



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

Appeal Reference: PR/2016/0051

**Heard at Leeds
On 19 April 2017**

Before

JUDGE JACQUELINE FINDLAY

Between

YORK PROPERTY SHOP (MR ALI OKTAY)

Appellant

and

CITY OF YORK COUNCIL

Respondent

DECISION AND REASONS

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

1. 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:-

“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

2. 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

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.

D. Appeals

4. 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.

E. Explanatory Notes and Guidance

5. 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.

6. 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.”

7. 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”.

8. Potentially relevant 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”.

Background

9. Mr Ali Oktay, on behalf of York Property Shop, the Appellant, appeals against the Final Notice served by City of York Council, the Respondent, dated 21 November 2016. The Notice sets out the details of the alleged breach as follows: “as Reviewing Officer I have considered the information and have had regard to your appeal. I have found that there is sufficient evidence that there was a breach in the law to serve a Final notice to impose a monetary penalty and that the fine should remain at £1250.”
10. The body of the Final Notice under the heading Breach states “Mick Wilkinson visited the website of York Property Shop on 5 October 2016 and found that one of the adverts did not display fees charged to tenants and that the landlord fees were not shown in full, in accordance with the Consumer Rights Act 2015 section 83, 3. Mick Wilkinson Licensing Enforcement Officer also visited the offices on 5th October 2016, and although invited in, did not consider them to be open to customers and therefore not commercial premises as defined by the Consumer Rights Act. A notice of intention to serve a monetary penalty was served on 6th October 2016.”
11. The Decision that the final monetary penalty should be reduced to £1250 took into account that the Appellant had not displayed landlords’ fees with sufficient detail on the website to comply with the Act, the Appellant had displayed tenants’ fees on the website in compliance with the Act and that there were no commercial premises in which to display the landlords’ and tenants’ fees.
12. Mr Oktay, on behalf of the Appellant submits that the monetary penalty is unreasonable taking into account that he offers a very basic and uncomplicated letting service comprising only two options without any hidden fees or charges. He offers a single “all in one price” of £99.00 maximum to advertise only and £199 maximum for finding a tenant. He submits that the letting agency is a low key service that runs alongside the sales service of the business.
13. Mr Oktay submits that the purpose of the legislation is to protect tenants and landlords and he has complied with the letter of the law in that he has consistently provided the most competitive fees before the legislation was introduced.

14. Mr Oktay submits that the ethos of his business has always been to provide the best service for the lowest fees and that this has always been openly advertised. He works on a bespoke basis and this is always stated clearly on the website. Mr Oktay has lodged a number of statements from landlords who have used his services to confirm his submission that there has never been any hidden or extra fees. He submits that the website has been amended and only a few words were required to indicate the fees for finding a tenant and for the wording to be compliant with the statutory requirements.
15. The Respondent submits that the imposition of a penalty £1250 is reasonable in all the circumstances and takes into account all the evidence produced by Mr Oktay as set out on document G54.

Findings of Fact

16. I have conducted an oral hearing in which I heard submissions from Ms Waudby for the Respondent and oral evidence from Mr Oktay. Mr Wilkinson attended but gave no evidence. I have considered the Respondent's response and the bundle of documents.
17. I find Mr Oktay is the appropriate person to represent the Appellant and is the person who is responsible for the Appellant's acts and omissions.
18. I find Mr Oktay to be a credible and persuasive witness and I accept his evidence.
19. On 5 October 2016 Mr Wilkinson on behalf of the Respondent checked the Appellant's website and found that landlords' fees were not being displayed in accordance with section 83 of the Act.
20. On 6 October 2016 the Appellant was served with a Notice of Intent to Impose a Monetary Penalty (documents G34 and G35). The Notice provided the information required by the legislation and stated that the Appellant had until 4 November to make representations or objections.
21. I find that it is reasonable for the Final Notice to be varied so that the financial penalty payable in respect of the breach is the sum of £750 rather than £1250. In reaching this decision I have taken into account the oral evidence of Mr Oktay about the financial circumstances of the business and its modest nature and the length of the breach.
22. Mr Oktay trading as York Property Shop is a sole trader and his net income from the whole business at all relevant dates was no more than £17,000 net per annum of which the letting part of the business accounted for about a quarter. Mr Oktay produced no accounts but I accept his evidence. He has low overheads as he rents an office space and runs a 2 litre saloon car through the business and has a very high annual mileage.
23. On the basis of this modest income I find that it is likely a monetary penalty of £1250 would put the business in difficulties, is unreasonable for that reason and amounts to an extenuating circumstance.
24. There is no criticism of the Respondent for not taking this information into account because it was not available until the date of the hearing. Notwithstanding that this information has been produced late by Mr Oktay it is just and fair that it be taken

into account on the basis that Mr Oktay is not represented and he struck me as a witness trying his best to give an accurate account of the financial circumstances of his business.

25. In reaching the decision I have taken into account, also, the length of time of the breach which was very short, namely about three weeks. I accept that Mr Oktay rectified the breach as soon as he became aware of the situation and that the changing of a few words on the website sufficed.

26. I find that it is reasonable for the Final Notice to be varied so that the financial penalty payable in respect of the breach is the sum of £750 rather than £1250.

The Decision

27. The appeal is allowed to the above extent.

Signed J R Findlay

Judge of the First-tier Tribunal

Date: 19 April 2017

Promulgation Date: 06/06/2017