



**IN THE FIRST-TIER TRIBUNAL
(ESTATE AGENTS)
GENERAL REGULATORY CHAMBER**

Case No. EAA/2009/0005

On appeal from:

**The Office of Fair Trading's
Decision reference:**

ADJ/2026 – NOP/1032

Dated:

14 August 2009

Appellant:

Wolfgang David Dunn

Respondent:

The Office of Fair Trading

Heard at:

The Tribunals Service, 45 Bedford Square
London WC1B 3DN

Date of hearing:

4 February 2010

Date of decision:

25 March 2010

Before

Judge Keith Rowley Q.C.

Attendances:

For the Appellant:

Wolfgang David Dunn

For the Respondent:

Nicholas Gibson, Legal Division of the Office of Fair
Trading

Subject matter: Order under Estate Agents Act 1979 section 3 prohibiting Appellant from doing estate agency work - no appeal filed within prescribed time – application for extension of time – relevant factors in consider whether to exercise discretion – Appellant’s credibility – application refused

Cases: *R. v. Immigration Appeal Tribunal, ex parte S*, CO/2544/97
Ashingdane v. United Kingdom (1985) E.H.R.R. 528
Sayers v. Clarke Walker [2002] 1 W.L.R. 3095
Robert v. Momentum Services Ltd. [2003] 2 All E.R. 74

**DECISION OF THE FIRST-TIER TRIBUNAL ON APPLICATION
FOR EXTENSION OF TIME FOR APPEALING**

A. Introduction

1. This is an application by Mr. Wolfgang David Dunn (“Mr. Dunn”), referred to in the above title as “the Appellant” but more correctly described as the intended Appellant, for an extension of time for the bringing of an appeal against a determination dated 14 August 2009 (“the Determination”) made under section 3(2) of the Estate Agents Act 1979 (“the 1979 Act”).
2. By the Determination Ms. Elaine Rassaby, an Adjudicator acting for and on behalf of the OFT (“the Adjudicator”), made an order prohibiting Mr. Dunn from (to use the language of section 3(2) of the 1979 Act) “doing any estate agency work at all”.
3. Also on 14 August 2009 determinations in *mutatis mutandis* the same terms were also made against Mr. Sean Allen Wren (“Mr. Wren”) and Astons GB Limited (“Astons”), to whom I refer further below. In this decision I am, however, concerned only with the Determination made against Mr. Dunn.

4. Mr. Dunn appeared before me in person and I should start by paying tribute to the clear and articulate manner in which he presented his case. He began his submissions by explaining that he wished that he could have enjoyed the benefit of legal representation before me but said that he was unable to afford it. As he made clear to me, his present financial circumstances are directly attributable to the impact of the Determination on both Astons and him personally.
5. The Respondent (“the OFT”) appeared by Mr. Nicholas Gibson of counsel. Mr. Gibson assisted me with both a detailed skeleton argument and full oral submissions presented at the hearing, in the course of the latter recognising his duty as counsel to draw my attention to matters that were adverse to the OFT’s case, given that Mr. Dunn was acting in person.
6. The Tribunal’s jurisdiction to grant the extension of time sought by Mr. Dunn is conferred by rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) General Regulatory Chambers) Rules 2009, S.I. No. 1976 of 2009 (“the 2009 Rules”). That rule, and the two immediate predecessor rules to which it refers, are in the following terms:
 - “5.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
 - (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
 - (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—

- (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit;”

7. Implicit in what I have said in the foregoing paragraph is the proposition that regime applicable to Mr. Dunn’s application is that constituted by the 2009 Rules, and not that of their legislative predecessor, the Estate Agents (Appeals) Regulations, S.I. No. 1518 of 1981 (“the 1981 Regulations”). So far as material, the relationship between the 1981 Regulations and the 2009 Rules is governed by the Transfer of Functions (Estate Agents Appeals and Additional Scheduled Tribunal) Order, S.I. No. 1836 of 2009 (“the Transfer Order”).
8. I am satisfied that the proposition to which I have referred above is correct, for the reasons set out in a post-hearing note dated 8 February 2010 provided to me, at my request, by Mr. Gibson. In summary, the effect of the Transfer Order is that the 1981 Regulations would have continued to apply only if there were any proceedings pending before the Secretary of State for Business, Innovation & Skills (“the Secretary of State”)¹ immediately before 1 September 2009.² There could only have been any such proceedings had Mr. Dunn, before 1 September 2009, appealed against the Determination. The fact he did not do so explains, in part, the reasons for his application to me for an extension of time under rule 5(3)(a) of the 2009 Rules.

¹ To whom, prior to 1 September 2009, appeals against (*inter alia*) prohibition orders made under the 1979 Act lay.

² That being the date of which the 2009 Rules came into force.

9. Rule 5(3)(a) neither contains any relevant fetters on the exercise of the discretion which it confers, nor does it (or any other provision in the 2009 Rules, save for rule 2 which deals generally with the overriding objective of those Rules) give any guidance as to the manner in which that discretion should be exercised. The latter is a point to which of necessity I shall return later in this decision when considering the arguments advanced before me by Mr. Dunn and Mr. Gibson respectively. First, though, I need to set out both the factual background to the Determination and the relevant procedural chronology.

B. Factual background

(i) General

10. I propose to take this part of the case as briefly as possible, as I have clearly in mind that I am not concerned with the substantive merits, whether factual or legal, of Mr. Dunn's proposed appeal. It is not suggested by Mr. Gibson that the proposed appeal is not reasonably arguable, and I therefore approach the matter on that basis.
11. My summary of the factual background is based on both the contemporaneous documentation which is before me, and also on what Mr. Dunn told me during the hearing and the contents of his letters to the OFT dated 16 November 2009 and to the Tribunal dated 17 November 2009 respectively.

