First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2016/0008

Before

JUDGE BRIAN KENNEDY

Between

UXDALE LTD

Appellant

and

LONDON BOROUGH OF ISLINGTON

Respondent

Introduction

1. This is an appeal brought against the decision of the London Borough of Islington (hereinafter "LBI") to issue a Final Notice on 5 April 2016 (the "Final Notice") against the Appellant Company (the "Company") in respect of alleged breaches of s.83 of the Consumer Rights Act 2015 (the "CRA").

2. It is claimed in the Final Notice that the Company has breached s.83 in four material ways, namely: -

    a. It failed to display a list of fees on its website contrary to s.83(3);
    b. It failed to include relevant information in its list of fees contrary to s.83(4) (namely it failed to give fees inclusive of VAT);
    c. It failed to include on the list of fees a statement concerning membership of a client money protection scheme contrary to s.83(6);

d. It failed to indicate its membership of a redress scheme, or to give details of the said scheme contrary to s.83(7)

3. For the reasons below, the Appeal is dismissed.

Legal Framework

4. The relevant obligations placed on letting agents are contained in ss.83-88, and Schedule 9, of the CRA.

5. An obligation to letting agents to publish their fees came into force on the 27th May 2015. Section 83 sets out the duty on letting agents as follows:-

> ***Duty of letting agents to publicise fees etc***
>
> *(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.

(5) Subsections (6) and (7) apply to a letting agent engaging in letting agency or property management work in relation to dwelling-houses in England.

(6) If the agent holds money on behalf of persons to whom the agent provides services as part of that work, the duty imposed on the agent by subsection (2) or (3) includes a duty to display or publish, with the list of fees, a statement of whether the agent is a member of a client money protection scheme.

(7) If the agent is required to be a member of a redress scheme for dealing with complaints in connection with that work, the duty imposed on the agent by subsection (2) or (3) includes a duty to display or publish, with the list of fees, a statement—

(a)that indicates that the agent is a member of a redress scheme, and

(b)that gives the name of the scheme.

(8) The appropriate national authority may by regulations specify—

(a) other ways in which a letting agent must publicise details of the relevant fees charged by the agent or (where applicable) a statement within subsection (6) or (7);

(b) the details that must be given of fees publicised in that way.

(9) In this section—

"client money protection scheme" means a scheme which enables a person on whose behalf a letting agent holds money to be compensated if all or part of that money is not repaid to that person in circumstances where the scheme applies;

"redress scheme" means a redress scheme for which provision is made by order under section 83 or 84 of the Enterprise and Regulatory Reform Act 2013.

6. The methods for enforcing the duties set out in s.83 are provided for in s.87 CRA as follows: -

Enforcement of the duty

(1) It is the duty of every local weights and measures authority in England and Wales to enforce the provisions of this Chapter in its area.

(2) If a letting agent breaches the duty in section 83(3) (duty to publish list of fees etc on agent's website), that breach is taken to have occurred in each area of a local weights and measures authority in England and Wales in which a dwelling-house to which the fees relate is located.

(3) Where a local weights and measures authority in England and Wales is satisfied on the balance of probabilities that a letting agent has breached a duty imposed by or under section 83, the authority may impose a financial penalty on the agent in respect of that breach.

(4) A local weights and measures authority in England and Wales may impose a penalty under this section in respect of a breach which occurs in England and Wales but outside that authority's area (as well as in respect of a breach which occurs within that area).

(5) But a local weights and measures authority in England and Wales may impose a penalty in respect of a breach which occurs outside its area and in the area of a local weights and measures authority in Wales only if it has obtained the consent of that authority.

(6) Only one penalty under this section may be imposed on the same letting agent in respect of the same breach.

(7) The amount of a financial penalty imposed under this section—

(a)may be such as the authority imposing it determines, but

(b)must not exceed £5,000.

(8) Schedule 9 (procedure for and appeals against financial penalties) has effect.

