Appeal number: PR/2019/0017

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)

TAREN LAMBA trading as SMART MOVE **Appellant**

- and -

LONDON BOROUGH OF ENFIELD **Respondent**

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

Hearing at Field House, London EC4

Decision

1. The Appeal is allowed in part.
2. The Final Notice dated is varied:
    a. to remove reference to breaches in relation to *premises*; and
    b. to reduce the amount of the penalty from £5,000 to £2,000.

Reasons

Background

3. The Appellant, Taren Lamba ('TL') is a letting agent trading as Smart Move ('SM'). The Respondent ('the Council') is the enforcement authority which served a Final Notice on TL on 14 February 2019 (having withdrawn an earlier Final Notice dated 29 January 2019).
4. The Final Notice imposed on TL a financial penalty of £5,000 for breach of duty to display fees on SM's business premises and on its website, and for failing to state SM's membership of a client money protection scheme, and membership of a redress scheme with details of that scheme.
5. By a Notice of Appeal dated 13 March 2019, TL says that the Council's decision to impose a penalty was unreasonable. TL had previously indicated to the Council by email dated 11 February 2019 that the facts stated in the original Final Notice dated 29 January 2019 (and repeated in the Final Notice dated 14 February 2019) were incorrect.
6. TL asked for a hearing of this matter rather than determination on the papers.

The Legal Framework

7. **Section 83(2) and (3)** of the Consumer Rights Act 2015 ('CRA') impose 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.
8. **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 of whether it is a member of a client money protection scheme.
9. **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).

10. 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. **S.87(6)** provides that only one penalty may be imposed on the same letting agent in respect of the same breach.
11. **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 that:
    (a) 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.
12. The Tribunal may quash, confirm or vary the Final Notice which imposes the financial penalty.

Submissions and Evidence

13. TL's Notice of Appeal dated 13 March 2019 relies on Grounds of Appeal, in summary, that:
    a. By 16 October 2018, all issues raised by the Council had been addressed, amended and complied with. However, the Council replied on 31 October 2018 that display of logos of the redress scheme and client money protection scheme were not considered "statements" of membership of these schemes, so TL immediately responded by email that this would be addressed.
    b. TL has attempted in good faith to comply in a timely manner with all issues raised by the Council although there was some confusion about what needed to be done.
    c. At no time were there any delays in rectifying what needed to be corrected in line with current legislation.
    d. TL has been trading as SM in Enfield for 17 years with an impeccable record.
14. At the hearing, TL added that:
    a. The Council had breached its own guidance on enforcement of trading standards because this was not a serious breach (in terms of detriment to customers or competitors) nor had the business failed to respond, or to engage with attempts to secure compliance.
    b. There has never been any complaint from SM's customers about fees.

c. The Council's guidance leaflet about the CRA (incorporated in new guidance about the Tenants' Fees Act 2019) was sent to letting agents in August 2019, four years after the CRA came into effect.

d. In other reported Tribunal cases on breaches of the CRA, guidance letters had been sent to letting agents prior to a visit and on average at least three months was given to them to comply before notices of intent were served.

e. SM's website has been compliant since 3 November 2018.

f. No copy of the report given to the Council's panel has been provided.

g. As the original Final Notice was withdrawn, should not the matter have been put in front of the Council's panel again?

h. Trading Standards have at least an 'ethical' responsibility or 'duty of care' to ensure that awareness is given to businesses, especially small businesses.

i. To fine small businesses such great amounts will be detrimental to local business in the community.

15. The Council's Grounds of Opposition dated 15 April 2019 are in summary:

a. The legal obligation to publicise fees (pursuant to **s.83 CRA**) came into force in May 2015. However, SM was found by the Council to be in breach of these duties in September 2018, some three years and four months later.

b. The Council visited SM's premises on 11 September 2018, pointing out to TL the requirement – amongst other things – to include with the list of fees a statement whether the agent is a member of a client money protection scheme, and member of a redress scheme and to provide the name of the scheme. Later that same day, the Council had followed up the visit with a telephone call and email to TL. TL indicated he would correct these matters.

c. On 21 September 2018, the Council again checked SM's website but the outstanding matters had not been remedied. The Council therefore emailed TL the same day – with screenshots of SM's website – pointing out the matters needing remedy.

d. The Council received no response (but at the hearing accepted that, in error, its email of 21 September had not actually been sent to TL).

e. On 5 October 2018, SM's website still did not publicise, as required by CRA, its fees or membership of a client money protection scheme and membership of a redress scheme. The Council says TL admitted this.

f. The Council drafted a Notice of Intent, visited SM's premises on 5 October 2018, and handed over the Notice TL's brother (an employee at the premises), having first

amended it to show that SM's premises were now compliant although its website was not.

