First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2018/0037

Decided without a hearing
on 12th December 2018

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

TILECROFT LTD

Appellant

and

COLCHESTER BOROUGH COUNCIL

Respondent

DECISION

1. The Appeal is refused. The final notice served by the Colchester Borough Council ("Colchester") on Tilecroft Limited ("Tilecroft") dated 27th June 2018 was correct in identifying a breach by Tilecroft of their duty to become a member of an approved redress scheme whilst engaging in property management work and imposed a monetary penalty that was reasonable in all of the circumstances of this appeal.

REASONS

A. Background

2. Tilecroft appealed against a final notice dated 27th June 2018 served on it by Colchester (the "Final Notice"), which is the enforcement authority for letting agents and property managers carrying on business in Colchester. The Final Notice is addressed to Tilecroft at its business address at 26 Theydon Road, London E5 9NA and concerns Tilecroft's property management work being carried on at Pico Wharf, Whitehall Road, Colchester CO28YX. The Final Notice requires Tilecroft to pay a monetary penalty of £5,000 in respect of its failure between 31st October 2016 and 13th March 2018 to meet its duty under The Redress Scheme for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc. (England) Order 2014 (the "Order") to belong to an approved redress scheme whilst engaged in property management work.

B. Legislation

3. The Order was issued in order to permit the exercise of the powers conferred by the Enterprise and Regulatory Reform Act 2013 (the "Act"). The sections of the Act and the Order that are referred to in this decision or that are otherwise relevant to this appeal are set out below in the Annex, which forms a part of this decision.

4. Where the relevant enforcement authority is satisfied on the balance of probabilities that a letting agency has breached its duties under the Order, it may impose a monetary penalty under article 8 of the Order. It does so by serving first a notice of intent, considering any representations made in response, and then serving a final notice on the letting agent concerned.

5. The Order provides that a letting agent upon whom a financial penalty is imposed may appeal to this tribunal. The permitted grounds of appeal are (a) that the decision to impose the financial penalty was based on an error of fact; (b) the decision was wrong in law; (c) the amount of the monetary penalty is unreasonable; or (d) the decision was unreasonable for any other reason. The tribunal may quash, confirm or vary the final notice which imposes the financial penalty

C. Guidance

6. The Act and the Order are the subject of Guidance for Local Authorities issued by the Department for Communities and Local Government in March 2015 (the "Guidance"). The Guidance is non-statutory but the relevant enforcement authority is expected to have regard to it when considering what fine is reasonable for a breach of the Order. The section of the Guidance that is of greatest relevance to this appeal is set out below:

"*The enforcement authority can impose a fine of up to £5,000 where it is satisfied, on the balance of probability that someone is engaged in letting or management work and is required to be a member of a redress scheme, but has not joined.*

……..

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 £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.' (See page 53 of the Guide.)

D. The Appeal and the Response

7. After lengthy dealings with Tilecroft over the management of the property at Pico Wharf, Colchester served a notice of intent dated 14th March 2018 (the "Notice of Intent") on Tilecroft giving details of their breach of the Order and indicating that it was considering imposing a penalty of £5,000. Colchester invited representations for Tilecroft. Tilecroft responded later that day and stated that they were part of Bintons, who were members of a redress scheme and stating that they had now registered with PRS.

8. Colchester has provided a Witness Statement for an Environment Health Officer who had had extensive dealings with Tilecroft, who confirmed that the representations from Tilecroft in response the Notice of Intent had been considered. A copy of the form setting out Colchester's views on the representations was provided with the witness statement. This form records that previous verbal and written warnings had been provided to Tilecroft and that there had been no mention of Bintons in relation to the management of Pico Wharf in any document or correspondence. Colchester also noted that Tilecroft's business was categorised at Companies House as "management of real estate for a fee or contract basis". Colchester concluded that there were no mitigating factors that would justify a reduction in the penalty and decided to issue the Final Notice with a £5,000 penalty.

9. On 23rd July 2018 Tilecroft submitted a Notice of Appeal to Colchester setting out their grounds of appeal against the Final Notice. The main points of Tilecroft's grounds of appeal are:
   - The amount of the fine imposed by the Final Notice is unreasonable.

- The fact of the offence of not registering with an approved redress scheme between 31 October 2016 and 13th March 2018 is admitted.
- Tilecroft effectively trades as a single entity with Bintons Property Services Ltd, ("Bintons") who registered with the Property Redress Scheme ("PRS") in a timely manner. Customers of Tilecroft receive details of a contact at Bintons and Bintons' PRS number if they wish to complain.
- The fine imposed is the maximum permissible under the Act and is unreasonable as their non-compliance was inadvertent and technical, rather than substantive, the breach was remedied promptly and did not cause any harm to consumers.

10. Colchester submitted a response to the appeal and outlined their dealings with Tilecroft in relation to the property at Pico Wharf in Colchester since 2016. Colchester ascertained that Tilecroft were acting as property managers for the property in late 2016 and have been in correspondence or have served legal notices on them since that time. Colchester has not seen any reference to Bintons at Pico Wharf. Colchester state that they informed Tilecroft of the need for them to join a redress scheme at a meeting on 2nd May 2017 and again in in an e-mail on 6th November 2017. Colchester referred to the Guidance and the expectation that a penalty of £5,000 is the norm unless there are extenuating circumstances. Colchester does not consider that there are any extenuating circumstances justifying a reduction in the penalty and Tilecroft had not claimed that the fine was disproportionate to their turnover. Colchester had reviewed the most recent filed accounts of Tilecroft and noted that in these accounts for the year to 29th April 2017 Tilecroft had net assets of £43,000. Colchester stated that they did not believe a reduction in the penalty was appropriate.

