



**First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation**

Appeal Reference: PR/2016/0032

**Heard at Fleetbank House, London
on 31st January 2017**

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

CHERRY ESTATE AGENCY LIMITED

Appellant

and

LONDON BOROUGH OF NEWHAM

Respondent

Representation:

For the Appellant: Mr A Gudzenko, a director of the Appellant.

For the Respondent: Mr J Hardman, counsel for the Respondent

DECISION AND REASONS

A. Background

1. Cherry Estate Agency Limited ("Cherry") appeals against a final notice dated 25/08/2016 served on it by the Council of the London Borough of Newham ("Newham"), which is the local weights and measures authority for the geographical area comprising the Borough of Newham. The final notice refers to the office of Cherry located at Unit 3 Thames Road, London E16 2EZ and to its head office at 17 Manbey Park Road, London E15 1EY both of which are within the Borough of Newham. The final notice

imposes a penalty of £5,000 on Cherry for failing to comply with the duty to belong to an approved redress scheme.

2. The final notice set out details of the alleged breach:

"I, Meredith Howell-Morris, an authorised officer of London Borough of Newham believe that you have committed a breach of the following duty under The Redress Schemes for Letting Agency Work and Property Management Work (Requirement to belong to a Scheme etc) England) Order 2014.

A failure to comply with the duty to belong to an approved redress scheme

From 25/05/2016 to 02/06/2016 the company trading as Cherry Estate Agency limited had failed to become a member of an approved redress scheme.

On 25/05/2016 I found the company did not comply with the conditions set out in the legislation above and have committed a breach of the following duty under The Redress Schemes for Letting Agency Work and Property Management Work (Requirement to belong to a Scheme etc) England) Order 2014 – **A failure to comply with the duty to belong to an approved redress scheme."**

B. Legislation

3. 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."

4. 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."

5. 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")."

6. 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. Article 3 of the Order 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."

7. 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 Newham.

8. 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).

9. 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.”

C. The appeal

10. In its grounds of appeal, Cherry explained that it trades as an estate agency and had done since the date of its incorporation on 13 January 2012.
11. It admitted that prior to 2nd June 2016 it was not a member of an authorised redress scheme as required by the Order. On 2nd June 2016 it received a notice of intent from Newham stating that Newham intended to impose a penalty of £5,000 in respect of their failure to become a member of an authorised redress scheme. On that day Cherry became a member of an authorised redress scheme. Cherry provided a copy of certificate from the Property Redress Scheme showing their membership start date as 2nd June 2016.
12. The appeal went on to state that in response to the notice of intent Cherry had made representations to Newham on 10 June 2016 stating in outline:
- It had not previously been aware of the requirements to be a member of a scheme.
 - It had complied as soon as it become aware.
 - The penalty was excessive and would effectively drive Cherry out of the market.
- Cherry’s appeal stated that they received a final notice on 25 August 2016 and that the final notice indicated that no representations had been made by Cherry in time.
13. Cherry submitted the following grounds of appeal:
- The decision of Newham was based on a material error of fact in that the decision had been based, at least partially, on Newham’s mistaken belief that Cherry had not made representations.
 - The decision of Newham was contrary to the law as the notice of intent has to be served within six months form the date on which they were first satisfied that Cherry had failed to comply with the Order and Cherry had failed to comply from the time the Order came into force on 1 October 2014. Newham had given a date for Cherry’s failure that had “been plucked entirely out of the air”.
 - The amount of the penalty was unreasonable as £5,000 was the maximum fine permitted for this breach and the amount did not take account of those mitigating factors that Cherry had put forward in its representations. A penalty of £1,000 was put forward as being more proportionate or reasonable.

14. The hearing of the appeal took place on 31st January 2017. Prior to the hearing a bundle of relevant documentation was prepared by the parties, which included details of the correspondence between Newham and Cherry before and after the date of the final notice. Newham provided a witness statement from Mr Meredith Howell-Morris and correspondence that showed the receipt of the representations that Cherry made in response to the notice of intent and the correspondence and documents that related to the date on which Newham first became aware that Cherry was carrying on business as a letting agent.
15. At the hearing Mr Gudzenko and Mr Hardman confirmed that there was common ground between them that Cherry had been carrying on lettings agency work, that it should have been a member of a redress scheme whilst it was carrying on such activities and that it had not been a member until 2nd June 2016. They also agreed that Cherry had made representations in response to the notice of intent and that these had been received by Newham and passed on by Mr Howell-Morris to the relevant decision makers, who had to determine whether to issue the final notice and, if they were to do so, how much the penalty should be.
16. I am grateful to the parties for their co-operative approach in limiting the scope of the appeal and for their explanation of the issues that remained. In reaching a decision in this case I have had regard to those oral submissions and also to the written submissions, evidence and other documentation contained in the hearing bundle.

