First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2017/0015

Heard at Fleetbank House, London
on 7th September 2017

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

HOMEGAIN LIMITED

Appellant

and

LONDON BOROUGH OF NEWHAM

Respondent

DECISION

1. The Appeal is refused. The Final Notice served on Homegain correctly identified three failures to comply with three requirement of section 83 of the Consumer Rights Act 2015 by Homegain on 20th January 2017. The three failings give rise to two breaches of section 83 for which a penalty may be levied. I conclude that an aggregate financial penalty of £7,500 in respect of both breaches at a rate of £3,750

per breach is not unreasonable. I find no other basis in law or fact on which this appeal may succeed

REASONS

A. Background

2. Homegain Limited ("Homegain") appealed against a Final Notice reference FLP/MHM/MH1 dated 6th April 2017 (the "Final Notice") served on it by the London Borough of Newham ("Newham"), which is the local weights and measures authority for the geographical area comprising the London Borough of Newham. The Final Notices refers to the office of Homegain located at 178 Major Road, Stratford, London E15 1DY, which is within the Borough of Newham. The Final Notice requires Homegain to pay a penalty charge of £7,500 in respect of three failures to meet the following requirements of section 83 of the Consumer Rights Act 2015 (the "Act"):
   - A failure to indicate a membership of a redress scheme with details of that scheme as required by section 83 (7) of the Act.
   - A failure to display a list of their fees on their website as required by section 83 (3) of the Act.
   A failure to include on the list of fees a statement concerning Homegain's membership of a client money protection scheme as required by section 83 (6) of the Act.

B. Legislation

3. The sections of the Act that are referred to in this decision or that are otherwise relevant to this appeal are set out below in Annex A which forms a part of this decision.

C. Guidance

4. Section 83 of the Act is the subject of Guidance for Local Authorities issued by the Department for Communities and Local Government (the "Guidance"). Local authorities are required to have regard to the 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 which forms a part of this decision.

D. The Appeals

5. Homegain submitted a Notice of Appeal dated 28th April 2017 setting out the grounds of its appeal against the Final Notice. The main points of Homegain's grounds of appeal are:
   - The information required under section 83 of the Act was displayed.
   - The Final Notice is not in accordance with the law as Newham failed to take the required steps before it was issued. These failures include;

speaking to a junior member of staff and not to the Director or manager of Homegain when visiting Homegain; not providing a notice or warning before taking action; failure to re-visit Homegain's premises 7 days after providing a notice of intent and failing to give a copy of the notice of intent.
- Failing to take account of Homegain's compliant record of carrying on business in Newham since 1995.

In addition Homegain appeal on the basis that their rights have been interfered with in an unreasonable and disproportionate manner that did not pursue a legitimate aim and did not accord with the law.

6. In support of the appeal Homegain submitted a witness statement from Mr Osama Hassan who is the Manager of Homegain. Homegain also provided a copy of a P45 for a trainee employee and financial statements for the year to 30 November 2013, 30 November 2014 and 30 November 2015.

7. Newham responded to the Appeal with a Statement of Case summarising the facts and circumstances that gave rise to the Final Notice and a response to the grounds of appeal. These are referred to in more detail below. Newham provided copies of the notices that it sent to Homegain, the relevant section of the Act and a copy of the Guidance. Prior to the hearing a bundle of relevant documentation was prepared by Newham, which included a witness statement from the Trading Standards Officer who identified the alleged breaches by Homegain and prepared the correspondence with Homegain and issued the Final Notice to them. Attached to this witness statement were copies of the correspondence and notices sent by Newham to Homegain and photos of the information on display at Homegain's premises.

E. The Hearing

8. The hearing of the appeal took place on 7th September 2017. Homegain was represented by Mr M Saeed, the director of Homegain and Mr Hassan. Newham were represented by Counsel, Mr Ryan Thompson. At the start of the hearing Homegain provided a copy of their financial statement for the year to 30 November 2016.

9. It was common ground between the parties at the hearing that:

- Homegain was, and remains, a letting agent as defined in the Act.
- Homegain was carrying on business within the London Borough of Newham.
- A Trading Standards Officer, Mr Howell-Morris visited Homegain's premises on 28th October 2016 (the "First Visit") and issued a non-compliance notice.
- The Trading Standards Officer visited Homegain's premises on 20th January 2017 (the "Second Visit") and issued a notice of intent to Homegain.

