman's fee and had to defer

the matter until after Christmas. He also had personal problems, in that his daughter was in hospital with asthma and he was going backwards and forwards to the hospital during that period. Mr El-Hakam accepted that the letter of 8 January 2015 had been served but said that he had not received it. When he returned to work in January he saw two emails from the Ombudsman in his "in box" and noted that the required payment had gone up from £60 to £225. He then sought to have discussions with the Ombudsman about this. All relevant obligations were then satisfied by Mr El-Hakam within the following two weeks. His was a very small business and being fined, in effect, £400 per day was unfair and ridiculous, as well as not being affordable. He pointed out that since being a member of the Ombudsman scheme, not a single complaint had been made against the appellant.

23. Cross-examined, Mr El-Hakam disagreed that there was, in fact, no formal grace period. He agreed that when he contacted the Ombudsman in December, he was not doing so by reference to any understanding that there was a grace period. He accepted that the letter of 4 December was "very basic".

24. Mr El-Hakam was asked whether it was the duty of a responsible letting agency to keep up to date with relevant legislation. He replied that he was not aware of the legislation until the letter of December 2014 had been sent out. When he received that letter, he got on with the registration process and could not do it any faster. Had he been aware of the law earlier, he would have acted earlier.

25. Mr El-Hakam was asked about his company's website which described the service offered as being very professional. He said that that related to the services he provided to customers. He had worked for 8 years for an employer in the lettings industry before starting on his own.

26. Mr El-Hakam was asked about his letter of 21 April 2015 to the Council, which he wrote following receipt of the final notice. In this letter, Mr El-Hakam said that "the registration process wasn't without problems due to deed poll filled in incorrectly and also a payment requested by the Ombudsman for the fee which was received by the Ombudsman transpired wasn't assigned to my company thus the application was delayed".

27. Mr El-Hakam was asked why he had said in oral evidence that the reason for the delay in payment was that appellant was unable to pay the £60 fee. Mr El-Hakam said that the letter of 21 April 2015 had been a response written on the day that he got the final notice. Now, however, he was saying that there was an error in that letter. He was asked whether, if the reason for not paying was that the company could not afford £60, that would surely have stuck in his mind at the time he was writing the letter. Mr El-Hakam said that if one looked at the email exchanges, such as that on page 38 of the bundle, one would see that the Ombudsman was reminding him on 24 December 2014 Mr El-Hakam confirmed that payment had been sent to the Ombudsman on 27 January 2015. He reiterated that the delay had been occasioned by, in the beginning, his lacking

£60 to pay what was then the fee. He considered that, with the benefit of hindsight, it could also be seen that much of the period fell within the "grace period". It was not until 12 January 2015 that the appellant had returned the deed poll.

28. It was put to Mr El-Hakam that the Council's position was that their letter to the appellant of 2 December 2014 had not been properly followed up and that 28 January, when the appellant became a member of the Ombudsman scheme, was too late. Mr El-Hakam said that the majority of this time was within the "grace period", which he said that the Council had afforded to other companies. Mr El-Hakam said that he had not received the Council's letter of 8 January 2015, at the time it was sent. It was put to him that the Council's case was that he had received the letter. He also confirmed that he had been sent an electronic copy of the notice of intent on 20 April 2015, when the Council stated that they would consider any representations of the appellant, if submitted by 1 May 2015.

29. Mr El-Hakam confirmed that, as set out at page 34 of the appeal bundle (his reply) since February 2015 he had been employing a further staff member, alongside himself, the staff member being employed part time. Mr El-Hakam was asked how it was possible to go from a position of not being able to afford £60 for the Ombudsman fee to being able to take on another person. Mr El-Hakam said that there was no dispute that the email traffic showed that he had had an issue with payment to the Ombudsman. If he could have afforded to pay, he would have done so.

30. He was asked why (as set out in the accounts at pages 75 and 75) administrative expenses, which Mr El-Hakam said included his own earnings from the company, rose from £10,939 in 2013 to £27,323 in 2014. He said that his accounts were done by his accountant. There had been a need to replace flooring in the office. He would have to speak to his accountant in order to understand the accounts side of the matter. He was asked why the replacement of flooring was not, in that event, shown under the heading of "exceptional items" rather than "administrative expenses". Mr El-Hakam said that the whole floor had to be taken off. It was put to him that if this was a "one-off" cost then the appellant could expect a larger turnover in 2015. Mr El-Hakam agreed, saying that he was working very hard. He did not have the accounts for the year end 31 July 2015.

