First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2016/0009

Heard at Field House
on 25th October 2016

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

ALEXANDERS PROPERTY CONSULTANTS LIMITED

Appellant

and

LONDON BOROUGH OF CAMDEN

Respondent

Representation:

For the Appellant: Mr O. Weetch, Counsel, instructed by Mr M Levine, Solicitor

For the Respondent: Ms L. Cooke for Camden Legal Services Department

DECISION AND REASONS

A. Background

1. Alexanders Property Consultants Limited ("Alexanders") appeals against a Final Notice served on it by the Council of the London Borough of Camden ("Camden"), which is the local weights and measures authority for the geographical area comprising the Borough of Camden. The Final Notice refers to the West Hampstead branch office of Alexanders located at 337 West End Lane, London NW6, which is within the Borough of Camden. However, the Final Notice relates exclusively to Alexanders' website, which is www.alexanders-uk.com. The Final Notice imposed penalties totalling £10,200 on Alexanders for breaches of section 83 of the Consumer Rights Act 2015 ("the Act").

2. The Final Notice set out details of the alleged breach.

> "On 30th June 2015 and on 22nd December 2015 the London Borough of Camden wrote to Alexanders Property Consultants Limited advising them that as of 27th May 2015, all Letting Agents and Property Management Agents had to display ALL their fees to tenants and landlords, together with the details of the Redress Scheme of which they are a member. The letter also stipulated that it is now compulsory for all agents to display details of whether or not they are a member of a client money protection scheme at their trading premises and on the internet.
>
> On 15th February 2016 I checked the website for Alexanders Property Consultants Limited and found that the company had failed to comply with the requirements of Section 83 Consumer Rights Act 2015 as follows;
>
> A failure to publish details of agents landlord fees on their website (S83.3)
>
> A failure to publish details of agents tenant fees on their website (S83.4)
>
> A failure to publish details of whether or not the agent is a member of a client money protection scheme (S83.6)
>
> On 15th February 2016 Camden Council issued you with a Notice of Intent to impose a monetary penalty giving details of the breach. I am now issuing you with a Final Notice imposing a final penalty as detailed below:
>
> £5000 for failing to publish details of agents tenant fees
>
> £5000 for failing to publish details of agents landlord fees

£200 for failing to publish details of the agents' client money protection scheme

After careful consideration of your representations, the Council has decided to confirm the above penalty ……."

B. Legislation

3. The sections of the Act that are referred to in this decision or that are of greatest relevance to this appeal are set out below in Annex A to this decision.

C. Guidance

4. Section 83 of the Act is the subject of Guidance for Local Authorities issued by the Department for Communities and Local Government (the "Guidance"). Local authorities are required to have regard to the Departmental Guidance under S.87(9) of the Act. The sections of the Departmental Guidance that are of greatest relevance to this appeal are set out below in Annex B to this Decision.

D. The appeal

5. In its grounds of appeal, Alexanders explained that they were a "*small agency with two branches in different council areas and we are seriously affected by these fines*" and that they had tried their best to comply with the regulations relating to the publicising of fess. The appeal went on to state that:
   - Camden had not written to the registered office of Alexanders where its Managing Director, Mr Tom Hague, was based.
   - Mr Hague was not permitted sufficient time to deal with the correspondence form Camden.
   - Their fees were set on their website on 15th February 2016 when the Notice of Intent was issued.
   - They had instructed their web developers to make the amendments as soon as required.
   - The allegations were not properly explained and were confusing.
   - The monetary penalty was excessive and unreasonable as Camden had "*taken £5000 as the maximum fine under the Consumer Rights Act and doubled it for the same offence"* and it was unaffordable for Alexanders.

6. The hearing of the appeal took place on 25th October 2016. Prior to the hearing a bundle of relevant documentation was prepared by the parties, which included details of the correspondence between Camden and Alexanders before and after the date of the Final Notice. Camden provided

two witness statements from David Hunt, a Consumer Protection Officer for Camden and two CDs which showed recordings of the Alexanders website as it was at 9th and 25th January 2016, 17th February and 10 March 2016. Alexanders provided details of the sections of their website setting out the fees they charge landlords and tenants and provided a witness statement from Mr Hague.

