



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

Appeal Reference: PR/2017/0048

**Heard at Fleetbank House, London
on 19th April 2018**

Between

NEXT PROPERTY LTD

Appellant

and

WESTMINSTER CITY COUNCIL

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Next Property Limited (“Next”) appealed against a Final Notice dated 17th November 2017 served by Westminster City Council (“Westminster”) in which Westminster stated that Next was between 18th April 2017 and 24th July 2017 engaged in letting agency work in Westminster and in breach of the duty imposed on letting agents under section 83 of the Consumer Rights Act 2015 (the “Act”). The Final Notice set out the breach in the following terms:

“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 Westminster*

Date of breach: 18th April 2017-24th July 2017 and continuing

Details of breach:

As a letting agent you have failed to publicise on your website (www.netproperty.co.uk) the amount of your landlord fees partially or at all”

2. In the Final Notice Westminster imposed a monetary penalty on Next of £5,000 for this breach. Westminster stated in the Final Notice that they had issued a notice of intent to impose a monetary penalty to Next on 31st August 2017 (the “Notice of Intent”) and that no representations had been received from Next in response to the Notice of Intent.

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 the Annex 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. Next submitted an appeal dated 14th December 2017 against the decision in the Final Notice. In the appeal Next set out the following grounds of appeal:
 - Their fees for landlords were published on their website so the reason for the penalty was wrong.
 - Westminster was wrong to say where on Next's website the landlord fees should be set out.
 - The amount of the penalty was unreasonable as it was unaffordable for Next and would require them to make staff redundant.
 - Next had notified their web developer of the need to add the fees, however the work was delayed by technical problems with producing pop-ups on their website.
 - They had called Westminster in response to the Notice of Intent but had been unable to get through.

8. Westminster responded to the grounds of appeal by providing details of the discussions and correspondence that they had had with Next prior to the issue of the Notice of Intent and up to their visit to Next's premises on 17th November 2017 when they delivered the Final Notice. Westminster argued that Next were in breach of other provisions of the Act during this period and that they had been very lenient in not imposing further fines for other breaches of the Act. They referred to the accounts for Next for the year to 31 May 2016, which showed that they had made a small profit of over £10,000. Westminster stated that a £5,000 penalty was not unreasonable. Westminster accepted that on 17th November 2017 Next was able to demonstrate that their fees for landlords were on their website, but Westminster regarded this information as having been only just put on the website and as not being displayed prominently enough on the website.

9. Next responded to Westminster's assertions and gave more details of their reasons for appealing. They repeated that their website was compliant prior to the issue of the Final Notice. They stated that they had asked for an extra seven days to make representation to Westminster after the Final Notice had been delivered to them. This had been agreed by the Trading Standards Officer who delivered the Final

Notice, but the offer was then withdrawn. They repeated that they would suffer financial hardship if the penalty of £5,000 had to be paid.

D. The hearing

10. The Appellant was represented by Mr Robert Benson, the head of its residential business. The Respondent was represented by Ms Kirsty Panton. Westminster provided witness statements and evidence from Donald Silcock and Samantha Cowell, two Trading Standards Officers who had dealt with the case against Next, Mr Chuma Akpom, the manager of the Trading Standards function at Westminster, who made the decision to issue the Final Notice, and from Laura Cox, a Trading Standards Officer who had taken screen shots of Next's website at various times in 2017.
11. It was agreed between the parties that Ms Panton would commence by setting out the basis upon which Westminster had issued the Final Notice and why it believed the monetary penalty should be imposed. Ms Panton explained that Westminster had decided to issue the Final Notice and impose a penalty because of Next's failure to display its fees for landlords on its website between 18th April and 24th July 2017.
12. Mr Benson responded and set out Next's appeal and in particular he sought to establish that Next had responded effectively to the Notice of Intent and had remedied its breach before the Final Notice was issued. Next had been delayed in adding the fees information to their website by difficulties in presenting them through pop-ups on the website.
13. It was apparent from the submissions at the hearing and from the written submissions that preceded it that the parties agreed on some of the facts that are relevant to the outcome of this appeal. It was common ground between the parties at the hearing, and I find it was the proper conclusion from the evidence, that during the period from 18th April to 17th November 2017 :
 - Next was operating as letting agent.
 - Next operated from premises within Westminster and fell within Westminster's jurisdiction as an enforcement authority under the Act.
 - Next operated a website on which it was required to publish its fees for landlords and tenants.
 - Westminster had properly delivered the Notice of Intent and the Final Notice to Next's premises.
 - Next did not submit any representations in response to the Notice of Intent.
 - The only breach that is set out in the Final Notice is the failure to display landlord fees on Next's website between 18th April and 24th July 2017 and the monetary penalty is imposed solely in respect of this breach.
 - On the visit by Westminster to Next's premises on 17th November 2017 Mr Benson had been able to show Mr Silcock where the landlords' fees were then displayed on Next's website.

