First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2017/0018

Between

COUNTRYWIDE RESIDENTIAL LETTINGS LTD

Appellant

and

LONDON BOROUGH OF BARKING & DAGENHAM

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Countrywide Residential Lettings Limited ("Countrywide") appealed against a Final Notice served on it by the Council of the London Borough of Barking & Dagenham ("Barking & Dagenham"), which is the local weights and measures authority for Countrywide's premises at 74 Station Parade, Barking. The Final Notice is dated 15th May 2017 and sets out Barking & Dagenham's conclusion that Countrywide was on 2nd March 2017 engaged in letting agency work and it imposes a penalty of £5,000 on Countrywide for two breaches on that day of their obligations under section 83 of

the Consumer Rights Act 2015 (the "Act"). The Final Notice records these breaches as;

"Failed to publish a statement saying whether you belong to a client money protection scheme at your premises at 74 Station Parade, Barking, IG11 8EA …" and

Failed to publish a statement saying whether you belong to a client money protection scheme on the company's website at www.bairstoweves.co.uk."

2. Barking & Dagenham state in the Final Notice that they had had regard to Countrywide representations made in response to a notice of intent dated 16th March 2017 (the "Notice of Intent") that had been issued by Barking & Dagenham. The Notice of Intent sets out Barking & Dagenham's conclusion that Countrywide were in breach of section 83 of the Act and gives the precise nature of the breach in the following terms:

"You have failed in your duty to publish with the list of fees a statement as to whether you are a member of a Client Money Protection Scheme at your premises at 74 Station Parade, Barking IG11 8EA"

Ther Notice of Intent states Barking & Dagenham's intention to impose a penalty of £5,000 and invited Countrywide to make written representations in relation to the proposed imposition of a monetary penalty within 28 days.

B. Legislation

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

C. Guidance

4. Section 83 of the Act is the subject of Guidance for Local Authorities issued by the Department for Communities and Local Government (the "Guidance"). Local authorities are required to have regard to the Guidance under subsection 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 Appeal

5. Countrywide submitted an appeal dated 9th June 2017 against the decision in the Final Notice. Countrywide set out two broad grounds of their appeal: Firstly, that the Final Notice does not comply with the requirements of the Act and does not give reasons for selecting the maximum penalty permitted under the Act, which may disguise a mistake of fact or a failure to take account of the representations made by Countrywide. Secondly that the amount of the penalty is unreasonable and wholly disproportionate as the failure was short lived and had not harmed consumers and Barking & Dagenham had blindly imposed the maximum penalty without regard to the individual facts of this case.

6. Barking & Dagenham responded to the grounds of appeal by stating that all of the requirements of the Act had been complied with in the procedure followed to issue the Final Notice and in the form of the Final Notice. They submitted that the penalty was not unreasonable and that the amount reflected the Guidance and the lack of any extenuating circumstances in relation to the breach. The proportionality of the sum had to be seen in the context of the size and resources of Countrywide.

7. This response sent out the various dealings that Barking & Dagenham had with Countrywide prior to issuing the Notice of Intent. These included;
   - sending written guidance on 5th January 2017 setting out the requirements of the Act;
   - visiting Countrywide's premises on 24th February 2017 and advising that the information displayed was non-compliant;
   - visiting again on 2nd March 2017 and explaining the notice displaying the information required by the Act was in too small a print size and did not contain a statement regarding whether Countrywide was a member of a client money protection scheme; and
   - giving a presentation on matters that included the requirement for clarification of membership of client money protection schemes to a landlord and lettings agent forum in Barking & Dagenham at which a manager of Countrywide was present on 7th March 2017.

   Barking & Dagenham confirmed that they visited Countrywide's premises on 16th March 2017 and found that the clarification of their membership of client money protections scheme was still not displayed. This led them to issue the Notice of Intent.

8. Barking & Dagenham provided a Statement of Truth from Mr Elworthy, a Principal Trading Standards Officer who had visited Countrywide and dealt with the enforcement action against them. He outlined the history of Barking & Dagenham's dealings with Countrywide as set in the preceding paragraph. He described in some detail the communication and dealings between Barking & Dagenham and Countrywide between the issue of the Notice of Intent and the issue of the Final Notice. Mr Elworthy referred in his Statement of Truth to, and provided copies of, the following ;
   - the programme that Barking & Dagenham had implemented in order to enforce Sections 83 -88 of the Act on 1st December 2016;
   - the letter of guidance issued to Countrywide in January 2017;
   - photographic evidence of the signs on display at Countrywide' premises in March 2017;
   - the presentation provided to landlord and lettings agents in March 2017;
   - correspondence between Countrywide and Barking & Dagenham in March and April 2017;
   - the submission prepared by Trading Standards that was sent to the decision making panel of Barking & Dagenham which had to decide whether to issue a final notice;
   - Countrywide's representations to the decision making panel; and

- a copy of the notes made by the two members of the decision making panel when recording their decision in relation to the issue of a final notice.

