Appeal number: PR/2019/0014

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)

BUCHANAN MITCHELL LIMITED **Appellant**

- and -

HARROGATE BOROUGH COUNCIL **Respondent**

TRIBUNAL: JUDGE ALISON McKENNA (CP)

Sitting in Chambers on 15 May 2019

Decision

1. The Appeal is dismissed.
2. The Final Notice dated 12 February 2019 is confirmed.

Reasons

A: Background

3. The Appellant is a letting agent. The Respondent ("the Council") is the enforcement authority which served a Final Notice on the Appellant on 12 February 2019. The Notice imposed a total financial penalty of £2,500 for the Appellant's breach of duty to belong to an appropriate redress scheme, pursuant to the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014.

4. By its Notice of Appeal dated 8 March 2019, the Appellant accepts that it was in breach of the Order but submits that the amount of the penalty is unreasonable. It asks the Tribunal to reduce the penalty. It submits that, as the maximum penalty is £5,000, it would be proportionate to reduce it below £2,500 given that it is a small business, there has been no repeat offending and there have been no complaints about the business. It explains that it was unaware of its legal obligations and sought to correct the position as soon as it became aware of its default.

5. The Council's Response is that the Appellant was not a member of a relevant redress scheme when it checked in November 2018 but that the Appellant had subsequently joined a scheme. It is submitted that a reduction by half of the maximum penalty is in line with Tribunal decisions and that the Appellant has provided no verifiable financial information about the business. It is denied that the mitigating factors relied on by the Appellant are relevant to the level of penalty.

6. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. I have considered carefully the agreed hearing bundle.

B: The Legal Framework

7. Section 83 of The Enterprise and Regulatory Reform Act 2013 and paragraph 3 of The Redress Schemes for Letting Agency Work and Property Management Work (Requirement to Belong to a Scheme etc.) (England) Order 2014 require a letting agent to belong to a relevant Redress Scheme. It came into force in October 2014.

8. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under paragraph 3 of the 2014 Order, it may impose a financial penalty. It does so by serving a Notice of Intent and then a Final Notice on the letting agent concerned.

9. Paragraph 9 of the 2014 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 financial 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.

10. I have been provided with some Decisions of the First-tier Tribunal which have no precedent value. Only Decisions of the Upper Tribunal set precedent which I am bound to follow.

11. In *LB Camden* v *F Ltd* [2017] UKUT 349 (AAC)[1], UTJ Levenson considered the correct approach to setting the relevant penalty for breaches by letting agents of the Consumer Rights Act 2015. At paragraph [31], he referred to the appropriateness of giving credit for an agent's steps to ensure future compliance. He did not consider the question of giving credit for the additional factors referred to in the Notice of Appeal.

[1] http://www.bailii.org/uk/cases/UKUT/AAC/2017/349.pdf

12. In *M & M (Europe) v LB Newham*[2] UTJ Levenson approved at paragraph [22] the approach of the First-tier Tribunal (on which I sat) in requiring evidence of any claimed financial hardship to by produced by the Appellant before reducing the appropriate penalty in relation to that factor.

C: Evidence

13. My bundle contains documentary evidence in the form of print outs of the properties advertised to let by the Appellant, and correspondence between the parties, including the submissions made in response to the Notice of Intent.

14. It also contains witness statements from the Council's officers Claire Riley, Bryony Brown and Madeleine Bell which set out the factual history of this matter.

15. The contents of these statements have not been disputed by the Appellant.

D: Conclusion

16. I am satisfied on the basis of the evidence, and indeed it is admitted, that the Appellant breached the Order. In view of the admission that the Appellant was entirely unaware of its legal obligations I conclude that the breach persisted from the commencement of trading at Boroughbridge in 2015 until January 2019 when it was rectified. I find that to be a substantial period of time during which the Appellant's clients did not have the consumer protection afforded to them by the law.

17. I am satisfied that it is appropriate for the Council to impose a penalty in these circumstances.

18. I have concluded that £2, 500 is the appropriate penalty for the breach in this case. Firstly, I have found that the period of breach was a significant one, and I consider that it would have been reasonable for the Appellant to have taken steps to comply with the law by which it was bound much earlier. Secondly, I have no reason to think that the Appellant cannot afford to pay a penalty of this amount because it has not provided me with financial evidence to support its assertion of hardship. Finally, it is appropriate in my view to acknowledge the Appellant's swift

[2] https://assets.publishing.service.gov.uk/media/5b8e6b3bed915d1eb703f882/GE_2787_2017-00.pdf

action to put itself in compliance with the law following the service of the Notice of Intent with a significant reduction in the penalty. I find that 50% is a significant reduction. Balancing out the seriousness and longevity of the breach with the mitigating factor of swift remedial action, I conclude that the penalty imposed by the Council was appropriate in all the circumstances and that I should neither increase nor reduce it.

19. I am not persuaded that the other factors relied on by the Appellant as mitigation are relevant and note that they are unsupported by legal authority.

20. For all these reasons, this appeal is dismissed, and the Final Notice upheld.

(Signed) **Dated: 15 May 2019**

Alison McKenna

Chamber President