FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Professional Regulation

Tribunal Reference:	**PR/2015/0011**
Appellant:	**Smartmove Properties Management & Services Ltd**
Respondent:	**Darlington Borough Council**
Judge:	**Peter Lane**

DECISION NOTICE

Legislation

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. Section 84(1) enables the Secretary of State by order to impose a requirement to belong to a redress scheme on those engaging in property management work. Subject to certain exceptions, "property management work"-

> "means things done by any person ("A") in the course of a business in response to instructions received 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" (section 84(6)).

5. 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
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> 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."

6. Article 5 imposes a corresponding requirement on a person who engages in property management work.

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 Darlington Borough Council ("the Council").

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 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).

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.

The appeal

10. The appellant, Smartmove Properties Management & Services Ltd, appeals against a final notice dated 12 June 2015 from the Council, imposing a penalty charge of £5,000 in respect of a breach of Article 3 or 5 of the Order. Following representations from the appellant, the Council subsequently reduced the amount of the charge to £3,000.

11. The hearing of the appeal took place at Durham Civil and Family Justice Centre on 28 October 2015. Mrs Beverley Hall (nee Rodgers), a director of the appellant, appeared on its behalf. She was accompanied by Mr John Hall, another director of the appellant, and Mr Tim Haigh, the appellant's office manager and sole employee. The Council was represented by Ms Helen Thompson, solicitor. Mr Conyard and Mr Burrell gave evidence on behalf of the Council.

12. Mr Conyard adopted his written statement of 11 September 2015, in which he stated that he is a private sector Housing Officer for the Council. On 7 April 2015, the housing team received a service request concerning issues with a rented property. In the course of dealing with this matter, Mr Conyard ascertained that, although the appellant had been required by the relevant legislation to be a member of an approved redress scheme from 1 October 2014, the appellant had not become such a member until 5 March 2015. According to his statement, Mr

Conyard had a conversation on 26 May 2015 with Mrs Hall. She said that the appellant was only a small business that made little over £1,000 profit in the previous year and that they had not known about the redress scheme until March 2015, when they signed up to it.

13. In June 2015, following a case review after the appellant had submitted representations regarding the penalty, the Council decided to reduce the amount to £3,000.

14. Mr Conyard said in oral evidence that the Council has adopted a three month grace period, on the basis that the Council had decided not to take steps to advertise the new legislation. The Council thought that the matter had already been well advertised through landlords' websites and that letting agents should know their business. The decision was, however, also influenced by the Council's financial situation.

15. Cross-examined by Mrs Hall, Mr Conyard was asked whether he was aware that the appellant was not a member of any private landlord's forum. He reiterated that the Council had operated a three month grace period and that there must be websites that dealt with letting agents. The limited financial resources of the Council were a further reason for not advertising the requirements.

16. In answer to a question from the Tribunal, Mr Conyard said that the Council was establishing a list of all agents in its area, in order to determine whether each was complying with the legislation. It was the Council's contact with the tenant who made the service request in April 2015, which had led to the discovery that the appellant had not become a member until March 2015. In answer to a question from Mr Haigh, Mr Conyard said that the process of gathering information about agents had started from 1 October 2014. The Council had issued a number of other final notices to agents within its area, which were considered not to have complied with the law.

17. Mrs Hall gave evidence. Cross-examined by Ms Thompson, she said that the likely profit for the year ending April 2015 would be similar to that ending April 2014, which was £1,105. The directors' remuneration (bundle page 71) for 2013 in the sum of £7,488 was remuneration for her husband, John Hall. The company had no 'back up' money. The figure shown as administrative expenses for 2013 (£16,395) and 2014 (£14,472) was the salary of Mr Haigh, the company's employee. He was also Mrs Hall's brother. Mrs Hall said that she had reverted to working full-time for the NHS. Mr Hall worked part-time in the appellant's business. The company had been founded in 2007.

18. Mrs Hall said that she and her husband had been private landlords for a long time and they had encountered other landlords, who wished them to manage properties on their behalf. This was how the appellant came into being. At one stage they had had 50 properties on the books but this had reduced to 17. They hoped to see the business grow. She and her husband still had a private portfolio

of leased properties but these were dealt with separately (that is to say, not through the appellant). She said that Mr Hall had taken no director's remuneration in 2014 because there was insufficient money.

19. Mr Haigh gave evidence that he had been "generally Googling" on the internet in March 2015, when he had come across what he thought was a landlords' forum, which had made him aware of the need to be a member of a redress scheme. They had immediately chosen a suitable scheme and joined it. Mrs Hall said that she accepted the appellant should have been "up-to-date" with the legislation.

