



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

Appeal Reference: PR/2017/0025

**Determined without a hearing
On 23 February 2018**

Before

JUDGE JACQUELINE FINDLAY

Between

FROGNAL ESTATES LIMITED

Appellant

and

LONDON BOROUGH OF CAMDEN

First Respondent

DECISION AND REASONS

A. The legislation

The requirement for letting agents to publicise details of fees

1. The Consumer Rights Act 2015 (“the CRA 2015”) imposes a requirement on all letting agents in England and Wales to publicise details of their relevant 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.”

Enforcement

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.”

Financial penalties

SCHEDULE 9

DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

Section 87

Notice of intent

1

- (1) Before imposing a financial penalty on a letting agent for a breach of a duty imposed by or under section 83, a local weights and measures authority must serve a notice on the agent of its proposal to do so (a “notice of intent”).
- (2) The notice of intent must be served before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the agent’s breach, subject to sub-paragraph (3).
- (3) If the agent is in breach of the duty on that day, and the breach continues beyond the end of that day, the notice of intent may be served--
- (a) at any time when the breach is continuing, or
 - (b) within the period of 6 months beginning with the last day on which the breach occurs.
- (4) The notice of intent must set out--
- (a) the amount of the proposed financial penalty,

- (b) the reasons for proposing to impose the penalty, and
- (c) information about the right to make representations under paragraph 2.

Right to make representations

2

The letting agent may, within the period of 28 days beginning with the day after that on which the notice of intent was sent, make written representations to the local weights and measures authority about the proposal to impose a financial penalty on the agent.

Final notice

3

(1) After the end of the period mentioned in paragraph 2 the local weights and measures authority must--

- (a) decide whether to impose a financial penalty on the letting agent, and
- (b) if it decides to do so, decide the amount of the penalty.

(2) If the authority decides to impose a financial penalty on the agent, it must serve a notice on the agent (a “final notice”) imposing that penalty.

(3) The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was sent.

(4) The final notice must set out--

- (a) the amount of the financial penalty,
- (b) the reasons for imposing the penalty,
- (c) information about how to pay the penalty,
- (d) the period for payment of the penalty,
- (e) information about rights of appeal, and
- (f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

4

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

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

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

Appeals

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.

Explanatory Notes and Guidance

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.

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.”

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”.

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”.

Any representations made about a penalty reduction will be considered on a case-by-case basis. Account may be taken of:

- The size of the business committing the breach may be a factor to consider.
- Whether the maximum fine of £5,000 fine (sic) may be disproportionate to the turnover/scale of the business.
- May lead to the organisation going out of business.

A lower fine may be charged if the enforcement authority is satisfied that there are extenuating circumstances.”

B. Background

1. Mr Achraf Borghol is the sole director and shareholder of Frogmal Estates limited, the Appellant. He employs two employees. The Appellant at all relevant dates was in business as a letting agent.

2. On 30 June 2015 and 22 December 2015 the Respondent wrote to the Appellant to advise that as of 27 May 2015 all letting agents and property management agents had to display all their fees to tenants and landlords and details of the Redress Scheme of which they were a member.

3. Attached to the letter of 22 December 2015 was a guidance leaflet (page 33) which states *“it is now a legal requirement for all letting agents in England and Wales to publicise details of their relevant fees; to state whether or not they are a member of a client money protection scheme; and give details of which redress scheme they have joined.”* The guidance sets out the obligations on letting agents and the penalty provisions for breaching the duty.

4. On 22 May 2017 Ms A McKeown, a Consumer Protection Officer for Camden Council Trading Standards, made a search of the Appellant’s website and found that the Appellant had failed to comply with the requirements of s 83 of the CRA 2015.

5. On 22 May 2017 the Respondent issued a Notice of Intent to impose a monetary penalty.

6. On 4 July 2017 the Respondent issued a Final Notice imposing a penalty of £15,000.

7. I have determined this appeal on the papers only on the basis that the parties have consented to the appeal being determined without a hearing and I am satisfied that the issues can be properly determined without a hearing. I have considered the

Respondent's Response, the bundle of documents numbered 1 to 85 and the video recording of the searches made by Ms McKeown on 22 May 2017.

C. The Issues

The Appellant's Case

8. Mr Borghol submits that the Appellant company is a small business. He has lodged parts of the company's last filed accounts dated 30 June 2016 showing the total net assets of the business are £5,296.

9. Mr Borghol states that he has made every effort to comply with the legislation and co-operate with the Respondent. He states he does not have huge resources to employ people and legal advisers and English is not his first language. He says the company prides itself on offering a bespoke and personal service to clients and customers and that is why he gets repeat business and recommendations.

10. Mr Borghol admits that the Appellant was not compliant with the legislation but he submits that it should be taken into account that he made every effort to make the Appellant complaint. He confirms that he received the letter from the Respondent dated 22 December 2016 but he was not clear what to do.

11. Mr Borghol states that a representative of the Respondent came to see him on 24 February 2017 to explain to him what needed to be done and he then instructed web designers to update his website. He delegated the task of instructing the web designers to Said, an employee.

