



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

Appeal Reference: PR2018/18/0082

**Heard at Field House
On 1 April 2019**

Before

JUDGE JACQUELINE FINDLAY

Between

GOLDEN EAGLE INTERNATIONAL LIMITED

Appellant

and

WESTMINSTER CITY COUNCIL

Respondent

DECISION AND REASONS

Appearances:

The Appellant, Mr P Siha

For the Respondent, Mr M Coley, Counsel for Westminster City Council

Witnesses:

Mr M Chamberlain witness for the Appellant

Mr N Obiajulu witness for the Appellant

Ms A Cosgrave witness for the Respondent

Mr C Akpom witness for the Respondent

In attendance as observer:

Mr D Silcock

A The legislation

The requirement for letting agents to publicise details of fees

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.

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.

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

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 and the Hearing

1. On 15 February 2019 the Respondent, following a policy decision, decided not to pursue a monetary penalty in relation to the Client Money Protection (“CMP”) information breach and accordingly only one monetary penalty of £5,000 was payable. Accordingly, the Appellant withdrew the appeal in relation to the imposition of the monetary penalty for the CMP breach. The details of the guidance which led to the change of policy are not before me and I am not required to adjudicate on this matter notwithstanding that was a breach in relation to the CMP information.
2. I have considered the Respondent’s Response and the bundle of documents numbered 1 to 138 and two DVDs dated 16 July 2018. I conducted an oral hearing at which I heard submissions and evidence from Mr Siha on behalf of the Appellant, submissions from Mr Coley, on behalf of the Respondent, and heard oral evidence from Mr Chamberlain and Mr Obiajulu for the Appellant and from Ms Cosgrave and Mr Akpom for the Respondent.

C The Final Notice

3. The Final Notice which appears at pages 22 and 23 is erroneously dated 19 November 2019 instead of 19 November 2018.

It states that there has been a breach under sections 83(1) and 83(3) of the Act and sets out the breaches as follows:

“As a letting agent you have failed to:

- Publicise details of your relevant fees in accordance with section 83(1) of the Act.
- - Publish a list of your fees on your website in accordance with section 83(3) of the Act.
- Do the above in relation to properties (Dwelling-houses) located in England.

Date of breach: 3rd July 2018 – 16th July 2018

Details of breach: As a letting agent you have failed to publicise on your website (www.golden-eagle.co.uk) your tenant and landlord fees.”

D The Appellant’s Case

4. The Appellant seeks the appeal to be allowed and submits in writing the following grounds:
 - a) The Appellant company is a well-established independent family-run lettings and property management agency and the family has worked hard for over 30 years to provide a safe, fair and professional service to clients at all times and takes pride in their reputation for fairness and professionalism. All the staff are very well trained and all the department heads have years of experience in their respective areas of expertise.
 - b) The reason for the temporary omission on the website of the fee structure was because the entire website was in the process of being rebuilt and the temporary site for the brief period beginning on 3 July 2018 was missing one standard page.

- c) On being made aware of the accidental omission immediate action was taken to rectify the omission within 24 hours and this was conveyed to the Respondent in a letter dated 23 July 2018.
 - d) The appellant is investing heavily in a bespoke software system to ensure a more effective and transparent website. The Appellant has amended its internal systems to ensure nothing like this happens again.
 - e) The Appellant has a Compliance Department which shows how committed it is to full compliance.
 - f) Such a punitive fine for a single brief omission by the software/site developer that occurred during a short period of paternity leave is wholly inappropriate.
5. At the hearing, Mr Siha submitted the following points in support of the appeal:
- a) The Final Notice should be deemed to be invalid as is dated incorrectly.
 - b) No potential tenant or landlord could sign a contract without knowing what fees would be charged, therefore, during the period of the breach no person was prejudiced or affected. The website received over 2000 hits a month and was used as a showcase to indicate to people what was available.
 - c) The Appellant company intends to invest heavily in improving the website with the new technology later this year.
 - d) On reflection it is likely the breach was probably for about a quarter of a year and from March to July 2018 which is still a relatively short time taken against the overall length of time there was compliance.
 - e) It feels like the Respondent has decided to make an example of the Appellant and it feels like this has been a witch hunt.
 - f) The Appellant caters for high profile clients including the Saudi Royal Family.
 - g) The Appellant manages over 400 properties and has a good reputation.
 - h) The Respondent could have dealt with this more sensitively and sensibly.
 - i) This was a simple mistake. The Appellant employs Mr Chamberlain as a Compliance Officer. Mr Siha holds Mr Chamberlain responsible and he will be held financially responsible for the breach.
 - j) The monetary penalty does not fit the breach which was a simple mistake and was not done on purpose.

E The Respondent's Case

6. The Respondent invites me to dismiss the appeal and invites me to consider the following points:

- a) The Appellant does not deny that the website was in breach of the Act for failing to display landlord and tenant fees.
 - b) The responsibility for compliance falls on the Appellant at all times and on Mr Siha as Director of the Appellant company.
 - c) The Appellant is required to exercise due diligence when instructing and supervising contractors to design their website.
 - d) The Respondent does not accept that the landlord and tenant fees were on the website at all other times prior to 3 July 2018. The breach was for longer than suggested by the Appellant.
 - e) Even if the breach was due to a temporary lapse this would still amount to an actionable breach under Act.
 - f) The Respondent gave a grace period of over a year and only started taking action under the Act in September 2016.
 - g) The grounds of appeal do not constitute extenuating circumstances that warrant reducing the monetary penalty.
7. Mr Chamberlain in his letter dated 23 July 2018, as Head of Compliance for the Appellant, put forward the following representations:
- a) His role with the Appellant is to ensure that the Appellant and clients are compliant and the Appellant prides itself on the thoroughness and professionalism that has been demonstrated since 1985.
 - b) The Heads of Department are vastly experienced and appropriately qualified and work together to ensure compliance and efficiency in whatever is done.
 - c) He was mortified by the breaches and working with the Directors took immediate steps to have the oversight rectified straight away. He states, “this was done within 24 hrs of my return to the office on Tuesday 17th July.”
 - d) The fees had always been displayed on previous website evolutions and the reason it was not visible during the 14 days period from 3/07/18 to 16/07/18 was that the original website had been taken down by the developers ‘Now Design’ and replaced with a completely new site that had been built from scratch.
 - e) The oversight had been discussed with the website developer and a full review of the website and software had been completed to ensure complete compliance.
 - f) The Appellant takes its responsibilities very seriously and will continue to monitor the situation to reflect any/all legislative requirements.
 - g) The infringement was a brief one and completely out of character for the Appellant.

