



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

**Appeal Reference: PR/2017/0041**

**Held on the papers**

**Before**

**Judge CLAIRE TAYLOR**

**Between**

**HEXLINK LIMITED t/a EXCEL PROPERTY**

Appellant

**and**

**LONDON BOROUGH OF CAMDEN**

Respondent

**Decision**

This appeal is allowed in part for the reasons set out below.

## REASONS

1. Hexlink Limited t/a Excel Property (the 'Appellant' or 'Hexlink') appeals against a penalty charge of £4,000 issued by the London Borough of Camden (the Council) related to failure to publicise details of the client money protection scheme ('CMP') on the agent's website statement in accordance with the section 83(6) Consumer Rights Act 2015.
2. Both parties were content for the matter to be determined without an oral hearing.

### **A. The Law**

#### ***The requirement for letting agents to publicise details of fees***

3. The Consumer Rights Act 2015 (the 'Act') 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, as follows:

#### **"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.”*

*Emphasis Added.*

## **Enforcement**

4. 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.” (Emphasis Added).*

## **Appeals**

5. 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 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.”*

*Emphasis Added.*

## **B. Guidance**

6. The Guidance for Local Authorities issued by the Department for Communities and Local Government (known as ‘statutory guidance’ and referred to below as the ‘Guidance’), during the passage of the Bill, concerning the duty to publicise fees includes the following at Annex D:

### **a. Penalty for breach of duty to publicise fees**

*“The expectation is that a £5,000 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 lettings agent 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 which could be considered is whether a £5,000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business". (Page 60 of the Guidance).*

### **C. Factual Background**

7. The basic facts in this case are not in dispute. On 25 February 2015 Mr McKeown, a Consumer Protection Officer for the Council visited the Appellant's premises and advised them of their obligations under the Act that were coming into force. On 30 June 2015, he wrote to the company and informed them that the Act had come in to force on 27 May 2015. On 22 December 2016, he sent a guidance leaflet about the legislation. (See pages 41 to 45 of the Bundle).
8. On 16 August 2017, he checked the Appellant's website and found that the company failed to state whether it was a member of a CMP. He visited the premises and served a Notice of Intent to impose a penalty of £5,000 for the breach. Hexlink responded informing that it had joined a CMP and had amended its website and that fine represented a high proportion of its turnover. The Council decided to issue a Final Notice reducing the fine to £4,000 in view of the Appellants having complied after the Notice of Intent. (This is referred to below as demonstrating a 'trajectory of compliance').

### **D. Submissions**

9. Kyriacos Kyriacou of the Appellant now appeals the penalty. Reasons and evidence submitted include:
  - a. The amount of the monetary penalty is unreasonable:
    - i. The Appellant is a small independent estate agency with two directors and four to five employees on gross salaries from £25,000 to £38,000 p.a. For the year to 31 March 2016 it had a net profit of £107,519.
    - ii. The penalty of £4,000 is disproportionate. It represents 3.72% of the net profit and 13.7% of the advertising expenditure for 2016. The penalty would result in a major cutting back of the advertising budget and as a consequence, turnover would be greatly reduced as agents rely on advertising to generate new property instructions and market properties.
    - iii. If having to cutback staff bonuses, some will consider moving to the multi-branch corporate estate agencies. In current market conditions it is extremely difficult to recruit and train good staff.

- b. The decision was unreasonable:
  - i. When Mr McKeown visited in February 2015 the Appellant was having a new website designed and thought they had that we had instructed the designers of all the many requirements of the Act. It was not its intention to mislead. The company has been trading since 1993, provides a professional service with no incidents of client funds being misappropriated. It immediately applied to become a member of CMP and amended the website as soon as it was notified of the breach.
  - ii. Whilst the Council is not obliged to contact businesses to advise of a breach, had they done so, they would have taken steps to remedy the situation much earlier.

10. The Council's evidence and submissions include:

- a. The company has made quite a high turnover.
- b. The Guidance indicates an expectation that a fine of £5,000 should be considered the norm, and that a lower fine should only be charged if satisfied of extenuating circumstances.

### **E. Finding**

- 11. It is accepted by the Appellant that it had failed to comply with the legislation set out above. Therefore, there was a legal basis for the Council to impose a financial penalty on the Appellant.
- 12. The Appellant maintains that the penalty is unreasonable due to the business being relatively small. However, the accounts do not support this contention, in terms of both turnover and net profit. It is for the company's to ensure it complies with its statutory duties, and the penalty system is a means to ensure compliance and consumer protection. That the company might prefer to spend the amount on another purpose is not a concern for the Council, where the Appellant has shown no compelling case of financial hardship resulting from the penalty. Likewise, if the company's website does not comply with the legislation, it needs to take responsibility for this.
- 13. Notwithstanding the above, looking at the matter in the round, the penalty does seem high. The requirement under section 83(6) regarding a CMP statement is one part of the duty within section 83(2). Sub-Sections 87(6) and (7) make clear that only one penalty may be imposed in respect of the same breach of duty and the total penalty must not exceed £5,000. The Council's original fine of £5,000 (prior to discounting £1,000 for the trajectory of compliance) takes no account of the company having complied with other aspects of the duty. On that basis, had the Appellant not published a list of tenants and landlord fees as well as the CMP statement, the Council's would have been seeking to levy the same level of fine.
- 14. It is noted that the Council's leaflet at page 42 seems ambiguous on this point. It refers to the ability to fine £5,000 for each 'offence' but does not make clear



that the statutory framework simply does not contemplate the possibility of multiple breaches of the same section 83 duty. From the descriptions and presentation of material, it might be thought that the Council would be able to levy two fines for the same section 83 duty.

15. In all the circumstances and based on the information before me, I find that it is reasonable for the final notice to be varied, so that the financial penalty payable is £3,000, rather than £4,000.
16. Accordingly, I allow the appeal to a limited extent.

**Dated**  
**Promulgation Date**

**Judge Claire Taylor**  
**13 May 2018**  
**22 June 2018**