7. At the hearing Mr Weetch explained on behalf of Alexanders that they had been in discussion with Camden immediately prior to the hearing and, in line with the contents of Mr Hague's witness statement, they had agreed that the appeal should proceed on a limited basis. He stated that Alexanders admitted that, at the time the Notice of Intent was issued to them by Camden on 15th February 2016, they were under an obligation under S.83 of the Act to ensure that their website listed the fees that they charged landlords and tenants and also stated if they were a member of a client money protection scheme and that they had failed to fulfil either of these obligations. Alexanders wished the appeal to continue on the basis that the penalty imposed in the Final Notice was excessive and that there were extenuating circumstances that meant that the aggregate penalty should be reduced. Ms Cooke confirmed on behalf of Camden that it was agreed that the appeal should proceed on this basis.

8. As a consequence of this agreement between the parties, no oral evidence was called. I heard submissions from Mr Weetch on behalf of Alexanders and Ms Crowe on behalf of Camden on the issues that were relevant to assessing the penalty to be imposed on Alexanders. I am grateful to the parties for their co-operative approach in limiting the scope of the appeal and for their explanation of the issues that remained. In reaching a decision in this case I have had regard to those oral submissions and also to the written submissions, evidence and other documentation contained in the hearing bundle.

E. Submissions on penalty

9. On behalf of Camden it was stated that Alexanders had received two letters explaining the obligations that they needed to satisfy in relation to the new legal obligation to publish in sufficient detail their fees to landlords and their fees to tenants and to make it clear if they were, or were not, a member of a client money protection scheme. These letters were sent on 30th June 2015 and 22nd December 2015 to Alexanders' West Hampstead branch and to over 300 other letting agents with an office in Camden. The letters included an invitation for the letting agent to contact Camden for further advice and guidance. It was further stated that even though the legal obligation to comply with S.83 of the Act existed at the time of the letters of 30th June 2015 and 22nd December 2015, recipients were given until 18th January 2016 to comply before enforcement action would be taken.

10. In the section of the Guidance that deal with penalty for breach of the duty to publicise fees (set out in Annex B) it is stated that a £5000 fine should be considered the norm unless there were extenuating circumstances and none had been suggested by Alexanders. Ms Cooke stated that the level of penalty was not unreasonable.

11. Ms Cooke submitted that Mr Hague had indicated in his witness statement that Alexanders had received both letters that were sent warning them of their obligation to comply with the Act. Mr Hague's letter in response to the Notice of Intent was disingenuous and confused when it stated that the website was compliant. It appeared that he had contacted solicitors in early 2016 for advice on this issue and on how to respond to Camden and must have been aware of the obligations of Alexanders.

12. Mr Weetch submitted on behalf of Alexanders that a number of extenuating circumstances existed that should lead to Alexanders paying a reduced fine or no fine. These circumstances included;
- Alexanders exemplary record;
- their excellent reputation in the community, in particular in West Hampstead;
- there had been no complaints and there was no evidence that any loss had arisen for members of the public;
- Camden had not visited either branch of Alexanders, as they had indicated they might, and no other contact or warning had taken place before the Notice of Intent was issued;
- the penalty was issued within one month of the 22nd December letter that indicated this was a possibility;
- the head office of Alexanders is in Baker St and within Westminster Council. Mr Hague worked here and had not seen the June 30th letter;
- Westminster Council had confirmed in a letter dated 11th May 2016 that Alexanders website was compliant with the Act and had not imposed a fine or other sanction despite first contacting Alexanders in late 2015, (a copy of this letter of confirmation was provided with Mr Hague's witness statement); and
- Mr Hague's first child was born in late 2015 and he was distracted at that relevant period with a lot to do at home as well as the Baker Street office and a long commute of ninety minutes to fit into his day.

13. On the issue of the affordability of the fine for Alexanders, Mr Hague had not understood that he should have submitted the accounts of Alexanders in response to the Notice of Intent or the Final Notice. He had submitted accounts for the last three years during the course of the appeal which showed the low profitability of Alexanders and the relatively modest remuneration of Mr Hague, the owner of Alexanders. The accounts for 2016 were not yet ready, but would show a small loss. Mr Weetch concluded

that Alexanders could not afford an aggregate fine of £10,200 and such a penalty was not just and proportionate by reference to the other fines issued by Trading Standards for more serious failings that pose greater risk.