(ii) Astons

12. Astons was incorporated in 2004 to carry on business as an estate agent. Mr. Dunn had previously worked for other people in this field³ and, at the outset, two other gentlemen, being Mr. Wren and a Mr. Brett Colman, were involved in Astons. Mr. Dunn describes himself as being a director of and the majority shareholder in Astons.⁴

13. According to Mr. Dunn,⁵ both Mr. Wren and Mr. Colman left Astons in about May or June 2007, but Mr. Wren rejoined Astons as a director in late 2007. Mr. Colman does not otherwise feature in the story.

14. Astons offices were situate at 395 Shirley Road, Shirley, Southampton (“Shirley Road”), which Mr. Dunn described as being part of a parade of shops in which there were some nine or ten estate agents. Shirley Road was not Astons’ registered office, this instead being situate at 66-70, Oxford Street, Southampton.

15. Mr. Dunn told me that Astons suffered from difficulties with its postal service from the time it commenced to trade, with post only being delivered either weekly or perhaps a few times a month. It was to these deficiencies on the part of the

³ In his letter to Tribunal dated 17 November 2009 Mr. Dunn said that, by 2009, he had worked in the estate agency field for 12 years.

⁴ Letter to the OFT dated 16 November 2009.

⁵ Letter to the Tribunal dated 17 November 2009.

Royal Mail that he attributed his, Astons' and Mr. Wren's non-receipt of various relevant documents.

(iii) 64 Eling Lane, Totton, Southampton

16. In May 2008 Astons was retained by Ms. Elizabeth Newell, the then owner of the property known as 64 Eling Lane, Totton, Southampton ("64 Eling Lane"), in connection with her proposed sale of the same. That property was marketed by Astons at an asking price of £150,000 and a sale was very soon negotiated, in early June 2008, to Mr. Baldir Potiwal, who was a cash buyer, at a reduced price of £125,000.

17. Shortly after that sale had been negotiated, two further offers for the property were received by Astons. Both were in writing. The first was from a Ms. J. Brewer who made an offer of £5,000 above the 'sale agreed' price"⁶ and the second from Mr. Martin Day and Ms. Sarah Thornton who said they were willing, subject to contract, to offer £150,000.⁷

18. According to copy letters taken from Astons' file, on 13 June 2008 Mr. Dunn:

18.1 wrote separately to Ms. Brewer and Mr. Day and Ms. Thornton respectively stating that he had been unable to contact Ms. Newell by telephone, and

⁶ Letter dated 5 June 2008.

⁷ Undated letter "To whom it may concern".

18.2 wrote to Ms. Newell (*inter alia*) informing her of the offers that had been made by Ms. Brewer and Mr. Day and Ms. Thornton respectively, and asking for her (Ms. Newell's) written response.

19. There is no record of any response being received from Ms. Newell to Mr. Dunn's letter of 13 June 2008 and, according to Mr. Dunn, Mr. Potiwal got fed up with waiting and bought another property. That evidence is supported by Astons' manuscript file "Progress Notes" for the transaction, according to which (and from Astons' then perspective) the matter terminated on 15 July 2008.

(iv) Intervention of the OFT

20. However that was not the end of the matter entirely, because Ms. Brewer subsequently made a complaint to the OFT alleging that the offer she made for 64 Eling Lane was not passed by Astons to the vendor, Ms. Newell. That complaint was communicated to Mr. Dunn on behalf of Astons by a letter dated 5 September 2008 from Mr. John Webb of the OFT's Estate Agents Enforcement Team.

21. That was a fairly full letter from Mr. Webb, which (in addition to summarising Ms. Brewer's complaint):

21.1 drew attention to the fact that an estate agent's failure to forward to his

- 21.2 explained the OFT's regulatory role in enforcing the 1979 Act and Regulations made under it, which included the power to ban a person from doing estate agency work if that person was considered unfit to carry on such work;
- 21.3 further explained that the purpose of writing was to seek information from Mr. Dunn to assist the OFT in considering whether the legislation had been breached;
- 21.4 specifically asked Mr. Dunn to acknowledge receipt of that letter.
22. Having heard nothing from Mr. Dunn, Mr. Webb wrote a reminder letter on 29 September 2008, which enclosed a copy of his (Mr. Webb's) earlier letter of 5 September 2008. That second letter elicited a telephone call from Mr. Dunn the next day, 30 September 2008. According to Mr. Webb's note of their conversation, Mr. Dunn stated (a) that he (Mr. Dunn) would respond to the letter dated 29 September 2008 "in the next couple of days" and (b) he had never

⁸ S.I. No. 1032 of 1991.

received the letter of 5 September 2009.

23. Mr. Dunn did not challenge the accuracy of Mr. Webb's note of the 30 September 2008 conversation.
24. That promised response from Mr. Dunn was not forthcoming, as a result of which (and according to a further note prepared by him) Mr. Webb telephoned Astons on 13 October 2008 and spoke to Mr. Wren, leaving a message asking Mr. Dunn to return his (Mr. Webb's) call. Mr. Dunn claims he did not receive any message about this telephone call.⁹
25. Clearly Mr. Dunn himself could not challenge the accuracy of Mr. Webb's second note, his not having been a party to the conversation, nor did I have any evidence before me from Mr. Wren dealing with it (or any other matter). However I see no reason to doubt the accuracy of that note.
26. The next document, according to the date it bears, is what the manuscript text on its top right-hand corner describes as a "File Copy" of a letter dated 20 October 2008 from Mr. Dunn to the OFT, marked for the attention of Mr. Webb.
27. I express myself in the circumspect manner because of an important issue that has arisen as to the authenticity of this copy document. That issue arises

⁹ Letter to the OFT dated 16 November 2009.

because the OFT has no record of ever having received such a letter. An electronic copy of it was supplied by Mr. Dunn as one of a number of attachments to an email dated 19 November 2009 sent by him to the Tribunal, those attached documents (including the letter of 20 October 2008) being in Microsoft “Word” format. That email, with its attachments, was then forwarded by the Tribunal to the OFT.

