



Appeal number: PR/2018/0001

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)**

**HAMILTON (SALES & LETTINGS)
LIMITED**

Appellant

- and -

WESTMINSTER CITY COUNCIL

Respondent

TRIBUNAL: JUDGE ALISON McKENNA

Sitting in public at Anchorage House London on 11 May 2018

Decision Reserved

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The Appellant was represented by Mr Kawmi (Sole shareholder and Director of Hamiltons) and Mr Khalil (employee).

The Respondent was represented by Kirsty Panton, counsel.

Decision

1. The Appeal is allowed in part.
2. The Final Notice dated 12 December 2017 is varied so as to impose a penalty of £5,000.

Reasons

A: Background

3. The Appellant (“Hamiltons”) is a letting agent. The Respondent (“the Council”) is the enforcement authority which served a Final Notice on Hamiltons on 12 December 2017. The Final Notice imposed three financial penalties as follows: (i) for breach of the duty to publicise fees, a penalty of £4,500; (ii) for breach of the duty to publish details of its client money protection scheme, a penalty of £4,500; (iii) for breach of the duty to publish details of its redress scheme, a penalty of £3,600. The total financial penalty imposed was therefore £12,600.
4. The appeal was heard at an oral hearing at which the Respondent’s witness statements were admitted as their evidence in chief as the Appellant did not wish to cross examine them and the Tribunal had no questions. The Appellant did not serve any witness evidence. The Tribunal heard oral submissions from Ms Panton on behalf of the Council and from Mr Kawmi and Mr Khalil on behalf of the Appellant. The Tribunal is grateful for their assistance.
5. The Appellant did not dispute that it had failed to publish fees, publish membership of a redress scheme and publish membership of a client money protection scheme on its website. Hamiltons’ case was that it had lost control

of its website in a contractual dispute with its agent and had been unable to upload the relevant information. Its appeal was based on grounds that the Council's imposition of the penalties was unreasonable in all the circumstances.

B: The Legal Framework

6. The primary statutory 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.*
-”

(i) *Fees*

7. 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.
8. 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.
9. 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.

(ii) *Client Money Protection Schemes*

10. Section 83 (6) of the Consumer Rights Act 2015 (above) requires a letting agent who holds money on behalf of persons to whom the agent provides services to publish with the list of fees a statement of whether it is a member of a client money protection scheme. It came into force in May 2015.
11. 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.
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.

(iii) *Redress Schemes*

13. Section 83 of The Enterprise and Regulatory Reform Act 2013 and paragraph 3 of The Redress Schemes for Letting Agency Work and Property Management Work (Requirement to Belong to a Scheme etc.) (England) Order 2014 require a letting agent to belong to a relevant Redress Scheme. The duty came into force in October 2014.
14. Section 83 (7) of the Consumer Rights Act 2015 (above) states that, if a letting agent holds money on behalf of persons to whom the agent provides services, the agent must publish with the list of fees a statement indicating whether it is a member of a redress scheme. It came into force in May 2015.

15. 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.

(iv) Enforcement

16. 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.

17. 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.*
- ...”*

C: Evidence

18. The Council relied on the evidence of Chuma Akpom, (Manager of the Trading Standards Service), Donald Silcock, (Trading Standards Civil Advice Officer) and Laura Cox (Trading Standards Officer). Their undisputed evidence was that the Council sent three Notices of Intent to Hamiltons on 26 September 2017, advising of its intention to impose three penalties amounting to £14,000. These comprised two penalties of £5,000 each for the failure to display a list of fees and details of membership of a client money protection scheme on Hamiltons' website and a £4,000 penalty for failure to state on the website details of its membership of a redress scheme. After considering Hamiltons' representations, the Council agreed to reduce each penalty by 10 %, bringing the cumulative total penalty down to £12,600.

19. Mr Silcock's witness statement confirmed that he had looked at Hamiltons' website on various dates in September 2017 and noted the absence of the information required by the statute. Ms Cox's witness statement exhibited the relevant screen shots.

20. Hamiltons' explanation for the failure to publish the required information on its website was set out in its correspondence with Mr Silcock between September and December 2017, exhibited to Mr Silcock's witness statement. Hamiltons' representations to the Council dated 8 November 2017 explained that its website had been up-graded in 2014 but that the website designer had reserved to itself the ability to make any changes, so that Hamiltons had been unable itself to upload the relevant information and there had been a contractual dispute which had lasted some eighteen months. Subsequent to the service of the Notice of Intent, Hamiltons had managed to track down the man who had originally created the website in 2010 and he had been able to make the required amendments.

