First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2018/0044

Decided without a hearing
On 7th December 2018

Between

BAYSWATER PROPERTY SERVICES LTD trading as ASTONS LONDON ESTATE AGENTS

Appellant

and

WESTMINSTER CITY COUNCIL

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Bayswater Property Services Limited ("Bayswater") appealed against a Final Notice served on it by Westminster City Council ("Westminster"), which is the local weights and measures authority for Bayswater's premises at 9 Spring Street, London W2 3RA. The Final Notice is dated 24th July 2018 and sets out Westminster's conclusion that Bayswater was between 1st March and 15th March 2018 engaged in letting agency work in breach of two of the requirements imposed on Bayswater

under section 83 of the Consumer Rights Act 2015 (the "Act"). The Final Notice records these breaches as follows;

"You have failed to:

- *Publish a list of your relevant fees on your website in accordance with section 83(3) and 83(1) of the Act.*
- *Display the said fees in relation to properties (dwelling houses) located in Westminster."*

Westminster imposed a penalty on Bayswater of £4,000 in total for the breaches.

2. Westminster stated in the Final Notice that they had issued a notice of intent to Bayswater on 15th March 2018 (the "Notice of Intent") giving details of their breaches of the requirements of section 83 of the Act and proposing a fine of £5,000.

B. Legislation

3. Section 83 of the Act and other 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.

4. Where the relevant enforcement authority is satisfied on the balance of probabilities that a letting agency has breached its duties under section 83 of the Act, it may impose a financial penalty under section 87 of the 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 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

7. Bayswater submitted an appeal dated 20th August 2018 against the decision in the Final Notice. Bayswater set out two grounds of appeal: They stated that the amount of the monetary penalty is unreasonable taking account of the size of Bayswater, its turnover and the fact that the company's business had been declining for some years and that it was barely profitable. Bayswater also stated in their appeal that the

decision of Westminster to find them in breach of section 83 of the Act was unreasonable as they had clearly published and displayed their fees to tenants on their website, they made their fees to landlords clear and transparent and provided them in writing when they engaged with the landlords and their failure to display their fees at ther premises arose as a consequence of an oversight after moving offices. The oversight had led them to fail to place the picture frames containing their client fee information on the walls by the time of the visit by Westminster's Trading Standards Officer on 15th March 2018. Bayswater provided details of their turnover and profit or loss for 2013 to 2017. They stated that their turnover had been £227,702 and their profit had been £6,170 in 2017. This was a marked decline from 2015 when their turnover had been £399,416 and their profits were £45,407.

8. In their appeal Bayswater indicated that they wished the appeal to be heard on the papers. Having considered the subject matter of the appeal, the evidence and submissions provided by the parties and the capability of the parties I consider that this appeal is suitable for determination on this basis.

9. Westminster submitted a response to the grounds of appeal on 20th September 2018. They stated that Bayswater had failed to publicise their tenant fees in full on their website. Westminster said that Bayswater had listed "a *single "Administration Fee" without a detailed description sufficient to enable a person who is liable to pay it to understand the service or the cost that is covered by the fee or the purpose for which it is imposed*" They concluded that as a consequence Bayswater was in breach of section 83 (4) (a) of the Act. The fees listed were also said to be in breach of section 83 (4) (b) of the Act as they did not indicate whether they related to each dwelling house or each tenant. Westminster also stated that no fees for landlords were listed on the website. Westminster regarded information disclosed in writing or by some other method as irrelevant in considering what was displayed on Bayswater's website at the relevant time. The response referred to the fact that no accounts or financial evidence had been submitted by Bayswater, but Westminster had considered the most recent account filed by Bayswater at Companies House. These accounts were for the year to 30 November 2017 and marked as a draft. Westminster set out a brief analysis of the financial information in these accounts and stated that "*this does not paint the picture of a small independent agent*".

10. Westminster also confirmed in their response to the appeal that they had considered the representations submitted to them by Bayswater on 5th April 2018 in response to the Notice of Intent. Bayswater made their representations in a letter to Westminster in which they explained that they had immediately remedied the breaches after receiving Westminster's Notice of Intent. They expressed regret that this incident had occurred and pointed to their long history of compliance and their membership of a number of trade and consumer protection bodies. They confirmed that the display of fees at their premises had been compliant until their office move in the last few months. Their website was undergoing a change which would have included a full display of their fees, but following the visit by the Trading Standards Officer on 15th March 2018 and the issue of the Notice of Intent the fees had been

added to the website immediately. Bayswater stated in their representations that any fine that is imposed would *"have a significant and detrimental effect which in the current climate will break us as a business"*.

