



Neutral citation number: [2024] UKFTT 983 (GRC)

Case Reference: **FT/SL/2024/0043 and 0044**

**First-tier Tribunal
General Regulatory Chamber
Professional Regulation**

Determined on the papers.

Decision given on: 05 November 2024

BEFORE

HHJ DAVID DIXON

BETWEEN

THE RIGHT PROPERTY COMPANY (BIRMINGHAM) LTD APPLICANT

- AND -

DUDLEY METROPOLITAN BOROUGH COUNCIL RESPONDENT

Decision: The Appeal is allowed to a limited extent by the reduction of penalties.

REASONS

Background

1. The Appellant company is a letting agent. The Respondent is the enforcement authority which served two Final Notices on the Appellant. A Final Penalty Notice was imposed for breach of a section 83 Consumer Rights Act 2015 requirement to display or publish the required information on the website in relation to fees, with a £2,250 penalty and for failing to ensure that Zoopla publish the correct information £3,250. The date of the breach was said to be 22nd February 2022. A further Final Notice imposed a financial penalty of £12,000 for breach of the duty to belong to a client money protection scheme (CMP) pursuant to Regulation 3 of the Client Money Protection Schemes for Property Agents (requirement to belong to scheme etc) Regulations 2019 {the 2019 Regulations}. The date of the breach was said to be between 28th March and 25th June 2023.
2. In terms of Chronology the Respondent (R) advances the following dates of note re the Appellant (Co):
 - a. . On 22nd February 2023 Respondent checks Zoopla and Appellant's website.
 - b. On 9th March 2023 the same breaches as noted on 22/2 were noted and video recorded
 - c. On 26th May 2023 3 Notices of Intent were issued for the relevant breaches.
 - d. On 31st May 2023 a further check of the websites was completed and again breaches were noted.
 - e. 6th June 2023 Mr Hussain indicates compliance, albeit work was still to be done.
 - f. 26th June 2023 membership of a CMP was confirmed.
 - g. 7th July 2023 a Review was completed by the Respondent and penalty levels were reduced.
 - h. 3rd May 2024 Appeal received by the Tribunal.
 - i. Respondent files a response setting out relevant dates.
 - j. 15th June 2024 the Appellant files a response to the Response providing 2023 accounts. The response seeks dismissal of the case.
3. The Appellant argues in the Appeal document, dated 24th April 2024, that whilst they were not in a CMP, as soon as they were told of the situation, in "February/May 2023," they rectified things. They indicate their own website was taken down, the Zoopla information was updated, and they registered with a CMP. On 26th June 2023 they indicated that they were now in compliance, albeit the relevant email indicated that the company was "updating its website and will include our fees we charge for our services", which wasn't full compliance at that stage.

4. The Appellant also argues that businesses are facing challenging times, and the penalties imposed will cause genuine issues. Financial accounts were supplied. It argues that the fines are excessive, particularly as the breaches were unintentional. It also indicates the level of fines will lead to the business being closed down and people losing their jobs.

Mode of Determination

5. The appeal was determined at on the papers after both parties agreed to the same. The Tribunal stepped back and considered whether such a disposal was appropriate bearing in mind the detail provided. Having completed that exercise, the Tribunal determined in accordance with the Rules that it was fair and appropriate to complete a paper determination.
6. The Tribunal had a Respondent's bundle consisting of 399 pages and considered it all with care.

The Legal Framework

7. The first provision with which I am here concerned is s. 83 of the Consumer Rights Act 2015, which provides 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. S. 83 of the Consumer Rights Act 2015 (above) requires letting agents to publicise details of relevant fees at its business premises and on its website. It came into force in May 2015.
9. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached s. 83, it may impose a financial penalty under s.87 of that Act. It does so by serving a Notice of Intent and then a Final Notice on the letting agent concerned.
10. S. 87 of the Consumer Rights Act 2015 provides that:

“(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) ...

(5) ...

(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.

...”

11. Where the Authority deems that a breach has occurred it must then comply with Schedule 9 of the 2015 Act:

“SCHEDULE 9 DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

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.

....”

12. The requirement to belong to a client money protection scheme under the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc) Regulations 2019, reads:

Reg 3.— (1) A property agent who holds client money must be a member of an approved or designated client money protection scheme.

(2) The property agent must ensure that the membership obtained results in a level of compensation being available which is no less than the maximum amount of client money that the agent may from time to time hold.

