First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2017/0030

Heard at Fleetbank House, London
on 12th February 2018

Between

GREEN HOUSE ESTATE AGENTS LTD

Appellant

and

LONDON BOROUGH OF ENFIELD

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Green House Estate Agents Limited ("Green House") appealed against a Final Notice dated 24th August 2017 served on it by the London Borough of Enfield ("Enfield"). The Final Notice sets out Enfield's conclusion that Green House was on 22nd June 2017 engaged in letting agency work in Enfield and had committed a breach of the following duties imposed on letting agents under section 83 of the Consumer Rights Act 2015 (the "Act"):

"Failure to display a list of fees, as required by Section 83(2)(premises), s83 (3) website.

Details of breach: No tenants fees displayed on the website www.greenhouseestate.co.uk"

In the Final Notice Enfield imposed a monetary penalty on Green House of £2,500 for this breach.

2. Enfield stated in the Final Notice that they had issued a notice of intent to Green House on 22nd June 2017 (the "Notice of Intent") giving details of the failure to display fees and two other failures to comply with the requirements of section 83 of the Act and indicating that they intended to impose a penalty of £5,000 and inviting representations from Green House.

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 which forms part of this decision.

4. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under section 83, it may impose a financial penalty under section 87 of that Act. It does so by serving first a Notice of Intent, considering any representations made in response, and then serving a Final Notice on the letting agent concerned.

5. Schedule 9 paragraph 5 to the Act provides that a letting agent upon whom a financial penalty is imposed may appeal to this Tribunal. The permitted grounds of appeal are (a) that the decision to impose the 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. The Tribunal may quash, confirm or vary the Final Notice which imposes the financial penalty

C. Guidance

6. 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 section of the Guidance that is of greatest relevance to this appeal is set out below:

"Penalty for breach of duty to publicise fees

The enforcement authority can impose a fine 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."

D. The Appeal

7. Green House submitted an appeal dated 6th September 2017 against the decision in the Final Notice. In the letter of appeal Green House stated that Enfield's decision to impose the penalty was unreasonable, unfair and based on an error of fact and the Final Notice should be quashed. In the appeal Green House explained that they do not charge fees to tenants or landlords and they had told Enfield this. However, as Enfield had insisted that they must charge fees and must publicise them, they had, asked their I.T. provider to add fees to landlords and tenants on to their website. They first contacted their I.T. provider on 13th April 2017 and then chased them to implement the work throughout April, May and June 2017. Copies of this correspondence had been sent to Enfield. Despite deciding to publicise fees Green House stated they had never levied any. They also argued that the penalty of £2,500 was too much for Green House, which was not making a profit and it would push the director, Mr Duzgun, and his family further into debt.

8. Enfield responded to the grounds of appeal by providing details of the contact and correspondence that they had had with Green House prior to issuing the Final Notice. In early April 2017 a Trading Standards Officer from Enfield visited Green House's premises twice and advised that Green House must display their fees to landlord and tenants at their premises and on their website. Mr Mohammed confirmed that Enfield had been informed at the time by Green House that they did not charge any fees. They denied saying that it was compulsory to charge fees. They had said that any fees, including zero fees must be displayed at Green House's premises and on their website. They left an 'inspection report ' after the visit on 12th April 2017 and in this the Trading Standards Officer stated "*no fees to tenants currently, but still need to state zero fees*".

9. Enfield denied that the amount of the penalty was unreasonable. They referred to the Guidance and the express statement that a penalty of £5,000 should be imposed unless there were extenuating circumstances. In the light of Green House's representations in response to the Notice of Intent they had reduced the penalty to £2,500. These representations made the point that, whilst Green House had originally decided not to charge fees to landlords and tenants, as result of the visits from the Trading Standards Officer they had now created and displayed fees to landlords and tenants at their premises and they had sent a photo of their sign

displaying this information to the Trading Standards Officer at Enfield on 25th April 2017. Green House went on to explain their attempts to get their I.T. contractor to amend their website so that the fees were displayed and provided copies of the phone messages and e-mails they had sent to the contractor. It also referred to the proposed penalty having a severe financial implication for the business.

