Appeal number: PR/20170006

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)

ABID SUKANDER **Appellant**
(Trading as A S PROPERTIES)

- and -

THE LONDON BOROUGH OF NEWHAM **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in public at Fleetbank House on 19 July 2017
Clara Zang, counsel, appeared for the Appellant
Ryan Thompson, counsel, appeared for the Respondent

Decision

1. The Appeal is allowed in part.
2. The Final Notice dated 17 January 2017 is varied so that the monetary penalty is £5,000.00

Reasons

Background

3. The Appellant is a letting agent. The Respondent ("the Council") is the enforcement authority which served a Final Notice on A S Properties on 17 January 2017. The Notice imposed a total monetary penalty of £10,000.00 for breach of duties under section 83 of the Consumer Rights Act 2015, consisting of £5,000 for breach of the duty to publicise a list of fees and £5,000 for breach of the duty to publicise whether A S Properties was a member of a client money protection scheme.

4. By its amended Grounds of Appeal, A S Properties disputed the facts on which the Council relied when deciding to impose the financial penalty, submitted that the Council had made errors of law and also submitted that the amount of the penalty was disproportionate.

5. The Appellant's pleaded case also raised a number of procedural or public law challenges to the Council's Final Notice. These were, appropriately, not pursued at the hearing. The First-tier Tribunal's role is to make a fresh decision on the matter appealed and it has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC).

6. The Council relied on the Decision of this Tribunal in PR/2016/0021 *Oakford Estates v London Borough of Camden* in conceding at the hearing that it had the power only to impose one financial penalty at a maximum rate of £5,000 and asking the Tribunal to vary the Final Notice accordingly. The Council provided the Appellant with a copy of the *Oakford* Decision only at the hearing, but Ms Zang confirmed she had been able to read it and take instructions. In future cases, I would hope that copies of any case reports relied upon would be included in the Respondent's bundle. I note that Decisions of the First-tier Tribunal have no precedent value and so I am not formally bound by the Decision in *Oakford.* However, it was not argued before me that that the analysis in that case was wrong.

7. The Tribunal sat in public and heard evidence called by both parties. I had before me an agreed bundle of documents. I am grateful to both counsel for their helpful oral and written submissions.

The Legal Framework

8. Section 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)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)...

(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)…

(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…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 scheme.

9. Guidance published by the Department for Communities and Local Government in March 2015 states that:

> *The agent must display a list of the fees at each of their premises at which the agent deals face-to-face with persons using or proposing to use services to which the fees relate. The list must be such that it is likely to be seen by customers.*
>
> *Ideally someone walking into an agent's office should be able to see the list without having to ask for it and if someone does ask it should be clearly on view and not hidden for example in a drawer.*
>
> *…*
>
> *The list of fees must be comprehensive and clearly defined; there is no scope for surcharges or hidden fees. Ill-defined terms such as administration cost must not be used.*
>
> *…*
>
> *In addition to the fees letting agents should publicise whether or not they are a member of a client money protection scheme and which redress scheme they have joined. Letting agents who are not members of a client money protection scheme must make this clear, silence on this subject is a breach of the legislation. As with the fees this information should be prominently displayed in every office and on the website.*

10. Section 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. In the *Oakford* case, referred to at paragraph 6 above, I ruled that it was the breach of the duty to publish the "*list*" of fees which gave rise to the Council's power of enforcement and that a failure to publicise any or all of the requirements of the list therefore constituted one single breach of the duty arising under s. 83 (3) of the 2015 Act. Further, that s. 87(6) of the 2015 Act prohibited the Council from imposing multiple financial penalties in respect of what I had found to constitute a single breach.

12. Where the relevant enforcement authority (here, the Council) is satisfied on the balance of probabilities that the letting agency has breached the duty under s. 83, it may impose a financial penalty under s.87 of the 2015 Act. It does so by serving a Notice of Intent, considering any submissions made and it may then serve a Final Notice on the letting agent concerned.

13. 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

14. The Tribunal was provided with witness statements made by Aisha Sukander of A S Properties and Fiona Exley, the Council's Trading Standards Officer. These stood as their evidence in chief. They both attended for cross examination.

15. Aisha Sukander is the wife of Mr Abid Sukander, the owner of AS Properties. He did not attend the hearing. Mrs Sukander's evidence was that she had received a letter from the Council in July 2015, advising her of the requirements placed on letting agents by the 2015 Act. She said she had accordingly displayed a list of fees at the premises.

16. A S Properties had received a visit from Ms Exley on 1 November 2016. A document which was produced for the Tribunal and described as "List 1" had been on display at the premises on that day, in a location above and behind the front desk in the reception area. It was part of the window display but facing into the room. Mrs Sukander accepted that List 1 did not comply with the legislation. She had amended List 1 by adding hand-written text to the typed information. This was produced to the Tribunal as "List 2".

17. On 21 November 2016, Ms Exley had visited again and advised Mrs Sukander that List 2 also did not comply with the legislation. Ms Exley had advised that the information should be made clearer and that it would be preferable to have the whole document typed.

18. On 28 November 2016, Ms Exley had visited the premises once more and found that Lists 1 and 2 had been removed from the window display and were on Mrs Sukander's desk in another part of the reception area.