28. Prior to the hearing and as set out in Mr. Gibson’s letter to the Tribunal dated 4 December 2009 (and also reiterated in his skeleton argument), the OFT’s case was that an examination¹⁰ of this electronic version of the letter of 20 October 2008 suggested that the electronic file containing this document was created only on 24 September 2009, more than 11 months after it purported to have been written.

29. This issue having been put squarely in play in Mr. Gibson’s above-mentioned letter, by his order dated 7 December 2009 His Honour Judge Wulwik directed (at paragraph 1) that by 23 December 2009 Mr. Dunn should send to the OFT and the Tribunal “ any letter or statement and any document upon which he relies by way of reply to [the OFT’s] letter dated 4 December 2009.”

¹⁰ Using the “Screenshot” facility in “Word”.

30. Mr. Dunn's response, by his his email dated 23 December 2009 to the Tribunal, was:

“... i [*sic*] cannot add anything further to the OFT letter of 4th December save that some of the comments mae [*sic*] by Mr. Gibson I find extremely insulting and therefore not worthy of further comment !”.

31. At the hearing, however, Mr. Dunn disclosed his hand on this issue, conceding that the electronic copy of the letter to the OFT dated 20 October 2008¹¹ had indeed only been created on 24 September 2009. The reason for this, he said, was that whilst he had in his possession the paper file copy of the 20 October 2008 letter, he (Mr. Dunn) did not have access to a scanner, hence it was necessary for him to type out a fresh copy of that letter to send electronically with his email of 19 November 2009. Mr. Dunn was, though, unable to explain why:

31.1 he had not previously offered this apparently innocent explanation for what had been discovered by the OFT, despite the terms of (a) Mr. Gibson's letter of 4 December 2009 and (b) Judge Wulwik's order dated 7 December 2009, and

31.2 the letter had been created nearly two calendar months earlier, on 24 September 2009, than the date on which it was sent to the Tribunal.¹²

¹¹ And a further letter dated 10 August 2009: see paragraphs 61 to 63 of this decision below.

¹² 19 November 2009: see paragraph 27 above.

32. I shall return to this issue in due course.
33. Reverting now to the chronology relating to Ms. Brewer's complaint, the OFT wrote again to Mr. Dunn on 21 October 2008, this time by Mr. Roger Young, the Manager of the OFT's Estate Agents Enforcement Team, and sent by recorded delivery to Astons' premises at Shirley Road. That letter:
- 33.1 referred to Mr. Webb's letters dated 5 and 29 September 2008;
- 33.2 referred also to Mr. Webb's telephone conversations with both Mr. Dunn and Mr. Wren;
- 33.3 formally required Mr. Dunn to provide, pursuant to section 9 of the 1979 Act, the information originally requested in Mr. Webb's letter dated 5 September 2008, that requested information being set out now in a separate schedule to Mr. Young's letter; and
- 33.4 warned Mr. Dunn of the potential penal and regulatory consequences if he (Mr. Dunn) failed to provide that information, including the possibility of the OFT considering under section 3 of the 1979 Act the fitness of Mr. Dunn to continue doing estate agency work.
34. No response having been received by the OFT, on 12 November 2008 Mr.

“We have given you ample time to respond to the Notice and, therefore, if we do not receive a written response from you by 21 November 2008, we will have no option but to consider Ms. Brewer’s allegation based on the information we possess at present and to take action accordingly.”

35. Mr. Dunn accepts that he received both of Mr. Young’s letters, but replied to neither of them.

36. Whilst Mr. Dunn’s omission to reply to Mr. Young’s letter dated 21 October 2008 might possibly be regarded as explicable on the basis that it crossed in the post with his (Mr. Dunn’s) letter dated 20 October 2008 and, if perhaps unwisely, he felt no further communication was called for, Mr. Dunn could offer no sensible explanation for his failure to reply to the letter of 12 November 2008. Indeed, in his submissions to me he accepted that he should have responded to at least the later of those two letters, whilst (and somewhat contradictorily) also saying that he was not concerned about the contents of that letter because he did not consider that he had committed any offence..

37. I have devoted a certain amount of time to the events of September to November 2008 because they were relied on by Mr. Gibson as evidencing, as he put it in

(v) Intervention of Southampton City Council Trading Standards Service (“the TSS”)

38. Under section 23A(1) of the 1979 Act, as inserted by Schedule 6 to the Consumers, Estate Agents and Redress Act 2007, the Secretary of State was given the power by order to require persons who engage in estate agency work in relation to residential property to be members of an approved redress scheme for dealing with complaints in connection with that work.
39. By the Estate Agents (Redress Scheme) Order 2008, S.I. No. 1712 of 2008, the Secretary of State did so order, with effect from 1 October 2008.
40. In May 2009 it came to the attention of the TSS that Astons was apparently not a member of an approved redress scheme. That this was indeed the case was confirmed by a visit by to Astons by Ms. Susan McLeod of the TSS on 20 May 2009, on which occasion she met Mr. Dunn. According to Ms. McLeod’s note, Mr. Dunn said Astons was “currently applying to be a member of the Property Ombudsman Service” and he assured her that “he will be a member within 1

41. Mr. Dunn did not challenge the accuracy of Ms. McLeod's note.
42. There were at this time two relevant redress schemes, namely "The Property Ombudsman" and the "Surveyors Ombudsman Service". Witness statements obtained by the TSS on 28 May and 3 June 2009 respectively¹³ revealed that Astons was not and had not applied to become a member of either scheme as at those dates. As a result, on 16 June 2009 the TSS imposed a fixed penalty charge of £1,000 on Astons in respect of its breach of section 23A(1) of the 1979 Act. Notice of that penalty was given to Astons under cover of a letter dated 16 June 2009 from Ms. Liz Marsh, Southampton City Council's Head of Environmental Health & Consumer Protection, addressed to Astons at its registered office in Oxford Street.
43. Mr. Dunn says he did not receive Ms. Marsh's letter.
44. Documentation sent to the OFT under cover of a letter dated 25 September 2009 from Eric Robinson, solicitors ("Robinson"),¹⁴ showed that on 1 June 2009 Astons, acting by Mr. Dunn, had applied to join the redress scheme operated by "The Ombudsman for Estate Agents Company Limited." That was, I understand,

¹³ Which were before me as part of the exhibit of the witness statement dated 25 January 2010 of Ms. McLeod.

