IN THE FIRST TIER TRIBUNAL **PR/2018/0040**

(GENERAL REGULATORY CHAMBER)

LIFESTYLE CLUB LIMITED

and

LONDON BOROUGH OF ISLINGTON

DECISION

Tribunal Judge: Brian Kennedy QC

Appellant: Oliver Kavanagh of Counsel.

Respondent: Richard Roberts of Counsel

DECISION OF THE FIRST-TIER TRIBUNAL:

The Tribunal refuses the appeal.

REASONS OF THE TRIBUNAL:

Introduction:

1. This decision relates to an appeal brought under Schedule 9 of the Consumer Rights Act 2015. It is an appeal against a Final Notice issued by the London Borough of Islington ("LBI"), in which LBI imposed a financial penalty of £5,000 on the Appellant company for failing to display on their website a statement concerning membership of a client money protection scheme while undertaking property management or letting agency work.

Legislation:

2. A letting agent is defined in section 84 of the Consumer Rights Act 2015 ('the 2015 Act') as follows:

   (1) In this Chapter "letting agent" means a person who engages in letting agency work (whether or not that person engages in other work).

   (2) A person is not a letting agent for the purposes of this Chapter if the person engages in letting agency work in the course of that person's employment under a contract of employment.

   (3) A person is not a letting agent for the purposes of this Chapter if—

      (a) the person is of a description specified in regulations made by the appropriate national authority;

      (b) the person engages in work of a description specified in regulations made by the appropriate national authority.

3. Section 86 further defines 'letting agency work':

   (1) In this Chapter "letting agency work" means things done by a person in the course of a business in response to instructions received from –

      (a) a person ("a prospective landlord") seeking to find another person wishing to rent a dwelling-house under an assured tenancy and, having found such a person, to grant such a tenancy, or

      (b) a person ("a prospective tenant") seeking to find a dwelling-house to rent under an assured tenancy and, having found such a dwelling-house, to obtain such a tenancy of it.

   (2) But "letting agency work" does not include any of the following things when done by a person who does nothing else within subsection (1)

      (a) publishing advertisements or disseminating information;

      (b) providing a means by which a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or a prospective landlord;

      (c) providing a means by which a prospective landlord and a prospective tenant can communicate directly with each other.

   (3)"Letting agency work" also does not include things done by a local authority.

4. Section 84(1) of the Enterprise and Regulatory Reform 2013 provides that

   "(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."

5. Section 84(2) explains that 'redress scheme' means the same as outlined in Section 83(2), which states:-

> (2) A "redress scheme" is a scheme, which provides for complaints against members of the scheme to b investigated and determined by an independent person.

6. Subject to specified exceptions in subsection (7) of section 84, property management work is defined as follows:-

> "(6) In this section, "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.

7. 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 5 of the Order provides:-

> "Requirement to belong to a redress scheme: property management work
>
> 3. —(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.
>
> (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."

8. Article 6 provides specific exclusions of certain actions from the definition of 'property management' for the purposes of the legislation.

9. 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 London Borough of Islington.

10. 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). Anyone served with such a notice has the right to appeal within 28 days, on one of four grounds:

    (a) the decision to impose a financial penalty was based on an error of fact,

    (b) the decision was wrong in law,

    (c) the amount of the financial penalty is unreasonable, or

    (d) the decision was unreasonable for any other reason.

Final Notice:

11. In the present case the Final Notice dated 11 July 2018, addressed to Lifestyle Club Ltd, stated that LBI was satisfied that between 30 October 2017 and 26 March 2018 the appellant committed a breach of its duty as a letting agent and a property management agent to belong to an approved redress scheme.

The Appeal:

12. The Appellant appealed to the Tribunal on 3 August 2018. Its first ground of appeal was that it was not a property management company, but rather than it ran a club membership on behalf of a company called Lifestyle Club LSC Ltd. It claimed that members' contracts were with Lifestyle Club LSC Ltd which are not leases, and that Lifestyle Club LSC Ltd was registered with a redress scheme. The Appellant claimed that it paid for Lifestyle Club LSC Ltd.'s membership of this scheme, and any members

would be covered under that arrangement given the close relationship of the companies.