11. Westminster explained in their response to the appeal that they had reduced the fine from £5,000 to £4,000 in the light of Bayswater's representations. Westminster said that this was done even though they were mindful that the Guidance indicates that a fine of £5,000 for a breach of the Act is to be regarded as the norm unless there are extenuating circumstances. Westminster acknowledged that Bayswater had worked quickly to bring their website into compliance, that they had moved premises recently, that Bayswater is a small business and the fine would be detrimental to them. However, they also stated that no accounts or financial evidence had been submitted, that the Act had been in force for three years and that Bayswater should have been aware of their obligations and its membership of various trade bodies provided access to the information required in order to comply with the Act.

12. Westminster provided witness statements from Mrs Alexandra McKeown, the Trading Standards Officer who had visited Bayswater's premises on 15th March 2018 and who had signed the Letter of Intent and the Final Notice and from Mr Chuma Akpom, Team Manager for Trading Standards at Westminster, who had made the decision to issues the Final Notice and to fix a penalty of £4,000. Both Mrs Alexander and Mr Akpom described their role in monitoring Bayswater and then pursuing the process leading to the issue of the Final Notice. They provided copies of Westminster's correspondence with Bayswater.

13. Bayswater made further submission on 2nd October 2018. They did so by commenting on the response submitted by Westminster. In this submission Bayswater stressed their financial difficulties and pointed to their decline in turnover and profitability The stated that they had made six members of staff redundant since 2014 and the owner of the business, Mr Antony DiLieto, had paid considerable amount into the company since 2014 from the funds derived from the sale of a property that he owned in order to keep Bayswater trading. They provide a list of payments totalling in excess of £275,000 that were paid into Bayswater between 2014 and 2017. Mr DiLieto stated that Bayswater had an overdraft of -£19.038.28. Mr DiLieto, on behalf of Bayswater, referred to Bayswater's 2017 accounts registered at Companies House and provided a response to the analysis of the 2017 accounts provided by Westminster in their response. Bayswater referred to the considerable decline in their turnover and employees. There are only two employees left out of eight in previous years. Their capital reserves had declined from the £27,777 shown in the 2017 accounts. Bayswater did not disagree that the fixed assets of the business were £512,603 and tangible assets were £502,391, but pointed out that these assets were not accessible in order to pay debts. Bayswater agreed that the wages and salaries, including Director salaries, were £67,045 in the 2017 accounts, but Bayswater stated that this was not relevant to whether they could afford to pay the penalty and this number did not include commission payments to

staff,. Bayswater said that they had only 5 lettings properties and 7 sales properties that they were marketing at the time that they wrote. Other properties advertised on their website were priced too highly and would not impact on the earnings of the business. Bayswater stated they were grateful to Westminster for their leniency in reducing the penalty from £5,000 to £4,000, however they had an overdraft and could not afford to pay this amount without an extremely detrimental effect of the business including a further redundancy.

D. Conclusions on the facts

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

15. The parties agree and on the basis of the evidence and the submissions, I concur, that between 1st March and 15th March 2018 (the "Relevant Period") Bayswater was engaged in lettings agency work within Westminster and had a duty to display the fees that they charged to tenants and landlords at their premises and to publish such fees on the website that they operated at the time.

16. I conclude from the submissions of the parties and the evidence that during the Relevant Period Bayswater was not meeting its obligation under section 83(2) to display a list of its fees at its premises at a place at which the list is likely to be seen by a person using or proposing to use their services. Bayswater acknowledged from the outset that they had not placed the information on their fees on the walls of their new office when they moved in and they remedied the position immediately after the receipt of the Notice of Intent.

17. I understand from Bayswater's submissions in this appeal and their representations to Westminster that they accept that during the Relevant Period they failed to display their fees to landlords on their website. Bayswater stated in their representations to Westminster that they supplied details of their fees to landlords enclosed with their detailed terms of business. In setting out the grounds of appeal, Bayswater repeated that they sent out their fees to clients and provided them in writing before engagement. Bayswater have not argued that their fees to landlords were fully set out on their website during the Relevant Period and their submission suggests that the fees were physically sent to landlords. Mrs McKeown stated in her witness statement that she could not find any landlords' fees listed anywhere on their website. I conclude from the submission of the parties that Bayswater had not published their fees to landlords on their website during the Relevant Period.

18. Bayswater stated that they had published their fees to tenants on their website during the Relevant Period. They explained that their fees were simple and consisted of a single lump sum for an initial tenant with a fixed price supplement for each additional tenant in a property. In their response to the appeal Bayswater stated that there was breakdown of their fees to tenants on their website, however they

understood that these were not in enough depth to comply with the "*change in legislation*". Mrs McKeown referred to the website displaying a single "Administration Fee" and this is supported by the extract from the website during the Relevant Period that was attached to her witness statement. Bayswater has not suggested that this extract is inaccurate or incomplete. After Mrs McKeown's visit to Bayswater's premises on 15th March 2018 the required changes were implemented and Westminster confirmed that these were satisfactory. I note that the information provided on the revised fees to tenants show that in addition to a "set up fee" Bayswater also charges a "referencing fee", a "guarantor fee" and possible additional fees for "change of tenant", "renewal", and an "unpaid deposit protection fee". In addition unpaid rent and professional cleaning fees were also listed. Westminster referred to section 83 (4) (a) of the Act and the obligation on letting agents to 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"*. I conclude from the evidence and submissions provided by the parties that Bayswater's action in publishing a single administration fee for tenants on their website during the Relevant Period was insufficient to satisfy the requirements of sections 83(3) and 83(4)(a) of the Act.

