



Appeal number: PR/2019/0021

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

**MULBERRYS INDEPENDENT ESTATE AGENTS LTD
trading as ALPHA RESIDENTIAL**

Appellant

- and -

BUCKINGHAMSHIRE & SURREY TRADING STANDARDS

Respondent

**TRIBUNAL: JUDGE ALEXANDRA MARKS CBE
(sitting as a First-tier Tribunal Judge)**

**Determined on the papers,
sitting in Chambers, London EC2**

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Decision

1. The Appeal is allowed.
2. The Final Notice dated 4 March 2019 is quashed.

Reasons

Background

3. Steven Daines is a director of Mulberrys Independent Estate Agents Limited, trading as Alpha Residential ('Alpha'), a firm of letting agents and the Appellant in this case. The Respondent, Buckinghamshire & Surrey Trading Standards ('B&STS') is the enforcement authority which served a Final Notice on Alpha.
4. The Final Notice imposed on Alpha a financial penalty of £4,000 for breach of the duty to publicise on its website a list of fees including statements whether Alpha belongs to a redress scheme, and a client money protection scheme.
5. By his Notice of Appeal, Mr Daines submits that B&STS's decision to impose this penalty is unreasonable.
6. 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.
7. The Tribunal considered a bundle of papers of 89 pages comprising evidence and submissions.

The Legal Framework

8. Section 83(2) and (3) of the Consumer Rights Act 2015 ('CRA') imposes duties on letting agents to publicise details of relevant fees at their business premises and on their website (if they have one). These duties came into force in May 2015.
9. Section 83(6) of CRA 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 whether it is a member of a client money protection scheme. This duty also came into force in May 2015.
10. Section 83(7) CRA also requires the agent to publish details of the Redress Scheme of which it is a member (membership being a requirement of letting agents under The Enterprise and Regulatory Reform Act 2013 ('ERRA') 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). This duty also came into force in May 2015.

11. Where the relevant enforcement authority is satisfied on the balance of probabilities that a letting agency has breached its duties under s.83 CRA, that authority may impose a financial penalty under s.87 CRA by serving a Notice of Intent and then a Final Notice on the letting agent concerned.
12. Schedule 9 paragraph 5 to CRA 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.
13. The Tribunal may quash, confirm or vary the Final Notice which imposes the financial penalty.

Chronology

14. On 22 November 2018, Ian Smith, Trading Standards Officer at BS&TS, inspected Alpha's website and found it did not comply with s.83(3) CRA.
15. On 3 December 2018, Mr Smith visited Alpha's premises in High Street, Egham and found the list of fees displayed there was similarly non-compliant. Mr Smith spoke to staff members (as Mr Daines, director of the company, was absent) and gave them his handwritten report of the deficiencies in their displayed list of fees. He also left a leaflet from the Trading Standards website containing guidance on CRA compliance. Mr Smith told the staff that he would return in 14 days, by which time remedial action should have been taken.
16. In fact, Mr Smith did not return to Alpha's premises until 29 January 2019, around 8 weeks later. He asked staff (as Mr Daines was again absent) to show him Alpha's website. They did so, and Mr Smith found the same deficiencies as before. Mr Smith therefore left a 'Penalty Charge Notice' which included his handwritten notes about the ways in which the website was non-compliant. The notice stated that, within 28 days (i.e. by 26 February 2019), Mulberrys must either pay the penalty charge of £5,000 or give notice to the authority that it wished the notice to be reviewed.
17. Later the same day (29 January 2019), Mr Daines emailed Mr Smith and B&STS. He explained that after Mr Smith's earlier visit, in December, he had instructed his staff to make changes to the list of fees displayed at the premises, and to contact the web designer to update

the website too. As evidence of this, he attached an email sent to the web designer dated 4 December 2018.