Respondent's reply:

13. LBI reiterated that the Appellant Company did not belong to a redress scheme, and the two companies were separate legal entities with different company numbers and different business descriptions at Companies House. The Appellant company described its business as "68209: The other letting an operating of own or leased real estate", and Lifestyle Club LSC Ltd as "68201: Renting and operating of Housing Association real estate". The Appellant Company advertises rooms on various property websites and the manner in which it conducts its business falls under the statutory definitions of a letting agency and/or property management. While the arrangements with clients are described as licenses, they are in effect tenancies as they provide accommodation under specified terms in return for payment of a monthly sum and deposit. The Appellant Company is the signatory to these agreements, not Lifestyle Club LSC Ltd.

Appellant's reply:

14. The Appellant denied "any actual letting and/or property management works despite the business description", and denies negotiating on behalf of landlords or having any control over any property. It was claimed that "at all times" the Appellant Company acted on behalf of Lifestyle Club LSC Ltd and would have been covered by its redress scheme membership.

Tribunal Hearing:

15. Prior to hearing, LBI provided a witness statement from Mr David Fordham, Service Manager of the Trading Standards Team at LBI. He stated that on 9 July 2018 he was shown an email from a Mr Tim Frome, who is involved in the management of the Property Redress Scheme (PRS). In this email Mr Frome stated that on 15 June 2018 the Appellant company was added to the redress scheme membership of Lifestyle Club LSC Ltd. Mr Frome also confirmed that the scheme would accept any complaints raised about the new company back to the date when Lifestyle Club LSC Ltd joined.

Mr Fordham was of the opinion that while that assisted new complainants, it would not have been available to consumers between the dates complained of.

16. A second witness statement from LBI was produced to the Tribunal. In it, Mr Simon Martin, Senior Trading Standards Officer in LBI, outlined that he had received “a dozen complaints from consumers” regarding the Appellant company. He contacted all three redress schemes, including PRS, who all confirmed that the Appellant Company was not a member of any scheme. Mr Martin exhibited further emails from Mr Frome, including one dated 11 September 2018, which confirmed that the Appellant Company was not set up as a member of the scheme at the same time as Lifestyle Club LSC Ltd.
17. At hearing, the Appellant pointed to emails from Mr Frome, which, in their submission, confirmed that the Appellant Company was covered back to the date on which Lifestyle Club LSC Ltd joined the scheme. This was evidence that there was no gap in coverage by the scheme, and this was described as the ‘error of fact’ upon which Mr Fordham’s’ decision was based and should be overturned.
18. Mr Roberts, Counsel for LBI stated that the legislation was clear, and imposed a strict liability duty that any person or body acting as a letting agent or property manager must be a member of a redress scheme. It is not in dispute that the Appellant Company was not a member. The fact that this was rectified *ex post facto* to ensure that there are *now* no gaps in coverage does not negate the lack of membership at the relevant time; a fact that has been confirmed by the email of Mr Frome of September 2017. The fact that there were multiple complaints made to LBI from consumers showed that at the time there was no effective redress.
19. The Appellant further asserted that it was not a body that required membership of such a scheme in any event. It denied that any tenancies were created, but stated that if any tenancies were created, Lifestyle Club LSC Ltd was the lessor, and the only role played by the Appellant company was the management of membership lists and the collection of payments. The Appellant again reiterated that Lifestyle Cub LSC Ltd was covered by the redress scheme, and argued that it was unreasonable to require both companies to provide “two separate lines of redress”.
20. LBI countered this by describing the Appellant’s business model as a “sham”; the company was collecting rent and allocating properties to customers, and to describe this as a ‘membership club’ when this is the only type of business it undertakes is to attempt to disguise what is obviously a tenancy arrangement. This assertion is strengthened by the fact that Lifestyle Club LSC Ltd did indeed join a redress scheme

immediately upon incorporation, which LBI raised as a tacit acknowledgement of the nature of the business.

21. The Tribunal accept and adopt the assertions and submissions made by the Respondent. It appears this was a scam a of the type envisaged and the Appellant has failed to identify any error of fact or Law in the Respondents procedure or application of the Law in effecting the Final Notice. There has been no evidence to justify a reduction of the fine for mitigation or other reasons. Accordingly the appeal is hereby dismissed.

Brian Kennedy QC 19 February 2019.

Promulgation date 20 February 2019.