First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2017/0020

Heard at Field House

on 19 October 2017

Before

JUDGE CLAIRE TAYLOR

Between

ANGLOWIDE ESTATES AND MORTGAGES LTD

Appellant

and

LONDON BOROUGH OF BARKING AND DAGENHAM

Respondent

This appeal is allowed in part, for the reasons set out below.

DECISION AND REASONS

1. Anglowide Estates and Mortgages Limited (the 'Appellant' or 'Anglowide') appeals against a penalty charge of £9,000 issued by the London Borough Barking and Dagenham ('the Council') related to failure to publicise details of fees and a client money protection statement in accordance with the legislative requirements set out below.

A. The Law: The requirement for letting agents to publicise details of fees

2. The Consumer Rights Act 2015 (the 'Act') imposes a requirement on all letting agents in England and Wales to publicise details of their relevant fees. This is achieved by sections 83 to 86, as follows:

"**CONSUMER RIGHTS ACT 2015**

Chapter 3

Duty of Letting Agents to Publicise Fees etc.

"83 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 of 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.

84 Letting agents to which the duty applies

(1) In this Chapter "letting agent" means a person who engages in letting agency work (whether or not that person engages in other work).
(2) A person is not a letting agent for the purposes of this Chapter if the person engages in letting agency work in the course of that person's employment under a contract of employment.
(3) A person is not a letting agent for the purposes of this Chapter if-
(a) the person is of a description specified in regulations made by the appropriate national authority;
(b) the person engages in work of a description specified in regulations made by the appropriate national authority.

85 Fees to which the duty applies

(1) In this Chapter "relevant fees", in relation to a letting agent, means the fees, charges or penalties (however expressed) payable to the agent by a landlord or tenant--

(a) in respect of letting agency work carried on by the agent,
(b) in respect of property management work carried on by the agent, or
(c) otherwise in connection with--
(i) an assured tenancy of a dwelling-house, or
(ii) a dwelling-house that is, has been or is proposed to be let under an assured tenancy.

(2) Subsection (1) does not apply to--
(a) the rent payable to a landlord under a tenancy,

(b) any fees, charges or penalties which the letting agent receives from a landlord under a tenancy on behalf of another person,
(c) a tenancy deposit within the meaning of section 212(8) of the Housing Act 2004, or
(d) any fees, charges or penalties of a description specified in regulations made by the appropriate national authority.

86 Letting agency work and property management work

(1) In this Chapter "letting agency work" means things done by a person in the course of a business in response to instructions received from--

(a) a person ("a prospective landlord") seeking to find another person wishing to rent a dwelling-house under an assured tenancy and, having found such a person, to grant such a tenancy, or
(b) a person ("a prospective tenant") seeking to find a dwelling-house to rent under an assured tenancy and, having found such a dwelling-house, to obtain such a tenancy of it.

(2) But "letting agency work" does not include any of the following things when done by a person who does nothing else within subsection (1)--

(a) publishing advertisements or disseminating information;

(b) providing a means by which a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or a prospective landlord;
(c) providing a means by which a prospective landlord and a prospective tenant can communicate directly with each other.

(3) "Letting agency work" also does not include things done by a local authority.

(4) In this Chapter "property management work", in relation to a letting agent, means things done by the agent in the course of a business in response to instructions received from another person where--

(a) that person wishes the agent to arrange services, repairs, maintenance, improvements or insurance in respect of, or to deal with any other aspect of the management of, premises on the person's behalf, and
(b) the premises consist of a dwelling-house let under an assured tenancy."

Enforcement

3. Section 87 explains how the duty to publicise fees is to be enforced:

*"**87 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.

(10) A local weights and measures authority in Wales must have regard to any guidance issued by the Welsh Ministers 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.

(11) The Secretary of State may by regulations made by statutory instrument--

(a) amend any of the provisions of this section or Schedule 9 in their application in relation to local weights and measures authorities in England;

(b) make consequential amendments to Schedule 5 in its application in relation to such authorities.