14. Ms Cooke said that Camden had not been made aware of Alexanders' involvement with Westminster Council. Had they known they would have liaised with Westminster Council about how to deal with Alexanders. They had not been given any financial details of Alexanders prior to the appeal. Camden had invited Alexanders to contact them and they had not done so. When they spoke to Mr Hague by phone in February 2016 he had been hostile. They had warned Alexanders of their intention to take action in their letters of 30th June 2015 and 22nd December 2015, but they took the view that, in any event, a business should be aware of the legal obligations affecting its operations. The penalty comprised two fines of £5000 which were to be regarded as the norm for breaches of S.83(3) and (4) of the Act and a fine of £200 for the breach in relation to S. 83(6). Camden took the view that the failure to put details on the website of whether the agent is a member of a client money protection scheme as required by S.83(6) was a straightforward issue, which as a matter of policy Camden had elected to respond to with a penalty that was much lower than the norm.

15. Mr Weetch submitted that only the most serious failures deserved the most serious penalty and Alexanders' failures were not in that category. The Guidance was only guidance and the Council should exercise discretion in implementing the legislation. In any event he pointed out that the Guidance expressly permitted the Council to consider departing from the norm when there were extenuating circumstance as there were in this case.

F. Submission on the number of breaches of the Act

16. Submissions were sought from the parties on the effect of S.87(6) on this appeal. S.87(6) is set out in Annex A and states that only one penalty may be imposed on a letting agent "*in respect of the same breac*h". It was agreed between the parties that the breach in relation to the failure to put details on the website of whether the agent is a member of a client money protection scheme was different to the breach or breaches relating to the failure to publicise fees. The issue of concern was whether the two separate £5000 penalties for failing to publish details of Alexanders' fees for tenants and for failing to publish details of Alexanders' fees for landlords were being levied for two separate breaches or for a single breach.

17. On behalf of Camden it was submitted that the proper construction of the legislation and the Guidance was that there were separate breaches in respect of the failure to publish fees for landlords and fees for tenants. The Guidance makes it clear that each of the two categories, landlords and

tenants, must be able to see and understand the fees that the letting agent is charging.

18. On behalf of Alexanders it was submitted that S.83(4) does not distinguish between landlord and tenants it merely imposes a particular requirement in S.83(4)(b) in relation to tenants. Furthermore, by analogy with the criminal law the circumstances of this appeal pointed to a need for a single concurrent sanction rather than two sanctions for what was in essence a single failing.

G. Findings

19. The Final Notice identified a failure by Alexanders to publish details on their website of their fees for landlords under S.83(3) and a failure to publish details on their website of their fees for tenants under S.83(4). S. 83(3) imposes a requirement on a letting agent to publish a list of fees on its website, if it has one. S.83(4) gives details of what such a list of fees must include. It does not create a separate obligation to publish fees from that set out in S.83(3). S.83(4) does not refer to separate lists of fees for landlords and tenants.

20. S.83(3) specifically requires a letting agent to publish "*a list of the fees".* The reference to "*the fees"* appears to be a reference back to S.83(1) which requires the publicising of details "*of the agents relevant fees".* S.85(1) provides the following definition of "*relevant fees":*

    "in relation to a letting agent, means the fees, charges or penalties (however expressed) payable to the agent by a landlord or tenant"

    This definition does not support a construction of S.83(3) that requires separate lists of fees to be published for landlords and agents. Neither the Explanatory Notes nor the Guidance confirm or support such a construction. I can find no reason to conclude that this is necessary to give effect to S.83 as a whole. It is clear that sub-sections 83(3) and 83(4) refer to the range of fees that a letting agent is imposing on customers and that a breach may occur where a website fails to publish any particular fee with the degree of clarity that the Act (properly interpreted taking due account of the Explanatory notes and Guidance) requires. It does not follow that a failure by a letting agent to publicise all or many of the fees that it is then levying on landlords or tenants gives rise to a separate breach in respect of each fee, or that fees for landlords and fees for tenants are two separate categories for this purpose giving rise to two separate breaches if they are not published. I conclude that on a proper construction of S.83 a breach arises under S.83(3) when the letting agent does not publish, in the detail required by S.83(4), a list of all or any fees that it is then charging to landlords or tenants.

