



Appeal number: PR/2019/0006

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

KADEN PROPERTIES LIMITED

Appellant

- and -

LONDON BOROUGH OF CAMDEN

Respondent

TRIBUNAL: JUDGE ALISON McKENNA (CP)

Sitting in Chambers on 15 May 2019

Decision

1. The Appeal is allowed in part.
2. The Final Notice dated 11 December 2018 is hereby varied so as to impose a total penalty of £5,000.

Reasons

A: Background

3. The Appellant (“Kaden”) is a letting agent. The Respondent (“the Council”) is the enforcement authority which served a Final Notice on Kaden on 11 December 2018. The Notice imposed a total financial penalty of £25,000 for breach of Kaden’s duty under s.83 of the Consumer Rights Act 2015¹.
4. The Final Notice specified as follows:
 - Breach of duty to publicise full details of tenant and landlord fees at the premises (£5,000 penalty);
 - Breach of duty to publicise full details of tenant and landlord fees on the website (£5,000 penalty);
 - Breach of duty to publish details of whether it is a member of a client money deposit scheme at the premises (£5,000 penalty);
 - Breach of duty to publish details of whether it is a member of a client money deposit scheme on the website (£5,000 penalty);
 - Breach of duty to publicise details of its membership of a redress scheme at the premises or the website. Only the logo appears. (£2,500 penalty).
5. The final item is included twice on the face of the Notice, so the total penalty is stated to be £25,000. The Council subsequently reduced the total penalty to £10,000, which it asks the Tribunal to uphold in determining Kaden’s appeal.

¹ <http://www.legislation.gov.uk/ukpga/2015/15/part/3/chapter/3>

6. By its Notice of Appeal dated 9 January 2019, Kaden disputes the facts on which the Council relied when deciding to impose the financial penalties and also submits that the amount of the penalty is in each case unreasonable. It asks the Tribunal to waive the penalty in its entirety.
7. 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. I have considered carefully the agreed hearing bundle.

B: The Legal Framework

(i) Fees

8. Section 83 of the Consumer Rights Act 2015 requires letting agents to publicise details of relevant fees at its business premises and on its website. It came into force in May 2015. Section 83 (4) (c) provides that the amount of fee publicised must be inclusive of any applicable tax.
9. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under s. 83, it may impose a financial penalty under s.87 of that Act. It does so by serving a Notice of Intent and then a Final Notice on the letting agent concerned.
10. Schedule 9 paragraph 5 to the 2015 Act provides that a letting agent upon whom a financial penalty is imposed may appeal to this Tribunal. The permitted grounds of appeal are (a) that the decision to impose the financial penalty was based on an error of fact; (b) the decision was wrong in law; (c) the amount of the financial penalty is unreasonable; or (d) the decision was unreasonable for any other reason. The Tribunal may quash, confirm or vary the Final Notice which imposes the financial penalty.

(ii) Client Money Protection Schemes

11. Section 83 (6) of the Consumer Rights Act 2015 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 of whether it is a member of a client money protection scheme. It came into force in May 2015.

12. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under s. 83, it may impose a financial penalty under s.87 of that Act. It does so by serving a Notice of Intent and then 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.

(iii) Redress Schemes

14. 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. It came into force in October 2014.
15. Section 83 (7) of the Consumer Rights Act 2015 also requires the agent to publish details of the relevant Redress Scheme to which it belongs. The duty is to publicise:

“a statement—

- (a) that indicates that the agent is a member of a redress scheme, and*
- (b) that gives the name of the scheme.”*

16. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under paragraph 3 of the 2014 Order, it may impose a financial penalty. It does so by serving a Notice of Intent and then a Final Notice on the letting agent concerned.
17. Paragraph 9 of the 2014 Order 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.

18. 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) *Multiple Penalties?*

19. 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*², 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*³ (appealed to the UT (AAC) but not on this point)⁴ 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*⁵ but that Judge Jacqueline Findlay took a different view in *Frogmore Estates v LB Camden* PR/2017/0025 (unreported).