(12) The Welsh Ministers may by regulations made by statutory instrument--

(a) amend any of the provisions of this section or Schedule 9 in their application in relation to local weights and measures authorities in Wales;
(b) make consequential amendments to Schedule 5 in its application in relation to such authorities." (Emphasis Added).

Financial penalties

4. The system of financial penalties for breaches of section 83 is set out in Schedule 9 of the Act:

"**SCHEDULE 9**

DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

Section 87

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.

Withdrawal or amendment of notice

4 *(1) A local weights and measures authority may at any time--*

(a) withdraw a notice of intent or final notice, or
(b) reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the letting agent on whom the notice was served."

Emphasis Added.

Appeals

5. Finally, Schedule 9 provides for appeals, as follows:

Appeals

"*5* *(1) A letting agent on whom a final notice is served may appeal against that notice to-*

(a) the First-tier Tribunal, in the case of a notice served by a local weights and measures authority in England, or
(b) the residential property tribunal, in the case of a notice served by a local weights and measures authority in Wales.

(2) The grounds for an appeal under this paragraph are that-

(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.

(3) An appeal under this paragraph to the residential property tribunal must be brought within the period of 28 days beginning with the day after that on which the final notice was sent.

(4) If a letting agent appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(5) On an appeal under this paragraph the First-tier Tribunal or (as the case may be) the residential property tribunal may quash, confirm or vary the final notice.

(6) The final notice may not be varied under sub-paragraph (5) so as to make it impose a financial penalty of more than £5,000."

Emphasis Added.

Guidance

6. The Guidance for Local Authorities issued by the Department for Communities and Local Government (known as 'statutory guidance' and referred to below as the 'Guidance'), during the passage of the Bill, concerning the duty to publicise fees includes the following at Annex D:

a. *"**Which fees must be displayed***

All fees, charges or penalties (however expressed) *which are payable to the agent by a landlord or tenant in respect of letting agency work and property management work carried out by the agent in connection with an assured tenancy. This includes fees, charges or penalties in connection with an assured tenancy of a property or a property that is, has been or is proposed to be let under an assured tenancy. …*

The only exemptions are listed below. The requirement is therefore for a comprehensive list of everything that a landlord or a tenant would be asked to pay by the letting agent at any time before, during or after a tenancy. As a result of the legislation there should be no surprises, a landlord and tenant will know or be able to calculate exactly what they will be charged and when."

(Page 56 of the Guidance)

b. ***How the fees should be displayed***

"The list of fees must be comprehensive and clearly defined; there is no scope for surcharges or hidden fees. ***<u>Ill-defined terms such as administration cost must not be used.</u>*** *All costs must include tax.*

Examples of this could include individual costs for:

- *marketing the property;*
- *conducting viewings for a landlord;*
- *conduct tenant checks and credit references;*
- *drawing up a tenancy agreement; and*
- *preparing a property inventory.*

It should be clear whether a charge relates to each dwelling-unit or each tenant".

(Page 57 of the Guidance).

c. ***Penalty for breach of duty to publicise fees***

"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. It will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the lettings agent makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; alternatively an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. 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". *(Page 60 of the Guidance).*

B. Background

7. The chronology of events is:

	Event	***Bundle page no.***
4.1.17	Council's first visit to Anglowide. Delivered its guidance on regulatory requirements.	
10.2.17	Council's second visit. Council took photos and gave the guidance to Ms Hassan.	33-34
15.2.17	Appellant emails Council, enclosing a photograph of its fees.	15 to 16; 35 to 36
21.2.17	Council sends reply email.	15 and 37
24.2.17	Council's third visit. Council took photos.	38 to 41
16.3.17	Council serves by hand a Notice of Intent to issue a	42 to 45

	penalty of £10,000. Appellant hands Mr Council a document (page 45).	
28.3.17	Appellant sends representations, enclosing photos.	46 to 49
15.5.17	Council serves by hand a Final Notice with penalty of £9,000 for being engaged that on 24.2.17 in letting work and failing to publish a list of agent's relevant fees and/or a statement saying whether it belonged to a client money protection scheme. Council takes photos.	55 to 60

