Appeal number: PR/2016/0021

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)

OAKFORD ESTATES LIMITED **Appellant**

- and -

THE LONDON BOROUGH OF CAMDEN **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA

Determined on the papers, sitting in Chambers on 1 February 2017

Decision

The Appeal is allowed. The Final Notice dated 29 July 2016 is varied. The appropriate total penalty is £1250.

Reasons

1. The Appellant ("Oakford") is a letting agent. The Respondent ("the Council") is the enforcement authority which served a Final Notice on Oakford on 29 July 2016. The Final Notice imposed a total financial penalty of £2500.00 for breach of the duty to publicise fees, comprised of £1250 for failing to publish details of tenants' fees and £1250 for failing to publish details of landlords' fees. Oakford now appeals against that financial penalty.

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

Background

3. The Council wrote to Oakford in June 2015 and again in December 2015 advising it of its obligation to publicise fees. The Council's officer visited Oakford on 11 November 2015 and left a non-compliance notice. On 26 April 2016 the Council's officer checked Oakford's website and found it still to be non-compliant.

4. The Council served a Notice of Intent on Oakford dated 27 April 2016. It is accepted by the Council that the Notice of Intent was administratively deficient because it failed to specify correctly both the amount of proposed financial penalty and the nature of the breaches alleged. The Notice was in a "tick box" format and the relevant boxes had not been ticked. (See paragraphs 11 to 17 below for consideration of the impact of the deficient Notice of Intent).

5. The Notice of Intent was intended to indicate that a penalty of £5,000 would be payable in respect of each of two breaches of the legislation, making a total penalty of £10,000. However, having considered prompt representations made by Oakford's solicitors, the Council decided to reduce the financial penalty to £2500 for each breach, making a total financial penalty of £5,000. Having received further submissions from Oakford's solicitors, it served the Final Notice dated 29 July 2016 imposing a further reduced total financial penalty of £2500 (£1250 for each breach). This is the financial penalty now appealed.

6. The parties agree that the failure to publicise fees relates to Oakford's website only and that the breach was swiftly rectified after service of the Notice of Intent. Oakford has appealed to this Tribunal against the Fixed Notice by its Notice of Appeal dated 8 August 2016, in which it asks for the financial penalty to be reduced to £1250 because it was an unreasonable penalty in view of the fact that the legislation was new, that it had faced technical difficulties with the website, and that the fees information was

available in its offices. It also alleges an error of law in relation to the penalty (considered at paragraphs 18 to 22 below).

7. The Council's Response to the appeal takes the form of a witness statement from Martin Harland, head of the Council's Trading Standards department. He sets out the history of the matter and maintains that the Council was correct in law to have imposed a discrete financial penalty in respect of each of the two breaches it had identified.

The Legal Framework

8. Section 83 of the Consumer Rights Act 2015 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 its duties under s. 83, it may impose a financial penalty under s.87 of that Act. It does so by serving first a Notice of Intent, considering any representations made in response, and then serving a Final Notice on the letting agent concerned.

10. 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.

The Notice of Intent

11. Section 87 and Schedule 9 paragraph 1 to the Consumer Rights Act 2015 provide for certain mandatory conditions pertaining to the Notice of Intent to be met before service of the Final Notice. These were not met in this case due to the administrative errors mentioned above and the failure of the Council to send a second (corrected) Notice of Intent before serving the Final Notice.

12. I asked the parties to make representations to me about whether the Final Notice should be regarded as valid when the Notice of Intent requirements had not been complied with.

13. The Council submitted that Oakford's solicitors had made representations in relation to the defective Notice of Intent, with the effect that Oakford had suffered no detriment as a result of the Council's administrative and/or procedural error.

14. Oakford submitted in reply to the Council that the effect of failure to comply with the legislative requirements in respect of the Notice of Intent was to invalidate the Final Notice.

15. I am grateful to the parties for their additional submissions on this point, which I have considered carefully. I note that the requirement to serve a valid Notice of Intent is

expressed in the legislation in mandatory terms, but I also note that the legislation does not specifically provide that the Final Notice is invalidated by failure to comply with the requirements. There is no indication that the intention of Parliament was to invalidate Final Notices where the Notice of Intent failed to meet the legislative requirements. I note that the Courts have tended to interpret such procedural requirements as importing a duty of natural justice and a requirement to comply with article 6 of the European Convention on Human Rights, so that where there has been a procedural error, they will ask themselves whether it has caused a material injustice on the facts of that case.