² http://www.bailii.org/uk/cases/UKFTT/GRC/2017/PR_2016_0021.pdf

³ http://www.bailii.org/uk/cases/UKFTT/GRC/2017/PR_2017_0007.pdf

⁴ https://assets.publishing.service.gov.uk/media/5b8e6b3bed915d1eb703f882/GE_2787_2017-00.pdf

⁵ http://www.bailii.org/uk/cases/UKFTT/GRC/2017/PR_2016_0037.pdf

20. 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. In *LB Camden v F Ltd* [2017] UKUT 349 (AAC)⁶, 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 was a breach of the duty imposed by s. 83(2) of the 2015 Act and it does not help with the correct interpretation of s. 83(4), (5), (6) and (7) of that Act.
21. Adopting a plain reading of the legislation, it seems to me that the statute reads as follows. Section 83 (3) imposes a duty to create and publicise 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.

C: Evidence

22. I have received a witness statement from Rebecca Bull, the Council’s Consumer Protection Officer, dated 27 March 2019. She states that she wrote to Kaden in September 2018 reminding it of its legal obligations. On 5 November 2018 she checked Kaden’s website and found no mention of fees, or of a redress scheme or indicating its membership of a client money protection scheme. Further, she describes visiting Kaden’s premises on 6 November 2018 where she issued a Notice of Intent having found similar non-compliance at the premises. She exhibits her brief notes, which I have read. She exhibits correspondence with Kaden but states she later found its website to be non-compliant when checking it again on 10 December 2018. She states that, whilst the fees were now listed, there was no indication of whether the stated fees were VAT-inclusive. She found there still to be no mention of client money protection scheme and found the mention of the Property Ombudsman redress scheme to be incorrectly listed as a place for landlords to advertise.

⁶ <http://www.bailii.org/uk/cases/UKUT/AAC/2017/349.pdf>

23. Ms Bull produces recordings of her website observations, which I have not been able to watch as they are in an unsupported format. I am satisfied that it is fair and just to rely on her unchallenged witness statement as evidence of the breaches she found instead of the videos.
24. My bundle includes the following documentary evidence: correspondence between the parties; the Notices; Ms Bull's notes of her visit to premises; a photograph of the information available at Kaden's premises; the films referred to above. It also includes documents provided by the Appellant with the Notice of Appeal, namely a letter from its accountant confirming that Kaden was incorporated in 2012 but has never been required to register for VAT, and photographs showing the Property Ombudsman sticker displayed in the window of Kaden's premises and on the website. Unfortunately, this photographic evidence is undated. A copy of Kaden's certificate of membership of the Property Ombudsman Scheme dated July 2012 is also provided. Testimonials have been provided, but these are not relevant to the issues I must decide.
25. While the Notice of Appeal refers at section 6 to a "great financial risk" to the business as a result of the penalty, I note that I have received no evidence of Kaden's financial situation from which I could assess such a risk.

D: Conclusion - Breaches

(i) Fees

26. The Final Notice imposes a breach for Kaden's failure to comply with its duties as at 6 November 2018. The evidence before me shows that no tenant or landlord fees were publicised as at the date of the service of the Notice of Intent on 6 November, but that a list of fees was displayed at the premises and on the website by the date of the Final Notice on 11 December. (These did not state whether they were inclusive of VAT, but I deal with that point below.)
27. Kaden's Notice of Appeal disputes that it had breached its duties under the legislation. This is on the basis that, as it is not registered for VAT, it takes the view that the requirement to publicise its fee "*inclusive of any applicable tax*" does not apply to its list of fees, whether publicised at the premises or on its website, because there is no applicable tax. Kaden has not, however, challenged the Council's evidence that no list of fees was available to the public on 6 November 2018. I accept that they were not available on that date and, in the absence of any evidence to the contrary, I proceed on the basis that they had not been made available to

Kaden's prospective customers from May 2015 onwards, which is when the relevant legal duty arose, until December 2018. I find that to be a significant period of breach.

28. The evidence from Kaden's accountant that it is not VAT registered has not been disputed by the Council. I accept on the basis of this evidence that there was no "*applicable tax*" in relation to Kaden's fees. In this regard, I disagree with Ms Bull's assessment that the publicised fees were deficient in not mentioning VAT.
29. I conclude on the basis of the evidence before me and on the balance of probabilities that, whilst Kaden had no list of fees available initially, it later publicised them appropriately and I conclude that there was no breach of its legal obligations in respect of the publication of fees by the date of the Final Notice.
30. I find that a financial penalty should be imposed with regard to the breach as at 6 November 2018 but that the level of penalty imposed should be one which considers Kaden's swift compliance following the service of the Notice of Intent.