(9) A local weights and measures authority in England must have regard to any guidance issued by the Secretary of State about—

(a) compliance by letting agents with duties imposed by or under section 83;

(b) the exercise of its functions under this section or Schedule 9.

7. The procedure is set out in Schedule 9 of the CRA, which states as follows: -

Notice of intent

1

(1) Before imposing a financial penalty on a letting agent for a breach of a duty imposed by or under section 83, a local weights and measures authority must serve a notice on the agent of its proposal to do so (a "notice of intent").

(2) The notice of intent must be served before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the agent's breach, subject to sub-paragraph (3).

(3) If the agent is in breach of the duty on that day, and the breach continues beyond the end of that day, the notice of intent may be served—

(a)at any time when the breach is continuing, or

(b)within the period of 6 months beginning with the last day on which the breach occurs.

(4) The notice of intent must set out—

(a)the amount of the proposed financial penalty,

(b)the reasons for proposing to impose the penalty, and

(c)information about the right to make representations under paragraph 2.

Right to make representations

2 The letting agent may, within the period of 28 days beginning with the day after that on which the notice of intent was sent, make written representations to the local weights and measures authority about the proposal to impose a financial penalty on the agent.

Final notice

3

(1) After the end of the period mentioned in paragraph 2 the local weights and measures authority must—

(a)decide whether to impose a financial penalty on the letting agent, and

(b)if it decides to do so, decide the amount of the penalty.

(2) If the authority decides to impose a financial penalty on the agent, it must serve a notice on the agent (a "final notice") imposing that penalty.

(3) The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was sent.

(4)The final notice must set out—

(a)the amount of the financial penalty,

(b)the reasons for imposing the penalty,

(c)information about how to pay the penalty,

(d)the period for payment of the penalty,

(e)information about rights of appeal, and

(f)the consequences of failure to comply with the notice.

8. To further assist with the proper interpretation and implementation of the above, the Department for Communities and Local government issued guidance on the private rented sector in March 2015 (the "Guidance").

9. The Guidance deals with issues relating to enforcement and notes the following relevant matters:

   a) *"Generally, the enforcement authority will be the local authority in whose area the lettings agent who has not complied with the requirement is based. So for a national letting agent who has not published their fees and other details, tjeu can be liable for a fine for each and every office where the information is not published. However, local authorities will need to agree to enforce fines for a website which covers the whole country, as fines cannot be imposed for the same breach of the requirement"*

   b) *"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"*

   c) *"In the early days of the requirement coming into force, lack of awareness could be considered; alternatiely an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction"*

   d) *"Another issue which could be considered is whether a £5,000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business"*

   e) *"The enforcement authority can impose further penalties if a lettings agent continues to fail to publicise their fees despite having previously had a penalty*

imposed. There is no limit to the number of penalties that may be imposed on an individual lettings agent if they continue to be in breach of the legislation."

10. The grounds for appealing a penalty imposed by a Final Notice are contained at Schedule 9 (5) as being: --
    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

The Parties Submissions

The Appellant's Submissions

11. In their written submissions, the Company claimed that each of the grounds of appeal outlined above were engaged.

Error of fact

12. The Company claimed that that the Final Notice was served before the timescale given to the Appellant to remedy its alleged breaches of s.83 had fully elapsed. The Appellant claimed, as a matter of fact, that they had been given until the close of business on 19th February 2016 to remedy any breaches of s.83 and that, because the Final Notice was served during the Company's business hours on that date, it was issued in error.

13. Continuing on from this, the Appellant argued that it had remedied any defects before that timescale had elapsed, i.e. in the period between the Final Notice being served and the close of business on 19th February 2016.

14. The error of fact, it was argued, was that the Final Notice had been served when, in fact, there were no breaches of s.83 by the close of business on 19th February 2016.