¹⁴ Who were at this time acting jointly for Mr. Dunn, Astons and Mr. Wren.

a former name of what is now (and was as at 1 June 2009) The Property Ombudsman Limited, which would tend to indicate that Mr. Dunn had obtained the relevant documentation some time earlier, but had not promptly completed and returned it. The date of that application was also inconsistent with the assurance he had given to Ms. McLeod, one week having expired on 27 May 2009.

45. Before leaving this aspect of the matter, I would observe that, by 20 May 2009,¹⁵ Astons had been in default of its obligations under section 23A(1) of the 1979 Act for a period in excess of 7½ months; no satisfactory explanation has been offered by Mr. Dunn for that default. He has described it as an “administrative oversight”.¹⁶

(vi) Other points

46. Before leaving the factual background I should also record at this point the comments made to me by Mr. Dunn about the state of Astons' business in 2008-2009 as a result of the recession and its adverse consequences for the UK residential property market.
47. Mr. Dunn told me, and I accept,¹⁷ that those consequences for Astons were severe, in that he was compelled to make staff redundant and to take on himself

¹⁵ The date of Ms. McLeod's visit.

¹⁶ Letter to the OFT dated 16 November 2009.

¹⁷ Further details appear in Mr. Dunn's letter to the OFT dated 17 November 2009.

roles that had previously been performed by employees. He said things were particularly bad in 2008 and that he was working 70 hours a week as a result of those economies.

C. Events leading to and the making of the Determination

48. By three letters each dated 18 June 2009 addressed to Mr. Dunn, Mr. Wren and Astons respectively the Adjudicator served warning notices on each of them to the effect that she proposed to make either an order under section 3 of the 1979 Act prohibiting them each from doing estate agency work, or a warning order under section 4 of that Act warning that continuing to engage in certain conduct would render them each unfit to carry on estate agency work. So far as material the notices were in identical terms and referred to (i) Ms. Brewer's complaint¹⁸ and (ii) the failure to comply with the notice¹⁹ served with Mr. Young's letter dated 21 October 2008. The warning notices requested responses within 21 days and stated that, absent a response:

“... it is almost inevitable that my decision will be to make a prohibition order.”

49. It is Mr. Dunn's case that none of those three notices were received.

¹⁸ See paragraphs 20 to 37 above.

¹⁹ i.e., the schedule.

50. By three further letters each dated 1 July 2009 addressed to Mr. Dunn, Mr. Wren and Astons respectively, the Adjudicator served supplementary warning notices on each of them, this time referring to Astons' failure to join an approved redress scheme, contrary to section 23A(1) of the 1979 Act.

51. Again, responses were requested within 21 days, each letter clearly stating that:

“if you tell me that you do not wish to make any representations, or I have not heard from you at all within 21 days, I shall proceed to make an order and it is likely that I shall prohibit you from doing any estate agency work.”

52. Mr. Dunn accepts that those letters dated 1 July 2009 were received.

53. There was, however, no response to any of those letters, whether from Mr. Dunn, Mr. Wren or Astons.

54. As a result, reminder letters were sent to all three by Ms. Ofoedu of the OFT's Adjudication Unit dated 16 July 2009. These letters again warned of the risk of prohibition orders being made.

55. Those letters did stimulate a response, at least from Mr. Dunn. Using his BlackBerry, he sent an email on 19 July 2009 in the following terms:

“Further to your letter regarding Astons GB Limited quoting the above

reference, I write to advise that I am currently away from my office and will not be returning until the 5th August 2009

As the Managing Director of the Company I will respond in full immediately upon my return.

I trust this is satisfactory.”

56. Mr. Richard Arnopp, the Support Team Manager of the OFT's Adjudication Unit, replied to that email, also by email, the next day, 20 July 2009, (a) asking why Mr. Dunn had responded so belatedly and (b) fixing a deadline of 5.00 p.m. on 10 August 2009 for the submission of any written representations that Mr. Dunn wished to make.
57. Mr. Dunn does not deny receiving that email, but did not reply to it.
58. Mr. Dunn also says²⁰ that he did not, as he had intended, return to work on 5 August 2009 as he was unwell. He did not explain the nature of his ill-health nor whether it prevented him informing the OFT, even if only by email, that his promised response would be delayed.
59. Mr. Arnopp sent a chasing email to Mr. Dunn on 10 August 2009, timed at 4.09 p.m. stating (*inter alia*) as follows:

“We have not heard from you, and the Adjudicator has now asked me to inform you that, as the deadline she imposed for the return of written representations expires today, it is her intention to begin determining

²⁰ Letter to the OFT dated 16 November 2009.

these cases on the basis of the information she currently has. You may still attend a hearing at a mutually convenient time between tomorrow²¹ and Thursday. Should you do so, a short additional window will be allowed for submission of any supporting documentation.”