F. Submissions

10. The parties agreed that Newham would open by explaining the basis upon which they had issued the Final Notice.

11. On behalf of Newham Mr Thomson referred the tribunal to their statement of case and then called their Trading Standards Officer, Mr Howell-Morris as a witness. The Trading Standard Officer explained the history of Newham's contact with Homegain in relation to the Act. On June 3rd 2015 Newham had written to all letting agents in Newham, including Homegain, explaining the requirement that the Act would place upon them in respect of the display of their fees and the penalty for failing to display their fees as required. On 3rd October 2016 Newham sent a letter referring letting agents to a number of requirements that they had to meet, including the requirement to display whether they are a member of a client money protection scheme. The Trading Standards Officer conducted the First Visit and found that no details of landlords' fees and only inadequate details of tenants' fees were on display at the premises of Homegain. There was no display confirming if Homegain was a member of a redress scheme or not and none stating if it was a member of a client money protection scheme. A non-compliance notice was issued to the member of staff who was present at the premises. Copies of all of these documents were included in the bundle. On his return to the office the Trading Standards Officer found that Homegain were members of a client money protection scheme.

12. Newham wrote to Homegain again on 21 December 2016 to clarify the legal requirements that Homegain and similar letting agents had to satisfy. On 20th January 2017 the Trading Standards Officer conducted the Second Visit to Homegain. Prior to the Second Visit Newham had conducted a web search and found that Homegain's fees and charges were not displayed on their website. At their premises he found that there was no information on display about membership of any redress scheme or of any client money protection scheme. Photographs of the displays in the window and on the walls of the premises were produced by Newham. A notice of intent listing three failings was left at the premises. The failings are those listed in the Final Notice and referred to above. This stated that Newham proposed to impose a penalty of £5,000 for each of the three breaches identified. The notice of intent explains the right that Homegain has to make representations in response to the breaches outlined in the notice of intent.

13. Homegain submitted representations in response to the notice of intent in which they stressed their long record of being in business without any legal or regulatory concerns arising. They confirmed that they were a member of a client money protection scheme. They also explained that they were a small business with only four employees and raised their concern that the notices had been left with junior employees and that no one on senior management had been contacted by Newham. Mr Saeed stated, on behalf of Homegain, that after the First Visit when the Trading Standards Officer "alerted us to the new legal requirements" of displaying agents' fees on our premises Homegain had made the required changes. After the notice of intent was seen by him and Mr Hassan all of the relevant amendments had been made to

address the breaches stated in the notice of intent. He stated that Homegain was appealing the monetary penalty being imposed on it.

14. These representations were reviewed by a committee of three decision makers at Newham. The decision makers decided to issue the Final Notice which sets out the three failures that are the subject of this appeal. In the light of the representations received and after checking the financial information on Homegain at Companies House, Newham reduced the aggregate penalty for the three failures by 50% to £7,500.

15. Mr Thomson submitted, on behalf of Newham, that it was not obliged to publicise the letting agents' obligations under the Act before taking action for failing to comply with them, but it had done so. It was not unreasonable for the Trading Standards Officer to serve notices by leaving them with a member of staff at the premises from which the lettings agent operated. The revised financial penalty was reasonable

16. Mr Saeed questioned the Trading Standards Officer at some length and made his own submissions to the tribunal. He stated that Homegain felt strongly that Newham was simply engaged in a money making exercise in imposing the penalty under the Final Notice. Newham had failed to speak to any manager or director of Homegain about the requirements and had declined to wait just two minutes for a manager to arrive during the Second Visit. Homegain had an exemplary 22 year record with no court disputes until this case had arisen and it had not had any disputes over deposits. He confirmed that had Homegain been aware of all of the requirements that they had to meet, they would have complied with them. There was no justification in a larger well-resourced estate agents not complying with its obligations, but a small agent could make mistakes. They were being punished for one mistake, which could have been corrected if the Trading Standards Officer had spoken to a manager or director of Homegain. The member of staff who was present at the First Visit was an apprentice who was dismissed shortly afterwards due to her mistakes and her lack of competence. The non-compliance notice issued after the First Visit stated that the Council would return after seven days; in fact they had not returned for a further three months. At the Second Visit Mr Hassan had phoned in to the premises and asked to speak to the Trading Standards Officer. He had said that he would come to the premises in two minutes but the Trading Standards Officer had declined to wait. The trainee that was present had only remembered that the concern was over the display of fees and not the other issues. She was inexperienced. Overall Homegain regarded the action being taken against them as unfair.

G. Submissions on penalty

17. Mr Saeed explained that the amount of the penalty was unreasonable for a firm the size of Homegain. Its profits were £10,312 in 2015 and £7,229 in 2014 and it would be difficult to pay a £7,500 penalty. This is more than the business could afford. They

had made profits of £11, 256 in 2016. Business was down at the moment which made paying the penalty very difficult.

18. On behalf of Newham it was pointed out that the Guidance that deals with penalty for breach of the duties under section 83 of the Act (set out in Annex B of this decision) states that a £5000 fine should be considered the norm unless there were extenuating circumstances. It was acknowledged that this Guidance was not legally binding. Mr Thomson explained that the Newham had found that the financial position of Homegain was such that it amounts to extenuating circumstances. Homegain profits had been low for three years. For this reason the penalty has been reduced to a level that was affordable. He pointed out that the accounts of Homegain for the years to 30 November 2016 showed shareholder funds of £49,302 and stated that the reduced penalty was affordable.