C. The Appeal

8. Anglowide now appeals the Council's decision. The Appellant's contests that the penalty was issued based on an error of fact and is also unreasonable. Further to questions I raised at the hearing, the Appellant also relies on the Council having made an error of law in penalising for two breaches. Reasons in written submissions included:

    a. Anglowide began trading in November 2015. As a small new business, it would not want to be on the wrong side of the law and compliance has been a top priority.

    b. From the outset, it had a full fees table on the noticeboard*. (See attachment D).* It went the extra mile by also having summaries placed on behind computer monitor so that every client had clear information about fees and could ask questions of staff, if in any doubt. It also had its membership of a redress scheme facing directly to the entrance door, so they could not be missed by anyone entering the office.

    c. On 24 February, Mr Elworthy said the displays did not fully meet requirements. The Appellant asked for clarity, and was given a website address setting out the requirements. The Appellant could not find from the website where it fell short. Therefore, the company emailed Mr Elworthy the summary fee table and asked to be shown what were the issues. He explained that they needed to refer to the membership or the lack of membership to a client money protection scheme, and indicate what the fees were for. The membership statement was now added to the summary table. There was too little space on the monitors to add details to the summary tables, however, there was already a full fees description clearly visible on the board. The company was therefore relieved by Mr Elworthy's response. It came as a shock to receive the notice of intention.

    d. The penalty was unduly punitive. The final notice had been pre-written before visiting the office to check if they had made the changes.

9. The Appellant's submissions at the hearing included that the Notice of Intent did not contain the date specified in the final notice. On the day of the hearing, Mr Enuka, the manager of Anglowide, lodged a witness statement and gave testimony that included the following:

    a. The Appellant had been compliant with regulation from its inception including the client money protection scheme statement.

    b. The full fees list had been displayed next to his desk on the left-hand side positioned directly opposite the client so that a potential client would always see the full list of fees. This was there on the first visit. He was not

present on the first on the first visit and Mr Elworthy (of the Council) had spoken with a friend who was not working for the company, although he helped out from time to time. Mr Enuka was also not there on the second or third visit. Mr Elworthy had spoken with Ms Hassan, a trainee who no longer worked there. He had been so fixated by the summary fee notices on the monitors, that he did not pay attention and photograph the full fee sheet such that the photos taken by Mr Elworthy are inconclusive. He failed to take photos of all the whole office.

c. The email of 15 February was dealt with by Ms Hasan and only addressed the concern highlighted by the officer related to the summary fee notice. He instructed her to make the changes after receiving Mr Elsworthy's email. Only two days later, Mr Elworthy returned.

d. There was then no communication so he assumed everything had been resolved and they rectified the error of the client money protection statement which was then displayed on the full fee list found next to his desk as well as on the monitors. *(See page 45).*

e. He was present for the meeting of 16 March 2017. He gave the officers a copy of the summary of charges sheet that stated that they were not a member of the client money protection statement. Had Mr Elworthy listened or given him a chance, he would have shown him the full fee list.

f. The reason no mention of the full fees description on the board was not made during the first and second visits was that Mr Elworthy's purpose was not clear and he met trainee staff both times. Although having a summary on the monitors draws attention to them, this does not detract from them having the full fees in the office and on the website. The reason no full description was on the monitors was that there was not enough space on 14 inch monitors. The response of 28 March makes clear that a full description was on the notice board.

g. Mr Elworthy's reference to the full fee description being pasted adjacent to the directors' desk is unfounded. The office is shared with TAC Concepts which operates from the right-hand side of the office. Therefore, the company did not have sole ownership of the four walls. The director's desk is the first point of call for most incoming clients because it is directly facing the entrance to the office eliciting eye to eye contact. Therefore it is a good location for the description. He believed that all clients on entering would sit opposite him, as Ms Hasan who sat in a different desk, would have directed them to him. When behind the director's desk, a client would be able to see the list of fees and that the photo at page 59 did not properly show that it was in colour.

h. The Appellant's Attachment D in the Grounds of Appeal contained the wrong photograph by mistake. That photograph showed words related to Client Money Protect.