g. On 8 October 2018, TL sent representations to the Council, stating that its website designer was sick so had been unable to complete the website amendments. However, TL stated that tenant fees were now displayed on the website, and statements regarding membership of the schemes 'will be added'.

h. On 9 October 2018, the Council asked TL for a medical certificate for the designer's sickness if TL wanted this representation to be considered. However, no evidence was provided.

i. The Council inspected SM's website again on 16 October 2018. A list of landlords' and tenants' fees had been uploaded, and logos of providers of client money protection schemes and redress schemes were displayed. However, there was no *statement* about SM's membership of these schemes *with* the list of fees.

j. The Council therefore emailed TL on 16 October 2018 to explain the requirement that such *statement* appear *with* the list of fees. In that email, the Council stated its appreciation of TL's continued efforts to comply.

k. On 17 October 2018, TL replied to the Council's email, saying that he had forwarded the Council's email to 'the web site person who will make the changes as requested.'

l. On 31 October 2018, the Council emailed TL to enquire when a *statement* about SM's membership of a client money protection scheme and redress scheme would appear on its website. It stated that display of logos of the redress scheme and client money protection scheme were not considered "statements" of membership of these schemes. The Council also informed TL that its next action would be formal, and that the Council could issue Notices of Intent for 'each and every occasion we view the website and note the non-compliance'. Again, the Council noted TL's efforts and attempts to comply.

m. On 13 November 2018, an internal panel of the Council considered TL's representations of 8 October 2018 and upheld the Notice of Intent dated 5 October 2018.

n. The panel was asked to consider imposing a further penalty of £5,000 for the SM's premises fees notice which was believed to be incorrect because it diverged from SM's list of fees on its website. The panel declined to impose any further penalties.

o. On 14 November 2018, and again on 22 January 2019, the Council re-inspected SM's website and noted it was still non-compliant because there was no statement

regarding redress and client money protection schemes, just logos, despite the Council having advised TL that a *statement* of membership of these schemes was required *with* the list of fees.

p. Having already considered TL's representations, the Council decided to issue a Final Notice.

q. A £5,000 penalty could have been imposed in respect of the website on each of the five occasions it was inspected (5, 16 and 31 October 2018, 14 November 2018 and 22 January 2019).

r. The Council took into account that TL had appeared to make efforts to comply but was still not compliant at 22 January 2019, some 4½ months after issue of the Notice of Intent.

s. The Council followed government guidance on the imposition of penalties, and had acted reasonably in imposing one maximum penalty fee of £5,000.

Discussion

16. There is no dispute that SM was engaged in letting agency work in respect of dwelling houses within Enfield, that SM holds money on behalf of landlords in the course of its business and that SM has a website. Accordingly, SM is required to comply with the obligations of **s.83 CRA** to display on its website, and on its premises, a list of fees as well as a statement that SM is a member of a client money protection scheme and a redress scheme, and the provider of the redress scheme.
17. TL disputes that he had breached the requirement of the CRA, and argues that the penalty imposed was unreasonable.
18. In reaching a decision in this case, I have had regard to all the oral submissions at the hearing, and also to the written submissions, evidence and other documentation contained in the hearing bundle, as well as that provided at the hearing and – with the Tribunal's permission – documentation provided subsequently.
19. It is clear that the Council did not include in its Notice of Intent any failure to display a list of fees in SM's *premises*, having been satisfied during the course of its visit to the premises on 5 October 2018 that any breaches had been rectified. During that visit, the Council therefore amended in manuscript its draft Notice of Intent to show that the only breaches alleged against SM related to its *website*.
20. It appears from the statement of the Council's Principal Trading Standard's Office, Heena Kanani, that on 13 November 2018 the Council's internal panel, when considering TL's

representations, was asked to consider a further Notice of Intent in relation to the non-compliance of SM's *premises* (because the list of fees on SM's premises diverged from the comprehensive list of fees on its website). However, at the hearing of this matter, the Council accepted that no further Notice of Intent was in fact served, nor is there any evidence that the Council sought any explanation from TL about the differences in fees displayed on SM's website and on its premises before issuing the Final Notice.

21. The Council – in its grounds of opposition to this appeal – requests the Tribunal "to consider whether or not a further penalty should be issued" for the alleged non-compliance of the premises.

22. I note also that, according to undisputed evidence, and as expressly acknowledged by the Council, TL repeatedly attempted to comply with the statutory requirements. For example, SM corrected the list of fees at its premises during the Council's visit on 5 October 2018, such that the Council then regarded the only outstanding issues as relating to SM's website and amended the Notice of Intent accordingly.

23. I accept that the last contact between TL and the Council before service of the Final Notice was on 31 October 2018 when the Council emailed TL. That email informed TL that SM's website was still non-compliant because – despite displaying logos of the redress and client money protection schemes of which SM was a member – there was no *statement* of SM's membership *with* the list of fees.