20. In her closing submissions, Ms Thompson said that the appellant had been in default from 1 October 2014 to 5 March 2015. The Council was entitled to set the amount of the penalties so as to cover its costs. She told me that the private sector housing officer had spent eight hours at £39.50 per hour on the matter, whilst legal costs came to £2,000. The penalty had to be imposed in order to make sure that those concerned took the legislation seriously. The Council had acted proportionately by reducing the penalty to £3,000.

21. Mrs Hall, in her closing submissions, said that the statement in the final notice was incorrect, in asserting that the tenant who had made the request had been "unable to complain to an approved organisation about the service they have received". That was incorrect, in that at the time the tenant had contacted the Council about the issue arising in the leased property, the appellant was a member of the redress scheme. Mrs Hall said that the appellant prided itself on being a good company. A fine of £3,000 would force it to go out of business, resulting in the loss of Mr Haigh's employment. It seemed harsh to have had a penalty imposed, when a warning might have been given. She had not come prepared in order to give an account of the costs that the appellant had expended in connection with these proceedings.

Discussion

22. It is unquestionably the case that the appellant was in breach of the legislation. Whether or not it was aware of the Council's policy of applying a three month "grace period", the appellant did not become a member of a scheme until more than two months after the expiry of that period. I note Mr Burrell's evidence that the grace period was adopted by the Council's officers as a reasonable measure, in all the circumstances.

23. Nowhere in the legislation or in the government guidance is it stated that a Council is required or expected to take active steps to notify letting agents of the impending or actual coming into force of the relevant legislation. I consider that the Council in the present case was entitled to expect professional letting agents to be aware of legal requirements directly impacting upon their business. The changes were advertised in a government website. They were also made known in websites, to which the appellant could be expected to have access, and to be

expected to consult. Indeed, this is precisely how Mr Haigh discovered, albeit belatedly, about the requirements in March 2015.

24. There has been mention in the proceedings of a tenant having approached the Council in April 2015, by means of a service request. The tenant was said to have been having difficulties with the condition of a rented property, which may have been one of those managed by the appellant. As I explained at the hearing, it is not the function of the Tribunal in the present proceedings to make any findings regarding the tenant's concerns. It is, however, plain that the approach of the tenant to the Council acted as the catalyst for Mr Conyard to check the issue of whether the appellant was a member of a redress scheme. I am, however, satisfied from the evidence that the Council was also taking steps to ascertain the membership position of all relevant letting agents, within its area. Accordingly, I do not find that the appellant was singled out for treatment in any way that can be described as unfair.

25. Although I agree with Mrs Hall that the comment relating to the tenant in the final notice is inaccurate, insofar as it suggests the tenant was unable to complain under a redress scheme, the fundamental reason for the issue of the final notice was, plainly, that the appellant had not been registered until 5 March 2015.

26. I fully take into account the fact that the Council has reduced the penalty to £3,000, having regard to the appellant's representations. Those included the contention that the appellant would be put out of business by the imposition of a £5,000 fine. The appellant's case is that it would also be put out of business by the imposition of a £3,000 fine.

27. Having heard Mrs Hall's evidence, I find that she is witness of truth. I do not consider that it has been shown in any way that the accounts submitted in connection with this case misrepresent the position. I accept the evidence that the number of landlords on the appellant's books has materially declined. I further accept the evidence that Mr Hall did not draw a director's remuneration in 2014, owing to the financial situation of the appellant.

28. On the other hand, I note that Mrs Hall was keen to emphasise that the appellant is anxious to re-build its business. I also take account of the way in which the appellant came into existence, effectively as a direct result of Mr and Mrs Hall's pre-existing (and continuing) activities as private landlords. The reality of the matter is that the imposition of a modest, but still significant, financial penalty is unlikely to put the appellant out of business because Mr and Mrs Hall will not allow that to happen, particularly given the effect this may have on Mr Haigh.

29. I consider that £3,000 is in, all the circumstances, too high. Although it is, of course, difficult to calculate with any certainty the point at which any lower penalty is unlikely to result in the appellant ceasing to trade and Mr Haigh ceasing to have a job, I have come to the conclusion that the appropriate penalty should be £2,000.

30. This appeal is accordingly allowed to that extent.

Peter Lane
Chamber President
Dated 9 November 2015
Promulgation Date 13 November 2015