F Findings of Fact and Reasons

8. Mr Siha is a Director of the Appellant company and the appropriate person to represent the Appellant in these proceedings.
9. The Appellant is a letting agent and does not come within any of the exceptions.
10. On various dates up to and including 16 July 2018 Ms Cosgrove (formerly Ms McKeown) looked at the Appellant's website at www.golden-eagle.co.uk and noted various breaches including a failure to publish details of their tenant and landlord fees. On 3 July 2018 she could not find any tenant and landlord fees listed anywhere. On 16 July she video recorded the Appellant's website using hypercam and she exhibits printed copies of the still screenshots of the website taken from the hypercam.
11. On 16 July 2018 Ms Cosgrove visited the Appellant's premises and issued two Notices of Intent and a guidance leaflet under cover of a letter from Mr Akpom dated 19 November 2018.
12. On 4 October 2018 Ms Cosgrove sent an email to Mr Chamberlain, copying in Mr Obiajulu (Nick@NOW Design), requesting evidence that fees were displayed on the website previously and for confirmation that the website was previously different (page 86).
13. This information was not supplied before the Final Notice was issued.
14. Mr Chamberlain's letter was not sent to the Respondent on 5 November 2018 (page 38). The content of Mr Chamberlain's letter and the content and date of Mr Obiajulu's letter of 20 November 2018 would suggest Mr Chamberlain's letter was written on or after 20 November 2018.
15. The breach was from March 2018 until 16 July 2018 and for a period of about 3 months.
16. I do not accept that the breach occurred just before 3 July 2018 when the website had been taken down by the developers as asserted. The Appellant has had ample opportunity to provide evidence of compliance prior to 3 July 2018 and has failed to do so.
17. Mr Siha stated when pressed that he was not sure how long the non-compliance had lasted.
18. The Wayback Machine shows the website was non-compliant on 1/4/18, 13/5/18 and 28/6/19 (pages 122, 124 and 126). I attach weight to this evidence which is consistent with Mr Siha's evidence that he did not know precisely how long the breach lasted and Mr Obiajulu's evidence.
19. The Wayback Machine is an Internet Archive that provides access to a digital library of internet sites in digital form which makes it possible to see old web pages stored in the Internet Archive's web archive. The archived date automatically stores copies of website files preserving those files as they existed at a point of time. Pages 120 to 126 show printouts of the Internet Archive's records on various dates including 1 April, 13 May and 18 June 2018. The printouts show no fees were displayed and there were no fees links next to the properties advertised.

20. The Appellant's website was subject to continual update and alteration as is usual in the letting business. When the breach was highlighted it would have taken longer than 24 hours to fix it. There was a major update of the website in January 2018 but as Mr Obiajulu was at work and in charge of the website it is likely he would have spotted any errors. Mr Obiajulu was on paternity leave for 4 weeks in March 2018 and it was likely that during this period of time when the website was updated by a junior member of staff that the fees were omitted and the breach began. The breach was not spotted by Mr Obiajulu at the time of the update in March and he was not aware of it until July.
21. The breach was not rectified within 24 hours of 17 July as claimed by Mr Chamberlain (page 40). This is on the basis of Mr Obiajulu's evidence about how long it would take to fix the website.
22. I cannot attach weight to the evidence of the snapshot on page 39 because it contains no date and this evidence was inconsistent with Mr Obiajulu's oral evidence which I prefer. Mr Obiajulu struck me as a credible and persuasive witness doing his best to give an accurate account of events. Where his oral evidence and the written evidence are inconsistent I prefer his oral evidence.
23. The date on the Final Notice of 19 November 2019 is wrong but on the basis the Final Notice was issued as an attachment to the letter from Mr Akpom of 19 November 2018 it would have been clear this was an administrative slip and does not invalidate the Final Notice. The Final Notice includes all the information as required by legislation.
24. There is an obligation on Mr Siha as Director of the Appellant company to comply with the legislative obligations and it does not assist him to assert that it was the fault of Mr Chamberlain or Mr Obiajulu. Letting agents are expected to be aware of the law as it impacts on their business. Mr Siha, as the Director of the Appellant company, is responsible for its omissions.
25. The decision to impose a monetary penalty was not based on an error of fact, was not wrong in law and the amount of the penalty is not unreasonable.
26. I find there are no extenuating circumstances. In reaching this decision I have taken into account the size of the business. I have no accounts to consider but I accept what Mr Siha has told me that the Appellant company manages over 400 properties and deals with the high end of the lettings market. I find that the maximum fine is not disproportionate to the turnover and scale of the business. I find that the penalty would not lead to the Appellant going out of business.

G The Decision

27. The appeal is dismissed. There are no extenuating circumstances. The monetary penalty is appropriate in all the circumstances.

Signed: J R Findlay
Judge of the First-tier Tribunal
Date: 1 April 2019
Signed: 29 April 2019

