PR/2016/0014

SOUTHWOOD PROPERTY SERVICES LTD

Appellant:

and

READING BOROUGH COUNCIL

Respondent:

Judge Kennedy QC

DECISION NOTICE

Legislation

1. Section 83 of the Consumer Rights Act 2015 ('the 2015 Act') provides that:

(1) A letting agent must, in accordance with this section, publicise details of the agent's relevant fees.

(2) The agent must display a list of the fees –

(a) at each of the agent's premises at which the agent deals face-to-face with persons using or proposing to use services to which the fees relate, and

(b) at a place in each of those premises at which the list is likely to be seen by such persons.

(3) The agent must publish a list of the fees on the agent's website (if it has a website).

(4) A list of fees displayed or published in accordance with subsection (2) or (3) must include

(a) a description of each fee that is sufficient to enable a person who is liable to pay it to understand the service or cost that is covered by the fee or the purpose for which it is imposed (as the case may be),

(b) in the case of a fee which tenants are liable to pay, an indication of whether the fee relates to each dwelling-house or each tenant under a tenancy of the dwelling-house, and

(c) the amount of each fee inclusive of any applicable tax or, where the amount of a fee cannot reasonably be determined in advance, a description of how that fee is calculated.

2. A letting agent is defined in section 84 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 fees to which this Chapter applies are set out in section 85:

(1) In this Chapter “relevant fees”, in relation to a letting agent, means the fees, charges or penalties (however expressed) payable to the agent by a landlord or tenant –

(a) in respect of letting agency work carried on by the agent,

(b) in respect of property management work carried on by the agent, or

(c) otherwise in connection with –

(i) an assured tenancy of a dwelling-house, or

(ii) a dwelling-house that is, has been or is proposed to be let under an assured tenancy.

(2) Subsection (1) does not apply to –

(a) the rent payable to a landlord under a tenancy,

(b) any fees, charges or penalties which the letting agent receives from a landlord under a tenancy on behalf of another person,

(c) a tenancy deposit within the meaning of section 212(8) of the Housing Act 2004, or

(d) any fees, charges or penalties of a description specified in regulations made by the appropriate national authority.

5. Further to the requirement to publish fees, 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)).

6. 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.

7. 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

8. In the present case the final notice dated 12 May 2016, addressed to the appellant, stated that Mr Paul Evans, an authorised officer of Reading Borough Council ('the Council'), believed that the appellant had committed a breach of its duty to publicise fees under section 83 of the 2015 Act. Mr Evans visited the

appellant's business premises on 29 January 2016 and found that the tenants fees, landlords fees and redress scheme were not publicised, and the Client Money Protection Scheme statement was not present in the office or on the website. A non-compliance notice was issued on that date, giving the appellant 28 days to remedy the breach. However, on a follow-up visit on 6 April 2016 the conditions had still not been met. On 14 April 2016 the breach was continuing, and a notice of intent was issued. The appellant made representations to the effect that it needed more time to comply, but the Council considered that ample time had been afforded for compliance, evidenced by the fact that steps had been taken to remedy the breach within hours of the notice of intent being issued.

The Appeal

9. The appellant appealed to the Tribunal. Both parties were content for the matter to be determined without a hearing.

10. The appellant company is a family operation, with Mr Johal as director and his wife Mrs Johal as company secretary. The appellant's grounds of appeal assert that, on the visit of 29 January 2016, Mr Evans informed Mr Johal of the requirements to display the required information but did not adequately inform him that it was a legal requirement to so do above and beyond friendly advice regarding 'best practice'.

11. The appellant notes that it has never received any complaints from landlords or tenants regarding these issues. There is no suggestion that the appellant profited from this failure to comply. It explains the delay in remedying the breach with reference to the failure of the Council to explain the urgency or consequences of non-compliance, and the health issues suffered by the Mr and Mrs Johal's child at this time.

12. When Mr Evans returned on 6 April 2016, it was explained to him that owing to the aforementioned difficulties, the appellant had not been in a position to remedy the breaches but that he would do so. The appellant states that the notices had been drafted but not displayed.

13. On Mr Evans' final visit on 14 April 2016 the notices were not displayed. Mrs Johal explained that the notices were on Mr Johal's computer but as it was password protected for confidentiality purposes, she could not print out the notices there and then. As a result, Mr Evan's issued the notice of intent.

14. The Appellant displayed the requisite notices within two hours, sending proof to the Council, inviting another inspection and requesting a review of the intention to impose a monetary penalty.