15. An additional argument was made, namely that the Final Notice made reference to a website which was no linked to, or operated by, the Company. The Appellants therefore claimed that LBI's decision to issued a Final Notice in respect of the Company's website was flawed, as they had considered the wrong website.

Error of law

16. In effect the Company argued that LBI had erred in issuing more than one penalty in the same Final Notice.

17. The Company made two alternative arguments concerning the proper construction of s.3 of Schedule 9, namely:-

    a. The CRA only envisages for one penalty to be imposed at a time for the same breach. The only breach here was with reference to the Company's website. Therefore, LBI was only entitled to impose one penalty; or alternatively,

    b. If "breach" was to be construed as meaning a breach of each subsection, for the purposes of s.87(6) CRA, a final notice can only impose a single financial penalty per breach of subsection. Therefore, if there were multiple breaches, there would have to be multiple final notices.

18. The Appellant therefore contended that LBI had imposed four fines for what was effectively the same breach. Alternatively, the Company claimed that LBI erred in issuing four penalties on the same Final Notice.

Unreasonableness of financial penalty

19. The Company claimed that, in all the circumstances, the financial penalty of £8,000 was unreasonable. The Company claimed in mitigation that, *inter alia*, it had been very responsive to LBI's requests and that it had done all that was within its control to comply with LBI's requests. It furthermore contended that the fact that its website had been dormant for some time was relevant.

20. The Company also argued that, in light of its turnover and profits, an £8,000 fine was excessive.

Unreasonable for any other reason

21. The Company repeated the points made above. It also added that the fact its website had been dormant for some time was relevant. It furthermore argued that, although other letting agents on the Holloway Road were in breach of the same provisions of CRA, the Company was the only one which had been fined for noncompliance.

The Respondent's Submissions

22. LBI first submitted that, even on the Company's case, it was not in dispute that the Company's website failed to publicise, *inter alia*, a list of fees during the period 27th May 2015 – 19th February 2016. In LBI's submission that fact without more was sufficient to justify the imposition of a final notice.

23. LBI made the following more specific submissions.

Error of Fact

24. LBI disputed that the Company had been given until the close of business on 19th February 2016 to remedy any breaches of s.83 CRA. LBI submitted that any reference to "the end of the week" was not a mandated timeframe, but was simply for the Company's information.

25. LBI also submitted that the error on the Final Notice, which made reference to a website that was unconnected to the Company, was insufficient to classify of an error of fact for the purposes of s.5(a) of Schedule 9. Rather, LBI submitted that "prestigeproperties.net" (the correct url) was the website that was in fact surveyed as being in breach of s.83, and furthermore that that fact was clear from the circumstances.

Error of law

26. LBI refuted the Company's parsing of s.87(6) CRA and argued that there is no reason why numerous breaches cannot appear on the same final notice. They contend that this is true both as a matter of construction and of common sense.

Unreasonableness of financial penalty

27. LBI submitted that it had acted entirely reasonably, and in accordance with the formal Guidance, in the way it calculated the level of fine awarded. Indeed, LBI submitted that it had levied a relatively modest fine, and that it could reasonably, and within the relevant Guidance, have levied a much larger fine.

Evidence

28. The Tribunal had the benefit of reading and considering written evidence in this matter, as well as oral evidence on the day of hearing.

29. Witness statements were filed on behalf of the Company by Sarah Johnson, dated 6 July 2016, by Morris Sanger, dated 11 October 2016, and by Anneta Francis 11 October 2016.

30. Samantha Tyler submitted two witness statements on behalf of IBC, dated respectively the 24th May 2016 and 25th July 2016. David Fordham also provided a witness statement dated 23rd May 2016 on behalf of IBC. IBC's final witness was Sonita Singh, who provided a witness statement dated 17 November 2016.

31. A number of factual matters were in dispute. We heard important evidence on the following disputed questions of fact: -

    a. whether the Company received letters from IBC in June and September 2015 concerning potential breaches of s.83;
    b. whether Ms Tyler visited the correct website when checking whether the Company had breached provisions of s.83;

    c. whether Ms Tyler had allowed the Company until the close of business on 19th February 2016 to comply with s.83.

