First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2016/0024

Heard at Fox Court
on 28 November 2016

Before

JUDGE CLAIRE TAYLOR

Between

EDWARD CLARK ESTATES LIMITED

Appellant

and

THURROCK COUNCIL

Respondent

Representation

For the Appellant: Mr Clark North
For the Respondent: Mr Adam Rulewski

Decision

I find in favour of the Respondent such that the appeal is dismissed.

DECISION AND REASONS

1. This is an appeal by Edward Clark Estates Limited ('Edward Clark') against a penalty charge of £3,250 issued by Thurrock Council ('the Council') related to failure to publicise details of fees in its premises and on its website in accordance with the legislation set out below.

A. The Law: The requirement for letting agents to publicise details of fees

2. The Consumer Rights Act 2015 (the 'Act') 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, as follows:

"**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."

Enforcement

3. 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 n-
(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." (Emphasis Added).

Financial penalties

4. The system of financial penalties for breaches of section 83 is set out in Schedule 9 of the Act:

"**SCHEDULE 9**

DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

Section 87

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 notice on the agent of its proposal to do so (a "notice of intent").*

(2) The 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 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 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 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 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 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 notice.

Withdrawal or amendment of notice

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

(a) withdraw a notice of intent or final notice, or
(b) reduce the amount specified in a notice of intent or final notice.

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

Appeals

5. 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 notice to-*

(a) the First-tier Tribunal, in the case of a notice served by a local weights and measures authority in England, or
(b) the residential property tribunal, in the case of a 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."

Guidance

6. The Guidance for Local Authorities issued by the Department for Communities and Local Government (known as 'statutory guidance' and referred to below as the 'Guidance'), during the passage of the Bill, concerning the duty to publicise fees includes the following at Annex D:

a. *"**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."

(Page 56 of the Guidance)

b. ***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". (Page 57 of the Guidance).

c. Penalty for breach of duty to publicise fees

"The expectation is 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 will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the lettings agent 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 an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue which could be considered is whether a £5,000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business". *(Page 60 of the Guidance).*

B. Background

7. On 6 May 2016, the Council sent Edward Clark a detailed letter explaining its concern that the company was not complying with its duties to publicise its fees in accordance with the relevant legislation. It made clear that a fine of £5,000 could be imposed for non-compliance.

8. On 26 May, an officer of the Council inspected the premises.

9. On 8 June 2016, the Council served on the Appellant a 'notice of intent' by hand. On 21 June 2016, the Appellant responded to this with representations.

10. On 12 July 2016, an officer of the Council issued a 'final notice', stating:

> "*On 23/05/2016 I visited your website, namely www.edwardclark.co.uk and found that you had failed to comply with the following requirements within Section 83 of the Consumer Rights Act 2015:*
> - *Publish details of the fees payable by tenants / landlords*
> - *Publish a statement regarding client money protection*
>
> *On 26/05/2016 I visited your premises at 36 Orsett Road. Grays. RM17 5EB. and found that you had failed to comply with the following requirements within Section 83 of the Consumer Rights Act 2015:*
> - *Publish details of the fees payable by tenants / landlords*
>
> *On 08/06/2016 Thurrock Council issued you with a Notice of Intent to impose a financial penalty and provided details of the breach.*
>
> *I am now issuing you with a Final Notice imposing the following financial penalty:*
>
> - *£1,500 for failing to publish details of the fees payable by tenants / landlords on your website*
> - *£250 for failing to publish a statement regarding client money protection on your website*
> - *£1,500 for failing to publish details of the fees payable by tenants / landlords at your premises*
>
> *The total penalty amounts to **£3,250**.*
> *The Final Notice is being issued for the following reason(s):*
>
> *a) After considering your representations, the Council has decided to confirm the financial penalty. We are of the opinion that as a professional lettings and property management business, you should have been aware of your legal obligations and complied with these requirements. We are also of the opinion that you have not satisfied any of the appeal grounds listed in the Act. We note that a member of staff was on annual leave, however the business is responsible for ensuring that letters are opened and dealt with promptly. The amount of the penalty has already been reduced from £5,000 to reflect the size of your business and other relevant factors.*"

C. The Appeal

11. Edward Clark now appeals the Council's decision. It is accepted by the Appellant that it had failed to comply with the legislation set out above. Therefore, there was a legal basis for the Council to impose a financial penalty on Edward Clark. The issues before me are whether, in all circumstances (as found by me), the amount of the

penalty was unreasonable or the decision to fine Edward Clark was unreasonable for any other reason.[1] On making a finding, I may quash, confirm or vary the final notice.[2]

12. The hearing of the appeal took place on 29 November 2016. I heard from both parties and I am grateful for their elucidation of the issues. I also heard briefly from the officer who had visited the Appellant as to how the decision as to the amount of the penalty was arrived at and considered. In reaching a decision in this case, I have had regard to those oral submissions, the written submissions, evidence and the documents contained in the hearing bundle.