10. The Council presented witness evidence from Mr Elworthy, the Principal Trading Standards Officer at the Council. This included:

a. In late December 2016, he started a planned project to bring businesses into compliance with sections 83 to 88 of the Act, encouraging consistency. His project plan's stated objectives included reduction of unfair and misleading business practices within the borough's letting agent

sector and creating improved fair trading environment to increase consumer confidence.

b. On his visit of 4 January, he noticed that the signs on the computer monitors did not include a breakdown of fees, a client money protection scheme declaration, or any reference to landlord fees. He told those present to read the guidance and modify the fees notice. On his second visit of 10 February, accompanied by Mr Hardy, a Trading Standards Enforcement Officer, the same signs remained in place. He spoke with Ms Hassan and gave her another copy of the guidance.

c. On 15 February, Ms Hasan emailed with a photo of the sign. On 21 February 2017, he replied explaining the sign was not compliant due to lack of a client money protection scheme declaration. The "My Deposits" scheme referred to in the sign was not a declaration as My Deposits did not protect holding deposits or monies such as rent to be transferred to landlords.

d. On 24 February 2017, he again visited the premises with Mr Hardy and spoke with Ms Hassan. They again photographed the signs at the premises which continued to be non-compliant. He asked why the signs had not been amended and she responded that she had been too busy.

e. On 16th March 2017, he revisited the premises with Mr Hardy and provided a Notice of Intent to issue a penalty for the failure to display a list of fees and/or a declaration whether or not the agent belongs to a client money protection scheme. Mr Smarts Ukueku and Mr Enuka were present became somewhat agitated and stated they needed further advice and guidance, and that its role was to work with businesses rather than to issue penalties. He reminded them of the guidance already provided. Mr Smarts Ukueku then stated they had amended the sign and provided a copy of an amended sign which still did not have a breakdown of fees but did include in a small font "we are currently not members of CMP (client money protection scheme)".

f. On 28th March 2017, Mr Smarts Ukueku emailed representation regarding the Notice of Intent accompanied by photographs of two signs. The more detailed sign had no client money protection declaration. The other sign referred to "My Deposits" as a "Money Protection Scheme". "My Deposits" is not a client money protection scheme - it does not protect the range of monies held by letting agents on behalf of tenants and landlords.

g. The Council reviewed its decision and supported both penalties with a ten percent reduction to take account of the trajectory of compliance by the business.

h. On 15 May 2017, he handed Mr Enuka the final notice. During the visit, a detailed notice on the wall adjacent to the director's desk was pointed out to him. This included, "*We are not member of Client Money Protect*". Other non-compliant notices continued to be displayed behind computer monitors on the premises. He took photographs.

11. At the hearing, a plan of the office was presented by the Respondent. Mr Elworthy stated:

a. On the first visit, the gentlemen present had said they were managers. He had asked about why there were so many signs up as to fees, because it

was unusual. He had been told that this was because there had been so many disputes as to fees. Both the summary fees on the monitors and the fuller sign identified in photos in the Bundle were on A4 paper. Therefore, it could not be argued that there was not enough space on the monitor for the full list.

b. On the second visit, Ms Hassan was the only person at the premises.

c. He questioned the assertion that TAC Concept took up the right hand side. All the desks on both sides of the room had the Anglowide signs on the monitors. Companies House had not heard of TAC Concept.

d. He had never been shown a fuller list of fees by the director's desk. However, he did look for other signs and that was why he had taken photos. Having visited 40 agents, staff would sit at the front desk and 'eyeball' those entering so that he would not expect them to walk to the back of the office. In making his visits, he would normally have a look around and staff would point out signs. In this case, he walked in, walked to the back of the office and took photos of signs he was directed to. He did not take a photograph of every blank wall.

e. Now having met Mr Enuka, he could confirm that he had only met him on the fourth visit on 16 March, and not before. On that day he was not in a rush, the manager had the opportunity to talk with him and did give him a sign.

f. On his final visit in May he saw the full list description. He had not seen that before and did not believe he had missed it or it had existed previously.