15. It is argued that:

    (a) the decision to impose a penalty was unreasonable given Mr and Mrs Johal's personal circumstances, their misunderstanding of the nature of their legal obligations and the fact that they were not professionally advised at the time of the notice;

    (b) The notices were defective in that they failed to provide any or adequate reasons for the amount of the penalty, as the imposition of the maximum amount without proper reasons is abrogating its responsibilities under the 2015 Act; and

    (c) The level of the penalty is excessive, as:

        (i) There is no suggestion of 'ambush charging' clients or profiting from the breach;
        (ii) There was insufficient warning of the consequences of a breach prior to the notice of intent;
        (iii) The penalty is over 10% of the appellant's pre-tax profit;
        (iv) Given the mitigating features it is inappropriate to mark the maximum penalty.

The Council's Response

16. Mr Evans provided a witness statement to the Tribunal. He exhibited a letter sent to the appellant on 18 January in which it demonstrates the purpose of the inspection was explicitly stated as being, *inter alia*, to ensure compliance with

the requirements of the 2015 Act. The letter and the attached guidance laid out the legal obligations of that Act regarding the displaying of fees and other necessary information, with the consequences of a breach set out in bold print.

17. The visit was initially scheduled for 25 January 2016, but was rescheduled to 29 January 2016 for the appellant's convenience. Whilst waiting to see Mr Johal, Mr Evans noted some concerns about the professionalism with which he observed Mr Johal conducting his business with clients. Contrary to the assertions in the grounds of appeal, Mr Evans states that he commenced the inspection by issuing Mr Johal with a Notice of Powers and Rights before laying out in clear terms the reasons for the inspection, referring Mr Johal back to the pre-inspection letter that Mr Johal had in front of him. When Mr Evans gave guidance on how to comply with the display requirements, referring him to templates for display notices and suggesting methods of compliance for the appellant's website. He states that throughout the inspection he continuously referred to the fact that these were legal requirements and any breach carried a maximum penalty of £5,000.

18. On 6 April 2016 Mr Evans returned to the appellant's premises with Ms Marlene Mobango, who has also provided a witness statement to the Tribunal. Both Mr Evans and Ms Mobango state that Mr Johal was fully appraised of the consequences of non-compliance of the 2015 Act, and took detailed notes of the requirements throughout their meeting. On the inspection of 14 April 2016 Mr Evans and Ms Mobango spoke to Mrs Johal who initially requested that the inspectors return the following day. When it was pointed out that the appellant was still not compliant, she requested an hour and a half to have "everything done".

19. Later that evening the appellant emailed Mr Evans with photographs indicating the implementation of the requirements and an explanation of the reasons for non-compliance, detailing the child's health problems. These were deemed to be written representations under Schedule 9 of the 2015 Act and were considered at a case conference on 25 April 2016. The fact that the breach was remedied so quickly shows how easy it was to comply with the requirements, especially as there are at least three other staff who could have actioned this.

20. Regarding the level of the penalty, the Council points out that the department of Communities and Local Government guidance clearly states that the expectation is the imposition of the maximum penalty.

Appellant's reply

21. Mr and Mrs Johal accept the truthfulness of Mr Evans account, but, given the distraction of his son's medical condition, they ask the Tribunal to accept that Mr Johal had no recollection of receiving the pre-inspection letter and did not fully understand what was being told to him in the meetings in April 2016.

22. Whilst it is accepted that the notices gave reasons for the imposition of a penalty, it is argued that the notices did not give with sufficiently clarity reasons for imposing the particular penalty that the Council sought to impose. The Appellant argues that Mr Evans' proposition that the notices gave sufficient detail "*considering the other paperwork served and detailed discussions that took place*" is incorrect and implies an acknowledgement that the notices themselves are defective by reason of insufficient detail. It is argued in the alternative that even if the Final Notice is valid, the Notice of Intent is insufficient and the Final Notice cannot stand in the absence of a valid Notice of Intent.

23. Regarding the amount of the penalty, the appellant argues that this is a new law creating a new offence, and the departmental guidance does not have statutory force, nor does it set a judicial precedent. The guidance specifically notes that *"in the early days of the requirement coming into force, lack of awareness could be considered".* There is no evidence that the Council ever considered whether £5,000 was an appropriate penalty in this case. The guidance also states that authorities should consider whether the maximum penalty would be "*disproportionate to the turnover/scale of the business"*.

24. I have read the witness statements of Paul Evans and Marlene Mobango and the exhibits provided, and on the facts before me in the papers provided, I am satisfied that the Appellant failed to comply with the statutory requirements as set out above.

25. Accordingly, looking at article 9 of the 2014 Order, the Respondent has not based the decision to impose a monetary penalty on any error of fact. The decision is not wrong in law and I do not consider that the monetary penalty is inappropriate in the circumstances as set out by the respondent and for the reasons given by them in their response herein.

26. Accordingly this appeal is dismissed.

Brian Kennedy QC 24 September 2016.