13. Edward Clark's arguments, as expounded upon at the hearing, are summarised below. (For ease of reference, I have grouped them into Grounds A, B and C.)

    a. Ground A: There were reasons for not having complied with the legislation earlier.

        i. As had been explained to the Council, its letter of 6 May had not been addressed directly to the director (Mr Clark North), but rather to the Branch/Lettings Manager. That member of staff was on leave at the time. The company receives a lot of 'spam' mailshots and something of the importance of this letter should have been addressed to the director. Although the letter had been shown to be signed for by 'Clarke', it was not the director's signature and he had never received the letter.
        ii. The Appellant had always displayed and notified tenants of its fees. It had not been aware that this was insufficient until the Council's visit.
        iii. As regards the website, the company had displayed its membership as of 'Safe Agent'/NALS which automatically enrols it for client money protection, it was unaware this was to be displayed on the website.

    b. Ground B: The matter had been rectified immediately within 14 days.

        i. During the Council's visit, the officer issued the Appellant with instructions for compliance and a time frame of 14 days, which was adhered to. Therefore the penalty seemed high.

    c. **Ground C: Size of Business**

        i. It was an independent small business and the fee should be reduced to reflect the size of the business.

14. The Council argued that the penalty sum of £3,250 was reasonable and that the Appellant had not satisfied any of the appeal grounds listed in paragraph 5(2) of Schedule 9 of the Act. Its response to the Edward Clark's arguments included the following:

    Ground A

    a. The Appellant should have complied with the requirements of section 83 following its implementation on 27 May 2015. The Tribunal had stated in the appeal of *ETB Property Services Limited v London Borough of Islington (PR/2015/0004)* that there is no legal requirement for local authorities to write

[1] See paragraph 5(2) of Schedule 9 to the 2015 Act.
[2] See paragraph 5(5) of Schedule 9 to the 2015 Act.

to letting agents regarding changes in legislation where professionals, can be expected to be aware of the law, directly impacting upon their business.

b. Further, as a member of both the National Approved Letting Scheme (NALS) and The Property Ombudsman (TPO), the Appellant had access to information about changes in legislation. NALS sent two emails to the company regarding the legislative changes on 14 May 2014 and 1st April 2015.

c. In any event, the Council sent a letter on 6 May 2016 by recorded delivery, addressed to "Branch/Lettings Manager". It was received on 7 May 2016 signed for by "Clarke". Where staff were away from the business, the Appellant should have procedures for ensuring that letters are opened and dealt with promptly.

d. Between 7 May and the inspection of 26 May, the Appellant had ample opportunity to read the letter and make any necessary changes.

e. It is acknowledged that the Appellant had been providing fee information, at the time of the inspection, both the Appellant's premises and website were both non-compliant with the relevant requirements of the Act.

Ground B

f. The issuing of an infringement notice at the time of the Council's visit (advising and instructing the company to rectify non-compliances within 14 days) was not an indication that enforcement action would not be taken. At the end of his inspection, the company was advised that they would receive a decision whether to issue a financial penalty. A notice of intent was served by hand on 8th June 2016. On that day, Mr North of the Appellant called the Council stating that they were still working to rectify the non-compliances. At the hearing, the Council confirmed that they did not dispute the non-compliances had been rectified within for the purposes of the penalty.

g. Further, the Council stated in submissions that they were not satisfied that the Appellant's measures fully complied with section 85 of the Act so as to display fees payable by a landlord.

Ground C

h. In accordance with the witness evidence from the officer (as clarified at the hearing), in reaching its decision regarding the amount of the penalty, the Council had taken into account:
    i. The number of non-compliances identified under Section 83;
    ii. The size of the business;
    iii. The business should have been aware of, and complied with, their obligations as a professional letting agent (professional diligence);
    iv. The business was a member of the National Approved Letting Scheme and The Property Ombudsman so had access to information about legislation;
    v. A letter had been sent to the business which had not been opened and actioned;
    vi. None of the appeal grounds specified in Schedule 9 of the Act could be satisfied;

vii. The financial penalty had already been reduced from £5,000; No evidence of financial hardship had been provided.

i. The Council had taken into account the points raised by the company in its email of 26 June. It nonetheless considered the penalty of £3,250 to be reasonable taking into account all relevant circumstances. As regards the scale of the business, the Appellant had not submitted any evidence, to show that a financial penalty of £3,250 would cause financial hardship or lead to the company going out of business.

j. Prior to issuing the Final Notice, the Council had assessed the size of the business compared to other letting agents in Thurrock and found that the Appellant appeared to be one of the largest in the borough. It had considered the section of the Guidance (set out in sub-paragraph 6c above).

k. During the inspection, Mr North informed the Council that the company offered sales, lettings and property management services and employed 4 members of staff. According to the 'Rightmove' website, the Appellant currently had 15 rental properties, 46 sale properties and had successfully rented 50 properties in the last 6 months.

