Neutral citation number: [2024] UKFTT 984 (GRC)

Case Reference: **PR/2023/0078/CMP**

First-tier Tribunal
General Regulatory Chamber
Professional Regulation

Determined on the papers.

Decision given on: 5 November 2024

BEFORE

HHJ DAVID DIXON

BETWEEN

N&A INVESTMENTS UK LIMITED T/A RUTHERFORDS LETTINGS AND SALES — **APPLICANT**

- AND -

STAFFORDSHIRE COUNTY COUNCIL — **RESPONDENT**

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

REASONS

Background

1. The Appellant company is a letting agent. The Respondent is the enforcement authority which served a Final Notice on the Appellant. A Final Penalty Notice was imposed 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 date of the breach was said to be 23rd March 2023.
2. The Respondent indicates that the Appellant had joined The Property Ombudsman, namely TPO on 14th April 2011, and they in turn sent a mailshot to the Appellant about membership of Client Money Protection Schemes. However, the Appellant didn't join a scheme. The Appellant indicates that despite not receiving the mailshot, it was their responsibility to have CMP, and they failed in that regard. However, they stress they thought they were in compliance as they operated a "client account" to protect deposited funds. The company was a member of Safeguard until March 2012, when the accreditation was terminated. Between April 2012 until 25th August 2023 the funds were therefore not protected. The breach of course only runs from 2019.
3. The Respondent bore in mind all those matters and came to the view the breach was a Cat 2, medium culpability case and issued a final penalty notice of £7350. A Notice of Intent was issued on 27th July 2023 where an initial penalty of £18,000 was indicated.
4. The Appellant argues in the Appeal document, dated 3rd May 2024, that they did not receive the email mailshot about membership of a CMP. As soon as it was known that membership was required the Appellant avers that it put in place steps to ensure compliance and indeed was a member of an appropriate scheme by August 2023.The Appellant indicates they also believed they were covered under CMP due to letterhead on their insurance details, but accept this was a mistake, a genuine one, but still a mistake.
5. The Appellant also argues that businesses are facing challenging times, and the penalties imposed will cause genuine issues. Financial accounts were supplied. The Appellant argues that the level of fine will lead to the business being closed down and people losing their jobs. They suggest that an initial warning would have been a more appropriate way of dealing with this matter.
6. The Appellant provided proof of membership of a CMP, details of other professional memberships and indeed their financial accounts. The accounts for the year to June 2023 indicate that despite turnover increasing from the previous year the company suffered a loss of £6,057. The difference between the two years disclosed related to an substantial increase

in “administrative expenses.” Liabilities of £228,566 were disclosed against total equity assets of £19,428.

7. The Response from the Respondent indicates that the factors that have been raised by the Appellant were all borne in mind in reducing the penalty as indicated. They placed particular reliance on compliance, cooperation and the full admission of responsibility. The Respondent avers accordingly that the penalty imposed was appropriate.

Mode of Determination

8. 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.

9. The Tribunal had a bundle consisting of 93 pages and considered it all with care.

The Legal Framework

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

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

12. 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

13. The vast majority of the detail is summarised above already.

14. The Appellant sought further details of the way the penalty was calculated and as a result the Authority Respondent provided a copy of the penalty table where harm and culpability decisions result in differing penalties.

Decision Reasons

15. I have considered all of the papers and evidence with care.
16. 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 a mistake.
17. Ignorance of the law (regulations here) is no defence, as the Appellant accepts. I find as per the admissions that the Appellant was in breach of the relevant requirement.
18. The Respondent having discovered the breach was under an obligation to deal with it. 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 is nothing of note in the way the Respondent has acted.
19. The Appellant has suggested that a warning could have been given before resorting to the penalty approach. This is right, but the Respondent is under a duty to ensure the law is complied with, and here there was nothing irrational, disproportionate or unfair in following the route advanced under law.
20. Having reached those findings, I turn to the issue of penalty. Here the Respondent applies a matrix approach to determine the level of penalty.
21. The first issue raised is culpability of the breach, and factors such as the following are generally applied. I say generally as whilst the Respondent has provided the penalty table it has not provided its guide to culpability nor harm.

    "*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*"

22. Here it is said that the culpability was medium, and I agree. The Respondent quite properly re-evaluated the position after the Notice if Intent and downgraded its assessment from high. The reasonable agent should have been aware that the requirement existed and that membership was necessary. The Appellant says it believed it had CMP, albeit mistakenly it accepts. I have difficulty accepting that approach. The fact that a third party puts something within their letterhead, wouldn't normally suggest anything about the receiving party. The Appellant was operating a separate client account, which is of course not ideal, but offers some protection. It seems to me balancing all that I can see here that this is a medium culpability case.
23. The next issue is harm. Again it is normally set out in these sorts of general terms:

"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."

24. Initially the Respondent fixed the harm at high, but again following representations received reduced the same to medium. The rational behind that approach was entirely fair and appropriate. The Appellant had not been a member of a relevant scheme since the requirement existed. The risk of harm was there and whilst the deposit client account is a factor, it did not protect in the way that a CMP would.

25. I therefore agree that this is a Cat 2 medium culpability case, where the starting point is £10,500 with a range of £5,000 to £20,000.
26. The Respondent then looked at further aggravating and mitigating factors and noted only mitigation, namely cooperation, compliance and admissions. It applied a 10% reduction for those factors individually, so £1050 multiplied by 3, to reduce the starting point to £7350.
27. Whilst I understand the pragmatism in such an approach, I'm not persuaded that that is the fairest or most appropriate of calculation methods. As is clear all cases must be considered on their merits and the approach adopted is too formulaic. Levels of compliance for example will vary and a simplistic 10% reduction doesn't reflect the same.
28. The Respondent should have looked at the detail of the three factorsy identified as mitigating the overall position, but should also have considered good character. Looking at the factors, whilst the Appellant has argued that it didn't receive notice, and the Respondent's approach is unfair etc, it has set about correcting everything quickly and with care. It hasn't given the impression of being in any way cavalier towards the risks or regulations. There is no suggestion that it has any previous disciplinary or breach history. On a holistic view of the relevant factors, the speed of compliance etc the approach regarding reduction should in my view have been greater. I take the view the appropriate penalty should have been £6,000.
29. Having indicated that position I stand back and look at the affordability, and therefore reasonableness of the penalty, particularly in light of the financial information provided by the Appellant.
30. I note the losses advanced in the profit and loss accounts. I also note the significant increase in administrative costs that have not been explained and aren't clear on the accounts provided. It is difficult to understand why they have risen £9,000 in a year. Further, I note that the company, whilst having significant debts, had cash in hand in the bank plus debtors of £41,407.
31. I look at care at the argument advanced that the penalty isn't fair and that for a company of this size it will have considerable effect. However, I balance against that that the penalty should "bite" it should be a consequence that the company takes note of. Having reduced the penalty to the level indicated, and carefully considered the Appellant's argument I come to the view my revised penalty is just and proportionate to the breach and reasonable in the circumstances.
32. The revised penalty will therefore be £6,000.
33. The appeal is allowed to that extent.

HHJ Dixon

Judge of the First Tier Tribunals Date: 23rd October 2024