E. The Hearing

9. The hearing of the appeal took place on 11th October 2017. Countrywide was represented by their counsel, Mr McNiff. Barking & Dagenham was represented by their counsel, Mr Cantor. Mr Elworthy attended as a witness.

10. Mr Cantor stated as a preliminary matter that Barking & Dagenham had realised since submitting their response to the appeal that the breach of Article 83 of the Act set out in the Final Notice in respect of the contents of Countrywide's website had not been listed in the Notice of Intent. As a consequence Barking & Dagenham accepted that it was not able to proceed with the case in respect of a breach of section 83 of the Act arising from any failure to publish on Countrywide's website a statement saying whether it is a member of a client money protection scheme.

11. Mr McNiff confirmed at the outset that Countrywide were not challenging the lawfulness or the contents of the Final Notice

12. It was common ground between the parties at the hearing that Countrywide was carrying on a letting agency business in respect of dwelling houses within Barking & Dagenham on 2nd March 2017 and that Countrywide holds money on behalf of landlords in the course of its business and was therefore required to comply with the duty imposed under section 83 of the Act to display at its premises, with its list of fees, a statement of whether it is a member of a client money protection scheme. Mr McNiff accepted that Countrywide had failed in that duty. Mr Cantor accepted that Countrywide was a member of client money protection scheme on 16th March 2017.

13. The sole issue in dispute in this appeal was whether the penalty imposed on Countrywide in the Final Notice was reasonable and proportionate in the particular circumstances of this case.

F. Submissions

14. Mr McNiff argued that Barking & Dagenham failed to have due regard to relevant matters in making their decision on penalty. They should have had regard to Countrywide's culpability and its character. Relevant issues in this regard would have included its membership of a client money protection scheme and the fact that this failure was a first offence from which Countrywide derived no benefit. He argued that Barking & Dagenham should have taken account of the previous good character of Countrywide and the fact that Countrywide was seeking to do the right thing, as its correspondence with Barking & Dagenham and its attendance at the presentation given by Barking & Dagenham demonstrates. Instead Barking & Dagenham had attached undue weight to the Guidance and appeared to regard it as taking precedence over the Act and relieving it of a duty to consider proportionality and

reasonableness as required by the Act. The decision making panel had not given any reasoned response to the representations from Countrywide. They had paid undue regard to unsubstantiated references by the Trading Standard department to poor practices in other areas and in other branches. They had referred to the Final Notice as a fixed penalty notice, which made clear their misunderstanding of their role. Overall Mr McNiff said that it cannot be appropriate to impose the maximum possible fine in these circumstances; it would means that there was nowhere for an enforcement authority to go when dealing with a breach of section 83 of the Act in much more serious circumstances.

15. Mr McNiff pointed to the decision of the First-tier Tribunal in the case of Foxtons Ltd v London Borough of Camden (PR/2016/0010) as evidence that fines below the maximum could be imposed in circumstances where a very large letting agent has committed multiple breaches of section 83 of the Act. He also pointed to the Introduction to Annex D of the Guidance, which makes it clear that the Guidance is no substitute for reading the Act and argued that Barking & Dagenham cannot simply follow the provisions of the Guidance without reference to the Act and to principles of natural justice and common sense.

16. With regard to the amount of the penalty, Mr Cantor referred the tribunal and Mr McNiff to the Guidance, which clearly states that "*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.* "Mr Cantor stated that the decision making panel had been properly briefed in the note they received from Trading Standards, which set out their responsibilities and the decision that they had to make. The reference to a fixed penalty notice was simply an error. The record shows that the decision makers considered the issues raised in Countrywide's representations and exercised their discretion having considered all of the appropriate matters. Mr Cantor argued that the size and sophistication of Countrywide and the extent of Barking & Dagenham's efforts to make them aware of what they had to do to meet their obligations removed some of the extenuating circumstances or mitigation that might otherwise be available to a letting agency when it first found itself to be in breach of the Act. He said that Countrywide's membership of a client money protection scheme and its good character were not extenuating circumstances. The fines are designed to encourage compliance and letting agents could not be let off because they had not been found to be in breach of the Act before. He stated that the Act had come into force in May 2015 and the Act specifically required enforcement authorities to have regard to the Guidance.