D. The hearing

10. The Appellant was represented by its owner and director, Mr M Duzgun. The Respondent was represented by Mr J Mohammed, Counsel.

11. Mr Duzgun arrived late for the hearing and did not have the bundle prepared by Enfield and stated that he had never received it. The hearing adjourned for 25 minutes to permit time for Mr Duzgun to read the bundle. Mr Duzgun confirmed after the adjournment that he had reviewed the bundle and that he understood the issues and was happy to proceed. It was agreed that Mr Mohammed, on behalf of Enfield, would present Enfield's case first in order to assist Mr Duzgun to understand the case he was appealing against.

12. Mr Mohammed represented Enfield and explained that Enfield had decided to issue the Final Notice and impose a penalty because of Green House's failure to display its fees for tenants on its website on 22nd June 2017. Two witnesses were called on behalf of Enfield; Ms Hearne, a Principal Fair Trading Officer at Enfield, who was able to explain the activities and correspondence that occurred prior to the issue of the Final Notice and Ms McDaid, who chaired the panel that decided on the issues of the Final Notice by Enfield after taking account of Green House's representations. Mr Duzgun had a number of questions for, and comments to make in response to, Ms Hearne, but had no questions for Ms McDaid.

13. Mr Duzgun explained that he was the owner and director of Green House, which is a small family run business that had been operating for three and a half years.

14. As the hearing progressed it became apparent that the parties agreed on a number of the facts that are relevant to the appeal. In particular it was common ground that Enfield had pointed out Green House's failures under the Act in April 2017 and that Green House had remedied all of the failures other than the failure to publish its fees to tenants on its website by 22nd June. Enfield asserted and Mr Duzgun accepted that Green House was operating as a letting agent in Enfield and dealing with tenants and landlords in the period up to and on 22nd June and that it was operating a website.

15. Three material matters remained in contention after the parties had made their submissions:
    - Whether Green House was carrying out letting agency work as defined in the Act? Mr Duzgun was asked to explain his statement that Green House did not charge fees to tenants and landlords, when these were the only sources of income

from a letting agency business. Mr Duzgun explained that the business model of Green House was to agree to "guarantee" the rents to the landlord of a property and then to let out the property to tenants at a higher rate.

- If no fees were charged to landlords, was Green House under an obligation to publish that fact or that "zero fees " applied as stated by Enfield.
- Whether the amount of the monetary penalty imposed by Enfield was unreasonable.

I consider these in detail below.

D. Conclusions on the facts and law

16. In reaching a decision in this case I have had regard to all of the written submissions, evidence and other documentation provided by both parties during the course of this appeal.

17. In considering whether Green House was carrying out letting agency work as defined in the Act, it is necessary to look at section 86 (1) of the Act, which states:

" 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."

18. Mr Duzgun did not directly challenge the conclusion that Green House was carrying on letting agency work. I referred him to the provisions of section 86 (1) at the hearing. Mr Duzgun stated repeatedly that Green House do not charge tenants or landlords fees. He said that he had understood from Enfield that he was required to do this and then to display the fees. His business model does not require it because his income is derived from committing to pay rents to landlords at a certain level, irrespective of whether the property had a tenant. Green House then let the property out to tenants at a higher rate than it had 'guaranteed ' to the landlord. The margin between the tenants' rent and the landlord's rent gave Green House an income. Mr Duzgun referred to Green House entering into a contract for three to five years with a landlord and then issuing a licence to tenants. He said that Green House bore minor costs of the property being let and the landlord picks up the major costs. He did not produce any documents that explained the respective responsibilities of Green House and the landlord and could not provide any more clarity with regard to the responsibilities that Green House took on behalf of, or in accordance with the instructions of a landlord. Mr Duzgun said that Green House only started charging fees after the visit from the Trading Standards Officer in April 2017. Mr Duzgun was content to accept that Green House was a letting agent even after the issue under the Act was explained to him. Green House had introduced fees in April 2017 and had sent a photograph of their display of such fees to Enfield to show their compliance.