21. A breach of the requirements of S.83(3) requirement is treated, for the purposes of S.87, as having occurred in each authority's area in which a dwelling-house to which the fees relate is located (S.87(2)). A breach that occurs in respect of the letting agents' website is a discrete breach, as to which any authority may take enforcement action. Accordingly, the restriction in S.87(6) applies, so that only one penalty may be imposed in respect of the website breach. In the present appeal, there is no evidence or other indication that Alexanders has been required by any authority other than Camden to pay a financial penalty in respect of the failure to publicise fees on their website that was described in the Final Notice served on Alexanders.

H. Decision

22. By virtue of paragraph 5(5) of Schedule 9 to the 2015 Act, the Tribunal may quash, confirm or vary a Final Notice.

23. The parties have agreed that Alexanders were on 15th February 2016 in breach of their obligations under S.83 of the Act to publish a list of fees on its website and to publish a statement of whether it is a member of a client money protection scheme. Having considered the evidence and submissions in this appeal I agree with this conclusion.

24. Camden have imposed a penalty of £200 for the breach of S.83(6) of the Act; the failure to publish on its website a statement of whether it is a member of a client money protection scheme. Alexanders did not seek to suggest an alternative figure. In all of the circumstances of this appeal and having taken account of the penalty being very different to that which the Guidance suggest should be the norm, I see no reason to vary this penalty.

25. It is my conclusion that the Final Notice served on Alexanders contained an error of law insofar as it purported to levy separate penalties for two breaches; one of S.83(3) and another of S.83(4). I find that Alexanders' failure to publish a list of fees payable by landlords and a list of fees published by tenants on 15th February 2016 gives rise to a single breach and not two breaches. Therefore, in accordance with S.87 (6) of the Act only a single penalty may be imposed on Alexanders for this breach.

26. The last issue in this appeal is, therefore, whether, in all the circumstances (including those set out in my conclusions in this Decision), the amount of the penalty for Alexanders' failure to publicise its fees is unreasonable. In deciding that issue, which is left open by the primary legislation, it is necessary to have regard to the Guidance, to which I have earlier made reference. The Guidance says the expectation is a "fine" (i.e. penalty) of £5,000 and that a lower sum should be imposed only if the authority is

satisfied there are "extenuating circumstances". The Guidance does not purport to be exhaustive as to what might constitute extenuating circumstances, saying that "*It will be up to the enforcement authority to decide what such circumstances might be*".

27. In the present case, it does not appear that Alexanders was unaware of the need to take action to publicise its fees. It was made aware of this obligation by Camden in good time and permitted some time to remedy the failings. It was also in a position to contact Camden and discuss its position, but it did not do so. It does not appear to me, having considered the annual turnover and general financial position of Alexanders, that it will be put out of business or seriously affected by a requirement to pay £5,000 in respect of the failure to publicise its fees on its website. The annual profits of Alexanders have been less than £5000 in each of the last four years, however its turnover has been in excess of £450,000 in each of these years, so a penalty of £5000 is not disproportionate to the size of the business. The business has ten staff at present, which indicates that Mr Hague's personal difficulties in dealing with new demands on his time during late 2015 could and should have been overcome by the business being organised in such a way as to spread the responsibility for complying with new legal requirements during this period across other staff members.

28. In all the circumstances, I find that it is reasonable for the financial penalty payable in respect of the failure to publish details on its website of the fees payable by landlord and tenants to be £5,000. The financial penalty of £200 for the failure to publish on its website a statement of whether it is a member of a client money protection scheme remains unchanged.

G. Decision

29. The appeal is allowed. The Final Notice served on Alexanders contained an error of law insofar as it purported to levy separate penalties for two breaches; one of S.83(3) and another of S.83(4). I find that Alexanders' failure to publish a list of fees payable by landlords and a list of fees published by tenants on 15th February 2016 gives rise to a single breach and in accordance with S.87 (6) of the Act only a single penalty may be imposed on Alexanders for this breach. It is reasonable for the financial penalty payable in respect of the failure to publish details on its website of the fees payable by landlord and tenants to be £5,000 and for the financial penalty for the failure to publish on its website a statement of whether it is a member of a client money protection scheme to remain unchanged at £200.