32. Ms Johnson's is the Company's office secretary. She gave evidence on a number of matters. She said that Ms Tyler gave the Company a "time scale" within which to implement changes to their website. She also gave evidence on whether letters had been received at any stage in 2015. In her witness statement, she stated that the first notification the Company had received

from Islington Council Trading Standards Team was in February 2016. She denied ever receiving correspondence in June or September 2015. Ms Johnson was also involved in liaising with the Company's website designer, with the aim of making the Company's website compliant with s.83. Finally, Ms Johnson's witness statement gives evidence of the Company's finances. She gives the Company's turnover for year end December 2014 as £94,922.00 and states its net profit was £11,877.00

33. Mr Sanger is the Company's office manager. His evidence was largely focussed on the Company's website. He stated that no properties were advertised on the Company's website before the website redirected to another property letting site. He also stated that the redirection of the Company's website took place either late on 18 February or early on 19 February. He had spoken with a Mr Golding of Astuium, who ran the Company's website, who informed him of same. Aside from this Mr Sanger did not have much else to add.

34. Ms Francis is a secretary at the Company. Ms Francis engaged in telephone conversations and email exchanges with Ms Tyler of IBC. Ms Francis claims that Ms Tyler told her that the Company had until the close of business on 19 February to resolve any irregularities with the Company's website. Ms Francis also made the allegation that Ms Tyler implied that the Company was under suspicion from IBC for some unspecified reason. Finally, Ms Francis gave evidence to the effect that Ms Tyler had not checked the correct website on 19 February 2016, and that she had instead checked the website of another company.

35. Ms Tyler's witness statement touched on a number of areas. She sets out the background to IBC's engagement with letting agents in Islington, and describes how IBC made efforts to advise letting agents of the changes to the law effected by the CRA. Ms Tyler is quite clear in her evidence that at all

relevant times she checked "www.prestige-properties.net" rather than "www.prestige-properties.co.uk" and, to take the point further, that she was aware that the ".net" domain name was the correct address. Crucially, she states that on 16 February, she checked the ".net" domain and noted that it remained non-compliant with the provisions of the CRA. She states that she checked the same site again on 18 and 19 February, and noted that it remained non-compliant on those dates as well. Ms Tyler states that on 16 February she sent an email informing the Company that she would be visiting the branch to do a compliance inspection "by the end of the week." She does not say that the reference to the "end of the week" was a deadline for the Company to remedy any non-compliance with s.83.

36. Mr Fordham's is the service manager of the Trading Standards team at IBC. In his witness statement he explains how he calculated the level of fine to be levied against the Company. He states that he believed an £8,000 fine was reasonable and proportionate in the circumstances. Mr Fordham also clarifies that there IBC alleged four breaches against the Company and details what they were. Aside from this, Mr Fordham did not have much else to add.

37. Ms Singh accompanied Ms Tyler to the Company's premises on 19 February 2016. She states that Ms Tyler told Ms Francis that the purpose of that visit was to check compliance with s.83. She denied that Ms Tyler stated the visit was for any reason other than checking compliance with s.83, and specifically denied that Ms Tyler made reference to any other unspecified reason for their visit. Aside from the above, Ms Singh only corroborated the evidence of Ms Tyler and did not add anything additional.

38. The Tribunal heard oral evidence on the day of trial from Ms Johnson, Ms Francis and Mr Sanger from the Company, and Ms Tyler and Mr Fordham from IBC.

39. Ms Johnson and Ms Francis were asked whether letters were received by the Company in 2015. Their response was that the Company went through periods where they did not receive post. Ms Johnson said that from time to time the Company would not receive post, but these were the only two letters they knew about that they had not received. Ms Francis was asked by the Tribunal whether they had contacted the Post Office about this, and she said that they had not.