They took these steps prior to 22nd June 2017. Mr Duzgun stated that Green House business was still 95% guaranteed lets, but that over a period that he estimated as the last 6 months it had "normal " lets as well. It had felt obliged to create fees and had displayed them, however Mr Duzgun said he had tried to levy the fees, but he had always waived them.

19. I conclude on the balance of probabilities that the evidence indicates that at the time of the Final Notice Green House was providing a service to those seeking to find a home to rent under an assured tenancy and to landlords seeking to find such tenants. Furthermore Green House was seeking at the time of the Final Notice to charge fees to some landlords and tenants, albeit with confused motives. I conclude that Green House was carrying out letting agency work as defined in section 86 (1) of the Act and was seeking to charge fees for this work..

20. It follows from this conclusion and from the evidence that was produced showing Green House displaying fees for both landlord and tenants after April 26th 2017 that the issues of whether Green House needed to publish that it had zero fees is not relevant to the determination of this appeal. I make no finding on this issue.

21. Green House was consistent in their representations, in their appeal and at the hearing in arguing that the amount of the monetary penalty imposed on them 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 recognises that an issue that should be considered in this regard is whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is clear that the Act must take precedence over the Guidance and that, in any event, enforcement authorities such as Enfield 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.

22. 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.

23. Mr Duzgun argued strongly that Green House had done everything that they could to comply with their obligations after being alerted to them by Enfield. He also argued that, as they had not imposed fees before being asked to so by Enfield, they had not been in breach of the Act before then. He said that they had been let down by their I.T. contractor despite their repeated attempts to cause him to carry out the required work in displaying the landlord's fees. I accept that the evidence points to

Green House taking steps to become compliant after April 2017 and that it had chased its I.T. contractor in order to ensure that the required information was on its website. I accept that prior to April, Green House may have genuinely believed that it did not need to comply with the requirements of the Act with regard to the display and publishing of fees. I note that the Inspection Report issued by Enfield after the visit of 12th April refers to the failure to display and publish fees and to display the full company name of Green House. It does not refer to any other failure to meet its other obligations as a letting agent under the Act. I conclude that it is reasonable for Enfield to have reduced the penalty imposed on Green House from the £5,000 level indicated in the Notice of Intent to £2,500 in the Final Notice in the light of the uncertainty around the duration of Green House's breach of the Act and their prompt efforts to achieve compliance.

24. No financial information was provided by Green House. Enfield produced the abbreviated account of Green House for the year to 30 November 2016, which they had obtained from Companies House. These only showed a balance sheet for Green House rather than a profit and loss account. The balance sheet showed cash in hand of £8,199 at 30th November 2016 and that Green House had net assets of £2,537, which had increased by approximately £7,000 over the previous year. It was not possible to assess the level of remuneration paid to Mr Duzgun or his family. The balance sheet suggests that Green House has a low value and low profits. The information available to me does not suggest that Green House would be unable to pay a penalty of £2,500 or that it will threaten the viability of the business. Green House has had the opportunity to provide further evidence supporting its contention that the level of its financial difficulties amount to extenuating circumstances that justify a further reduction from the penalty of £2,500 for the breaches of section 83 of the Act. It has not done so.

F. ***Decision***

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

26. I find that Green House' failure to display at their premises on 22nd June 2017 a list of the fees that they charged to tenants of their letting agency business put them in breach of section 83 of the Act and that the financial penalty of £2,500 imposed by Enfield is not unreasonable.

27. The appeal is dismissed

Peter Hinchliffe
Judge of the First-tier Tribunal
22 March 2018
Promulgation Date: 29 March 2018

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 and other information. 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

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 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 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 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.