18. On 16 February 2019, Mr Daines emailed B&STS asking for the Penalty Charge Notice to be reviewed. He apologised for any failure to display required information, and said there was no intention to commit any breach of duty. He said the breaches had since been rectified.
19. On 28 February 2019, Amanda Poole (Assistant Head of Trading Standards) considered Mr Smith's report, and Mulberrys' representations as well as B&STS's Enforcement Policy and 'general considerations for representations'. She stated that Mulberrys had 'multiple non-compliances' both in their premises and on their website at the initial visit. At a follow up visit, the premises were found to be compliant with CRA requirements but the website was still non-compliant. Considering that the business did bring their premises into compliance and took the first step to amend their website, she decided that the financial penalty should be reduced by 20%.
20. On 4 March 2019, B&STS issued Mulberrys with a 'Final Penalty Charge Notice' for breach of s.83CRA – duty of letting agents to publicise fees. The notice required Mulberrys to pay a reduced penalty of £4,000 following B&STS's review of Mulberrys' representations. Such sum was required to be paid within 28 days i.e. by 2 April 2019.
21. On 25 March 2019, Mr Daines emailed this Tribunal with Mulberrys' appeal against the penalty. At the Tribunal's suggestion, Mr Daines notified Mr Smith who replied that he believed the appeal to be out of time.
22. On 5 April 2019, the Tribunal Registrar made Case Management Directions. The Registrar was satisfied it was fair and just to extend until 23 March 2019 the time limit to appeal against the 29 January 2019 notice. She treated the appeal lodged by Mulberrys as appealing against both that notice and the notice dated 4 March 2019.
23. The Registrar stated she was unclear whether the Final Penalty Charge Notice dated 4 March 2019 was replacing the Penalty Charge Notice dated 29 January 2019, and directed B&STS to explain the chronology of events, and how the statutory scheme allowed for two notices to be issued. The date for B&STS's response to the appeal was extended until 9 May 2019.

Submissions

24. Mr Daine's Notice of Appeal dated 24 March 2019 sets out Grounds of Appeal, in summary that:
 - a. He had instructed his staff as set out in paragraph 17 above.

- b. During the revisit on 29 January 2019, Mr Daines had asked Mr Smith to hold off issuing the Penalty Charge Notice until he arrived at Alpha's premises so that Mr Daines could show him where the required information could be found on the website. However, Mr Smith had declined and went ahead with issuing the notice.
- c. Mulberrys is a small family company, operating for 14 years, serving the community and winning a local award.
- d. Mr Daines repeated his comments as set out in paragraph 18 above.
- e. Mr Daines said that the business could not afford such a heavy fine which was unreasonably high 'in these very lean times'.
- f. In mitigation, Mr Daines said, Mulberrys had acted immediately when notified in December about the failure to publicise fees on the website. Then on 29 January 2019, he had contacted the web designer again to add logos of their client money protection scheme and redress scheme providers.

25. B&STS's response to the appeal dated 7 May 2019 states in summary:

- a. B&STS took the 'Penalty Charge Notice' dated 29 January 2019 to be their 'notice of intent' in accordance with paragraph 1 of Schedule 9 CRA because:
 - i. Mulberrys was in breach of duties on 3 December 2018 and were still in breach by the revisit on 29 January 2019, less than 6 months later.
 - ii. As required by paragraph 2 of Schedule 9 CRA, the notice set out the amount of the proposed financial penalty, the reasons for proposing to impose it, and information about the right to make representations.
- b. Representations were received from Mulberrys on 29 January 2019 which B&STS had duly considered, and decided to reduce the amount of the penalty from £5,000 to £4,000.
- c. In accordance with paragraph 3 of Schedule 9 CRA, a 'Final Penalty Charge Notice' was issued on 4 March 2019, 'clearly setting out information' as required by paragraph 3(4).
- d. Mulberrys appealed on 24 March 2019, apparently against the 4 March 2019 notice on the grounds that the amount of the financial penalty was unreasonable.
- e. B&STS opposed that assertion on the grounds that:
 - i. S.83 CRA has been in force for over four years, so letting agents have had considerable time to ensure compliance.

- ii. It seems that Mulberrys accept that they were non-compliant when Mr Smith first visited their premises on 3 December 2018 as staff were instructed to rectify points raised in Mr Smith's report.
- iii. It was made clear that corrective action needed to be taken within 14 days or else a penalty notice would likely be issued.
- iv. In the event, B&STS provided a far longer period for compliance because the revisit did not take place till nearly two months later. By then, the premises were apparently compliant, but the website contained the same breaches as before.
- v. Because of this, a notice of intent was issued, providing 28 days for representations to be made.
- vi. Even though Mulberrys had immediately contacted their web designer after the original visit, the breaches were still present at the follow up visit so it was not unreasonable to issue a notice of intent.
- vii. B&STS did not consider that Mr Daines' representations constituted 'extenuating circumstances' in accordance with the Government's Statutory Guidance because he should have taken a more active approach in chasing up the web designer to ensure the necessary changes had been made.
- viii. However, B&STS did take into account the improvement in compliance at the premises and that Mulberrys had taken the first step to amend their website, albeit not following through to ensure the changes were implemented.
- ix. In a similar case previously considered by the Tribunal, the judge had commented that although a web designer had been instructed, the appellant 'retained the responsibility of ensuring the work was undertaken competently, thoroughly and timeously' so that the website complied with legal requirements.
- x. Overall, the primary concern is to ensure compliance, and B&STS had been generous in giving warnings and notice of non-compliance as well as time to ensure rectification.
- xi. Though no extenuating circumstances or valid reasons were put forward, B&STS had been 'entirely appropriate and generous' in reducing the financial penalty by 20% even though multiple breaches were still present upon the second visit.