31. It was put to him that the accounts did not tell the full picture. He replied that all he could do was to submit his bank statements to the accountant who then compiled the accounts. Asked whether there as, in fact, no clear evidence that he could not afford £3,500 as a penalty, Mr El-Hakam replied that he could not even afford the £60 last year. When asked if he kept up to date with regulatory requirements, Mr El-Hakam said that he now got newsletters from the Ombudsman and was aware that the government had a section on its website regarding relevant regulations. He read up on these as he did not want to make the same mistake again.

Submissions

32. In her closing submissions, Ms Littlewood said it was common ground that the appellant was not a member of a relevant scheme on 1 October 2014 and had not become such a member until 27 January 2015. A notice of intent had been served on 8 January 2015, at which point the appellant was not in compliance with the law. Service of the notice of intent had been effected by first class post. She submitted that Mr El-Hakam had not rebutted the presumption that the notice, having been posted, had not in fact been received. It was telling that after a month or so of inactivity the appellant had re-engaged with the Ombudsman on 12 January. The notice of intent could have been expected to have been received around 10 to 12 January.

33. There were other issues with credibility. At page 18, in the letter of 21 April 2015, Mr El-Hakam had said that the registration process problems were to do with a deed poll not being filled in correctly "and also a payment requested by the Ombudsman for the fee which was received by the Ombudsman transpired wasn't assigned to my company thus application was delayed". Now, however, Mr El-Hakam was saying that the problem regarding fees was not that the fee had not been assigned to the appellant but that he could not afford to pay. It was very difficult to accept that the statement of 21 April 2015 had been made in error. The issue of being unable to afford £60 or, later, £225, had arisen only at the hearing. Whether in January or in April 2015, the notice had been received by the appellant and there was, in the event, no prejudice caused by any inability of Mr El-Hakam to see the notice of intent in January.

34. There had not been a grace period; but in any event the appellant had been given an allowance of £1,000 on the basis of his representations regarding the steps he had taken. Most Ombudsman applications were completed within one or two weeks but the appellant's process had taken over a month. The Council had decided not to adopt an approach of giving individualised warnings to those whom it thought were in breach of the law. Their policy was perfectly reasonable.

35. In all the circumstances, particularly given the flimsiness of the evidence provided regarding the financial position from the appellant, the eventual reduction of the £5,000 penalty to £3,500 could be regarded as generous. The apparently sudden increase in administrative expenses in 2014, if valid, was in the nature of a one-off expense, which meant that 2015 should show greater profit. In any event, it was difficult to believe the assertion regarding impecuniosity in the light of the taking-on of a part time member of staff in February 2015.

36. In his closing submissions, Mr El-Hakam said it was clear from the emails that the appellant had been unable to pay the £60 joining fee. A grace period had been applied to other letting agents but without any guideline as to when it would finish. Accordingly, the appellant had assumed that it finished on 8 January. Assuming it took two weeks to register, then the appellant had not

been in breach for any significant period. Mr El-Hakam said that his business was very small. He could not afford a penalty of £5,000 and would struggle to pay £60. The imposition of the penalty would sink his business.

Discussion

37. It is common ground in this case that payment was not made to the Ombudsman until 27 January and that, as Mr El-Hakam himself stated in his letter of 21 April 2015, registration of the appellant did not occur with the Ombudsman until 28 January 2015. It is, accordingly, plain that there has been a breach of the relevant requirements by the appellant.

38. There are problems regarding Mr El-Hakam's credibility. In his letter of 21 April, he is clear that the problems regarding payment of the fee to the Ombudsman concerned the issue of assigning the fee to his company. No mention is made of the issue which, in oral evidence, Mr El-Hakam said had been responsible for the non-payment in December 2015; namely, the fact that the appellant could not afford the fee of £60. Although Mr El-Hakam said that the email traffic between him and the Ombudsman confirmed that the delay in payment was due to the company's inability to pay, the print-out of the relevant emails in no way supports this claim. The Ombudsman is stating that it has not received payment of the fee but there is no acknowledgement by the Ombudsman or response by Mr El-Hakam, to the effect that the company had been unable to meet the £60 cost, which was relevant up to 1 January 2015 when the fee requirements changed.