12. The Council argued that the penalty sum of £9,000 was reasonable and that the Appellant had not satisfied any of the appeal grounds listed in paragraph 5(2) of Schedule 9 of the Act. Its response included the following:

a. Contrary to the grounds of appeal, the "full fees notice" in attachment D was not in place from the outset. It was introduced some time after the issuing of a Notice of Intent on 16th March 2017.

b. Anglowide never referred to the full fees notice during the visits on 4 January 2017 and 10 February 2017. It was not mentioned in the email of 15th February 2017 accompanying a photograph of fees.

c. The company's response of 28 March 2017 included a photograph of a "full fees notice" without any client money protection statement. This photo was different to the notice produced at attachment D.

d. Even if the "full fees notice" had been in place, its position at the rear of the premises adjacent to a Director's desk rather than the lettings staff, would not comply with the section 83(2) requirement for agents to display a list of fees at a place at which it is likely to be seen by persons using or proposing to use services to which the fees relate.

e. The chronology provided in the grounds of appeal did not agree with the documents they have provided. The email correspondence referred to in their appeal preceded the visit of 24th February 2017 rather than being subsequent to the visit.

f. No evidence has been provided of how notices failed to meet regulatory requirements.

g. The business had been visited on three occasions, and email correspondence entered into, prior to issuing a notice of intent, which it appears led to a still non-compliant "full fees notice" being placed on the premises. Whether a notice has been pre-written or not has no bearing on its validity.

Findings

13. I do not find that the decision to impose a penalty was based on an error of fact. I do find that there was an error in law in awarding two penalties for a breach of the same duty. I do not find that the decision and amount of penalty was unreasonable in any other respect.

14. I do not accept that there was a fuller list of fees displayed prior to 15 May 2017. It is clear from the photographs that the summary fee notices on display did not comply with the section 83 requirements to display a description of each or accurate client money protection scheme statement by 15 May 2017.[1] Accordingly, the Appellant failed to comply with the legislation set out above and there was a legal basis for the Council to serve a notice of intent.

15. I note in particular:

a. The Appellant claims that there was a full list of fees clearly displayed. Mr Elworthy attended the premises four times before being shown that full list. The Appellant appears to suggest that the onus was on the Council to do a more thorough search. I do not agree. Mr Elworthy clearly went to the back of the premises, and photographed notices there. I accept his testimony that he was looking for notices displayed on the wall. He made clear that the regulations required a fuller description of fees than was seen on the monitors. It seems odd and, on balance, highly unlikely that if the fuller list were there, that the Appellant would not have taken responsibility to show it to him, as it was clearly in the company's interest to do so.

b. I do not accept that the officers did not give the Appellant sufficient time to show the fuller list because I accept Mr Elworthy's evidence on the point. Additionally, Mr Elworthy had clearly attended long enough to take photographs and for the Appellant to hand him a document.

c. In any event, it would have been open to the Appellant to contact the Council by phone or email. When email contact was made, to ask in what way compliance fell short, the Appellant enclosed the summary list and not the full list. Again, if there had been a full list and the Appellant was seeking to satisfy the Council of compliance or find out what were the issues, it would have been logical to include it.

d. Mr Enuka explains that he would have shown the Council the list, but that a trainee and a friend dealt with the Council and he had not been present during visits. First, Mr Enuka was copied in on both the relevant emails to