E. Proceeding without a hearing

11. In their appeal Tilecroft indicated that they wished the appeal to be heard on the papers. Colchester has not sought an oral hearing. Having considered the subject matter of the appeal, the evidence and submissions provided by the parties and the capability of the parties I consider that this appeal is suitable for determination on this basis.

G. Findings on liability

12. In reaching a decision in this case I have had regard to all of the written submissions, evidence and other documentation contained in the hearing bundle.

13. I note that Tilecroft have not sought in their representation or in their appeal to challenge Colchester' conclusion that Tilecroft was carrying on property management work in Colchester between 31 October 2016 and 13 March 2018 (the "Relevant Period") and needed to be a member of an approved redress scheme at that time. Tilecroft state in their appeal that "*The fact of the offence is admitted*". The submission and evidence of both parties appears to support such a conclusion and I accept that this was the position during the Relevant Period. The close link between Tilecroft and

Bintons does not affect Tilecroft's independent obligation to become a member of an approved redress scheme. I conclude that Tilecroft was in breach of its obligations under the Order and Colchester was justified in issuing the Final Notice and imposing a monetary penalty.

H. Findings on penalty

14. I have considered whether the amount of the monetary penalty is unreasonable as Tilecroft claim in their grounds of appeal. In deciding that issue, which is left open by the primary legislation, I accept that it is helpful and appropriate to have regard to the Guidance. 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*". The Guidance does not purport to be exhaustive as to what might constitute extenuating circumstances; however, it goes on to indicate some considerations that may be relevant. It recognises that an issue that should be considered in this regard is whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is clear that the Act must take precedence over the Guidance and that, in any event, enforcement authorities such as Colchester must consider the issue of reasonableness and proportionality of a penalty in the round and that they should not follow the advice in the Guidance to the exclusion of all other matters. The Act is intended to reduce harm and the risk of harm to consumers from letting agents and property managers. The penalty needs to be set at a level that reflects the public benefit in ensuring compliance with the Act whilst being proportionate to the scale of the business and the severity of the failure.

15. In this case Tilecroft state in their appeal that their failure to join an approved redress scheme when Binton did so was;
"*due to oversight and/or lack of appreciation of the importance of the existence of distinct corporate entities*.
Tilecroft state that they joined the PRS as soon as their failure was brought to their attention by Colchester on 13th March 2018. In their reply to Colchester's response to the appeal, Tilecroft state that the suggestion that the maximum penalty should be the norm runs contrary to all established principles of sentencing. They point out that some breaches could be repeated and deliberate and cause extensive harm, whilst other could be a single breach that is corrected and causes no harm and that a penalty should distinguish between these different breaches.

16. It is the responsibility of any business to understand the legal obligations that it must comply with in the markets in which it operates. I note in this case that Bintons, with whom Tilecroft shares some management, identified the need to comply with the Order in good time. I also take account of the two notifications by Colchester to Tilecroft pointing out their obligation to become a member of an authorised redress scheme. Despite this awareness of their obligations Tilecroft failed to take the steps required by law until 13th March 2018. I have no information that would enable me to assess whether or not any consumer has suffered harm by reason of Tilecroft's failure.

The purpose of requiring businesses carrying on property management work to become a member of a redress scheme is to make it easier for customers to pursue their concerns. Tilecroft's failure may have prevented any harm from coming to light.

17. The inability of a business to pay a penalty imposed under the Order is likely to be an extenuating circumstance giving rise to a reduction in the penalty. However, it is up to the business to persuade the local authority or the tribunal that the level of a penalty is such that it will pose a risk to their continued ability to trade or is otherwise disproportionate. Tilecroft has not sought to put forward such a claim and the limited information provided by Colchester on Tilecroft's financial position does not indicate that the level of penalty proposed would cause Tilecroft hardship.

18. In all of the circumstances of this case, I conclude that Tilecroft has not established that there are extenuating circumstances that make the amount of the penalty unreasonable. Tilecroft have failed to comply with the obligation under the Order for an extended period and did not comply when their failure was pointed out to them by Colchester on two occasions. I conclude that the level of the penalty is not disproportionate to the breach of Tilecroft's legal obligation set out in the Final Notice and is reasonable.

H. ***Decision***

19. By virtue of Article 9 of the Order, the Tribunal may quash, confirm or vary a final notice.

20. I conclude that the Final Notice was correct in identifying a breach by Tilecroft of their duty to be a member of an approved redress scheme whilst engaging in property management work during the Relevant Period and that the monetary penalty of £5,000 imposed in the Final Notice is reasonable in all of the circumstances of this appeal.

21. The Final Notice is confirmed.

Peter Hinchliffe
Judge of the First-tier Tribunal
17th December 2018
Promulgation date 20 Dec. 2018

ANNEX

1. Section 83(1) of the Enterprise and Regulatory Reform Act 2013 (the 'Act') provides:

> '(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:

> '(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 section 84 (6) provides that;

> " '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."

5. Pursuant to the Act, 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') was introduced. It 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.'

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.

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 £5000. 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. (See Paragraph 3 of Schedule to the Order).

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.

10. The Schedule to the Order provides as follows:

"Final notice

3.

(1) After the end of the period for making representations and objections, the enforcement authority must decide whether to impose the monetary penalty, with or without modifications.

(2) Where an enforcement authority decides to impose a monetary penalty on a person, the authority must serve on that person a final notice imposing that penalty.

(3) The final notice must include—

(a) the reasons for imposing the monetary penalty;

(b) information about the amount to be paid;

(c) information about how payment may be paid;

(d) information about the period in which the payment must be made, which must not be less than 28 days;

(e) information about rights of appeal; and

(f) information about the consequences of failing to comply with the notice.