21. The Council's letter of 12 December 2017 made clear that it had considered Hamiltons' representations before deciding to impose the slightly reduced

penalties. It took into account the fact that Hamiltons had responded quickly to the Council's Notices of Intent by bringing its website into compliance with the legislation. However, it noted that there had been a significant period of non-compliance (over a year) between September 2016 when the Council had started to take enforcement action after the "bedding down period" for the new legislation, and Hamiltons bringing itself into line with its obligations in late 2017. It accepted that the dispute with the website designer had prevented Hamiltons from changing its website, but noted that Hamiltons itself nevertheless retained legal responsibility for its compliance with the legislation and that it had allowed an unsatisfactory situation to endure for a significant period of time before taking decisive action in response to the service of the Notice of Intent.

22. It is clear from the exhibited correspondence that Mr Silcock invested significant time and energy into guiding Hamiltons as to the relevant content for its website. The clear impression given by that correspondence is that Hamiltons did not have all the correct information prepared and ready to be uploaded when the Council first contacted it, so the website dispute was not the only problem. However, it is also clear from the documentary evidence that Hamiltons had joined a client money protection scheme in October 2017 and was already a member of a redress scheme when the Council first made contact.
23. Hamiltons did not provide the Tribunal with any evidence about its financial situation or the impact that the financial penalties imposed would have on its business. Ms Panton did not object to me asking Mr Kawmi for an impromptu indication of Hamiltons' turnover at the hearing. He said he thought it had been around £250,000 in the previous financial year and that Hamiltons had only one office at which it employed five people. Ms Panton's instructing solicitor quickly checked Companies House website on his phone and said that the turnover figure recorded was in fact £332, 982. Mr Kawmi confirmed that was the correct figure.

D: Submissions

24. Ms Panton's submission on behalf of the Council was that it had been justified in serving all three Notices and that the amount of penalty was reasonable in each case. She noted that, even on the Appellant's case, the breaches were not disputed and that they had endured for 28 months.
25. It was accepted by the Council that it had not written to Hamiltons when the legislation was first enacted (Hamiltons had not been on its list of Letting Agents at that time) but she submitted that Hamiltons nevertheless had an obligation to ensure its own compliance with the law. She submitted that Hamiltons' dispute with its website provider had been taken into account and that the reduction of 10% for each breach was reasonable in all the circumstances.
26. Ms Panton was conscious that different Judges of the First-tier Tribunal had interpreted the Consumer Rights Act 2015 differently, so that some (myself included) had concluded that s. 83 of that Act, read as a whole, imposed on lettings agents a single duty to comply with a multi-faceted list of obligations. This meant that there could only be one "breach of duty" in cases of a failure to comply with one or more than one requirement of "the list" and that only one penalty of up to £5,000 could be imposed by a local authority. This approach to statutory interpretation drew support from the terms of s. 87 of the 2015 Act. Other Judges had taken the view that s. 83 of the 2015 Act imposed several different legal duties on letting agents, so that a failure to comply with each one represented a discrete breach and a separate penalty of up to £5,000 could be imposed for each breach.
27. Ms Panton's submission was that the approach of multiple breaches leading to multiple penalties was to be preferred. In her submission to this effect, she relied as an aid to interpretation on the heading of s. 87 which refers to a "*Duty*

to publish fees etc” which she said suggested that there was more than one duty.

28. Ms Panton also submitted that s.87(6) of the 2015 Act should be understood as a provision aimed only at preventing enforcement action being taken in respect of the same breach by more than one local authority and did not prevent the Council from imposing multiple penalties.

29. The Appellant’s submissions were directed more towards principles of fairness than statutory interpretation. Mr Khalil submitted that all three penalties related to the same underlying problem, which was the lack of access to the website, so that it was unfair to impose multiple penalties in relation to the same underlying problem. Mr Kawmi emphasised that Hamiltons had expended a significant amount of money on employing someone to gain access to the website in order to upload the relevant details and the cost of this ought to be taken into account in setting the penalty level. He submitted that the penalty was in all the circumstances too high.

E: Conclusions

30. I formally conclude on the basis of the evidence before me that Hamiltons did breach s. 83 of the 2015 Act in failing to publish on its website: (i) details of its fees, (ii) its membership of a client money protection scheme, and (iii) its membership of a redress scheme on its website. The period of default was from the date when the relevant legal obligations arose (May 2015) until November 2017 when Mr Silcock declared himself happy with the content of Hamiltons’ website. I am satisfied that it was reasonable for the Council to decide to impose a financial penalty on Hamiltons in these circumstances, but I must go on to consider whether the penalties imposed were both lawful and reasonable.