(ii) Client Money Protection Scheme

31. Kaden frankly admits in its Notice of Appeal that it did not belong to a client money protection scheme. Ignorance of the law is no excuse and I am satisfied that it was in breach of its legal obligations in this regard. It appears that Kaden's breach in this regard lasted from May 2015, when the legal obligation arose, until at least December 2018 when the Council served the Final Notice. I find this to be a significant period of time during which consumer rights were infringed in an unacceptable way.
32. I am satisfied that it is appropriate for a financial penalty to be imposed by the Council for this breach. I consider the level of that penalty below.

(iii) Redress Scheme

33. Kaden has provided evidence of its membership of the Property Ombudsman scheme, which has not been disputed by the Council. It has provided me with (undated) photographic evidence which demonstrates that its membership is clearly indicated on the door of its premises and inside. Its statement that it was publicised at the relevant time has not been disputed by the

Council. The penalty imposed by the Final Notice appears not to rely on its absence but rather on an argument that displaying the logo only is insufficient to comply with the Act.

34. I conclude on the basis of the evidence before me and on the balance of probabilities that Kaden was a member of a Redress Scheme from July 2012. I am satisfied by its evidence that this fact was publicised at its premises and that the sticker on the door was sufficient to comply with the duty imposed under s. 83 (7) of the 2015 Act. I accept that the information on the website was somewhat confusing, but the Property Ombudsman logo was displayed there, and I am not persuaded that there was a breach of s. 83 in this regard.

35. Accordingly, I am not satisfied on the basis of the evidence that a penalty may be imposed under this heading.

36. In summary, my findings are that:

- Kaden breached its obligation to publicise fees at its premises and on its website from May 2015 until December 2018;
- It remedied that breach after service of the Notice of Intent. There was no obligation to mention VAT;
- Kaden breached its obligation to belong to a client money deposit scheme from May 2015 onwards;
- Kaden did not breach its obligations to belong to and publicise its membership of a relevant redress scheme;
- It belonged to the Property Ombudsman Scheme from 2012 and it publicised that fact at its premises and on its website.

E: Conclusion - Level of Penalty

37. The consequence of my analysis of the law at paragraph 21 above is that I find it was unlawful for the Council in this case to impose multiple penalties on Kaden. I find that it had power to impose only one penalty of a maximum of £5,000 for breach of the single duty imposed by s. 83 (3) of the Consumer Rights Act 2015, notwithstanding that the duty was breached in various ways.

38. The reduction by the Council of the total penalty from £25,000 to £10,000 is described on pages 7 and 8 of my bundle (“Respondent’s Response”) as due to representations received from Kaden and consideration of Ministerial advice on maximum fines. I have not seen the representations received or the advice and I am not told how the Council finally arrived at the figure of £10,000. This makes it difficult for me to understand how the level of penalty was calibrated in relation to the facts. I have proceeded to consider for myself whether the maximum penalty of £5,000 is warranted and is in all the circumstances a reasonable penalty in this case.
39. I have concluded that £5,000 is a reasonable penalty for the breaches I have found to be established for the following reasons. Firstly, I have found above that the statutory duty under s. 83 of the 2015 Act was breached in several different ways. Secondly, I have found that Kaden’s period of breach was a significant one, and I consider that it would have been reasonable for it to have taken steps to comply with the law by which it was bound much earlier. Thirdly, I have no reason to think that Kaden cannot afford to pay a penalty of this amount. Finally, whilst I acknowledge Kaden’s swift attempt to put itself in compliance with the law following the service of the Notice of Intent, I am not persuaded that the penalty should be reduced in relation to that factor, in view of the seriousness and longevity of the breaches I have found.
40. For all these reasons, this appeal is allowed in part. The Final Notice is hereby varied so that a penalty of £5,000 is now payable by Kaden.

(Signed)

Alison McKenna

Chamber President

Dated: 15 May 2019

Promulgation date: 17 May 2019

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