Peter Hinchliffe
Tribunal Judge
1 November 2016

ANNEX A

The Consumer Rights Act 2015 imposes a requirement on all letting agents in England and Wales to publicise details of their relevant fees. This is achieved by sections 83 to 86:-

A. Duty of Letting Agents to Publicise Fees

"**CONSUMER RIGHTS ACT 2015**

Chapter 3

Duty of Letting Agents to Publicise Fees etc

83 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 of 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.

(8) The appropriate national authority may by regulations specify--

(a) other ways in which a letting agent must publicise details of the relevant fees charged by the agent or (where applicable) a statement within subsection (6) or (7);

(b) the details that must be given of fees publicised in that way.

(9) In this section--

"client money protection scheme" means a scheme which enables a person on whose behalf a letting agent holds money to be compensated if all or part of that money is not repaid to that person in circumstances where the scheme applies;

"redress scheme" means a redress scheme for which provision is made by order under section 83 or 84 of the Enterprise and Regulatory Reform Act 2013.

84 Letting agents to which the duty applies

(1) In this Chapter "letting agent" means a person who engages in letting agency work (whether or not that person engages in other work).

(2) A person is not a letting agent for the purposes of this Chapter if the person engages in letting agency work in the course of that person's employment under a contract of employment.

(3) A person is not a letting agent for the purposes of this Chapter if--

(a) the person is of a description specified in regulations made by the appropriate national authority;

(b) the person engages in work of a description specified in regulations made by the appropriate national authority.

85 Fees to which the duty applies

(1) In this Chapter "relevant fees", in relation to a letting agent, means the fees, charges or penalties (however expressed) payable to the agent by a landlord or tenant--

(a) in respect of letting agency work carried on by the agent,

(b) in respect of property management work carried on by the agent, or

(c) otherwise in connection with--

(i) an assured tenancy of a dwelling-house, or

(ii) a dwelling-house that is, has been or is proposed to be let under an assured tenancy.

(2) Subsection (1) does not apply to--

(a) the rent payable to a landlord under a tenancy,

(b) any fees, charges or penalties which the letting agent receives from a landlord under a tenancy on behalf of another person,

(c) a tenancy deposit within the meaning of section 212(8) of the Housing Act 2004, or

(d) any fees, charges or penalties of a description specified in regulations made by the appropriate national authority.

86 Letting agency work and property management work

(1) In this Chapter "letting agency work" means things done by a person in the course of a business in response to instructions received from--

(a) a person ("a prospective landlord") seeking to find another person wishing to rent a dwelling-house under an assured tenancy and, having found such a person, to grant such a tenancy, or

(b) a person ("a prospective tenant") seeking to find a dwelling-house to rent under an assured tenancy and, having found such a dwelling-house, to obtain such a tenancy of it.

(2) But "letting agency work" does not include any of the following things when done by a person who does nothing else within subsection (1)--

(a) publishing advertisements or disseminating information;

(b) providing a means by which a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or a prospective landlord;

(c) providing a means by which a prospective landlord and a prospective tenant can communicate directly with each other.

(3) "Letting agency work" also does not include things done by a local authority.

(4) In this Chapter "property management work", in relation to a letting agent, means things done by the agent in the course of a business in response to instructions received from another person where--

(a) that person wishes the agent to arrange services, repairs, maintenance, improvements or insurance in respect of, or to deal with any other aspect of the management of, premises on the person's behalf, and

(b) the premises consist of a dwelling-house let under an assured tenancy."

B. Enforcement

Section 87 explains how the duty to publicise fees is to be enforced:-

"**87 Enforcement of the duty**

(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) A local weights and measures authority in England and Wales may impose a penalty under this section in respect of a breach which occurs in England and Wales but outside that authority's area (as well as in respect of a breach which occurs within that area).

(5) But a local weights and measures authority in England and Wales may impose a penalty in respect of a breach which occurs outside its area and in

the area of a local weights and measures authority in Wales only if it has obtained the consent of that authority.

(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.

(8) Schedule 9 (procedure for and appeals against financial penalties) has effect.

(9) A local weights and measures authority in England must have regard to any guidance issued by the Secretary of State about--

(a) compliance by letting agents with duties imposed by or under section 83;

(b) the exercise of its functions under this section or Schedule 9.