12. Mr Borghol paid the web designers £1,100 plus VAT but they had not completed the work when the Notice of Intent was received. Mr Borghol instructed Said to arrange for the new website to go live even though it was not ready.

13. Mr Borghol has now received advice from a solicitor about the legislative obligations which is expensive and he has dismissed Said because he did not take care of things while Mr Borghol was abroad.

14. Mr Borghol asks that account is taken of the efforts he has made and the cost of taking legal advice and that he was relying on others while he was abroad attending an urgent family crisis.

15. Mr Borghol submits that the penalty of £15,000 will cripple the business and put the Appellant in severe financial hardship and that it is disproportionate taking into account that this is the maximum penalty and should be reserved for serious offenders and not someone like him who has been co-operating all along and trying his best to comply in very difficult personal circumstances.

The Respondent's case

16. The Respondent submits that on 22 May 2017 the Appellants was in breach of the requirements of s.83 of the CRA 2015, namely:

- A failure to publish details of tenant fees on the website (s 83.3).
 - A failure to publish details of landlord fees on their website (s 83.3).
 - A Failure to publish details of whether or not the agent is a member of a client money protection scheme (S83.6).
 - A failure to publish details of the redress scheme membership (s 83.7).
17. The Respondent submits that a penalty of £15,000 is appropriate in all the circumstances.
18. The Respondent submits that the letter to the Appellant was dated 22 December 2015, that Ms McKeown visited the Appellant's premises on 24 February 2015 and that no contact was been made by the Appellant since that date to ask for advice or assistance. The Respondent provided ample information to the Appellant about the statutory requirements and the Appellant failed to make representations to the Respondent following service of the Notice of Intent.

D. Findings of Fact and Reasons

19. I find that the Respondent served a valid Notice of Intent and Final Notice on the Appellant and that those Notices contained all the information as required by the CRA 2015.
20. I find that the Respondent sent letters to the Appellant on 30 June 2015 and 22 December 2015 to advise that as of 27 May 2015 all letting agents and property management agents had to display all their fees to tenants and landlords and details of the Redress Scheme of which they were a member.
21. I find that attached to the letter of 22 December 2015 was a guidance leaflet (page 33) which states "*it is now a legal requirement for all letting agents in England and Wales to publicise details of their relevant fees; to state whether or not they are a member of a client money protection scheme; and give details of which redress scheme they have joined.*" I find that the guidance sets out clearly the obligations on letting agents and the penalty provisions for breaching the statutory duty.
22. I find that Ms McKeown visited the Appellant's premises on 24 February 2015 (page 80) and advised the letting consultant of the obligation to display all fees comprehensively and to include VAT.
23. I find that Mr Borghol, as sole director of the Appellant company, can have been in no doubt of the legal requirements. I find that Mr Borghol was at all times the appropriate person to represent the Appellant and be responsible for the running of the business. I find the Mr Borghol did not make sufficient efforts to ensure the Appellant complied with its legislative obligations and I do not accept his submission that he had been co-operating at all times and doing his best to comply. Despite being clearly informed of the legal requirements on the basis of the evidence it seems he did very little to ensure compliance. It was incumbent on him

to obtain the proper legal advice and take steps to ensure he did understand the requirements where he was uncertainty.

24. I find that the Appellant was in breach of the legal requirements and its statutory obligations on 22 May 2017 in that the website did not display the fees with sufficient details showing only a basic 'Admin Fee', that no landlord fees were displayed, that no details of the redress scheme to which they belonged was displayed and there was no information as to whether they were or were not members of a client money scheme.
25. I find that Mr Borghol delegated the task of instructing a web designer and overseeing content of the website to an employee but he retained the responsibility of ensuring the work was undertaken competently, thoroughly and timeously and that the website content complied with the legal requirements. Notwithstanding that he had to be abroad due to a family crisis for an unspecified period of time the responsibility was with Mr Borghol to ensure compliance. He had ample opportunity to obtain the advice and assistance he required and to ensure that the Appellant complied with its legal obligations. He could easily have made better arrangements.
26. I find the breaches significant and serious.
27. I am required to determine whether the amount of the penalty is reasonable and in doing so I may take my own view of all relevant matters.
28. Mr Borghol, on behalf of the Appellant, has had ample opportunity to submit detailed information about the net income of the Appellant. He has chosen not to do so. I am not satisfied that Mr Borghol has given a complete and accurate picture of the Appellant's financial position. Mr Borghol has submitted abbreviated unaudited accounts for the year ended 30 June 2016. The abbreviated accounts show the basic balance sheet with the assets and liabilities of the Appellant. This does not show the full picture about the financial health of the Appellant and gives only a snapshot of the Appellant's net value.
29. On the basis of the evidence available I do not find that the penalty of £15,000 is unreasonable. I do not consider it in all the circumstances to be disproportionate. I am not satisfied on the evidence available that the penalty will cause the Appellant to go out of business.

E. The Decision

30. I dismiss the appeal. I consider that it is reasonable to impose a penalty in the sum of £15,000

Signed: J R Findlay

Judge of the First-tier Tribunal

Date: 23 February 2018

Signed: 13 April 2018

Promulgation date: 19 April 2018