24. TL says this email prompted him to contact the web designer again and instruct him to rectify the site immediately. TL says he notified the Council of this the same day (although he provided no documentary evidence of this), and then heard nothing further from the Council till 29 January 2019 some three months later. Until that point, TL told the hearing, he believed that all issues had been resolved by 31 October 2018.

25. On 29 January 2019, the Council served its (first, incorrect and therefore subsequently withdrawn) Final Notice, reflecting the Council's view of SM's on-going breaches of the legislation.

26. At the hearing, the Council explained that due to a 'clerical' error, the Final Notice erroneously omitted details of the recipient's entitlement to appeal to the First Tier Tribunal and other required information. On 14 February 2019, the Council emailed TL withdrawing the Final Notice dated 29 January 2019 and sending him a 'new' Final Notice dated 14 February 2019. The Council simply told TL that the Final Notice had been 'updated with the First Tier Tribunal and payment details' and referred to 'the appeal hearing on 13 November 2019'. The Council did not send TL with the new Final Notice any covering letter equivalent

to that which had accompanied the original Final Notice dated 29 January 2019. Nor did the Council explain what it meant by 'the appeal hearing on 13 November' which was actually an internal Council consideration of TL's representations in response to the Notice of Intent.

27. I consider all this would have been confusing for TL as the recipient of the Final Notice(s). I also consider that TL's perception that he had satisfactorily resolved all issues was, though incorrect, understandable despite the Council's statement in its 31 October email that 'the next action will be formal.' Between mid-September to end October 2018 (about 6 weeks), the Council and TL had been in contact by frequent email exchanges, two face-to-face visits and at least one telephone conversation. During that period the Council had repeatedly expressed its recognition of TL's attempts to comply. However, in the three months between the Council's final email and its service of the Final Notice, TL heard nothing.
28. The Council may wish to reflect on its future practice and in particular the interval (two and a half months in this case) between the decision made by its internal panel to impose a penalty, and service of a Final Notice. More prompt service of Final Notices might reduce recipients' surprise and grievance at receiving one - and thus reduce their likelihood of challenging it.
29. The Council's Final Notice to TL alleged breaches of **s. 83 CRA** through failure to:
    a. display a list of fees as required by **s. 83(2)** (premises), **s. 83(3)** (website); AND
    b. include in the list of fees the information required by **s.38(4)** (sic); AND
    c. include on the list of fees a statement concerning membership of a client money protection scheme **s.83(6)**; AND
    d. indicate membership of a redress scheme with details of that scheme **s.83(7)**
30. At the hearing, I drew the parties' attention to a letter dated 29 January 2019 from Mrs Heather Wheeler MP, Minister for Housing and Homelessness to Lord Harris, copied to Wendy Martin, Director of National Trading Standards with a request that its contents be conveyed to all trading standards teams in England. That letter acknowledged the lack of clarity about **s.83 CRA**, and whether failing to publicise more than one element of the required information counts as one or multiple breaches for the purposes of **s.87 CRA**. The letter went on to state that the Government's position as to the policy intent of this legislation is that failure to display any number of the prescribed pieces of information at a single point in time should be treated as a single breach for the purposes of **s.87** and therefore the penalty limited to £5,000.
31. I accepted at the hearing that a copy of Mrs Wheeler's letter may not have reached the Council by 14 February 2019 when it served the Final Notice on TL. In post-hearing documentation sent to me, the Council stated that it had received a copy of the letter *after* the first (and

incorrect) Final Notice had been sent on 29 January 2019. The Council maintains that it nevertheless imposed the monetary penalty of £5,000 in accordance with government guidance.

32. I would observe that the Council did receive the letter before serving the corrected Final Notice on 14 February 2019 but there is no evidence that it took its contents into account.

Decision

Alleged premises breaches

33. The statutory scheme set out in the CRA requires the enforcement authority first to serve a Notice of Intent in respect of any alleged breach, after which the letting agent has 28 days in which to make any representations. Those steps were not followed in this case as regards the alleged breaches relating to SM's *premises*.
34. I determine that the Council cannot - through this appeal, nor without first serving a further Notice of Intent and giving TL the opportunity to make representations - pursue the breach set out in the Final Notice relating to SM's *premises* (**s. 83(2)**) as no Notice of Intent was ever served in relation to SM's premises.
35. The Council's proper course – had it wished to pursue such an allegation – would have been to have served a separate Notice of Intent in respect of the alleged breach(es) it later discovered relating to SM's premises and thus given TL the opportunity to make representations about that.
36. The Council did not take that course so I find the Final Notice invalid insofar as it relates to SM's premises and I therefore vary the Final Notice accordingly.

