



**First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation**

Appeal Reference: PR/2016/0037

**Heard at Fleetbank House, London
on 20th March 2017**

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

FLAVIO COSTA PROPERTIES LIMITED

Appellant

and

LONDON BOROUGH OF NEWHAM

Respondent

DECISION AND REASONS

A. Background

1. Flavio Costa Properties Limited ("Costa Properties") appealed against three Final Notices served on it by the Council of the London Borough of Newham ("Newham"), which is the local weights and measures authority for the geographical area

comprising the Borough of Newham. The Final Notices refer to the office of Costa Properties located at 439a High Street North, London E12 6TJ, which is within the Borough of Newham. Each of the Final Notices was dated 28th September 2016 and each imposed a penalty of £5,000 on Costa Properties for breaches of their obligations to make information available to customers.

2. Final Notice reference FLP/MHM/Redress/FLA (the "Redress Final Notice") set out details of the alleged breach by Costa Properties of the "*duty to belong to an approved redress scheme*" under regulation 3 of The Redress Schemes for Letting Agency Work and Property Management Work (Requirements to Belong to a Scheme etc) (England) Order 2014. Costa Properties appealed against this Final Notice on the basis that they had been a member of the Property Redress Scheme since 10th May 2016. On 28th November 2016 Newham notified Costa Properties that the Redress Final Notice had been withdrawn and as a consequence no financial penalty had to be paid.
3. Final Notice reference FLP/MHM/Fees1/M20a (the "Fees Final Notice") set out details of the alleged failure by Costa Properties of the obligation to display their fee structure for tenants and landlords as required by section 83 of the Consumer Rights Act 2015 (the "Act"). The Fees Final Notice included a declaration by an authorised officer of Newham summarising the basis for the notice in the following terms:

"On the 21/07/2016 I visited the offices of Flavio Costa Property Limited and I found that the company had failed to comply with the requirements of Section 83 Consumer Rights Act 2015 there was no fee structure as requested for tenants or landlords. This contravenes Section 83(4). The office was closed at the time however there was no visible fee structure. I posted a non-compliance notice to the company.

On the 22/8/2016 I revisited the company at 439a High Street North and found that their fee structure wasn't displayed. This time I left the non-compliance notice with a member of staff.

On the 24/08/2016 I visited the offices of Flavio Costa Property Limited E12 6TJ and found that the company had failed to comply with the requirements of Section 83 Consumer Rights Act 2015 as there was no fee structure outlaying the fees and charges to tenants or landlords which contravenes Section 83(4). "

On the third visit, on 24th August 2016, the authorised officer left a notice of intent setting out the facts set out above and giving Costa Properties 28 days in which to make written representations and objections to the proposed imposition of a monetary penalty. When no representations were received in response to the notice of intent, the Fees Final Notice was issued.

4. Final Notice reference FLP/MHM/Fees1/M18a (the "Client Money Final Notice") set out details of the alleged breach by Costa Properties of section 83(6) of the Consumer Rights Act 2015 (the "Act"). The Fees Final Notice included a declaration by the same authorised officer describing the same three visits to the office of Costa Properties and stating that on each occasions Costa Properties were failing "*to display whether or not they are a member of a client money protection scheme*". On the third visit, on 24th August 2016, the authorised officer left a notice of intent giving Costa Properties 28 days in which to make written representations and objections to the proposed

imposition of a monetary penalty. When no representations were received in response to the notice of intent, the Client Money Final Notice was issued.

B. Legislation

5. 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

6. 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 Guidance under S.87(9) of the Act. The sections of the Guidance that are of greatest relevance to this appeal are set out below in Annex B to this decision.