60. Again, Mr. Dunn does not deny receiving that email.
61. He does, however, claim to have responded to the OFT, by a letter dated 10 August 2009. I use the word “claim”, because precisely the same issue arises in relation to that alleged letter that I have also considered in relation to Mr. Dunn’s alleged letter to Mr. Young dated 20 October 2008.²²
62. As to this:
- 62.1 the observations I made at paragraphs 31.1 and 31.2 above are equally apposite here;
- 62.2 on its face, the letter represents an admission that Mr. Dunn did receive the Adjudicator’s letter dated 1 July 2009, as well as Ms. Odeoufu’s subsequent letter of 16 July 2009;
- 62.3 however the letter omits to deal with any of the matters raised in Mr Arnopp’s emails of 20 July and 10 August 2009;

²¹ 10 August 2009 was a Monday.

²² See paragraphs 26 to 31 above.

- 62.4 if the reason why it did not deal with the second of Mr. Arnopp's emails is because it (the letter) was sent before that email arrived, there was no subsequent communication from Mr. Dunn dealing with that second email;
- 62.5 given that the OFT's letters of 1 and 16 July 2009 each warned Mr. Dunn of the possibility of a prohibition order being made against him which would have the effect of depriving him of the opportunity to pursue his chosen profession, it is surprising that he took no steps (e.g., by telephone or email) to check that his alleged letter of 10 August 2009 had been received and acted on by the OFT, nor did he even take the precaution of sending his letter by recorded delivery.
63. It is the OFT's case, and I accept, that it has no record of receiving Mr. Dunn's alleged letter dated 10 August 2009.
64. As a result of the silence of Mr. Dunn (and also of Mr. Wren and Astons) and as had been intimated, prohibition orders were made against Mr. Dunn, Mr. Wren and Astons on 14 August 2009 (I have referred to the prohibition order against Mr. Dunn as "the Determination") and sent to each of them under cover of letters from the Adjudicator of the same date.
65. It is Mr. Dunn's case that none of those letters were received by the addressees, or at least that he was unaware of them.

66. As they were so informed by their respective letters dated 14 August 2009, under the 1981 Regulations Mr. Dunn, Mr. Wren and Astons each had 28 days from 14 August 2009 in which to appeal against the prohibition orders; none of them did so. Under rule 22(1)(b) of the 2009 Rules, which came into effect on 1 September 2009, the applicable time period for appealing was the same. It expired on 11 September 2009.
67. On 21 September 2009 Mr. Charles Wallace, the OFT's Head of Estate Agents Enforcement, wrote to each of Mr. Dunn, Mr. Wren and Astons informing them that, their not having appealed against the prohibition orders, it would now be a criminal offence for them to engage in any estate agency work.
68. A press release announcing the making of the prohibition orders was also issued by Mr. Wallace, dated 23 September 2009. Mr. Dunn says that he was at an appointment out of the office on the day of that press release, but that he was contacted by Mr. Wren and informed that "we were prohibited from operating as Estate Agents".²³ In his submissions to me Mr. Dunn said that on his return to the office he read Mr. Wallace's letter addressed to Astons, but that he (Mr. Dunn) did not receive Mr. Wallace's letter addressed to him as an individual.²⁴

²³ Letter to the OFT dated 16 November 2009.

²⁴ It is apparent that Mr. Wren's letter arrived, as a copy of it was sent with Robinson's letter dated 25 September 2009 to which I refer in paragraph 72 below. That is also said in Mr. Dunn's letter to the Tribunal dated 17 November 2009 to have been the case.

69. Mr. Dunn spoke to both Mr. Wallace and Mr. Young by telephone on 23 and 24 September 2009 and, on the latter's advice, sent a faxed letter to the Adjudicator on the latter date, asking the Adjudicator to "reconsider" the matter and to "give thought to overturning this Prohibition Order".
70. Mr. Dunn enclosed with that faxed letter (*inter alia*) copies of his alleged letters dated 20 October 2008 and 10 August 2009 to which I have referred to at paragraphs 26 to 31 and 61 to 63 above.
71. Mr. Dunn said that the effect of the OFT's press release was to generate numerous telephone calls from the media and, he said, Astons' business was ruined within 48 hours. He told me the business closed on 25 September 2009 and that he had eventually been able to arrange to sell it to a competitor, with completion of the sale being due on the Friday of the week of the hearing before me.
72. In addition to communicating directly with the OFT, Mr. Dunn also instructed Robinson to act on behalf of Astons and Mr. Wren, as well as on his own behalf, and, by a letter dated 25 September 2009 sent by fax and addressed jointly to Mr. Wallace and Mr. Young, Robinson requested copies of the documentation that had been sent by the OFT on 14 August 2009. Included with Robinson's letter was a copy of Mr. Dunn's alleged letter dated 20 October 2008 to Mr. Webb.

73. I mentioned in paragraph 44 above that Robinson's letter also included a copy of Astons' application dated 1 June 2009 to join the redress scheme operated by "The Ombudsman for Estate Agents Company Limited." I observe that although that application was required to be executed and delivered as a deed by Astons acting by two duly authorised signatories, the application was defective because it was in fact signed by Mr. Dunn alone.²⁵
74. The OFT responded to Robinson's letter by a fax dated 28 September 2009, sending the papers relating to Mr. Dunn only, stating that those relating to Mr. Wren and Astons, which were virtually identical, would be sent by first class post.
75. Mr. Dunn's Notice of Appeal, completed by him in manuscript, is dated 1 October 2009 but is date-stamped as having been received by the Tribunal only on 16 October 2009.
76. Mr. Dunn's grounds of appeal set out in the Notice of Appeal were:
- 76.1 because he did not receive the Determination he was unaware of it and hence could not appeal within the prescribed 28 day period;
- 76.2 a full explanation about Eling Lane was given (I add in parentheses to the

²⁵ A subsequent application dated 1 October 2009 addressed to the correct body, did not suffer from this defect, being executed by both Mr. Dunn and Mr. Wren.