D. Findings

15. In deciding if the amount of the penalty or decision to award a penalty is unreasonable, it is necessary to have regard to the Guidance, to which I have earlier made reference. This says that the expectation is a "fine" (ie penalty) of £5,000 is the norm 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. It states that "*It will be up to the enforcement authority to decide what such circumstances might be*".

16. In this case, the Council considered the nature of the specific breaches and arrived at a figure of £3,250 when issuing its notice of intent. I am satisfied from what was stated that the Council subsequently considered the representations made by the Appellant but decided they had insufficient weight to reduce the fine further for the reasons summarised in paragraph 14 above.

17. Dealing with Edward Clark's points:

a. The director of the Appellant states that as soon as it was notified (during the Council's visit) of breaches to legislation it rectified them. He also states that he had not read the letter of 6 May. The implication is that had the letter been addressed to the director he would have acted upon it and complied at an earlier stage.

b. I find that it is highly probable that the letter arrived at the Appellant such that, on the balance of probability, it did so. There should clearly have been systems in place to ensure it was read and actioned upon. Where the branch manager was on holiday, there should have been a mechanism for reading her post within a reasonable time period. The Council could not have known the particular workings of the company and a letter address to a 'branch manager' and sent by recorded delivery requiring signature could reasonably have been

expected to reach the relevant person and should not have been be mistaken for ‘spam’ mail.

c. Therefore, in my view, the Council went to extensive and impressive efforts to notify and advise the Appellant of its obligations and the potential for a fine. (The example fee of a fees schedules starting at page 48 of the bundle and attached to the letter of 6 May was particularly helpful). In fact, the director of the company graciously stated he had wanted guidance and help from the Council and feels that he got it during the officer’s visit.

d. In view of this letter, the information provided by NALS, the length of time the legal requirements had been in place and the basic obligations of professionals to know those legal requirements relevant to their business, I do not accept that there were reasons for not having complied with the legislation earlier so as to justify the penalty to be reduced below £3,250.

e. Whilst I accept that the Appellant had previously been providing fee information, it was not complying with the relevant requirements of the Act.

f. As regards the Council statements as to whether the Appellant’s amendments made after the visit fully comply with s.85 of the Act by displaying all fees payable by a landlord, it is not necessary for me to make a finding on this point. This is because the Council explained at the hearing that it had not been factored in when considering the penalty amount and I have no reason not to accept this.

g. As regards the Edward Clark having complied with the requirements within a short time after the officer’s visit, I do not think that this makes the penalty unreasonable. This is because the legal requirements had been in place for a some time, and the Council had previously made efforts to notify the Appellant of its obligations as had NALS such that the company should have made the necessary adjustments at some point prior to the officer making an onsite visit.

h. Mr Clark North explained that the company does well at what it did and was not providing the company accounts so as to support the contention that the fine was unreasonable in view of the size of the business. On that basis, I have no reason not to accept the Council’s arguments in sub-paragraph 14 (j) and (k) above and so I reject the Appellant’s contention.

i. I would note that Mr Clark North made the point that the NALS logo did appear on the company’s website. He explained that membership of NALS automatically meant it was enrolled as members of a client money protection scheme. However, the Act requires the website to contain a “statement of whether the agent is a member of a client money protection scheme”. I do not find that the presence of logo constituted a statement and or that a prospective tenant or landlord would have understood from the presence of the logo that the Appellant was a member of a client money protection scheme. Further, I take into account that the Council fined the Appellant £250 in relation to this breach which does not seem to me to be an excessive amount, within the overall context of a total fine of £3,250.

18. In short, I do not consider that the Appellant has made any arguments (whether cumulatively or individually) that justify lowering the fine below £3,250 where we are guided that in any event the fine of £5,000 is to be considered the norm. Accordingly, I

find that the fine was not unreasonable within the ordinary meaning of the word ‘unreasonable’. Further, I have seen no credible reason why the decision to fine was unreasonable.

19. In view of the above, the appeal is dismissed.

Judge Claire Taylor
5 December 2016