(10) A local weights and measures authority in Wales must have regard to any guidance issued by the Welsh Ministers about--

(a) compliance by letting agents with duties imposed by or under section 83;

(b) the exercise of its functions under this section or Schedule 9.

(11) The Secretary of State may by regulations made by statutory instrument--

(a) amend any of the provisions of this section or Schedule 9 in their application in relation to local weights and measures authorities in England;

(b) make consequential amendments to Schedule 5 in its application in relation to such authorities.

(12) The Welsh Ministers may by regulations made by statutory instrument--

(a) amend any of the provisions of this section or Schedule 9 in their application in relation to local weights and measures authorities in Wales;

(b) make consequential amendments to Schedule 5 in its application in relation to such authorities."

C. Financial penalties

3. The system of financial penalties for breaches of section 83 is set out in Schedule 9 to the 2015 Act:-

"**SCHEDULE 9**

DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

Section 87

Final Notice of intent

1

(1) Before imposing a financial penalty on a letting agent for a breach of a duty imposed by or under section 83, a local weights and measures authority must serve a Final Notice on the agent of its proposal to do so (a "Final Notice of intent").

(2) The Final Notice of intent must be served before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the agent's breach, subject to sub-paragraph (3).

(3) If the agent is in breach of the duty on that day, and the breach continues beyond the end of that day, the Final Notice of intent may be served--

(a) at any time when the breach is continuing, or

(b) within the period of 6 months beginning with the last day on which the breach occurs.

(4) The Final Notice of intent must set out--

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the penalty, and

(c) information about the right to make representations under paragraph 2.

Right to make representations

2

The letting agent may, within the period of 28 days beginning with the day after that on which the Final Notice of intent was sent, make written representations to the local weights and measures authority about the proposal to impose a financial penalty on the agent.

Final Notice

3

(1) After the end of the period mentioned in paragraph 2 the local weights and measures authority must--

(a) decide whether to impose a financial penalty on the letting agent, and

(b) if it decides to do so, decide the amount of the penalty.

(2) If the authority decides to impose a financial penalty on the agent, it must serve a Final Notice on the agent (a "Final Notice") imposing that penalty.

(3) The Final Notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the Final Notice was sent.

(4) The Final Notice must set out--

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the Final Notice.

Withdrawal or amendment of Final Notice

4

(1) A local weights and measures authority may at any time--

(a) withdraw a Final Notice of intent or Final Notice, or

(b) reduce the amount specified in a Final Notice of intent or Final Notice.

(2) The power in sub-paragraph (1) is to be exercised by giving Final Notice in writing to the letting agent on whom the Final Notice was served.

D. Appeals

4. Finally, Schedule 9 provides for appeals, as follows.

Appeals

5

(1) A letting agent on whom a Final Notice is served may appeal against that Final Notice to--

(a) the First-tier Tribunal, in the case of a Final Notice served by a local weights and measures authority in England, or

(b) the residential property tribunal, in the case of a Final Notice served by a local weights and measures authority in Wales.

(2) The grounds for an appeal under this paragraph are that--

(a) the decision to impose a 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.

(3) An appeal under this paragraph to the residential property tribunal must be brought within the period of 28 days beginning with the day after that on which the Final Notice was sent.

(4) If a letting agent appeals under this paragraph, the Final Notice is suspended until the appeal is finally determined or withdrawn.

(5) On an appeal under this paragraph the First-tier Tribunal or (as the case may be) the residential property tribunal may quash, confirm or vary the Final Notice.

(6) The Final Notice may not be varied under sub-paragraph (5) so as to make it impose a financial penalty of more than £5,000.