[1] *See page 58; and pages 33 to 34, 38 to 41.*

and if he had wanted to correct things he could have. Second, Mr Enuka by being absent chose to trust Ms Hassan and his friend to run the business for him. He allowed or asked them to make the emails and written representations to the Council. It is his and not the Council's concern if this is how he chose to deal with the matter. Third, Mr Elworthy in visiting so often went to unusual efforts to ensure the company fully understood its obligations. He passed on written guidance which Mr Enuka had the opportunity to read and respond to and it included links to find out further information online.

e. Mr Elworthy's testimony was that Ms Hassan had told him they had not amended the summary fee notices because they had not had time. It seems more likely that despite the number of interactions with the Council, the Appellant had not got round to fully complying rather than the other reasons that have been given (namely, that the A4 paper on the monitor could not fit in the details and there was a full list of fees at the director's desk.)

16. Further, even if the fuller list had been displayed at the relevant time, I do not accept that it was positioned at a place that was likely to be seen by customers. This is because:

a. Mr Enuka has explained that the full list of fees was clearly displayed near his desk. This is demonstrated by the photograph at page 59 of the Bundle. It is on a wall where the desk and printer prevent customers from getting close enough to stand directly in front of it. Even if standing behind the director's desk, a customer would find it hard to notice and read the list which is on sufficiently small font to fit on A4 paper. It is at one of the furthest points from the entrance. In fact, (disregarding that the font size is likely to be smaller than that used on the summary notices) it would be easier to read such print if on the monitor as the customer would be in far closer proximity to it.

b. Further, I do not accept that customers who saw Ms Hassan would always be directed to go to the director's desk to speak with Mr Enuka. Given that Mr Enuka was not actually present for the first three visits Mr Elworthy made this seems highly unlikely.

c. The Appellant asserts that two businesses worked from the same premises with the other working on the right hand side. In view of the submissions and evidence above (such as the summary fee signs being on all monitors and on both sides of the premises), the argument seems somewhat disingenuous. Even if there are two businesses, I am not satisfied that this meant there would not be a space on the walls, or window display, or rear of the monitors could not have been used to display the fuller list in a way that it would be likely to be seen by customers.

d. As regards the client money protection statement, Mr Enuka asserted in his statement that this was present from the outset. This is plainly false. The Council handed a Notice of Intent on 16 March. On that day, the Appellant handed Mr Elworthy a copy of the summary fees that included a Client Money Statement that is shown at page 45 of the Bundle. Mr Elworthy did not accept that this was on the monitors on that day. Further,

the company's representations (including photographs) made to the Council in response to the Notice of Intent at pages 48 to 49 do not show any client money statement on the full or summary list and when Mr Elworthy took photos of the summary notices on display on 15 May, these did not contain the statement. Mr Enuka stated at paragraph 7(f) of his statement that after the email exchange the client money protection statement was then displayed on the monitors. Given that there have been a number of occasions where the Appellant has not presented its case fully accurately on material points[2], I find Mr Elworthy's evidence more compelling. In any event, even if I am wrong on this, it is clear that the statement was not displayed on the three earlier visits, and this is sufficient evidence of breach to satisfy Schedule 9 paragraph 1.

e. I would note that placing summary fee lists on the monitors without making clear that there is a fuller list available is likely to confuse matters.

17. The Appellant was still not in full compliance at the time of the Final Notice. Photographs taken by the Council when serving it on 15 May demonstrate the full list of fees and its positioning. *(See pages 59 to 60 of the Bundle.)* Whilst by that time there was clearly a fuller list of fees on display, some charges include amounts for "Admin". The Guidance above makes clear is not a satisfactory description. *(See paragraph 6 above).* As set out above, the position of the fuller list did not satisfy section 83(2). It also contained the statement reads "*We are not a member of Client Money Protect"* which does not fully satisfy section 83(6). The summary of fees on the monitors still contains the misleading statement *"Money Protection Scheme: My Deposit"* which the Council had explained was inaccurate by email on 21 February. *(See pages 57 to 58.)*

