MISC 1742 2018

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This appeal by the London Borough of Newham ("the Authority"), brought with my permission given on 12th July 2018, succeeds in respect of the single ground advanced by the Authority**. I set aside the decision of the First-tier Tribunal (GRC) made on dates variously given as 9th March and 16th and 19th April 2018 under reference PR/2017/0023, insofar as it relates to residential leasehold management. I substitute my own decision. This is to the effect that Samson Estates Ltd ("the 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. I held an oral hearing of this appeal on 7th March 2019 at Field House (London). The Authority was represented by Ryan Thompson of counsel. The Company was represented by Raza Khan, a senior executive (who is not legally qualified). Mr Khan opposed the appeal and relied on the legal analysis put forward by the First-tier Tribunal.

The Legal Framework

3. 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 –
>
> (a) a redress scheme approved by the Secretary of State, or
> (b) a government administered redress scheme.
>
> 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 –
>
> (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.

4. 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)).

5. 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 Newham is the enforcement authority.

6. 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.
>
> (2) The amount of the monetary penalty must not exceed £5000.

7. 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.
>
> (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.

Background

9. There is no significant dispute about the facts. On 15th February 2017 the Authority received a complaint from a tenant at a residential block of flats which the Company had managed for two years, stating that the Company was not a member of an approved redress scheme. The Authority discovered that the Company was a member of such a scheme (the Property Ombudsman Scheme) for its letting agency work but not for its property management work. The Authority took the view that the company was in breach of its legal obligations in this and other respects. On 22nd February 2017 it issued three notices of intent indicating likely financial penalties totalling £17,000. On 9th June 2017 it issued three Final Notices with financial penalties then totalling £11,000. This appeal to the Upper Tribunal concerns only one of those matters – failure on 22nd February 2017 "to belong to an approved redress scheme for property management (residential block management)", with a penalty of £3000 (the maximum penalty being £5000). In fact, according to the evidence, the Company never belonged to such a scheme as defined by the Authority. Its membership of the Property Ombudsman Scheme covered it for residential sales and lettings, commercial sales and lettings and some property management, but not for residential leasehold management. (I was told at the hearing before me that a further fee would have been payable to the scheme in respect of further cover.)

The First-tier Tribunal

10. On 5th July 2017 the Company appealed to the First-tier Tribunal in respect of all of the matters. The First-tier Tribunal considered the appeal without an oral hearing and confirmed the Final Notices in respect of the matters with which I am not concerned (although the penalties were reduced) but in respect of the residential leasehold management redress issue it allowed the appeal and stated in its decision as follows: (the references are to paragraph numbers):

> 23. It is easy to see that there is a distinction in commercial terms between different forms of property management and in particular, between managing individual properties and managing a large block of flats. However, it is not clear that the Order imposes an obligation to join different elements of an approved redress scheme in order to provide redress for different types of property management work. Newham have not provided any explanation of why the obligation of Samson under the Order goes beyond obtaining the membership that they held on 22nd February 2017 in respect of property management work. In this case Newham has not provided evidence about the different property management activities that Samson was carrying out on 22nd February 2017, nor has it explained the difference in the categories of membership offered by the Property Ombudsman of businesses undertaking property management work.

11. In paragraph 24 the First-tier Tribunal referred to section 84 of the 2013 Act and its "single definition" of "property management work" and pointed out that neither section 84 nor the Order distinguish between different categories of property management work that fall within this single definition. It continued:

> 24. … There is no express term in the Order that requires that different categories of membership of a redress scheme must be taken out in order to cover any sub-division of property management work that an approved redress scheme provider may choose to operate in practice.

12. The tribunal concluded that:

> 25. … there is insufficient evidence … to find that on 22nd February 2017 Samson's membership of the Property Ombudsman Scheme in connection with property management work was insufficient to meet their obligations under the Order.

The Appeal to the Upper Tribunal

13. On 17th May 2018 the Authority applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal in respect of the residential leasehold management issue. This was refused by the (same) judge of the First-tier Tribunal on 31st May 2018. In my view some of his reasoning was confused but paragraph 10 of his reasons included the following summary of the issue:

> 10. The [Authority] does however raise a question over the proper construction of the Act and the Order. The particular question is whether there is a requirement on a person carrying out property management work to belong to more than one category of a redress scheme where the redress scheme provider has chosen to offer different categories of membership and the person is carrying on property management work that falls into more than one category of membership. In the decision I found that there is no express term of the Order that requires that different categories of membership of a redress scheme must be taken out in order to cover all of the sub-divisions of property management work that a redress scheme provider may operate in practice. Whether the proper construction of the Act or the Order does give rise to such an obligation is a point of law that is novel and potentially significant to the operators of the redress schemes approved under the Act, the persons required by the Act to belong to one of them and to consumers who deal with such persons. Whilst this point of law may need to be addressed in due course, I do not believe that this is the appeal in which it could be determined given the lack of evidence about the property management activities that the [Company] was carrying out on 22nd February 2017 and the categories of membership of the Property Ombudsman's redress scheme that their property management work may have fallen into at that time.