19. I sought the views of the parties on whether more one penalty may be levied in respect of the three failures to meet Homegain's obligations under section 83 of the Act outlined in the Final Notices. Mr Thomson stated that in the light of earlier decision of the Tribunal, Newham had reconsidered their position and accepted that the breach of section 83 (6) and section 83 (7) arising from the failure to display information in the premises amounted to a single breach. The failure to pay information on the website was a different breach for which a separate penalty could be levied. The two breaches could give rise to a penalty of £5,000 each and £10,000 in total. In the circumstances Mr Thomson said that an aggregate penalty of £ 7,500 was still reasonable. Mr Saeed did not wish to make a submission on this point.

G. Findings

20. 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.

21. I find that 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 Homegain 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. By the time of the First Visit they had had over a year to become aware of their legal obligations under the Act.

22. Homegain appeared to be blind both to their obligation to ensure that they were on top of their legal obligations and to any risk that their lack of knowledge created for their customers. Mr Saeed believe that leaving the sole trading premise of the business in the care of trainees with limited capability and competence obliged Newham to make additional efforts to bring the company's legal obligations and failings to the attention of the company's management. No such duty arises. The

customers of Homegain appear to be expected to deal with trainee staff whose competence Mr Saeed did not trust and who were not supported by displays or other guidance that would have assisted them in providing the information to clients that is required by law. This is the sort of behaviour that the Act is intended to penalise.

23. I find that the evidence establishes, and that it is not contested, that on 20th January 2017 Homegain failed to publish a list of the fees that they charged customer of their letting agency service on their website. S.83 of the Act is set out in full in Annex 1 and sections 83 (1) and 83 (3) provide that:

    (1) *A letting agent must, in accordance with this section, publicise details of the agent's relevant fees.*

    and

    (3) *The agent must publish a list of the fees on the agent's website (if it has a website).*

    I conclude that Homegain was in breach of its legal obligation under s.83 (3) of the Act on 20th January 2017.

24. I find that the evidence also establishes that on 20th January 2017 Homegain held money on behalf of its customers and was a member of a redress scheme and failed to display at its premises in Newham, with the list of fees, a statement of whether it is a member of a client money protection scheme and a statement of whether it is member of a redress scheme. Sections 83 (6) and (7) of the Act provides that;

    (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

    I conclude that on 20th January 2017 Homegain was in breach of its legal obligations to display at its premises a statement of whether it was a member of a client money protection scheme and a redress scheme.

25. The last issue in this appeal is, therefore, whether, in all the circumstances the amount of the penalty for Homegain's breaches of their obligations under section 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."

26. Homegain is a small business. Its accounts make this clear. Profits are modest and staff costs also appear modest. This was recognised by Newham in reducing the penalty proposed in the Notice of Intent by 50% in the Final Notice following a review of Homegain's accounts. I note that at that time Newham considered that ther were three breaches and that the aggregate penalty for all three should £7,500. As Newham now concedes, there are only two breaches of section 83, it is therefore appropriate to consider if the penalty should be reduced proportionally. I have considered this factor and have also taken account of the failure by Homegain to recognise an obligation on it to ensure that it is aware of change in the law under which it must operate and its continuing refusal to accept any responsibility for its failure to provide information that is required by law in order to protect its clients.

27. In all of the circumstances of this case, I find that it is reasonable for the financial penalty payable by Homegain to be set at £3,750 in respect of the failure to publish on their website a list of the fees that they charged clients of the letting agency business and a further £3,750 in respect of their failure to display at their premises statements of whether they were a member of a client money protection scheme or a redress scheme.

H. ***Decision***

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

29. The Final Notice served on Homegain correctly identified three failures to comply with three requirement of section 83 of the Act by Homegain on 20th January 2017. There is no error of fact that affects the basis on which the Final Notice was issued. The Final Notice imposed a single penalty of £7,500 for all of the breaches. I find that the three failings give rise to two breaches of section 83 for which a penalty may be levied. The Final Notice does not seek to allocate the amount of the penalty to any particular failing or breach. I see no error of law in this; I conclude that an aggregate financial penalty of £7,500 in respect of both breaches at a rate of £3,750 per breach is not unreasonable. I find no other basis in law or fact on which this appeal may succeed

30. The Appeal is refused.

Peter Hinchliffe
Judge of the First-tier Tribunal
29 September 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 under section 83 to publicise fees and other information 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**
>
> <u>All fees, charges or penalties (however expressed)</u> which are payable to the agent by a landlord or tenant in respect of letting agency work and property management work carried out by the agent in connection with an assured

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

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

… … … … …

How the fees should be displayed

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

Examples of this could include individual costs for:

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

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

Penalty for breach of duty to publicise fees

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

The expectation is that a £5000 fine should be considered the norm and that a lower fine should only be charged if the enforcement authority is satisfied that there are extenuating circumstances. It will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the 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".