D. The timing of the Notice of intent

17. Cherry's grounds of appeal referred to para. 1(2) of the Schedule to the Order which requires that;

“The notice of intent must be served within 6 months of the date on which the enforcement authority is first satisfied that the person has failed to comply with article 3 (requirement to belong to a redress scheme: lettings agency work)”.

Cherry submitted that the notice of intent was served too late and that Cherry had failed to comply with the Order since 2014. Mr Gudzenko stated that Cherry's activities had not been concealed from Newham during the period from 2014.

18. Mr Hardman referred to the evidence that Mr Howell-Morris in Newham's Trading Standards Dep had received an e-mail from a Principal Environment Officer in Newham dated 25th May 2016 who, after becoming aware of a tenancy agreement put into place by Cherry, had referred Mr Howell-Morris to “an agent who is not signed up to any redress scheme”. A further e-mail of 25th May 2016 showed Mr Howell-Morris responding to

the Principal Environment Officer with Cherry's name and saying that he would be looking into them. Mr Howell-Morris provided a witness statement in which he referred to this e-mail as the source of his knowledge of Cherry. In his evidence at the hearing Mr Howell-Morris confirmed that he and the Trading Standards department first became aware of Cherry when it received the e-mail for the Principal Environment Officer. He was not aware of any other dealings between Newham and Cherry. Mr Howell-Morris referred to the extensive work that he and his department undertake in communicating with estates agents and letting agents in the London Borough of Newham and that he and his colleagues had not come across Cherry during the course of that work.

E. The representations made by Cherry

19. It is common ground between the parties that Cherry submitted an e-mail on 10th June to Mr Dick of Newham in which he referred to the notice of intent and asked him to "check this decision and give us a chance". In this e-mail Mr Gudzenko stated that Cherry had not received any warning or notice relating to registration and had registered with a redress scheme the day they received the notice of intent. He enclosed the certificate of registration with the Property Redress Scheme. Mr Gudzenko also asked Newham to review the amount of the penalty as Cherry was a small business and the penalty could cause them big financial difficulties. He stated that had they known about registration they would have registered a long time ago. Mr Dick replied the same day and stated that he would pass on the e-mail to his colleagues "for their consideration". Mr Howell-Morris confirmed that the e-mail had been sent on to the decision makers.

20. Despite this correspondence the Final notice stated that:

"You did not make proper representations or objections within the time period of specified in the notice of intent"

Mr Hardman agreed that representations had been made within the required timescale and that these had been seen by those making the decision on whether to issue the Final notice. However, Mr Hardman suggested that the decision makers had not accepted that these representations were "proper". No evidence was provided from either of the two employees of Newham who had made the decisions, one of whom has since left their employment, about whether they had seen the representations or formed a conclusion on them.

F. The reasonableness of the penalty

21. At the hearing Mr Gudzenko referred to the extenuating circumstances that existed that should lead to Cherry paying a reduced fine. These

circumstances are referred to in the representations made in response to the notice of intent which are set out in paragraph 12 above

22. At the hearing Mr Gudzenko stated that Cherry was a small business and just surviving. It had 5 staff and two directors and had changed its business model after initially struggling in order to concentrate on short term and holiday lets. He had not understood that he should have submitted the accounts of Cherry in response to the notice of intent or the final notice. Mr Gudzenko provided some estimates of Cherry's turnover and profits at the hearing but indicated that these numbers may not be entirely accurate. After the hearing he provided the accounts of Cherry for 2015/16. These accounts disclosed that Cherry had made a profit of £6,000 on a turnover of £75,257 in the year to 31st January 2016 and a profit of £15,537 on a turnover of £55,513 in the preceding year. The salaries of the directors were modest. Mr Gudzenko submitted that only the most serious failures deserved the most serious penalty and Cherry's failures were not in that category.
23. On behalf of Newham, Mr Hardman referred to the Guidance for Local Authorities on the Order that was issued by the Department for Communities and Local Government. In the section of the Guidance that deals with penalty for breach by lettings agents of the requirement to belong a redress scheme fees it was stated;

"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."

Mr Hardman stated that the level of penalty was not unreasonable and that the accounts provided by Cherry revealed that the fine could be paid out the profits of Cherry and that the only impact would be to reduce the funds available to the directors and owners.