40. In cross examination, Ms Francis was also asked about the inclusion of VAT in their fee information. She quite candidly accepted that some of the prices given were exclusive of VAT. This remained so on the date of hearing.

41. Counsel for the Company engaged in a line of questioning with Ms Tyler concerning whether the LBI had sought to enforce CRA breaches against other letting agents. She was quite clear in her responses that a systematic review had taken place and the treatment of the Company was not out of the ordinary at all. It was put to Ms Tyler that she made a telephone call with Ms Francis where she gave the Company a deadline to comply with the provisions of s.83 "by the end of the week." Ms Tyler was clear in her evidence that she did not believe this was said and she did not believe she made this call. Finally, it was put to Ms Tyler that she checked "www.prestige-properties.co.uk" for compliance, but she was resolute that she had in fact checked the "www.prestige-properties.net" domain name and that what was recorded on the original final notice was simply an error.

Discussion

42. The Tribunal will deal first with the alleged errors of fact referred to above. Having heard evidence on the matter, we are satisfied that the best evidence available to us is contained in the email of 3.32pm on Tuesday 16th February, when Samantha Tyler stated that she would be visiting "by the end of the week." The oral evidence we heard at the hearing of this Appeal was not

sufficiently probative to convince us that Ms Tyler had in fact given an oral representation that was incompatible with what had been given in writing.

43. The Tribunal do not doubt that reference was made to "the end of the week," however we are not satisfied that that reference was to a separate timeframe within which the Company was to remedy any breaches of s.83. For that reason, we are not satisfied that the evidence supports the Company's contention that they were given until the close of business on 19 February to remedy any defects. Ms Tyler therefore did not issue her Final Notice based on a mistake of fact.

44. In respect of the Company's website, the evidence we heard from Ms Tyler and Ms Singh was that the correct website visited, but that a simply slip was made on the face of the Final Notice. This version of events was not changed under cross examination.

45. The Tribunal furthermore note that the website incorrectly identified on the Final Notice (the ".co.uk" url) is not a letting agency website at all. It appears that, although that domain exists, it is not a letting agency website, and is therefore unrelated to the matter of letting.

46. In any event, it is clear that the correct website was identified in previous correspondence. There is no doubt that Ms Tyler had previously visited the Company's correct website. This is furthermore made clear by the fact that the Company's employees and agents contacted their website administrator to make the necessary alterations. It is also clear that Ms Tyler corresponded with the Company at the correct email address, which is a ".net" address.

47. The Tribunal therefore have no doubt that Ms Tyler based her finding that there had been breaches of s.83(3) with reference to the Company's website, rather than that of another company going by the same name. We are

satisfied that the incorrect address given on the Final Notice was a slip and not a substantial error.

48. The Tribunal therefore conclude that there was no mistake of fact on this basis either. For these reasons, we find that the Company's submissions on mistake of fact are unsubstantiated.

49. Turning to the alleged mistake of law, it is first important to note that the s.83 of the CRA contains a number of requirements. This much is clear from the face of the statute; the subtitle to s.83 is given as "duty of letting agents to publicise fees ***etc***." It is absolutely clear from the face of the CRA that s.83 imposes a number of obligations.

50. Turning to those obligations, it is also clear that they are not mutually exclusive. For example, s.83(3) imposes an obligation to publish fees on their website, whereas s.83(7) imposes a duty on agents to display or publish a statement indicating which redress scheme they are a member of, if any. There is no degree of mutual exclusivity with respect to the duties in s.83 at all. It is therefore correct as a matter of simple logic that a Company can be in breach of one or more duties in s.83 at one time.

51. The Company's submission that only one breach can occur at one time is therefore without merit.

52. Next, turning to the Company's submission that separate final notices should be issued for separate breaches, we note that this submission is not grounded in the CRA or the procedure set out in Schedule 9 at all. The Company has failed to identify any provision that stipulates that a final notice can only be issued in respect of one breach.