19. Mrs Sukander's evidence was that she had taken the lists down that day in order to photograph them and send them to her daughter, who was going to type up some new notices. She produced for the Tribunal photographs of the documents sitting on her desk. There was a date and time on the photographs which suggested the photographs had been taken at 11.22 am that day. She said her memory was that she had sent them to her daughter in the morning. There was another time on the photographs (14.37) which she said she did not understand.

She also produced e-mails from her daughter dated 3.13 and 3.32pm that day, which she said had included the replacement Notices ("Lists 3 and 4"). She said that Lists 1 and 2 had therefore been out of the window for a period between 11.22am and just after 3.30pm on 28 November. She suggested that they were nevertheless on display and complied with the legislation because they were available to be seen on her desk during that period.

20. Ms Exley's evidence was that she had visited the premises that afternoon. She had made a note of serving the Notice of Intent at 2.55pm and said that she had left soon afterwards. The Lists had not been amended and they were not displayed in the window but were on Mrs Sukander's desk.

21. Mrs Sukander's evidence was that she had handed copies of the replacement Lists 3 and 4 to Ms Exley when she received them from her daughter, but Ms Exley said she had not received them that day and had already left the premises by the time shown on the e mails. It was clear from the documents before the Tribunal that A S properties and Ms Exley had then continued to correspond about the contents of the Lists until January 2017 by which time they were both satisfied with them. Ms Exley accepted that A S Properties had readily made amendments at her suggestion but stated that no compliant information had been on display when she visited on 28 November 2016, so that was why the financial penalty had been imposed.

22. Mrs Sukander's answer in cross examination was that Lists 1 and 2 had been on her desk facing towards her (as shown in the photograph) and not facing out towards customers. Ms Exley's recollection (as specified in the Final Notice itself) was that the Lists were amongst other papers on the desk at that time.

Submissions

23. Ms Zang, on behalf of the Appellant, submitted that AS Properties had complied with the requirement to state whether it was in a Client Money Protection Scheme from 1 November onwards. She submitted that Lists 1 and 2 had been clearly displayed on Mrs Sukander's desk on 28 November, even though they had been taken out of the window display. She drew my attention to the use of the word "ideally" in the DCLG Guidance, which she said suggested that exceptions were permitted, such as the removal of the Lists from the window for what

she described as "a few moments" for amendment. She urged the Tribunal to take the view that in these circumstances there had been no breach of the statutory requirements.

24. Ms Zang argued that the imposition of a financial penalty was unreasonably heavy-handed in circumstances where AS Properties had been co-operative and had remained in dialogue with the Council over a period of time. Whilst she accepted that Lists 1 and 2 required amendment, she described this as an on-going process.

25. In relation to the amount of the financial penalty, she provided no evidence of financial difficulty but submitted that the maximum financial penalty should be reduced in circumstances where the letting agent was co-operating with the Council.

26. Mr Thompson, on behalf of the Council, reminded the Tribunal that Lists 1 and 2 were not compliant with the legislation wherever they had been displayed. Ms Exley had advised A S Properties of this on 21 November but the breach had not been rectified before the return visit on 28 November, when a different breach was identified namely the failure to publicise any list. As to the location of the lists on Mrs Sukander's desk, he submitted that they were not placed in a location where customers or potential customers could read them.

27. As to the amount of the penalty, he conceded that £5,000 was the maximum which could be imposed but stated that no extenuating circumstances had been placed before the Tribunal so as to suggest that a reduction below £5,000 was warranted.

28. Ms Zang in reply submitted that AS Properties would be penalised for their co-operation unless their willingness to engage with the Council was taken into account in reducing the financial penalty.

Conclusions

29. Having reviewed all the evidence, I conclude on the balance of probabilities that A S Properties did breach its legal obligations in respect of the requirement to publicise its fees and to publicise its non-membership of a Client Money Protection Scheme. I find that the relevant information was not publicised *at a place in the premises at which the list is likely to be seen by persons using or proposing to use the services* provided by AS Properties. This is because I am satisfied that Lists 1 and 2 had been removed from their usual place in the

window display and that, for a period from around 11.22am until around 3.30pm on 28 November 2016, they were kept on Mrs Sukander's desk, facing towards her, amongst other papers, and not *clearly on view*, as set out in the Guidance.

30. I accept Ms Zang's submission that momentary removal of a notice from display for administrative purposes ought not to be penalised and that the use of the word "ideally" in the DCLG Guidance provides for such exigencies. However, I do not regard a period of four hours as a momentary removal and I note that it took place in the middle of the day when persons using or proposing to use the services of AS Properties might be most likely to visit.

31. Turning to the matter of the financial penalty, for the reasons set out above I am satisfied that a financial penalty is warranted. I find that £5,000 is the maximum penalty that the Council can impose in relation to the breaches I have identified. A S Properties was at liberty to put evidence of financial difficulty before the Tribunal and ask for a reduction on this basis, but it did not.

32. I am not persuaded by Ms Zang's submission that the willing acceptance of advice from the Council over a protracted period, during which the notices evidently remained non-compliant, is a factor which should serve to reduce the penalty. If that were the case, there would be a significant disincentive for letting agents promptly to remedy a breach of the statutory scheme. I am not persuaded that a penalty of £5,000 is unreasonable in all the circumstances of this case.

33. For all the above reasons, I now allow the appeal in part and vary the Final Notice so as to substitute a financial penalty of £5,000.

Dated: 20 July 2017
Alison McKenna
Principal Judge
Promulgation date 25 July 2017