ANNEX B

Explanatory Notes and Guidance

A. In the present appeal, the parties made reference to the Explanatory Notes published in respect of the Consumer Rights Bill (which became the 2015 Act) and the Guidance for Local Authorities issued by the Department for Communities and Local Government, during the passage of the Bill, concerning the duty to publicise fees

B. Paragraphs 456 to 459 of the Explanatory Notes read as follows:-

> "456. This section imposes a duty on letting agents to publicise 'relevant fees' (see commentary on section 85) and sets out how they must do this.
>
> 457. Subsection (2) requires agents to display a list of their fees at each of their premises where they deal face to face with customers and subsection (3) requires them to also publish a list of their fees on their website where they have a website.
>
> 458. Subsection (4) sets out what must be included in the list as follows. Subsection (4)(a) requires the fees to be described in such a way that a person who may have to pay the fee can understand what service or cost is covered by the fee or the reason why the fee is being imposed. For example, it will not be sufficient to call something an 'administration fee' without further describing what administrative costs or services that fee covers.
>
> 459. Subsection (4)(b) requires that where fees are charged to tenants this should make clear whether the fee relates to each tenant under a tenancy or to the property. Finally, subsection (4)(c) requires the list to include the amount of each fee inclusive of tax, or, where the amount of the fee cannot be determined in advance a description of how that fee will be calculated. An example might be where a letting agent charges a landlord based on a percentage of rent."

C. So far as enforcement of the duty is concerned, the Explanatory Notes state:-

> "477. Subsection (4) [of section 87] provides that while it is the duty of local weights and measures authorities to enforce the requirement in their area, they may also impose a penalty in respect of a breach which occurs in England and Wales but outside that authority's area. However, subsection (6) ensures that an agent may only be fined once in respect of the same breach".

D. Other passages of the Departmental Guidance are as follows:-

> "**Which fees must be displayed**
>
> All fees, charges or penalties (however expressed) which are payable to the agent by a landlord or tenant in respect of letting agency work and property management work carried out by the agent in connection with an assured

tenancy. This includes fees, charges or penalties in connection with an assured tenancy of a property or a property that is, has been or is proposed to be let under an assured tenancy. …

The only exemptions are listed below. The requirement is therefore for a comprehensive list of everything that a landlord or a tenant would be asked to pay by the letting agent at any time before, during or after a tenancy. As a result of the legislation there should be no surprises, a landlord and tenant will know or be able to calculate exactly what they will be charged and when.

… … … … …

How the fees should be displayed

The list of fees must be comprehensive and clearly defined; there is no scope for surcharges or hidden fees. Ill-defined terms such as administration cost must not be used. All costs must include tax.

Examples of this could include individual costs for:

- marketing the property;
- conducting viewings for a landlord;
- conduct tenant checks and credit references;
- drawing up a tenancy agreement; and
- preparing a property inventory.

It should be clear whether a charge relates to each dwelling-unit or each tenant".

Penalty for breach of duty to publicise fees

The enforcement authority can impose affine of up to £5000 where it is satisfied, on the balance of probability that someone is engaged in letting work and is required to publish their fees and other details, but has not done so.

The expectation is that a £5000 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 will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the lettings agency makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; alternatively and authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue that should be considered is whether a £5000 fine is disproportionate to the turnover / scale of the business or would lead to an organisation going out of business.

Primary Authority Advice

E. Under the Regulatory Enforcement and Sanctions Act 2008, eligible businesses can form partnerships with a local authority in relation to regulatory compliance. The local authority is known as the "primary authority".

F. Pursuant to the 2008 Act, a primary authority partnership exists between Warwickshire County Council Trading Standards, the National Federation of Property Professionals and the Property Ombudsman. In November 2015, Warwickshire Trading Standards issued "Primary Authority Advice" in relation to the question: *"is it misleading for a letting agent not to display tenant and landlord fees in their offices?"*

G. This Advice includes the following:-

> "**Assured Advice Issued:**
>
> Section 83 of the CRA requires letting agents to display their fees for tenants and landlords.
>
> These must be displayed at each of the agent's premises where people using or likely to use the agent's services are seen face-to-face. The fees must be displayed in a place where such people are likely to see them. People should not need to ask to see the fees as the list should be clearly on view.
>
> The fees must also be published on the agent's website, if there is one.
>
> It is considered good practice for agents to check that customers have seen the fees price lists before they enter into any agreements or contracts.
>
> The list of fees must include a description of each fee that enables people to understand what it relates to and how much it will be. In relation to fees payable by tenants, it should be clear whether each fee is per property or per tenant. Fees should be inclusive of VAT and any other taxes. …
>
> The list must be clear and comprehensive. Surcharges, hidden fees or vague expressions like 'admin fee' are not permitted".