31. The question of whether multiple financial penalties may be issued by Councils in respect of breaches of the different component parts of s. 83 of the

Consumer Rights Act 2015 has been the subject of conflicting Decisions in the First-tier Tribunal. For example, in *Oakford Estates Ltd v LB Camden*¹, I concluded that the Appellant had breached a single but multi-faceted duty imposed by that statutory provision and that s. 87(6) of the Act prohibited the Council from imposing multiple financial penalties in respect of what I found to be a single breach of duty. In *M & M (Europe) v LB Newham*² (appeal to the UT (AAC) pending, but not as I understand it on this point) that analysis was conceded by counsel for LB Newham, who asked for the Final Notice to be varied accordingly. I am aware that Judge Peter Hinchliffe adopted the same analysis of the legislation as myself in *Flavio Costa Properties Ltd v LB Newham*³ but that Judge Jacqueline Findlay took a different view in *Frogmore Estates v LB Camden* PR/2017/0025 (to which I was referred by Ms Panton, but which is so far unreported).

32. The difficulty in resolving these conflicting approaches is that they are all first instance Decisions which have no precedent value. The Upper Tribunal has not yet definitively ruled on the correct approach to this issue. So far as I am aware, the only Upper Tribunal Decision which has so far been issued in relation to financial penalties for letting agents is *LB Camden v F Ltd* [2017] UKUT 349 (AAC)⁴, in which UTJ Levenson decided that multiple penalties could be imposed in circumstances where a letting agent had breached the requirement to display a list of fees at several different office premises. This

¹ http://www.bailii.org/uk/cases/UKFTT/GRC/2017/PR_2016_0021.pdf

² http://www.bailii.org/uk/cases/UKFTT/GRC/2017/PR_2017_0007.pdf

³ http://www.bailii.org/uk/cases/UKFTT/GRC/2017/PR_2016_0037.pdf

⁴ <http://www.bailii.org/uk/cases/UKUT/AAC/2017/349.pdf>

was a breach of the duty imposed by s. 83(2) of the 2015 Act and it does not definitively help me with the correct interpretation of s. 83(4), (5), (6) and (7) of that Act.

33. I find I am not persuaded by Ms Panton's submission that the inclusion of the word "etc" in the heading of s. 83 of the 2015 Act supports the view that there is more than one duty imposed by that section. If anything, it seems to me to support the contrary view that there is a single duty "to list fees and other matters".... I am also not persuaded by her submission that s.87(6) of the 2015 Act should be understood as a provision aimed only at preventing enforcement action being taken in respect of the same breach by more than one local authority. It seems to me that, if a party's submission relies upon an approach to statutory interpretation which departs from a plain reading, then an application under the rule in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3 ought properly to be made, on notice to the Tribunal and the other party. No such application was made in this case and I am not persuaded that I should depart from the approach of taking a plain reading of the statute.
34. Taking that approach, it seems to me that the statute reads as follows. S. 83 (3) imposes a duty to create and publicise on the website a single "list", which list must include both the fees required by sub-section (4) and, in relevant cases, the additional details required by sub-sections (6) and (7). S. 87 (2) then refers back to breach of that duty (in the singular), and s. 87 (6) provides that a single financial penalty may be imposed in respect of one breach. S.87(7) limits the amount of that single penalty to £5,000.
35. The consequence of my analysis is that I find it was unlawful for the Council in this case to impose multiple penalties on Hamiltons. I find that it had power to impose only one penalty of £5,000 on Hamiltons for breach of the single duty imposed by s. 83 (3) of the Consumer Rights Act 2015. Accordingly, I now vary the amount imposed by the Final Notice dated 12 December 2017.

36. I have considered whether the maximum penalty of £5,000 is a reasonable penalty in all the circumstances of this case. I conclude that it is a reasonable penalty on the following reasons. First, I note that there were three ways in which the duty was breached. Second, I note that Hamiltons' period of breach was significant and, although it acted swiftly on receipt of the Notice of Intent, I consider that it would have been reasonable for it to have taken steps to remedy the breach much earlier. Third, whilst I accept that Hamiltons lost control of its website in a contractual dispute, it is clear from the correspondence exhibited by Mr Silcock that Hamiltons did not have the relevant material ready to upload in any event. Fourth, I note that Mr Silcock was required to offer Hamiltons significant advice and support to ensure its eventual compliance. Finally, I have no reason to think that Hamiltons cannot afford to pay a penalty of this amount. Accordingly, I now vary the Final Notice to impose a penalty of £5,000.
37. In conclusion, this appeal is allowed in part. A Penalty of £5,000 is now payable by Hamiltons.

(Signed)

Dated: 18 June 2018

**Alison McKenna
Chamber President**

Promulgation Date : 22 June 2018