13. For breaching Regulation 3 a financial penalty, that “must not exceed £30,000,” Regulation 6(2)(b), is possible. Such a penalty may be imposed where the relevant local authority is “satisfied beyond reasonable doubt” that a breach has occurred.

14. Schedule 9 paragraph 5 to the 2015 Act 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.

Evidence

15. The Respondent supplied a statement from Jaswinder Matoo, Principal Trading Standards Officer, who set out the work completed by Mrs Julie Miller, who had left the service. It

indicated that in February 2023 the company internet presence was checked. Deficiencies were noted in that:

- a. There was a failure to publish full details of the agent's fees on their website.
- b. There was a failure to publish details of membership of a CMP.

As a result of those investigations checks were completed with all of the CMPs and all confirmed the Appellant was not a member of the relevant schemes.

A further check, and video evidence was obtained, of the breaches on 9th March 2023.

16. Having issued Notices of Intent the Respondent received information from the Appellant suggesting compliance and checks confirmed the same to a substantial degree. As a result, a Review was held. The notes of the Review (at p343) indicate, applying the Local Authority penalty matrix, that it was felt that the Appellant was "high" in terms of culpability and medium in terms of harm in regard to the CMP breach. In terms of aggravating and mitigating factors it was noted that failures had existed for some time, but steps to remedy matters were in place.
17. For the other breaches medium culpability and medium harm on the basis that the Appellant should have known of the rules and there was potential harm. The Review notes indicate "*No apparent attempt to remedy the breach made by the trader. Trader did not make reference to 3rd party portal in representations and made no agreement to remedy the breach.*" As a result of the review penalties were reduced.
18. The Appellant provided accounts showing a year end profit of £2340 in 2019, £4875 in 2020, £2498 in 2021 and a loss of £595 in 2022. It was noted that staff costs rose massively in 2022 from 2021. In a reply to the Response from the Respondent, the Appellant provided more financial information including its accounts for 2023 that showed an increase in turnover and an increased profit of £12,389. Staff costs had continued to rise during this year.

Decision Reasons

19. I have considered all of the papers and evidence with care.
20. The Appellant is clearly a lettings agent and subject to the relevant provisions. It accepts that it was in breach albeit avers that this was an oversight in effect. However, it seems they were in the process of rectifying the CMP issue at the time of the investigation. As the Respondent points out that was 4 years after the provisions came into effect. This was a serious breach of the Regulations.
21. As far as the publishing rules are concerned the Appellant accepts being in breach again and asserts that upon receiving notice, they acted to remedy matters. It did take 3 months or so for this process to be completed, but efforts were made to comply. Again, the Regulations are not new, and the Appellant should have known about them.

22. Ignorance of the law (regulations here) is no defence. I find as per the admissions that the Appellant was in breach of all matters.

23. The Respondent having discovered the breaches was under an obligation to deal with them. By initiating the Notices of Intent, which were properly sent, and then considering a Review before issuing the final notices the Respondent has acted perfectly properly. There are no procedural issues that I can see.

24. Having reached those findings, I turn to the issue of penalties. Here the Respondent applies a matrix approach to determine the level of penalty. I start my consideration in relation to the CMP breach:

25. The first issue raised is culpability of the breach, and factors are listed at Appendix 1 of the Respondent's Policy:

"Culpability

Very High: Where the Landlord or Agent intentionally breached, or flagrantly disregarded the law or has/had a high public profile (which may include any significant role in a trade or business representative organisation) and knew their actions were unlawful.

High: Actual foresight of, or wilful blindness to, risk of a breach but risk nevertheless taken.

Medium: Breach committed through act or omission which a person exercising reasonable care would not commit

Low: Breach committed with little fault, for example because:

- Significant efforts were made to address the risk although they were inadequate on the relevant occasion*
- There was no warning/circumstance indicating a risk*
- Failings were minor and occurred as an isolated incident"*

26. Here no one suggests this was a very high case. The Respondent suggests that it is a High case, because there was wilful blindness of the rules. Whether it was high or medium (on the basis a reasonable person would not have omitted to act" is a fine line to draw. It seems to me this breach sits between the two but probably nearer to High. The Appellant as a professional letting agent should have known of the rules, they are not hidden away and all appropriate agents should be aware of them. The period of time the rules have existed is very relevant to knowledge.