16. I have concluded that I should also adopt the approach of asking myself whether any administrative and/or procedural failings in respect of a Notice of Intent have the effect of causing material prejudice to the letting agent on whom it is served. It seems to me that a failure to specify the nature of the breaches relied upon and/or to notify the proposed amount of a financial penalty would frequently have the effect of causing material prejudice because they would serve to deprive the recipient of the defective Notice of the opportunity to make meaningful representations before the Final Notice is served, so infringing the principles of natural justice and/or article 6 ECHR. It seems to me highly likely that this Tribunal would quash the Final Notice if that were the case. It also seems to me that the appropriate way for any Council to remedy a defect in the Notice of Intent is to serve a corrected Notice of Intent rather than to continue to serve a Final Notice. Such a step would ensure that meaningful representations were invited.

17. In the particular circumstances of this case, I have concluded that there was no material prejudice caused by the admitted deficiencies in the Council's Notice of Intent. This is because Oakford's solicitors engaged promptly and robustly with the Council and made persuasive representations which were effective in obtaining clarification of the Council's position and, indeed, in securing an immediate reduction in the amount of the penalty. In the circumstances, I am not persuaded that the Final Notice should be quashed on the grounds of procedural irregularity in this case. I may very well take a different view on the facts of other cases.

Multiple Breaches?

18. S. 83 of the Consumer Rights Act 2015 provides that:

> *(1)A letting agent must, in accordance with this section, publicise details of the agent's relevant fees.*
>
> *(2)……*
>
> *(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.

19. On a straightforward reading of s. 83 (3), I understand it to mean that the letting agent is required to publish "a list" of fees. That list (singular) is to include details of both the fees payable by landlords and by tenants. It does not seem to me that the statutory provision can reasonably be interpreted as requiring the publication of two separate "lists", one for landlords and one for tenants.

20. 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.*
>
> …

21. It seems to me that the wording of s. 87 reinforces my interpretation of s. 83 of the Act. Sub-sections (2) and (3) refer to the "breach" in the singular and the statutory framework simply does not contemplate the possibility of multiple breaches of the same s. 83 duty. Furthermore, subsection (6) specifically prohibits the imposition of more than one penalty per breach.

22. I conclude that the Council's interpretation of these provisions is erroneous and I accept Oakford's suggested interpretation to the effect that it is the breach of the duty to publish the "*list*" of fees which gives rise to the Council's power of enforcement. I find that the fees to landlords and fees to tenants are properly to be understood as components of the same list, as they are both required to be included in a single list by s. 83 (4). Accordingly, I find that a failure to publicise both of them constitutes one breach of the duty arising under s. 83 (3) and that s. 87(6) prohibits the Council from imposing multiple financial penalties in respect of what I find to be a single breach.

Conclusion

23. On the basis of the evidence before me, I am satisfied on the balance of probabilities that Oakford was in breach of its legal obligation to publicise fees on its website for a period of 11 months (May 2015 to April 2016).

24. The financial penalty imposed by the Council in the Final Notice dated 29 July 2016 purported to penalise Oakford for two breaches rather than one. I conclude that this constitutes an error of law. For the reasons I have set out above, I find that the Council has misunderstood its powers under the legislation and that Oakford is properly to be regarded as having committed one regulatory breach only, consisting of a failure to publicise a list of its fees, including those payable by both tenants and landlords.

25. Turning to the amount of the financial penalty, I note the Council has determined that the appropriate penalty for one regulatory breach is £1250. That amount does not appear to me to be unreasonable. Indeed, Oakford accepts that this would be a reasonable penalty in its Notice of Appeal.

26. For the above reasons, I find that there was an error of law in the Final Notice dated 29 July 2016 and also that the amount of the penalty imposed by that Notice was unreasonable. Accordingly, this appeal is allowed and the Final Notice is varied so as to impose a total penalty of £1250 in respect of the single regulatory breach that has been admitted by Oakford.

Dated: 1 February 2017

Alison McKenna
Principal Judge