53. The purpose of the final notice is to give the recipient sufficient information regarding breaches of the CRA to enable them to understand the position in which they find themselves. Any penalty imposed under the CRA is imposed because of the relevant breach, not because of the notice given.

54. Whether one notice was served or four separate notices is therefore of no consequence. What is important is that the notice gave the Company sufficient information to allow them to understand the situation they were in. The Tribunal do not accept that including four breaches in one notice is irregular in any way, and therefore dismiss the proposition that irregularity in the notice procedure constitutes an error of law.

55. Turning next to the Company's contention that its website was inactive and that it therefore acted as nothing more than a "business card." It went on to argue that s.83 did not apply to the website as there were no dwelling to which fees could attach.

56. The purpose and effect of s.83 is to regulate the way in which letting agents advertise their fees. According to s.86(1), "letting agency work" relates to things done by a person in the course of business in response to instructions received *either* from prospective tenants or prospective landlords.

57. If it were the case that "letting agency work" related only to prospective tenants, there may be some merit in the Company's contention that the lack of properties advertised on the website prevented breaches of s.83 occurring. However, a prospective landlord who may wish to engage the Company's services would still be entitled to know the Company's fees, notwithstanding that there were no properties advertised on the Company's website.

58. Because the CRA is explicit that the duties in s.83 apply for the benefit of both prospective tenants *and* prospective landlords, the argument that the website

did not advertise any properties must fail. The Tribunal therefore is not persuaded by the Company's submissions on this point.

59. It now falls to consider whether the amount of the financial penalty is unreasonable. We note that LBI provided the Company with advice on the duty under the CRA well in advance of the instant proceedings. LBI provided multiple opportunities to the Company to rectify the relevant defects. By letter dated 4th February, LBI again repeated its advice and warnings to the Company and gave it a further opportunity, with guidance, to comply with the provisions of CRA. This notwithstanding, the Company continued its failure to comply with its duties on 19th February.

60. The Tribunal note furthermore that at the hearing of this appeal, the Company's witness Ms Francis candidly accepted that the price information given by the Company remained exclusive of VAT. It is not in dispute that giving prices exclusive of VAT is a breach of s.83(4). Therefore, the Tribunal is satisfied that the Company knows its pricing information is a breach of s.83(4), and furthermore that, despite the fact they are appealing the decision to impose a fine, they have done nothing about it, and continue to do nothing about it until at least the date of hearing.

61. The Tribunal takes a very serious view of this behaviour. The Company has, despite the instant proceedings, continued to flout the provisions of the CRA when it has no reasonable excuse to do so. At least in respect of the failure to give prices inclusive of VAT, this constitutes a serious aggravating feature.

62. The Tribunal note that LBI were entitled to impose a fine of up to £5,000 per breach. We accept, furthermore, that the Guidance stipulates that £5,000 should be the starting point and that a lower fine should only arise where there are good reasons to do so.

63. In the circumstances, where the Company has continually failed to meet its duties under the CRA, and where it continues to do so, we have no difficulty accepting that the fine levied was reasonable.

64. Finally, in respect of the argument that the Company is being unfairly targeted, we find that the evidence points squarely to the fact that an audit was undertaken of a number of letting agents in Islington, and that the Company was one of the companies who were found to be in breach of s.83. Even if the Company was the only letting agency on the Holloway Road being fined for breaches of CRA, which we do not accept, that would not excuse the Company's behaviour. The Company has been given a number of opportunities to make very modest changes which would render its conduct CRA-compliant. It has chosen to ignore those opportunities and to continue flout the provisions of the CRA.

65. For those reasons, we do not accept that the decision was unreasonable for any other reason.

Conclusions

66. In view of the foregoing, we are not satisfied that any of the grounds of appeal have been made out. We therefore dismiss the appeal.

Brian Kennedy QC 7 December 2016.