Absolute obligation to comply

37. The obligations under the CRA are absolute so the absence of intent on TL's part to breach the requirements, and even his genuine and repeated attempts to comply, are not sufficient to meet his duties under the Act.
38. TL complained in his written submissions and at the hearing that he had been given insufficient time to comply. This betrays a misunderstanding of the statutory scheme. It is letting agents' sole responsibility to comply with the CRA requirements about publishing fees since the law came into force in May 2015. There is no obligation on enforcement authorities such as the Council to issue reminders, advice, guidance or time to comply. The absence of

complaints from customers or members of the public is irrelevant because it is compliance with the legislation that counts.

39. The law provides 28 days after service of a Notice of Intent for letting agents to make representations. This time is to enable letting agents to explain to the enforcement authority why - contrary to the authority's view – they are not in breach of their duties: it is not time given to letting agents to enable them to remedy the breaches.
40. Although it is not the enforcement authority's role to do other than enforce the law, in this case, the Council repeatedly informed TL that the display of logos of redress and client money protection schemes was insufficient to satisfy the requirement that the published list of fees include a *statement* that SM was a member of these schemes, and the name of its redress scheme provider.
41. Because TL is solely responsible for complying with the legislation, it is no answer that TL gave instructions to his web designer when, unfortunately, those instructions did not result in SM's website fully complying with the CRA requirements.
42. I accept that, following the Council's visit on 11 September 2018 and thereafter, TL responded promptly to the Council's communications. I also accept that TL made swift and genuine efforts to comply.
43. I also accept that, in the absence of any further contact from the Council after 31 October 2018 and the long interval which then followed before service of the Final Notice, TL believed that he had resolved all issues and was by then fully compliant.
44. However, I find as a matter of fact that, on the balance of probabilities, TL's efforts did not result in full compliance: SM's website breached CRA requirements not just on 11 September 2018 when the Council visited but continuously since the law came into force in May 2015, over three years previously. The breach included a failure to include a *statement with* the list of fees that SM was a member of a client money protection scheme and a named redress scheme, rather than just display scheme logos.
45. On the evidence TL produced, I am not satisfied that SM's website was fully compliant on 31 October 2018 or 13 November 2018 or indeed any date prior to service of the Final Notice. Even if the website *had* been fully compliant by either or both of those dates, this would not have excused the earlier breaches which had subsisted for over three years since May 2015.
46. I therefore reject TL's argument that the Council's decision to serve a Final Notice was unreasonable.

Single breach not multiple breaches

47. I determine as a matter of law that, on a purposive reading of **s.83**, subsections **(4), (6) and (7)** are all part of the list of fees and therefore not separate breaches for the purposes of **s.87(6)**.
48. Thus, in this case, the allegations listed in Final Notice comprised only one breach, namely of **s.83(3) (**relating to SM's website).
49. For the reasons I have set out in paragraphs 33 to 36 above, it was not open to the Council to serve a Final Notice or impose a financial penalty for alleged breach of **s.83(2)** relating to SM's premises.

Amount of penalty

50. I have considered whether the amount of the financial penalty was unreasonable. I note that the amount of a penalty is within the discretion of the Council and that, under the legislation, £5,000 is the maximum penalty it can impose on the same letting agent in respect of the same breach.
51. I reject TL's argument that the Council was in breach of its own guidance. Government guidance on enforcement of the CRA fees requirements states 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 is up to the enforcement authority to decide what such circumstances might be, taking into account any representations the agent makes during the 28 day period after service of the Notice of Intent. I consider that the Council in this case was entitled to conclude that there were no extenuating circumstances.
52. However, it appears from the Council's written evidence and its oral submissions at the hearing that, at the time of the internal panel meeting on 13 November 2018, the Council was of the view that it could have imposed a £5,000 penalty for alleged breach of each of **s.83(2)** and **s.83(3)**. Had the Council's view been correct - and contrary to my finding that it could not serve a Final Notice for alleged breach of **s.83(2)** (relating to SM's premises) - it could have imposed a total penalty of £10,000.
53. As the Council panel decided to impose a total penalty of £5,000 I infer that the Council regarded that sum as a proportionate penalty for *all* breaches listed in its Final Notice, despite its apparent belief that it could have imposed a larger penalty.
54. On this basis, I determine that amount of the financial penalty imposed by the Final Notice was unreasonable as it was in fact the maximum that could have been imposed. It seems to me that the Council intended to recognise TL's prompt and continued efforts to comply - and the improvements TL in fact achieved which, though imperfect, were in the public interest in

meeting at least some of the policy objectives of the legislation. I therefore consider that an appropriate discount should be applied to the amount of the penalty that the Final Notice actually imposed (namely £5,000 being the maximum penalty permissible).

55. I therefore reduce the financial penalty from £5,000 to £2,000 and accordingly further vary the Final Notice dated 14 February 2019.

(Signed) **Dated: 07 November 2019**

Alexandra Marks CBE

(sitting as a First-tier Tribunal Judge)