D. The Appeals

7. In its grounds of appeal against the Fees Final Notice and the Client Money Final Notice, Costa Properties explained in both cases that Mr Costa, the owner and sole employee of Costa Properties, had not seen the Non-compliance Notice issued on 21st July 2016 and that the Non-compliance Notice delivered on 22nd August had stated they would have a visit again after a ten day period. When Mr Costa saw this notice he had asked Charlene Bao to come in and assist the business to meet its obligations in respect of displaying all fees and information to tenants. They had attempted to contact the officer of Newham who had issued the Final Notices in order to "*to get an explanation of how to resolve the notice*", but the officer was not available. The grounds of appeal went on to state that despite this a document displaying all fees to tenants was created and has been displayed since. They had also sought to update their online postings but they had been unable to do so due to an error which led to their on-line account being suspended.
8. The hearing of the appeal took place on 20th March 2017. Prior to the hearing a bundle of relevant documentation was prepared by Newham, which included copies of the notices Newham sent to Costa Properties. Newham provided a witness statement from the authorised officer who issued the notices, including the Final Notices. On the day of the hearing Costa Properties produced a copy of the Non-compliance Notice dated 22nd August.
9. It was common ground between the parties at the hearing that Costa Properties were and remain letting agents as defined in the Act and that it did not have website at the relevant time on which the relevant information of fees and client money protection had to be displayed.
10. At the hearing Mr Costa represented Costa Properties and was assisted by Ms Bao as Mr Costa said that he was concerned about his command of English. Mr Costa was

questioned about his understanding of English and he indicated that he was comfortable in understanding the proceedings, but welcomed some assistance or reassurance when speaking. The Tribunal found that Mr Costa was able to follow and participate in the proceedings and that Ms Bao provided useful assistance and reassurance to him.

11. Mr Costa explained on behalf of Costa Properties that he had not been aware of the obligation to display or publish their fees to clients and to provide a statement of whether they were a member of a client money protection scheme. However, when he received the Non-compliance Notice on 22nd August 2016 he had taken steps as soon as he could. He pointed to the copy of the Non-compliance Notice that he had received and how it differed from the copy retained by Newham. In the copy retained by Newham a line had been added in ink through the figure of "10" included in square brackets in the pre-printed sentence saying that they would be visited again in "10" days. In the copy that Costa Properties received the ink line had missed the "10" and was marked close by. He had read the notice and assumed that they had time to remedy the position. He had immediately contacted Ms Bao for assistance and had paid her to help do what was required. They had produced a list of fees to tenants and displayed it on the wall of the office by his desk. This list included a statement that Costa Properties was not currently a member of a client protection scheme. Mr Costa explained that Costa Properties did not make representations when invited to do so in the notice of intent as they had never seen the notice of intent, which Newham state was delivered by hand to the premises that Costa Properties share.
12. Mr Thompson represented Newham and stated that Costa Properties should have been aware that they were under an obligation under S.83 of the Act to ensure that they displayed at their premises a list of the fees that they charged clients of the letting agency business and also a statement of whether they were a member of a client money protection scheme. They had failed to fulfil either of these obligations. The legal obligation to comply with the legislation was not dependant on the letting agency being given notice or a warning. He referred to the tribunal decision in ETB Property Services v London Borough of Islington ref PR/2015/0004 as authority for this argument. Newham took the view that they had delivered or posted all of the notices to Costa Properties at their registered office so they had done what they could to contact them and they could not be responsible if letters left at their premises were not received by Mr Costa. Mr Thompson didn't accept that the list of fees prepared by Costa Properties after the Final Notice was adequate or that it had been displayed where customers could see it. However, he did accept that the statement in the list of fees prepared by Costa Properties that they were not a member of a Client Protection Scheme was sufficient to fulfil the legal requirement on this point.

E. Submissions on penalty

13. On behalf of Newham it was pointed out that the Guidance that deals with penalty for breach of the duty to publicise fees (set out in Annex B) states that a £5000 fine should be considered the norm unless there were extenuating circumstances.