OFT) in October 2008, all offers relating to that property having been “put in writing”;

76.3 that an application to join a redress scheme “has been made”;

76.4 all correspondence had previously been sent to the OFT;

76.5 neither he nor Astons had acted in a way that could be detrimental to any consumers.

77. An application for an extension of time was sought in the Notice of Appeal, essentially on the same basis as Mr. Dunn’s first ground of appeal.²⁶

78. Mr. Dunn says²⁷ that the Notice of Appeal was sent to the Tribunal on 1 October 2009,²⁸ but that it was necessary to send a further copy by registered post on 15 October 2009 because the original was not received by The Tribunal. He says its non-arrival was ascertained by Mr. Wren in various telephone calls with Tribunals Service.

79. I have no evidence before me from Mr. Wren to this effect, nor any documentation to support the same. The second copy was apparently not sent

²⁶ See paragraph 76.1 above.

²⁷ Letter dated 16 November 2009 to the OFT.

²⁸ i.e., on the date it bears.

under cover of any explanatory letter to this effect.

80. Directions as to the hearing of Mr. Dunn's application were then given by His Honour Judge Wulwik on 2 November and 7 December 2009.

D. The hearing

81. By his directions given on 7 December 2009 Judge Wulwik directed that Mr. Dunn's application should be determined at an oral hearing, hence the matter came before me on 4 February 2010.

82. Although Judge Wulwik's directions did not provide for the service of witness statements, the OFT adduced two, from Mr. Clive Robinson of the TSS and Ms. McLeod, also of the TSS, who visited Astons on 20 May 2009 as I have previously described. Mr. Dunn did not object to the OFT relying on those statements.

83. Mr. Robinson's evidence was directed to two matters:

83.1 In Mr. Dunn's letter to the OFT dated 17 November 2009 he said that, before Astons opened, the TSS were invited to check Astons' systems "to ensure both compliance and diligence". Mr. Robinson's evidence was that the TSS's records did not include a record of such a visit.

83.2 Robinson dealt with the issue of the penalty charge against Astons in June 2009, and produced an electronic recorded delivery confirmation showing that the notice of the charge was duly delivered on 18 June 2009.

84. Ms. McLeod's evidence also addressed two matters:

84.1 A complaint that was made to the TSS in February 2008 by a Mr. Hayden, a vendor client of Astons, who alleged that he had not been given written details of an offer made for the property he was selling. This resulted in Ms. McLeod visiting Astons in March 2008 and meeting Mr. Dunn, at which meeting Mr. Dunn was unable to produce evidence that the relevant offer had been communicated in writing to Mr. Hayden. This resulted in Ms. McLeod writing a confirmatory letter of advice to Mr. Dunn dated 1 April 2008.²⁹

84.2 Events relating to her visit on 20 May 2009, that being prompted by a complaint by a vendor, a Mrs. Harris, about the service she had received from Astons. It appears that when Mrs. Harris sought to invoke the redress procedure, she discovered that Astons was not a member of a redress scheme. Her complaint to the TSS led to Ms. McLeod's visit. As I

²⁹ That letter also dealt with Astons' obligations as agents under the Energy Performance of Building (Certificates and Inspections)(England and Wales) Regulations 2007, 2007 S.I. No. 991 of 2007. Since that aspect of the matter did not feature in argument before me, I shall say no more about it.

have already considered this aspect of the matter in some detail, I need say no more about it.

85. I did not have before me any witness statement from Mr. Dunn himself, nor from anyone else in support of his application. Inevitably - and I do not mean this in any derogatory sense - Mr. Dunn's submissions to me involved a mixture of both argument and evidence and, as regards the factual assertions made by him during his submissions, I shall treat them as evidence from him.

86. There was no application from Mr. Gibson to cross-examine Mr. Dunn.

E. The respective submissions

87. I can summarise these quite shortly.

88. In essence, Mr. Dunn's case is that:

88.1 He was unaware of the Determination until 23 September 2009, hence as a matter of fact he simply could not have appealed within the prescribed period.

88.2 On and from 23 September 2009, when he first became aware of the Determination, he took the appropriate steps to bring an appeal, albeit

- 88.3 His appeal has good prospects of success, as the complaint made by Ms. Brewer was without foundation and he acted to remedy his omission to cause Astons to become a member of an approved redress scheme.
- 88.4 The consequences for him, professional, financial and personal, have been catastrophic.
- 88.5 In all the circumstances the making of a prohibition order was disproportionate.
89. In some post-hearing written submissions, which were lodged by Mr. Dunn at my invitation after Mr. Gibson had produced, unheralded at the hearing, two authorities that Mr. Dunn had not previously had the opportunity to consider, Mr. Dunn suggested that it would be a breach of his human rights were he to be denied the opportunity to appeal by my refusing to extend time.
90. There is no substance in that further submission. The right to a fair trial, which is contained in Article 6 of the European Convention of Human Rights and which is the right that Mr. Dunn seek to invoke, is not unconditional: see the judgment of Sullivan J. in *R. v. Immigration Appeal Tribunal, ex parte S*, CO/2544/97, where

“A right to a hearing is rarely unconditional, even where matters of life and liberty are at stake. One may have to appeal within a certain time, appear at a certain time, not be abusive or disruptive, file certain documents in support of the appeal and so forth. Having an opportunity for a hearing does not mean that one may not disentitled oneself from taking up that opportunity if one behaves in a certain manner. I do not consider that it offends any fundamental principle to say that certain branches of procedural rules may mean that an Appellant loses his right to a hearing in certain circumstances.”

91. The same point was made, in rather more general terms, by the European Court of Human Rights itself in paragraph 57 of its judgment in *Ashingdane v. United Kingdom* (1985) E.H.R.R. 528, to which I was also referred by Mr. Gibson.