14. On 29th June 2018 the Authority renewed its application direct to the Upper Tribunal and on 12th July 2018 I gave permission to appeal in general terms. On 14th January 2019 I directed that there be an oral hearing of the appeal, and this took place on 7th March 2019.

The Evidence Point

15. The Authority's grounds of appeal of 26th June 2018 submitted that "there is ample evidence from which to determine the property management activities of Samson on 22nd February 2017 and the type of scheme operated by The Property Ombudsman into which this management activity fell" (paragraph 6). I am bound to agree. Looking at the bundle of papers before the First-tier Tribunal: pages 24 and 25 show the Company acknowledging that it had been managing a particular residential block since 14th September 2015 and that it should have but did not belong to a redress scheme "for the block management function" (although stating that this should not be seen as detrimental and that it did later join a property redress scheme "for the management functions that we carry out"); page 57 is a copy of a letter from the Company dated 18th October 2016 and demanding payment of ground rent and service charge for the coming year "on behalf of the freeholder" from one of the tenants/leaseholders.

16. Pages 55 and 56 of that bundle reproduce an e mail from The Property Ombudsman stating "please note that whilst Samson Estates Limited are registered with this office for residential sales and lettings, they are not registered with The Property Ombudsman for residential leasehold management. Therefore any dispute you have concerning the management of the block will not fall within the Ombudsman's jurisdiction".

17. In overlooking or ignoring this evidence the First-tier Tribunal was in error of law for not taking account of matters of which it should have taken account.

The Construction Point

18. The First-tier Tribunal found that there is no express term of the Order that requires that different categories of membership of a redress scheme must be taken out in order to cover all of the sub-divisions of property management work that a redress scheme provider may operate in practice.

19. Section 84(6) of the 2013 Act, set out above, defines "property management work" and that is clearly what the Company was doing in relation to at least the residential block referred to above. Article 5(1) of the 2014 Order provides (my emphasis);

> 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 <u>that</u> work.

In my opinion this means that a person so engaged (including the Company in the present case) must be a member of a redress scheme for <u>all</u> such work in which they are engaged. Otherwise the whole purpose of the requirement for redress schemes is undermined in relation to those who might have cause to complain, or wish to do so, but find that the relevant property manager does not happen to belong to the right scheme. This cannot possibly be an obligation that can be met by belonging to a different scheme, or a different part of a scheme which could cover the requirement but does not do so.

Substantive Conclusions

20. Contrary to the view taken by the First-tier Tribunal, this is an appeal in which this point of law needs to be addressed and determined. I have already indicated that the decision of the First-tier Tribunal was made in error of law, and therefore I set it aside insofar as it concerned the residential leasehold management issue. I have set out in the immediately preceding paragraph my view of what the law requires. I see no advantage in referring this matter back to the First-tier Tribunal, where it would be considered by a judge sitting alone. I am satisfied that the relevant facts have been established – the activities of the Company and the provisions of the redress scheme as explained above, and the Company's failure to belong to a relevant scheme or relevant part of a scheme. Accordingly, I remake the decision as indicated in paragraph 1 above.

The Financial Penalty

21. The First-tier Tribunal had before it the March 2015 version of the DCLG Guide for Local Authorities on Improving the Private Rented Sector and Tackling Bad Practice. It is non-statutory guidance but the First-tier Tribunal did consider it in relation to the other matters that it was considering alongside the matter that has come to the Upper Tribunal. 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.

22. 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.

23, In the present case the Company has pointed out that by the time of the issue of the 22nd February 2017 notice it was no longer managing the block referred to above and that it was not in a position to pay the imposed penalty (£3000) which represented a considerable proportion of the company's "net worth". Mr Khan told me that the annual turnover of the Company is somewhere between £120,000 and £160,000.

24. I am not persuaded by the financial argument but it might be thought unfair at this stage to increase the penalty above that originally imposed by the Authority and set aside by the First-tier Tribunal. I also take into account the fact that the erroneous view of the law (supported by the First-tier Tribunal) might have been an honestly held belief by those running the Company. The Authority's original assessment of £3,000 (representing a 40% discount from the maximum) was appropriate and that is the amount that I order.

H. Levenson
Judge of the Upper Tribunal
29th March 2019