Newham asserted that no extenuating circumstances had been suggested by Costa Properties. Mr Thompson stated that the penalty of £5,000 is appropriate. However, Mr Thompson went on to say that Newham were now aware of earlier decisions of this tribunal that suggested that the failure of a letting agency to display fees and the failure to clearly display whether or not a letting agency was a member of a client protection scheme amounted to a single breach of the Act in respect of which a single fine of £5,000 was the maximum. When questioned further, Mr Thompson accepted on behalf of Newham that in this case Costa Properties should face a maximum liability of £5,000 in respect of both the Fees Final Notice and The Client Money Final Notice. He suggested that the tribunal might wish to dismiss the Client Money Final Notice or to apportion the total penalty amount of £5,000 across both the Fees Final Notice and The Client Money Final Notice.

14. Mr Costa explained that Costa Properties could not afford to pay £5,000. The business had started in April 2015. It provided cleaning and building work as well as letting agency work. The website promoted the cleaning and construction work but not the letting work, this was undertaken through the office only. The website was not complete as they did not have the money to achieve this. Mr Costa referred to the accounts of Costa Properties and he was asked if he had these with him. A copy of the accounts to 30 April 2016 was produced by Mr Costa and copies were made and given to Newham and to the tribunal at the end of the hearing. These show that the company was formed on 9th April 2015 and started its operations on 1st December 2015. The turnover for the period to 30 April 2016 was £8,350 and the profits were £548. The accounts did not show any expense for payments to employees, directors or shareholders. Mr Costa said that business in the current year was very low, but he could not say what the revenue would be. He provided no other information on the current profitability or resources of Costa Properties.

G. Findings

15. In reaching a decision in this case I have had regard to all of the oral submissions at the hearing and also to the written submissions, evidence and other documentation contained in the hearing bundle and provided at the hearing. The Fees Final Notice identified a failure by Costa Properties to display at their premises a list of the fees that they charged clients of the letting agency business as required by S.83(2) and S.83(4) of the Act. S.83(2) specifically requires a letting agent to;

"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.

The reference to "*the fees*" appears to be a reference back to S.83(1) which requires the publicising of details "*of the agent's 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"

Costa Properties admit that they were not aware of this obligation until the Non-compliance Notice was received on 22nd August 2016 and had not complied with it prior to then

16. In the Client Money Final Notice, Newham have identified a failure by Costa Properties to meet its obligations under s.83(6) of the Act to;

"display or publish, with the list of fees a statement of whether the agent is a member of a client money protection scheme".

Costa Properties admit that they were not aware of this obligation until the Non-compliance Notice was received on 22nd August 2016 and had not complied with it prior to then.

17. There is no requirement or expectation that enforcement authorities must publicise or take active steps to ensure that letting agents are aware of the coming into force of legislation that creates an obligation on them before taking any action to enforce those obligations. As Costa Properties were and are carrying on business as letting agents, it is their responsibility to ensure that they are aware of the regulatory and legal requirements affecting letting agents and that they comply with any change in these requirements. In this instance Newham did take steps to alert Costa Properties to its obligations and provided two Non-compliance Notices that were intended to permit Costa Properties to take remedial action and a notice of intent that permitted Costa Properties to respond to the allegations that they contained. Newham delivered or posted the notices to the registered office of Costa Properties and it is the responsibility of the business to ensure that correspondence received at its registered office finds its way to the right person. I accept Mr Costa's account of the practical difficulties that he has arising out of the fact that Costa Properties shares its premises with two other businesses and that he is not in the office much of the time. I also accept that he did not see all of the notices when they were first delivered and that the Non-compliance Notice of 22 August was open to misunderstanding as it could be read as implying a further visit would take place. The evidence also suggests that Costa Properties acted promptly when it was alerted to the obligations that it had to meet. However, these factors do not affect the finding that Newham did not need to give notice to Costa Properties of its obligations under the Act or of its intention to take action for breach of the obligations and that having chosen to do so, Newham made every reasonable effort to provide the notices to Costa Properties.