19. Bayswater's principal concern in bringing the appeal and the main focus of their arguments has been that the amount of the proposed penalty is unreasonable. For the reasons set out above Bayswater assert that the proposed penalty is too great and will harm their business and its ability to survive. Westminster argue that the reduction of £1000 in the penalty amount in the Final Notice, which was made in response to the representations that Bayswater submitted regarding their difficulty in paying the penalty and the serious adverse impact it would have on their business, is sufficient to recognise the particular circumstances of Bayswater.

20. Section 87 of the Act sets out the basis upon which penalties can be levied for breaches of subsection 83. Section 87 (6) states that:
"*Only one penalty under this section may be imposed on the same letting agent in respect of the same breach*".
Bayswater's failure in the Relevant Period to display their fees at their premises and publish them on their website put them in breach of their obligation under sections 83(2) and 83(3) and as a consequence of section 83(1). Subsection 87 (7) limits the amount of any financial penalty under section 87 to £5,000.

21. The issue for me to decide is, therefore, whether in all the circumstances the penalty of £4,000 set out in the Final Notice in respect of Bayswater's breaches 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 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 Westminster 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. 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.

22. I note that Westminster decided to reduce the penalty to £4,000 in response to Bayswater's representations about the speed with which they remedied the breaches and their financial position and the impact that the penalties would have on them. I have considered the financial information provided by Bayswater in order to determine if a further reduction in the penalties is appropriate. The information provided shows that Bayswater is correct to say that its business is in decline. The turnover has reduced significantly. The profits in 2016 and 2017 are in aggregate no more than the amount of the proposed penalty. I accept the submission from Bayswater that the staff headcount has reduced considerably. I also accept that the figures provided by Westminster from Bayswater's 2017 accounts, show that the company has considerable assets and its net worth remains high and I note that Bayswater did not challenge these figures in their response. I also note that the salary payments to the remaining staff, one of whom appears to be the owner Mr DiLieto, were around £67,000 excluding commission. Bayswater have provided a copy of the bank statement for their "office account" for the period from 2nd October 2017 to 2nd October 2018. This shows that the account has had a negative balance for the whole year and that this net balance has improved by £1,000 over the period. However it is not clear that this account sets out the full position for Bayswater's trading in this period. The payments to staff are not included and number of transaction appears to involve another Bayswater account. There is no evidence that the net worth of Bayswater has declined from the position set out in the 2017 accounts Bayswater have not provided any more recent information on their financial position despite having had the opportunity to do so and understanding the significance of such information to this appeal.

23. I conclude that Bayswater has faced some financial difficulties and has been barely profitable in recent years and I agree with Westminster that these difficulties amount to extenuating circumstance that justify a reduction in the penalty from the £5,000 figure that is set as the "norm" in the Guidance and as the maximum penalty for a breach of section 83 under the Act. However, the evidence does not indicate that Bayswater cannot afford to pay the proposed penalty or that the payment of the proposed penalty will by itself threaten the viability of Bayswater or would be disproportionate to the turnover or scale of the business.

24. I conclude that a £4000 fine is not disproportionate to the turnover and scale of Bayswater's business and would not lead to Bayswater going out of business. I recognise that Bayswater responded quickly and effectively to the breaches when they were pointed out to them and that their non-compliance may have arisen in part out of oversight following an office move at a difficult time for the business and that they had sought to be compliant before that move. For these reasons the penalty should be set at a level below the "norm" set out in the Guidance.

25. In all of the circumstances of this appeal I conclude that a penalty of £4,000 for the breaches of the Act arising out of the failures set out in the Final Notice is reasonable.

F. ***Decision***

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

27. I find that during the Relevant Period Bayswater were in breach of their obligations under section 83 of the Act to display a list of their fees for their customers or prospective customers at their premises and to publish a list of such fees on their website and that a financial penalty of £4,000 should be payable in respect of this breach and that such a figure is reasonable and proportionate.

28. The appeal is dismissed.

Signed

Peter Hinchliffe
Judge of the First-tier Tribunal
7th December 2018
Promulgation Date: 13 December 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. 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

Finally, Schedule 9 provides for appeals, as follows.