G. Findings and Decision

24. By virtue of paragraph 5(5) of Schedule 9 to the 2015 Act, the Tribunal may quash, confirm or vary a final notice.
25. The parties have agreed that Cherry were until 2nd June 2016 in breach of their obligations under the Order to belong to an approved redress scheme. Having considered the evidence and submissions in this appeal I agree with this conclusion.
26. It is my conclusion that the notice of intent served on Cherry was not served more than six months after Newham was first satisfied that Cherry had failed to comply with article 3 of the Order. The evidence from Mr Howell-Morris and from the internal e-mails within Newham supports a

finding that the Principal Environmental Officer, who referred his concern over Cherry to Mr Howell- Morris on 25th May 2016, had just become aware of the activity that caused him to be concerned about whether Cherry had registered with a redress scheme and that Mr Howell- Morris and his colleagues were not previously aware of this failing. Mr Gudzenko indicated that the changed business model of Cherry may have resulted in Cherry having few dealings with the Council and with trade bodies. This supports a conclusion that Cherry may not have been in contact with Newham's communication programme with estate agents and lettings agencies. I find that it was not too late for Newham to issue the Final notice to Cherry.

27. There is no requirement or expectation that enforcement authorities must publicise or take active steps to ensure that lettings agents are aware of the impending or actual coming into force of the legislation that created the obligation to register with a redress scheme. In fact such steps were undertaken by Newham but these were not directed at or visible to Cherry. However as Cherry were and are carrying on business as a lettings agent it is their responsibility to ensure they are aware of and react to any change in the regulatory and legal requirements affecting lettings agents.
28. It is common ground that Cherry submitted representations to the notice of intent and did so in good time. I can see no reason to conclude that these representations could have been regarded as improper by anyone who had reviewed them. There was no evidence that this view had been taken by the relevant decision makers. The Guidance referred to at paragraph 23 above expressly states that it is up to the enforcement authority to decide what such circumstances might be, but goes on to refer to lack of awareness in the early days of the requirement and whether a £5,000 fine is disproportionate to the turnover/scale of the business or would lead to the organisation going out of business. Cherry raised these issues in their e-mail and it seems unlikely that had the decision makers seen the e-mail they would have regarded it as making improper points. I conclude that the Newham erred in saying in the final notice that no representations had been received and that they did not take account of these in fixing the penalty as they should have done.
29. This appeal is a full appeal on law and fact and the Tribunal is able to take account of all of the representation, submission and evidence from Cherry, including those made before the final notice was issued and those made after the final notice and in the course of this appeal.
30. The last issue in this appeal is, therefore, whether, in all the circumstances (including those set out in my conclusions in this Decision), the amount of the penalty for Cherry' failure to publicise its fees is unreasonable. In deciding that issue, which is left open by the primary legislation, it is

appropriate and useful to have regard to the Guidance, to which I have earlier made reference. The Guidance says the expectation is a “fine” (i.e. penalty) of £5,000 and that a lower sum should be imposed only if the authority is satisfied there are “extenuating circumstances”.

31. I have considered the arguments advanced by Cherry for a lower penalty. Having considered the annual turnover and general financial position of Cherry, it is not the case that it will be put out of business by a requirement to pay a penalty of £5,000. However, a fine of this size is a considerable penalty for a business with the turnover and profitability of Cherry. I accept that Cherry was not aware of the obligation to register with a redress scheme before it received the notice of intent and that it acted promptly at that time to remedy the position. I do not attach any weight to the argument that no customer of Cherry has suffered as a result of the failure. No evidence is available on this point and the availability of an independent redress scheme is important in providing consumers with a way forward with complaints or grievances that they do not feel are being addressed by the business they are dealing with.
32. I have also taken account of Newham’s apparent failure to consider Cherry’s representations prior to issuing the final notice. Cherry were entitled to have these considered and to believe that they may have had some impact. They have had to go the trouble and expense of bringing this appeal in order to be certain that their arguments against a fine at the top end of the available scale were heard.
33. In all the circumstances of this appeal, I find that it is reasonable for the final notice to be varied, so that the financial penalty payable in respect of the failure to register with a redress scheme prior to 2nd June 2016 should be £3,000 rather than £5,000.

H. Decision

34. The appeal is accordingly allowed to the extent set out in paragraph 33 above.

Signed

Peter Hinchliffe
Judge of the First-tier Tribunal
Date: 16 February 2017