Discussion

26. There is no dispute that Mulberrys is required to comply with the obligations of s.83 CRA to display on its website, and on its premises, a list of fees and a statement that it is a member of a client money protection scheme and a redress scheme, and the provider of the redress scheme.
27. There is also no factual dispute in this case: Mulberrys have effectively admitted that, albeit unintentionally, they were in breach of the legal duties in relation to the publication of fees in respect of both their premises and their website at the date of B&STS's first visit on 3 December 2018. By that date, the CRA had been in force for approaching four years.
28. B&STS accepts that, by the date of its follow up visit on 29 January 2019, Mulberrys' premises were compliant, but not its website.
29. B&STS was therefore entitled to issue a Notice of Intent within six months of the website breaches and – unless satisfied by any representations received within 28 days of that notice – to issue a Final Notice, imposing a financial penalty of up to £5000.
30. However, Mr Daines claims that the monetary penalty was unreasonable. BS&TS denies that it was unreasonable, and invites the Tribunal to confirm its decision to impose such a penalty.
31. In reaching a decision in this case, I have had regard to all the written submissions and evidence contained in the case bundle.
32. I consider that on the basis of the evidence before me and on the balance of probabilities that while Mulberrys *did* breach its legal obligations in respect of the publication of fees, I am not satisfied that it was lawful for B&STS to impose a financial penalty in this case.
33. My reason for considering that B&STS's decision to impose a financial penalty was wrong in law is that its Final Notice did not – despite B&STS's assertion set out in paragraph 25c. above – comply with the requirements of paragraph 3(4) of Schedule 9 CRA.
34. That paragraph states that the Final Notice **must** set out, amongst other things, information about rights of appeal, and the consequences of failure to comply with the Final Notice.
35. Neither of these mandatory elements were included in the Final 'Penalty Charge' Notice served by B&STS on Mulberrys on 4 March 2019.
36. Confusingly – evidently for the Registrar of this Tribunal in light of her Case Management Directions dated 5 April 2019 – these two statutory requirements of a Final Notice were included in B&STS's misleadingly entitled 'Penalty Charge Notice' served on Mulberrys on 29 January 2019.
37. B&STS submits this earlier notice was a Notice of *Intent* under paragraph 1 of Schedule 9. Even if it that misnamed notice *did* satisfy the statutory requirements for a Notice of Intent,

the CRA clearly states that information about rights of appeal and the consequences of failure to comply, must be contained in the **Final** Notice which imposes the financial penalty, not the Notice of *Intent* to impose a penalty.

38. As it was, Mr Daines found out for himself that he could appeal to the First-tier Tribunal and did so. However, in my opinion that does not excuse B&STS's error in failing to include that statutorily required information in its Final 'Penalty Charge' Notice.
39. Moreover, the information about rights of appeal that B&STS did give – albeit in the wrong notice – was incorrect because it referred to an appeal to the County Court rather than the First-tier Tribunal (contrary to the clear wording of paragraph 5(1)(a) of Schedule 9 CRA).
40. The information in B&STS's first notice was further muddled by referring to 'review' and 'penalty charge' (terms not used by the CRA) and suggesting that the 'penalty charge' of £5000 was immediately payable when in law the CRA requires the service of a further notice (Final Notice) in order to *impose* a financial penalty.
41. I conclude that the omissions from B&STS's Notice dated 4 March 2019 render it non-compliant with the statutory requirements of CRA, and thus the decision to serve that notice was wrong in law.
42. Lest B&STS seek to argue that its Notice dated 29 January 2019 can stand as a Final Notice (perhaps in view of the Registrar's Case Management Directions dated 5 April 2019) I would reject such an argument. Paragraph 1(1) of Schedule 9 CRA states that, before imposing a financial penalty on a letting agent for breach of s.83 CRA, the authority **must** serve a notice of intent of its proposal to do so. If the 29 January 2019 notice were to be treated as a Final Notice, it would be invalid because it was not preceded by a notice of intent.
43. I am satisfied for all the above reasons that the decision to impose a financial penalty in the circumstances of this case was wrong in law.
44. Accordingly, this appeal is now allowed and the Final Notice dated 4 March 2019 is quashed.

(Signed)

Alexandra Marks CBE

Sitting as a First-tier Tribunal Judge

Dated: 6 October 2019

Promulgation Date: 11 October 2019