92. I should also note in passing that the time limit for appeals to the Tribunal provided for under the 2009 Rules, being 28 days, is seven days longer than the time provided for under CPR 52 of the Civil Procedure Rules 1998 for appeals from decisions of the High and County Courts.

93. For his part, in his oral argument Mr. Gibson grouped his submissions under two heads:

93.1 Mr. Dunn had failed to co-operate with the Tribunal, contrary to his obligation under rule 2(4)(a) of the 2009 Rules, and

93.2 Mr. Dunn had no satisfactory explanation for failing to bring his appeal within the prescribed time.

94. I need to say a little more about the first of those submissions since, as it was developed by Mr. Gibson, it became apparent that the substance of the submission was that Mr. Dunn had misled the Tribunal in three respects, viz.,

94.1 as to the authenticity of Mr. Dunn's letters dated 20 October 2008 and 10 August 2009 to the OFT and his failure, until the hearing and despite Judge Wulwik's directions of 7 December 2009, to offer any explanation for their having been produced on 24 September 2009;

94.2 as to the claim that the TSS had vetted Astons' business before it commenced to trade;

94.3 as to the claim that, prior to Ms. Brewer, Mr. Dunn had not received a single complaint about a failure "to put forward an offer".³⁰

F. Analysis

95. I have already observed, at paragraph 9 above, that the 2009 Rules offer no guidance as to how the discretion conferred by rule 5(3)(a) should be exercised.

³⁰ Mr. Dunn's terminology: see his letter dated 17 November 2009 to the Tribunal.

96. I have not found the two authorities cited by Mr. Gibson of much assistance in this regard. In the course of argument I suggested that CPR rule 3.9, which defines the criteria to be applied when, under the Civil Procedure Rules 1998, a party is seeking relief from sanctions might be helpful by analogy. That approach is supported by the decision of the Court of Appeal in *Sayers v. Clarke Walker* [2002] 1 W.L.R. 3095, in which CPR rule 3.9 was held to apply where an applicant was seeking permission to appeal to that court out of time.³¹
97. I should stress, though, that in expressing myself in this way I do not intend to suggest that I am bound to or, even if not bound, should rigidly apply those principles. I take them as a helpful guide, but no more than that. Given the uncircumscribed nature of my discretion, I must have regard to all factors that appear to be relevant on the particular facts of this case. That, I shall now do.

(i) Onus

98. I start from the proposition that, since it is Mr. Dunn who is contending that I should exercise my discretion in his favour, the onus is on him to satisfy me that I ought to do so. If, having considered all relevant factors, he has not so satisfied me, then it follows that I should dismiss his application.

³¹ That is not the case where the application is made before time for appealing has expired: *Robert v. Momentum Services Ltd.* [2003] 2 All E.R. 74. In such a case, the applicant is not subject to, and therefore does not need relief from, any sanction.

(ii) Merits of the proposed appeal

99. I have largely dealt with this point at paragraph 10 above. I have, in effect, seen one side only of the proposed appeal, viz., Mr. Dunn's version of events. Plainly there was sufficient substance in Ms. Brewer's complaint to cause the TSS to investigate the matter in autumn 2008, but I have not seen any of the detail of that complaint, hence I am in no position to attempt to evaluate the strength of it, even if that were an appropriate exercise for me to undertake (which, for my part, I do not think it is).

100. I have in mind also that, the very lowest, averments made by Mr. Dunn need to be treated with a degree of circumspection, given that he was plainly wrong in asserting that, before Ms. Brewer, he had not been subject to a complaint about a failure to communicate in writing to the vendor the details of an offer. Ms. McLeod's witness statement reveals evidence of an apparently well-founded complaint approximately six months before Ms. Brewer's.³² I also bear in mind the absence of any evidence to support his assertion that the TSS had vetted Astons' business before it commenced to trade.³³

(iii) Length of the delay

101. As a matter of fact, the delay was just under five weeks, from 11 September to 16 October 2009. Whilst not an excessively long period, neither is it a period that could be regarded as very short, as might a delay of a few days only. I therefore

³² See paragraph 94.3 above.

³³ See paragraph 94.2 above.

do not regard this is a factor as pointing in either direction.

(iv) Reasons for the delay

102. This factor seems to me to go to the heart of this application, and, necessarily requires me to form a view as to the credibility of the account of the relevant events as given to me by Mr. Dunn.
103. I should preface this part of my decision by noting that, in his submissions, Mr. Gibson said that if I was not satisfied that Mr. Dunn had received the Determination then I should extend time.
104. Whilst I do not think that it would be appropriate to adopt such a bright-line rule in all cases, on the particular facts of this case I shall proceed on the basis suggested by Mr. Gibson.
105. My assessment of Mr. Dunn's credibility necessarily turns on my evaluation of his account as to the circumstances in which his letters of 20 October 2008 and 10 August 2009 were produced.
106. I have already drawn attention to certain unsatisfactory features of Mr. Dunn's account, but in my judgment there is more. I have in mind the following additional points:

106.1 Had the OFT not carried out its “Screenshot” investigation, it is highly unlikely that the fact that these documents were not copies of contemporaneous originals but had only been produced on 24 September 2009 would have been known to the Tribunal. There was nothing in Mr. Dunn’s letter date 24 September 2009 to the Adjudicator, Robinson’s letter of 25 September 2009 to Mr. Wallace and Mr. Young or Mr. Dunn’s letter dated 16 November 2009 to the Tribunal which even suggested this might be the case.³⁴ All of those items of correspondence enclosed copies of one or both of the letters in question.

106.2 The supposed contemporaneous nature of these letters was in part conveyed by the manuscript text “FILE COPY” which appears in the top right-hand corner of each of the letters. On Mr. Dunn’s version of events, they plainly were not file copies; they were freshly produced typed copies of a file copy and that manuscript text was therefore misleading.