Appeals

5
(1) A letting agent on whom a Final Notice is served may appeal against that Final Notice to--

(a) the First-tier Tribunal, in the case of a Final Notice served by a local weights and measures authority in England, or

(b) the residential property tribunal, in the case of a Final Notice served by a local weights and measures authority in Wales.

(2) The grounds for an appeal under this paragraph are that--

(a) the decision to impose a financial penalty was based on an error of fact,

(b) the decision was wrong in law,

(c) the amount of the financial penalty is unreasonable, or

(d) the decision was unreasonable for any other reason.

(3) An appeal under this paragraph to the residential property tribunal must be brought within the period of 28 days beginning with the day after that on which the Final Notice was sent.

(4) If a letting agent appeals under this paragraph, the Final Notice is suspended until the appeal is finally determined or withdrawn.

(5) On an appeal under this paragraph the First-tier Tribunal or (as the case may be) the residential property tribunal may quash, confirm or vary the Final Notice.

(6) The Final Notice may not be varied under sub-paragraph (5) so as to make it impose a financial penalty of more than £5,000.

ANNEX B

Explanatory Notes and Guidance

A. In the present appeal, reference was made to the Explanatory Notes published in respect of the Consumer Rights Bill (which became the 2015 Act) and the Guidance for Local Authorities issued by the Department for Communities and Local Government, during the passage of the Bill, concerning the duty to publicise fees

B. Paragraphs 456 to 459 of the Explanatory Notes read as follows:-

> "456. This section imposes a duty on letting agents to publicise 'relevant fees' (see commentary on section 85) and sets out how they must do this.
>
> 457. Subsection (2) requires agents to display a list of their fees at each of their premises where they deal face to face with customers and subsection (3) requires them to also publish a list of their fees on their website where they have a website.
>
> 458. Subsection (4) sets out what must be included in the list as follows. Subsection (4)(a) requires the fees to be described in such a way that a person who may have to pay the fee can understand what service or cost is covered by the fee or the reason why the fee is being imposed. For example, it will not be sufficient to call something an 'administration fee' without further describing what administrative costs or services that fee covers.
>
> 459. Subsection (4)(b) requires that where fees are charged to tenants this should make clear whether the fee relates to each tenant under a tenancy or to the property. Finally, subsection (4)(c) requires the list to include the amount of each fee inclusive of tax, or, where the amount of the fee cannot be determined in advance a description of how that fee will be calculated. An example might be where a letting agent charges a landlord based on a percentage of rent."

C. So far as enforcement of the duty is concerned, the Explanatory Notes state:-

> "477. Subsection (4) [of section 87] provides that while it is the duty of local weights and measures authorities to enforce the requirement in their area, they may also impose a penalty in respect of a breach which occurs in England and Wales but outside that authority's area. However, subsection (6) ensures that an agent may only be fined once in respect of the same breach".

D. Other passages of the Departmental Guidance are as follows:-

> "**Which fees must be displayed?**
>
> <u>All fees, charges or penalties (however expressed)</u> which are payable to the agent by a landlord or tenant in respect of letting agency work and property management work carried out by the agent in connection with an assured

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

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

… … … … …

How the fees should be displayed

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

Examples of this could include individual costs for:

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

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

Penalty for breach of duty to publicise fees

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

The expectation is that a £5000 fine should be considered the norm and that a lower fine should only be charged if the enforcement authority is satisfied that there are extenuating circumstances. It will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the letting agency makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; alternatively an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue that should be considered is whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business.

Primary Authority Advice

E. Under the Regulatory Enforcement and Sanctions Act 2008, eligible businesses can form partnerships with a local authority in relation to regulatory compliance. The local authority is known as the "primary authority".

F. Pursuant to the 2008 Act, a primary authority partnership exists between Warwickshire County Council Trading Standards, the National Federation of Property Professionals and the Property Ombudsman. In November 2015, Warwickshire Trading Standards issued "Primary Authority Advice" in relation to the question: *"is it misleading for a letting agent not to display tenant and landlord fees in their offices?"*

G. This Advice includes the following:-

> "**Assured Advice Issued:**
>
> Section 83 of the CRA requires letting agents to display their fees for tenants and landlords.
>
> These must be displayed at each of the agent's premises where people using or likely to use the agent's services are seen face-to-face. The fees must be displayed in a place where such people are likely to see them. People should not need to ask to see the fees as the list should be clearly on view.
>
> The fees must also be published on the agent's website, if there is one.
>
> It is considered good practice for agents to check that customers have seen the fees price lists before they enter into any agreements or contracts.
>
> The list of fees must include a description of each fee that enables people to understand what it relates to and how much it will be. In relation to fees payable by tenants, it should be clear whether each fee is per property or per tenant. Fees should be inclusive of VAT and any other taxes. …
>
> The list must be clear and comprehensive. Surcharges, hidden fees or vague expressions like 'admin fee' are not permitted".