



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Professional Regulation**

Tribunal Reference: **PR/2015/0001**  
Appellant: **Letting International Ltd**  
Respondent: **London Borough of Newham**  
  
Judge: **Peter Lane**

**DECISION NOTICE**

1. Section 83(1) of the Enterprise and Regulatory Reform Act 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 the London Borough of Newham (“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 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 £5,000. 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 (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.

8. The appellant, Letting International Ltd, appealed against the Council's notice imposing a monetary penalty of £2,500 in respect of the appellant's failure until 5 November 2014 to be a member of an approved redress Scheme. A hearing of the appeal took place at Field House on 28 April 2015, when the Council was represented by Ms A. Cafferkey of Counsel. I heard oral evidence from Ms A. Winter, Mr M. Howell-Morris and Mr I. Dick, on behalf of the Council. Messrs A. and M. Patel spoke on behalf of Letting International Ltd. I am grateful for the parties' submissions, both oral and written.

9. As Ms Cafferkey points out, article 7 of the Order imposes a duty on the Council to enforce the requirement to belong to a redress scheme. Central to the Council's enforcement machinery is the power under article 8 to impose a monetary penalty. Mr Dick, Head of Private Housing and Community Infrastructure in the Council has overall responsibility for the Council's Fair Lettings Project. There are some 40,000 private rental units in the Council's area and the Council has an approach that involves "rigorous enforcement" of the relevant legislation.

10. I am satisfied on balance that on 22 September 2014 the Council wrote to letting agencies in its area, which were not then members of a redress scheme, to advise them of the impending new law and that a copy of such a letter was sent to the appellant. The Council further advised that, although the legal requirement commenced on 1 October, the Council were affording letting agents until 29 October to register. It was not until 27 October 2014 that the appellant applied to the Property Ombudsman, who runs a redress scheme approved by the Secretary of State, in order to be a member of that scheme. Mr A. Patel told me that the appellant did not apply earlier because its professional indemnity insurance had expired at the end of September and had been extended to 15 October. It was thought expedient to apply for redress membership with the benefit of the new insurance.

11. However, on 30 October 2014 the Property Ombudsman emailed the appellant to state that she was unable to process the appellant's application because it was unclear what form of application was being made and also because the Ombudsman required a copy of the appellant's professional indemnity policy Schedule, not merely the cover note from the appellant's broker. This email went into the appellant's "generic" email box. It apparently went unnoticed by the appellant's personnel. On 5 November, the Ombudsman contacted the appellant again, as a result of which a revised application was made. However, as can be seen from an email of 5 November timed at 15:25, the Ombudsman was "still unable to process your application as you have provided a cover note rather than the policy schedule which you should have received from your insurer". An email from the appellant's insurance broker of 5

November 2014 stated that there would be a delay in getting the relevant policy documents.

12. The appellant accordingly applied to a different redress scheme provider, which accepted the appellant as a member.

13. Having received representations from the appellant, the Council decided to reduce the originally envisaged penalty of £5,000 to £2,500. In its grounds of appeal to the Tribunal, the appellant blamed delays on the part of the Property Ombudsman, who had been the appellant's preferred redress scheme provider. The grounds contend that the appellant has acted in good faith throughout and found it alarming the fact that other schemes were willing to accept members without any checks being performed. If the appellant had been informed earlier by the Property Ombudsman, it was considered that the appellant could have avoided the penalty charge "as the new application only took 10 minutes to register with the Property Redress Scheme after exhausting all our efforts with the TOP". The appellant contends that the penalty charge, even as reduced, does not reflect the true position.

14. As I mentioned to the parties at the hearing, and as Mr Dick confirmed, guidance has been issued by the Department for Communities and Local Government to local authorities in the form of a document entitled "Improving the Private Rented Sector and Tackling Bad Practice". This guidance, published in March 2015, had its origins in a draft document produced in 2014. The guidance states that "the expectation is that a £5,000 should be considered the norm and that a lower fine should only be charged in the enforcement authority is satisfied that there are extenuating circumstances". In this regard, the guidance notes that an issue that 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."

15. Mr A. Patel stated that the turnover of the appellant was in the order of £15 million per annum and that they had assets of £1.3 million.

16. Ms Cafferkey submitted that the word "unreasonable", as used in article 9 of the Order meant unreasonable in the "Wednesbury" sense; that is to say, that the Tribunal could interfere only if the amount of the monetary penalty was so unreasonable that no reasonable local authority could have imposed it or that the decision was otherwise unreasonable in this sense.

17. I see no reason to interpret the expression in this sense and strong reasons why I should not do so. If Parliament had intended the right of appeal to the Tribunal to be restricted in this way, one would expect article 9 to say so in plain terms. As is stated in *Jacobs: Tribunal Practice and Procedure* (3<sup>rd</sup> edition) at 4.122, the general approach of the courts to the scope of an appeal against a decision based on the exercise of judgment is that the judgment must be exercised afresh

on appeal (Secretary of State for Children, Schools and Families v Philliskirk [2009] ELR 68; Stepney Borough Council v Joffe [1949] 1KB 599).

18. The proper approach, I find, lies not in restricting the Tribunal's function in the drastic and blunt-ended way that a *Wednesbury* approach would produce but, rather, in affording due weight to the views of the Council, as the body statutorily entrusted with the enforcement function. This was the approach of the Court of Appeal in R (Hope and Glory Public House Ltd) v City of Westminster Magistrates Court [2011] EWCA Civ 31.

19. The guidance to which I have made reference is non-statutory. It is, however, of some relevance in that it supports the approach taken by the Council in the present case, which was to impose a penalty of £5,000, which was then halved on the basis of the representations submitted by the appellant.

20. It therefore falls to me to consider whether the penalty of £2,500 is unreasonable. In considering this issue, I have had regard to the particular challenge faced by the Council in relation to the private rented sector. It is legitimate that the Council wishes to send a strong message to letting agents, that they must comply with the relevant law.

21. I have had full regard to everything that has been said by and on behalf of the appellant. The fact remains, however, that the appellant left it until very late before seeking membership of a relevant scheme. It then failed to act on the email of 30 October from the Property Ombudsman and had to be prompted into action by the Ombudsman, by which time the appellant was in contravention of the law. I was not persuaded that the expiry of the professional indemnity policy in September/October 2014 provided a legitimate reason for the appellant's delay. Nor am I persuaded that, in the circumstances, any material blame can be attached to the Property Ombudsman, who seems to me to have acted with reasonable expedition in this regard. I also consider that the Council, through Ms Winter, gave reasonable notice of its intentions with regard to anyone who was in contravention from 29 October 2014.

22. In conclusion, in all the circumstances, I do not consider that the imposition of a penalty of £2,500 is unreasonable.

23. I do not find that there is any other basis for challenging the imposition of the penalty.

24. This appeal is accordingly dismissed.

**Peter Lane**

**Chamber President**

**Dated 2 June 2015**

**Promulgation Date 5 June 2015**