18. I do find that the imposition of two penalties was based on an error of law. The Council assessed that the Appellant had committed two breaches and that therefore it could fine up to £5,000 for both. However:

    a. Sub-section 83(6) clearly states that the client money protection scheme statement is part of the duty within sub-section 83(2).
    b. Section 87(6) makes clear that only one penalty may be imposed in respect of the same breach.
    c. The Council asserts there can be two breaches of the same duty. I do not find this compelling. Were it the case, there would have been no purpose in the legislation making clear in section 83(6) that the requirement to make the statement was to be included as part of the duty to display fees. (It is noted that the Council's text of the final notice states a penalty for failing to publish a list of agent's relevant fees "and/or" a statement saying whether it belonged to a client money protection scheme.)

19. The Appellant noted that the Notice of Intent failed to specify the date of 24 February 2017 which was the date the Final Notice had referred to as the date when there was non-compliance. The Council conceded this and asserted that the relevant date was that of the Notice of Intent of 16 March. In my view, the Notice of Intent complied with Schedule 9 of the Act and the Guidance at page 72 of the Bundle. It would have been better if the notice had contained the relevant

[2] See for instance paragraphs 9(h); 14(c); 21(d); 21(e); and reference in the Grounds of Appeal to the email exchange being after the 24 February visit, when in fact it was before such that Mr Elworthy attended once more before deciding to serve a notice. It is noted that the Council's evidence contained a small number of errors that were pointed at the hearing. However, these were not material or supporting its case.

date, but its absence did not prejudice the Appellant and was not of material substance. The Appellant failed to comply on 24 February such that the notice was served within the period of 6 months from the breach. *(See para.1(3)(b) of Schedule 9.)* The Appellant also failed to comply on 16 March such that the notice would still be valid under para.1(3)(a) of Schedule 9, in any event.

20. The Appellant complained that the notice served on it had been written prior to the Council attending. It was entitled to do so, having already established evidence of breach on prior occasions.

21. The Appellant sought to make something of the Council not complying with its strategy document set out at pages 24 to 25 of the Bundle. However, that document was not legislation or guidance and is not binding on it. It also complained of the Council turning up on 24 February shortly after its email of 21 February. However, (a) the email made clear the matters should be treated with some urgency; (b) the Council had already visited twice to explain the company's duties and did not need to change its schedule because the Appellant had chosen to email it; and (c) the Appellant claimed it already complied on 24 February such that it seems inconsistent to also argue that it did not have enough time to do so.

22. The Appellant noted that it was a new small business that "could not afford to be on the wrong side of the law". As noted by the Council, the Appellant produced no evidence of the fine being a disproportionate burden. In its absence, the Guidance set out above states an expectation that the £5,000 be considered the norm.

23. The Council lowered the penalty by ten percent in the Final Notice, because of the trajectory of compliance. I consider this a reasonable deduction. The company were trying to comply, but there were still failings at the time of the final notice; the Appellant failed to comply both with the fuller list description and the client money protection statement despite substantial effort on the part of the Council; and that the client money protection scheme statement was actually misleading. From the statement on page 36, it is plausible that a customer would assume that the Appellant is a member of a client money protection scheme when it is not. Mr Elworthy had made this clear in his email of 21 February, but it still remained in place on his fifth visit of 15 May. (I note the facts differs from the Upper Tribunal decision of *London Borough of Camden v Foxtons Ltd [2017] UKUT 349*.)

24. In all the circumstances, I find that it is reasonable for the Final Notices to be varied, so that the financial penalty payable in respect of each of them is the sum of £4,500, rather than £9,000.

25. It is noted that the parties were given an opportunity to respond after the hearing to make further submissions on a specific issue. The Council did so. No response was received from the Appellant at all. I have not found the submissions received alter my decision.

Claire Taylor

Judge

Dated 29 December 2017

Promulgation Date 2 January 2018