106.3 I note that no other item of contemporaneous correspondence produced by Mr. Dunn bears the same manuscript text.

106.4 Mr. Dunn had no satisfactory (or, perhaps more accurately, no) answer to Mr. Gibson’s point that his (Mr. Dunn’s) lack of a scanner in mid-November 2009 did not explain why the letters had been produced

³⁴ I should make clear that I am not suggesting that Robinson had any knowledge as to the circumstances in which the letters were produced, but that firm’s lack of knowledge is equally telling.

approximately seven weeks earlier, on 24 September 2009.

106.5 On Mr. Dunn's own version of events, he did have access to a photocopier, even in November 2009. Since his letter dated 24 September 2009 to the Adjudicator was sent by post, it would have been sufficient to photocopy the contemporaneous file copies of the letters and enclose those photocopies with his letter. There was no need to type them out afresh on that date if, as Mr. Dunn said, there were copies of those letters on the file. Given the dramatic events of that day as described by Mr. Dunn, photocopying would have been a much simpler and straightforward exercise to have undertaken than retyping.

106.6 The matter having been raised by the OFT in its letter dated 4 December 2009 and the subject of directions made by Judge Wulwik on 7 December 2009, I would have expected Mr. Dunn to bring to the hearing the original file copies of the letter which, he told me, were used to produce the retyped versions on 24 September 2009.

107. It is for these reasons, taken together with the matters to which I referred at paragraphs 31 and 62 above, that I am unable to accept Mr. Dunn's account as to the circumstances in which the letters dated of 20 October 2008 and 10 August 2009 were produced. Rather, I am driven to the conclusion that the OFT's suspicions were justified and that, contrary to Mr. Dunn's assertions in

108. This conclusion inevitably means that I have to approach everything I have been told by Mr. Dunn and which is put in issue by the OFT with very considerable care. I consider I should only accept his evidence if it is independently corroborated.
109. In particular, it follows that I am not satisfied that Mr. Dunn did not receive the copy of the Determination sent under cover of the OFT's letter dated 14 August 2009. I accept Mr. Gibson's submission that the more likely explanation for what occurred is that, despite his now very strenuous protestations, Mr. Dunn failed to heed the seriousness of or respond to that letter, just as he ignored Mr. Young's letters of 21 October and 12 November 2008. I think the reality of the position only dawned on Mr. Dunn on 23 September 2009 as a result of the OFT's press release of that date.
110. That is to say, I have reached the conclusion that Mr. Dunn's failure to bring an appeal within the prescribed time was due to his failure to respond to the OFT's letters to him and Astons of 14 August 2009 and enclosed determinations.

(v) Prejudice to Mr. Dunn if an extension of time is not granted

111. I have no doubt that Mr. Dunn will suffer prejudice if an extension of time is not

112. Nevertheless I must not lose sight of the fact that there would be no alleviation of those consequences unless I not only granted permission to appeal but, also, Mr. Dunn's substantive appeal was successful. That is to say, the prejudice suffered by Mr. Dunn, if I do not extend time, would be his ability to bring an appeal which might or might not result on the prohibition order being set aside
113. Overall, though, I do regard this as a factor pointing counting significantly in Mr. Dunn's favour.

(vi) Prejudice to the OFT if an extension of time is granted

114. Clearly the OFT would suffer prejudice were I to grant Mr. Dunn's application, in the sense that the OFT would then be in a position of having to resist an appeal (if it so decided) against a Determination that it had hitherto regarded as inviolate.
115. Whilst I do not regard this as irrelevant, I would be rather more influenced by this factor were it a case in which, e.g., the delay had led the OFT in some way to act in a manner that would occasion it prejudice were Mr. Dunn now to be permitted

116. As it is, therefore, this seems to me a factor of minor relevance only.

(vii) Effect on other parties and the administration of justice

117. Mr. Gibson argued that there are sound public policy reasons for my not extending time, on the basis that effective case management requires parties to adhere to the applicable rules, that there is a need to achieve finality in litigation and that parties are entitled to know where they stand.

118. Those points are, as generally observations, soundly made and do point against my granting the application. However in my judgment I need primarily to be guided by the facts of the particular matter before me rather than these more general considerations.

G. Conclusion

119. Having carefully considered all the above factors, I have reached the clear conclusion that I should not grant Mr. Dunn the extension of time he seeks. I do so essentially for the reasons I explained in paragraphs 102 to 110 above. That is:

119.1 I do not consider Mr. Dunn's version of events in certain key respects (viz., the authenticity of his purported letters dated 20 October 2008 and 10 August 2009) to be credible.

119.2 For those reasons I am unwilling to accept his evidence unless corroborated.

119.3 There is no corroboration of his claim that the letters dated 14 August 2009 from the Adjudicator, including that to Mr. Dunn himself enclosing the Determination, were not received by him.

119.4 I accept Mr. Gibson's submission that, based on Mr. Dunn's past conduct between September to October 2008 and May and July 2009, the more likely explanation is that Mr. Dunn simply did not treat those letters with the seriousness they merited.

120. In my judgment, therefore, there are no good reasons for Mr. Dunn's failure to bring his appeal within the prescribed time; he is the author of his own misfortune in this regard; and I decline to grant the extension of time he seeks.

121. I recognise the acute difficulties that Mr. Dunn now faces as a result of his inability to practice his chosen profession; my conclusion is that he is himself responsible for this state of affairs.

122. I therefore dismiss Mr. Dunn's application.

123. Any applications as to costs should be filed with the Tribunal in accordance with the terms of rule 10(3) and (4) of the 2009 Rules.

Keith Rowley Q.C.

Judge – First-tier Tribunal (Estate Agents)

25 March 2010