IN THE FIRST TIER TRIBUNAL **PR/2018/0050**

(GENERAL REGULATORY CHAMBER)

CAMERON ADAMS

and

LONDON BOROUGH OF NEWHAM

DECISION

Tribunal Judge: Brian Kennedy QC

Sitting: at Alfred Place, London on Wednesday 6 February 2019

Appellant: Kamran Younis, director of Appellant Company

Respondent: Ryan Thompson 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 Newham ("Newham"), in which the Council imposed a financial penalty of £4,500 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] The 2015 Act also imposes duties on letting agents engaged in letting agency or property management work to publish a statement of whether the agent is a member of a client money protection scheme (section 83(6)) and a statement indicating that the agent is a member of a client redress scheme and the name of that scheme (section 83(7). Section 87 imposes a duty on the local weights and measures authority to enforce these provisions in its own area where it is considered on the balance of probabilities they have been breached. Breaches are considered to have occurred in the area of the local authority in which a dwelling house is situated to which any fees relate, but authorities can take enforcement action in the area of another local authority with the consent of that authority. Local authorities have the power to impose monetary penalties not exceeding £5,000 in the event of a breach.

[5] The procedure for the imposition of monetary penalties and the rights of appeal are set out in Schedule 9 of the 2015 Act. The local authority is required to issue a 'notice of intent' to issue such a penalty within six months from the date the authority had sufficient evidence of a breach. The notice must set out the amount of the proposed financial penalty, the reasons for proposing to impose the penalty, and information about the right to make representations within 28 days of the sending of the notice. At the end of that period the authority must decide whether to impose a penalty and the amount of that penalty. The final notice must set out that amount, reasons for the imposition of the penalty and information regarding how to pay and how to appeal. 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:

[6] In the present case the Final Notice dated 2 August 2018, addressed to Cameron Adams t/a Century 21 Stratford, stated that Newham was satisfied that on 13 June 2018 the appellant committed a breach of its duty to display a statement concerning membership of a client money protection scheme.

The Appeal:

[7] The Appellant appealed to the Tribunal on 25 August 2018. It was argued that both the decision and the level of penalty were unreasonable. The Appellant raised a number of procedural complaints regarding Newham's conduct:

a) The business had not received any communications regarding these alleged breaches prior to the Notice of Intent on 13 June 2018

b) Previous communications with a different Trading Standards Officer did not raise any of these concerns;

c) The company name on the Notice of Intent was incorrect (reading 'Century21 Stratford' rather than 'Century21 Cameron Adams') and as such was defective.

[8] However, if such a breach were to be found, the Appellant argued that a £4,500 monetary penalty is unreasonable, as the company was in fact a member of a client money protection scheme, the details of which it states were displayed in the trading office. It described the law as "nonsensical" if it required a statement regarding a protection scheme without requiring membership.

Council's Response:

[9] Newham provided witness statement from Ms Fiona Exley, detailing the history or communications with the Appellant regarding the website. Newham accepted that the Notice of Intent was inaccurate, but argued that there was "no material injustice" occasioned as the Notice was correctly addressed and was delivered into the appropriate hands. The legislation at s83 imposes two distinct duties to display the declaration regarding protection schemes, and compliance with one duty does not negate non-compliance with another. The question of whether or not this had ever been raised with the Appellant prior to 2017 did not impact on compliance in 2018, but Newham did note that the Trading Standards Officer named by the Appellant works for a different London Borough. Nevertheless, Newham detailed how the Appellant was informed in February 2017 of the breach, and a Notice of Intent was issued and subsequently withdrawn, and again in September 2017 when the Appellant's rating under the 'star rating scheme' was downgraded owing to their failure to display the statement.

Appellant's Response:

[10] The Appellant reiterated their contention that the amount of the penalty was unreasonable, and argued that the intention of Parliament, the Appellant stated, was not to prosecute individuals "on the strictest of liability basis". It was emphasised that no clients were disadvantaged or put at risk by any breach. The Appellant claimed that the website was run from Century21 UK head office, and franchised offices have "limited access" to make amendments. Furthermore, it was claimed that "Century21 Stratford does not hold client money" - the money is held by Cameron Adams Ltd.

[11] The communication with the other Trading Standards officer was raised again, to argue that it was "not in the interest of legal certainty" to permit two officers in two boroughs to come to opposite conclusions.

Tribunal Hearing:

[12] The case was heard on 6 February 2019. Mr Younis, director of the Appellant company, conceded that there had been an oversight in failing to display the relevant statement on the company website. However, he emphasised that at no time was the business a threat to consumers, and that his business was registered with a client money protection scheme. It was argued that the legislation created a discretion as to whether or not to penalise businesses. Mr Younis also provided business accounts and some medical evidence by way of mitigation.

[13] Responding for Newham, Mr Thompson of Counsel, pointed out that while the Secretary of State's Guidance says that the maximum penalty is the norm, the Appellant's circumstances and efforts made to comply led to a reduction in the penalty. The history of engagement with the Appellant was raised, and Mr Thompson noted the lack of statement on the website had been flagged as an issue with the company some eighteen months before the Final Notice, both in communications and in the notification of the star rating which, Mr Thompson noted, was appealed by the business. It was this protracted period of non-compliance that informed the decision to issue the penalty.

[14] Mr Younis also raised the issue of the error on the Notice of Intent, arguing that by addressing it to "Cameron Adams Ltd t/a Century21 Stratford" rather than "Cameron Adams Ltd t/a Century21 Cameron Adams", the notice was invalidated. Mr Thompson argued that Mr Younis had responded to previous correspondence addressed to 'Century21 Stratford' before without issue, and also provided a copy of the Appellant's list of tenants' fees and charges in which the business is referred to as Century21 Stratford. As this was a name used by Mr Younis in the course of running the business, and Mr Younis received the correspondence, there is no injustice or prejudice.

Decision:

[15] It was not disputed by the Appellant that the website did not display a statement concerning membership of a client money protection scheme, contrary to s83(6). S83(3) specifically imposes the duty to display fees on a website as a separate duty to the duty to display the list of fees in the premises (s83(2)). As s83(6) requires the statement of membership to be displayed with the fees, it therefore imposes this requirement both on premises and websites where websites exist. In effect strict Liability. It is not a defence to show that the business complied with one of these duties where it is accused of non-compliance with another. This appears to be a relatively long-standing issue between Newham and the Appellant, and it is one that is easily resolved. The duty is not an onerous one. As for the level of the penalty, the Tribunal reminds itself of the Secretary Of State's 2015 Guidance on '*Improving the Private Rented Sector*' which states that "*The expectation is that a £5,000 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*." The level of the fine has already been lowered by Newham to take into account the minor nature of the breach, but the Tribunal, in all the circumstances considers that the length of time that this breach remained an issue prohibits any further reduction in the penalty.

[16] For the reasons above, the Tribunal refuses the appeal in its entirety.

Brian Kennedy QC 18 February 2019.

Promulgation date 19 February 2019.