

Primary Authority Partnership

Warwickshire County Council Trading Standards

Old Budbrooke Road, Warwick, CV35 7DP

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Propertymark

Arbon House, 6 Tournament Court, Edgehill Drive, Warwick, CV34 6LG

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The Property Ombudsman

Milford House, 43 - 55 Milford Street, Salisbury, Wiltshire, SP1 2BP

Primary Authority Advice

This advice is applicable to all member businesses acting in a capacity of a letting agent, managing agent or landlord. If you are contacted by a local authority enforcement body, please ensure that you inform them that you are a member of the scheme.

Advice requested:

In circumstances where a local council offers a financial incentive to landlords to accept specific tenants (e.g. in receipt of Housing Benefit), can a letting agent be entitled to keep that incentive payment as part of their fee?

Legislation considered:

Consumer Protection from Unfair Trading Regulations 2008 (as amended) (“CPRs”)

Business Protection from Misleading Marketing Regulations 2008 (as amended) (“BPRs”)

Tenant Fees Act 2019

Other Material considered:

TPOS Code of Practice for Residential Letting Agents [1st October 2016]

The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, Edition 12

CMA Guidance for lettings professionals on consumer protection law [13th June 2014]

The Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681

Assured Advice Issued:

In some areas, in particular those with higher property prices, it has become common for local councils to offer financial incentives to landlords offering rented accommodation to tenants with defined housing needs. This question addresses letting agents' duties and how their fees may be defined.

The CMA Guidance has this to say about a letting agent's duty of loyalty:

“The agent's responsibility is to represent the interests of their principal, and not to allow any other interest (their own, or someone else's) to conflict with this. If a potential conflict of interest arises, the agent must make full and frank disclosure of this to their principal. This duty also restrains agents from making 'secret profits', meaning money the agent is paid in addition to their agreed commission from the landlord client, and which the landlord client does not know about. So, for example, you should tell the landlord of any sums you propose to charge potential tenants, and disclose any commissions or other benefits you receive from workmen for passing work to them.”

This advice fits with the CPRs in relation to consumer landlords (as defined in Assured Advice no. 3, making reference to the *OFT v Foxtons*) and also, to a lesser extent, the BPRs in relation to professional landlords.

(Regarding the issue of who is to be considered a consumer landlord and who is to be considered a professional, see also paragraphs 3.09 and 3.10 of the CMA Guidance:

“The courts have recognised that certain landlords are to be regarded as consumers when dealing with letting agents who are acting in a business capacity. This is consistent with a recognition that members of the public letting out, for example, their homes, or parts of their homes on a one-off or occasional basis, are likely to be in a weaker bargaining position than the lettings agents whose services they seek to use. As businesses, professional landlords, by contrast, do not require the same degree of protection as consumers.

“Whilst it should not be assumed that every landlord is a consumer for the purposes of the law covered in this guidance, the CMA considers it is advisable for letting agents to comply consistently with the requirements of consumer protection law when dealing with all landlords, unless the landlord is clearly a corporate entity or running a business that lets out many properties. This is because there may be severe consequences for a trader for failing to treat customers as consumers, if this is in fact what they are... If you breach consumer protection law you may commit an offence, or your contract terms may be unenforceable, or you may be liable to other enforcement action.”)

As a basic principle, landlords and their agents are of course free to contract as they wish, and this includes the calculation of fees. If a contract is agreed whereby the

agent's fee will include a sum equal to that paid by the council as incentive for taking tenants in receipt of Housing Benefit, then that is permitted.

However, as set out above, agents must not make "secret profits". If such a sum is to be charged (or kept), then failure to tell a consumer landlord about this could constitute a misleading action or omission likely to affect their transactional decision, and could therefore be an offence under the CPRs. In this context, "failure to tell" includes "telling in an unclear way", for example by means of a poorly-worded clause buried in the small print.

Professional/business landlords are of course normally expected to carry out some due diligence on the contracts they enter into. However, if it can be shown that such a person or company has been misled, then an offence under the BPRs may be committed.

In either case, the law of agency described by the CMA above would apply, which could lead to a letting agent being ordered to pay the money over to the landlord.

So, in summary, a letting agent may be able include an incentive payment to the landlord as part of their fee, but only as long as they are very clear and up front that that is what they will be doing; otherwise they may commit an offence and/or be ordered to pay the sum over to their landlord client.

Date Advice is Effective from:

14 02 2019

Reference and renewal:

The reference for this advice is: WTS/PM/TPOS/33

This advice will be reviewed annually; however it will remain valid until it is marked 'obsolete' on the Primary Authority Database. If any part of this document requires amendment following a review, a completely new version will be added to the database and the previous version shall be marked 'obsolete'.