27. The next issue is harm:

"Harm

The following factors relate to both actual harm and risk of harm. Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Category 3 – High Likelihood of Harm

- Serious adverse effect(s) on individual(s) and/or having a widespread impact due to the nature and/or scale of the Landlord's or Agent's business*
- High risk of an adverse effect on individual(s) – including where persons are vulnerable (see Appendix 2 for a non-exhaustive list of vulnerable people)*

Category 2 – Medium Likelihood of Harm

- Adverse effect on individual(s) (not amounting to Category 1)*
- Medium risk of an adverse effect of individual(s) or low risk of serious adverse effect*
- Tenants and/or legitimate landlords or agents substantially undermined by the conduct*
- The Council's work as a regulator is inhibited.*
- Tenant or prospective tenant misled.*

Category 1 – Low Likelihood of Harm

- Low risk of an adverse effect on actual or prospective tenants.*
- Public misled but little or no risk of actual adverse effect on individual(s)*

We will define harm widely and victims may suffer financial loss, damage to health or psychological distress (especially vulnerable cases). There are gradations of harm within all of these categories.”

28. Here the Respondent avers that this is a Category 2 case where there is an obvious risk of adverse effects on individuals (Tenants and/or landlords) and/or the potential for serious adverse effects. On the basis that the lack of CMP carries obvious risks, but there is no evidence that the Appellant is acting in an unscrupulous or other negative way there can be little difficulty in ruling out Category 3. There is a clear risk here having had no CMP for some time, such that Category one is also excluded. I agree therefore that this is a Category 2 case.
29. Looking then at Appendix 8 “Financial Penalty in Respect of a breach of CMP” a medium category 2 case has a starting point of £10,500 with a range of up to £20,000. A High category 2 has a starting point of £15,000, with a range up to £24,000. Looking then at the further aggravating factors none seem to apply. In terms of the further mitigating factors no previous offences/breaches are set out, the Appellant was in the process of rectifying matters and has cooperated with the investigation/compliance.
30. The Respondent has set the penalty for this offence at £12,000. Having considered the matrix, and the facts, I agree that was an appropriate penalty for the offence.
31. For the publishing breaches under section 83, for failing to display fees and for failing to ensure that the 3rd party portal was correctly displaying details, again the breaches are accepted. The difference between the two offences is that the portal breach wasn't rectified as quickly as other matters. It is more serious as a result.

32. It seems to me that the same factors apply generally to the two breaches, and this is therefore a high/medium Cat 2 case. A High Cat 2 case looking at the breach of publication table, Appendix 6, has a starting point of £3,000. With a range of £2000 to £4000; a medium Cat 2 has a starting point £2250, with a range of £1250 to £3250. The same aggravating and mitigating factors apply, albeit the “Zoopla” matter wasn’t dealt with as promptly and therefore is more serious.
33. The Respondent set the failing to publish fees penalty at £2,250 and the “Zoopla” breach at £3250. It seems to me these penalties fail to take regard of the mitigating factors to a degree and as such should be reduced. The compliance, lack of previous breaches and cooperation are worthy of some reduction. It seems to me the penalties should have been lower £1,750 for the first and £2,500.
34. Having indicated that position and bearing in mind that results in total penalties of £16,250, I stand back and look at the totality, particularly in light of the financial information provided by the Appellant.
35. As the Respondent points out the Appellant’s bank accounts are in credit, and there is a healthy through floor of funds across the account. The accounts supplied show that the business is improving its profitability gradually over the years. However, the level of penalty is in excess of a year’s profit for the business. Whilst it may be that business has continued to improve over the past year, that is still a severe sanction to be reasonable.
36. The Respondent did not factor in “affordability” of the penalties as the details provided were not perhaps as they should have been. The details now are of more assistance. I bear in mind that the penalties must be of sufficient regard to bring home the seriousness of the breaches, but at the same time penalties that could crush a business are not in anyone’s interests.
37. Having stepped back and assessed things in the way indicated it seems to me that a global penalty sum of £9,750 is appropriate. As a result, I propose to reduce the penalties imposed to arrive at those figures as follows:
- a. For the CMP breach - £7,500
 - b. For the failure to publish fees £1,000
 - c. For the Zoopla breach - £1250.
38. The effect of all of the above is that the total penalty imposed decreases, and the appeal is allowed to that extent.

HHJ Dixon

Judge of the First Tier Tribunals

Date: 23rd October 2024