17. Mr Cantor emphasised the extent of Barking & Dagenham's engagement with Countryside and the need for a penalty that was proportionate in these circumstances for a firm of Countrywide's size. Mr McNiff in response pointed to the steps that Countrywide were taking at the time of the breach with the City of Westminster Trading Standards for them to become the primary authority for Countrywide in relation to their compliance with the Act across the country. Countrywide had made Barking & Dagenham aware of these discussions on 17th March when acknowledging

receipt of the Notice of Intent. At this time Countrywide's Compliance Manager suggested that there was real uncertainty as to what form of words should be used to clarify their position in respect of their membership of a client money protection scheme.

D. Conclusions on the facts

18. The parties agree and I concur that on 2nd March 2017 Countrywide was engaged in letting agency work within Barking & Dagenham and had a duty, which they were failing to meet, to display clearly whether they were a member of a client money protection scheme or not.

19. I accept that Countrywide were a member of a client money protection scheme at that date and had nothing to gain from failing to display this fact.

20. I agree that Barking & Dagenham had constructively sought to clarify Countrywide's obligations under the Act and had done so in a manner and in a timescale that should have permitted Countrywide to have understood and discharged its duties before 2nd March 2017.

21. Countrywide is a large, profitable and well-resourced letting agent.

22. 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. Countrywide 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 March 2017 they had had over 18 months to become aware of their legal obligations under the Act. Countrywide showed little urgency in addressing their failure after it had been pointed out to them by Barking & Dagenham.

F. Findings

23. 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.

24. I accept and agree with Barking & Dagenham's position that it cannot pursue the breach set out in the Final Notice arising from any failure by Countrywide to publish a list of fees on their website as such failure was not set out in the Notice of Intent.

25. The parties accept and I find that the evidence establishes that on 2nd March 2017 Countrywide failed to display, with the list of fees, a statement of whether they were a member of a client money protection scheme as required by section 83 of the Act.

26. The issue in this appeal is, therefore, whether, in all the circumstances the amount of the penalty for Countrywide' breach of their obligations under section 83 is unreasonable. In deciding that issue, which is left open by the primary legislation, I accept that it is helpful and appropriate to have regard to the Guidance. 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; however, it goes on to indicate some considerations that may be relevant. It is clear that the Act must take precedence over the Guidance and that, in any event, enforcement authorities such as Barking & Dagenham must consider the issue of reasonableness and proportionality of a penalty in the round and that they should not follow the advice in the Guidance to the exclusion of all other matters.

27. The Act is intended to reduce harm and the risk of harm to consumers from letting agents. The penalty needs to be set at a level that reflects the public benefit in ensuring compliance with the Act whilst being proportionate to the scale of the business and the severity of the failure. In the particular circumstance of this case there is a need to weigh up on the one hand, the limited harm arising from this individual breach and the fact that Countrywide were taking belated steps to resolve the issue on a national basis and on the other hand, the lethargy or indifference demonstrated by Countrywide in identifying and remedying this particular breach of its legal and regulatory obligations. In considering the proportionality of any penalty it is appropriate to consider if it will act as deterrent to the recipient. It is reasonable to determine that a larger penalty may be appropriate for a larger business if it is to act as a deterrent.

28. I find no material fault with the decision making panel at Barking & Dagenham. However, I note that they decided that a penalty of £5,000 was appropriate for both a failure to display the required information about membership of a client money protection scheme at Countrywide's premises and a failure to publish such information on Countrywide's website. The Final Notice needs to be varied to reflect the decision that the second of these failures cannot be pursued. A reduction in the penalty to reflect the finding that only one breach of the Act existed on 2nd March 2017 appears to be reasonable.

29. In all of the circumstances of this case, I find that it is reasonable for the financial penalty payable by Countrywide to be reduced to £4000 in respect of their failure on 2nd March 2017 to display at their premises at 74 Station Parade, Barking a statement of whether or not they were a member of a client money protection scheme.

F. ***Decision***

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

31. The appeal is allowed in part. The Final Notice served on Countrywide erred in law in finding Countrywide to be in breach of section 83 of the Act as a result of a failure to publish on the company's website a statement saying whether they were a member of a client money protection scheme when no such breach had been mentioned in the Notice of Intent. I find that Countrywide's failure on 2nd March 2017 to display in their premises a statement of whether they were a member of a client money protection scheme is a breach of s.83 and a financial penalty of £4,000 in respect of this breach is reasonable and proportionate. The Final Notice is varied to the extent required to reflect this decision.

Peter Hinchliffe
Judge of the First-tier Tribunal
27 October 2017
Promulgation Date: 3 November 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 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".