39. I accept the evidence for the Council that the notice of intent was put into the post on 8 January 2015. Given the problems with Mr El-Hakam's evidence, I find that the appellant has not shown, on balance, that this letter was not received in the ordinary course of post. Although Mr El-Hakam contended that the appellant's re-engagement with the application process was due to his return to work and finding the emails from the Ombudsman of 24 December and 7 January, I consider that it is more likely than not that the re-engagement was, at least in part, triggered by receipt of the letter of 8 January.

40. A further credibility issue, which impacts upon my overall view of Mr El-Hakam's evidence, is that it extremely difficult to see how a company which, in December 2014 was unable to pay a £60 fee to the Ombudsman, could engage a part-time employee only a few weeks later.

41. I find that the appellant has sought to make inappropriate use of the reference, drawn from government guidance, that the Council could operate a grace period, during which those not complying with the law would not be subjected to penalties. Mr El-Hakam seemed to think that the effect of any such grace period was that little, if anything, needed to be done by the appellant in terms of joining a scheme, until after that period had expired. That is plainly not the case. I accept the Council's evidence that, in practice, it did not proceed with

notices of intent to letting and property management agents who were registered by 1 January 2015. The fact of the matter is that the appellant, having been clearly notified in the letter of 4 December 2014 that registration was a legal requirement, took no proper steps to register during December 2014 (I do not accept the assertion that the appellant could not afford £60 during this time). Overall, I find as a fact that the appellant did not have any reasonable excuse for failing to be a member of the relevant scheme by 1 January 2015.

42. So far as the period thereafter is concerned, whilst I accept that Mr El-Hakam had problems resulting from the illness of his daughter, it is significant that it is not until 23 January 2015 that he emailed the Ombudsman to negotiate the details of payment. Indeed, that email further undermines Mr El-Hakam's account of the alleged inability to pay £60, since it makes no reference to that alleged issue, in circumstances where (were it the case) the email would plainly have mentioned it. What is stated, by contrast, is that the company was said not to be in a position "to pay £225 for 15 months", seeking confirmation that a payment of £60 could be paid for "payment to cover until April".

43. Accordingly, viewed overall, the evidence does not show on balance that the appellant was acting with anything like the degree of urgency, which professional businesses in its position could be expected to adopt.

44. I do not find that the Tribunal has been given an accurate picture of the appellant's financial position. The accounts are problematic, for the reasons mentioned by Ms Littlewood. The sum attributable to administrative expenses cannot, I find, be treated at face value. In any event, even if rebuilding the office floor was treated as an administrative expense for 2014, it is plain that, compared with 2013, the appellant was becoming significantly more profitable, a fact underscored by the decision in 2015 to engage a part-time employee.

45. Government guidance indicates that a penalty of £5,000 should be imposed, unless reasons can be show to reduce it. In the present case the appellant was in breach of the law for some 27 days after the 31 December 2014. In all the circumstances, it was plainly correct to impose a significant penalty. The reduction of £1,000 to reflect the fact that the appellant had become registered on 28 January rather than continuing in breach is, in all the circumstances, reasonable and I do not consider that any further reduction is warranted.

46. So far as the further reduction of £500 is concerned, on the basis of the possible financial impact on the appellant, I reiterate that I do not consider that a proper picture of the financial state of the appellant has been provided. In the circumstances, I agree with Ms Littlewood that the further reduction of £500 can be regarded as generous. The appellant has completely failed to show that the imposition of the penalty of £3,500 would be likely to drive the company out of business. Indeed, the appellant's case is that it has grown more profitable between 2013 and 2014, even absorbing what is claimed to be a significant cost in respect of repairs to the office floor.

47. In conclusion, I find that there is no error of law or fact involved in the imposition of the penalty of £3,500 and that the size of that penalty is, in all the circumstances, reasonable.

48. This appeal is dismissed.

Peter Lane

Chamber President

Dated 9 October 2015

Promulgated 14 October 2015