18. It is not clear that the actions that Costa took after 22nd August were sufficient to cause it to satisfy its obligation under s.83 of the Act to display a sufficiently detailed list of fees in a sufficiently prominent position in their premises. The document produced by Costa Properties, which they state was displayed in their premises in order to meet their obligations is a brief document with four sections. The heading, which contains a spelling error, is "FEES TO: TENTANTS". The document appears to only provide for one fee, which is payable by a tenant and is called a "2 Weeks Agency Fee" and described as a fixed cost fee without a number being provided. The parties disputed whether the document was displayed in a place where it was likely to be seen by clients. It is not necessary to finally determine whether Costa adequately displayed its fees after 24th August in order to decide the outcome of these proceedings as the Final Notices outline a breach of the Act during the period up to 24th August 2016 and Costa accepts that they had not met their obligation during this period.
19. I conclude that during the period from the commencement of Costa Properties letting agency business to at least 24th August 2016, Costa Properties were in breach of their obligations under S.83 of the Act to display at their premises a list of the fees that they charged clients of the letting agency business and a statement of whether they were a member of a client money protection scheme. It is accepted by Newham, and I find that it is the case, that only one penalty may be levied in respect of these breaches of Costa Properties obligations under s.83 of the Act. I find that it is appropriate, having regard to the overriding objective of this tribunal to deal with cases fairly and justly, to regard the Fees Final Notices and the Client Money Final Notice as constituting a single Final Notice that was delivered at the same time in two documents. In reaching this decision I have had regard to the legal and procedural effect of the two documents that were delivered simultaneously. This Final Notice set out on 28th September 2016 the information required to permit Costa Properties to understand that they had failed to comply with their obligations under S.83 of the Act to display at their premises a list of the fees that they charged clients of the letting agency business and also a statement of whether they were a member of a client money protection scheme..
20. The last issue in this appeal is, therefore, whether, in all the circumstances the amount of the penalty for Costa Properties' breach of their obligations under S.83 is unreasonable. In deciding that issue, which is left open by the primary legislation, it is helpful and appropriate 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*". However, it goes on to indicate some considerations that may be relevant and says:

" 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."

21. Costa Properties is a new and very small business. Mr Costa was not able to answer questions about its profitability in the current year, but in the course of his submissions he conveyed that the business was struggling financially, that he did not have any other income, (which suggests that he is receiving some funds from the business,) and that its income is derived from other works such as cleaning and minor building works as well as from its role as letting agents. I conclude that the ability to pay a £5,000 penalty is a genuine concern for Costa Properties and that a lower penalty may therefore be reasonable. However, in this case I think it appropriate to take account of the risk to its clients that arises from Costa Properties' limited knowledge of the law and regulations that apply to letting agents and its limited ability to organise itself and to identify and properly address the requirements that the business must comply with in order to offer clients the level of protection they are entitled to in law. I find that it would be appropriate to set the penalty at a level that takes account of Costa Properties limited means whilst providing sufficient deterrent for Costa Properties to avoid carrying on a letting agency business without the capability and willingness to take the steps required to identify and comply with its legal and regulatory obligations.
22. In all of the circumstances of this case, I find that it is reasonable for the financial penalty payable by Costa properties to be reduced to £4,000 in respect of the failure to display at their premises a list of the fees that they charged clients of the letting agency business and a statement of whether they were a member of a client money protection scheme.

F. Decision

23. By virtue of paragraph 5(5) of Schedule 9 to the Act, the Tribunal may quash, confirm or vary a Final Notice.
24. The appeal is allowed in part. The Final Notice comprising the Fees Final Notice and the Client Money Final Notice served on Costa Properties contained an error of law insofar as it purported to levy an aggregate penalty of £10,000 for breaches of S.83(4) and S.83(6). I find that Costa Properties' failure to display at their premises a list of the fees that they charged clients of the letting agency business and also a statement of whether they were a member of a client money protection scheme gives rise to a single breach of S.83 and in accordance with S.87 (6) of the Act only a single penalty may be imposed on Costa Properties for this breach. I conclude that a financial penalty of £4,000 in respect of this breach would be reasonable and the Final Notice is varied so as to impose a single financial penalty of £4,000.

Peter Hinchliffe
Judge of the First-tier Tribunal
30 March 2017

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, reference was made 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 a fine 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 letting 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 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 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”.