14. As a consequence of the conclusions on the points listed above, the principal matters that remain in contention between the parties and which I need to decide in order to determine this appeal are the following:
- The date on which the landlord's fees were published on Next's website.
 - If this was before 24th July 2017, whether the landlord's fees were displayed with sufficient prominence.
 - The reasonableness of the size of the monetary penalty imposed in the Final Notice after taking account of any extenuating, mitigating or aggravating circumstances and its impact upon Next's financial position.
15. I discussed the significance of these areas with the parties and in particular with Mr Benson in order to ensure that there was no misunderstanding about the breach of the Act that is the subject of the Final Notice. Mr Benson confirmed that he understood that any remedial work that took place after 24th July 2017 was relevant to the appeal only in so far as it constituted mitigation in respect of the breach, but that it did not give rise to a defence to the breach set out in the Final Notice. Similarly, Miss Panton and Mr Benson confirmed that they understood that any submission regarding other breaches of the Act by Next during the Period from April to November 2017 would only be relevant in so far as they had some bearing on the breach that is identified in the Final Notice. With regard to the reasonableness of the penalty, I explained that the submissions that they made were intended to affect the amount of the penalty and not the liability of Next for any breach of sections 83 (3) of the Act.
16. I consider these matters in detail below.

D. Conclusions on the facts and law

17. 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 and to the evidence and submissions provided in the course of the hearing.

The date on which the landlord's fees were published on Next's website.

18. In Next's written response to Westminster response to the appeal, they stated that at the time of the Final Notice the landlord's fees were on their website. This was accepted by Mr Silcock who confirmed that he had been shown the fees on Next's website on 17th November 2017. The Final Notice referred to Next's failure to display the landlord's fees as occurring between 18th April and 24th July 2017. The Notice of Intent gave the same dates for the breach. Next should therefore have been aware that Westminster was giving notice of their intention to impose a penalty as a consequence of Next's failure up to 24th July 2017. In the hearing Mr Benson stated on behalf of Next that the amendments to their website which added the landlord's fees to the website were made on 16th September 2017. I conclude from this that during

the period from 18th April to 24th July 2017 Next had not published their fees to landlords on their website.

Whether the landlord's fees were displayed with sufficient prominence

19. In the light of the finding that Next's fees to landlords were not displayed on their website during the period from 18th April and 24th July 2017, it is not necessary to determine whether the information about fees for landlords that was added to Next's website on 16th September or, in any event, prior to 17th November 2017 was displayed with sufficient prominence. I make no finding on this point.

The reasonableness of the size of the monetary penalty

20. Next was consistent in their appeal, in their submissions ahead of the hearing and at the hearing in arguing that the amount of the monetary penalty imposed on them is unaffordable and 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.
21. 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. Next stated that a £5,000 penalty was unaffordable, would cause them financial hardship and would cause them to have to make redundancies. Mr Benson said that Next were a small independent company with one office. He is now the only person working on residential property. Mr Benson stated that the residential side of the business was hardly making any money this year. He said that £5,000 would hit Next hard. However, he was unable to provide any specific figures about the turnover or profitability of Next. He was also not aware of their balance sheet. At no time during the course of the appeal did Next provide any evidence about their financial position that supported their contention that a £5,000 penalty would not be affordable or would have serious adverse consequences for their the business. Westminster provided a copy of the micro-entity accounts that Next had filed for the year to 31st May 2017 and abbreviated accounts for the year to 31st May 2016. The two sets of

accounts set out the balance sheet of Next but not its profit and loss accounts. No information on profitability or the remuneration of staff or owners was provided. The balance sheets showed that the total net assets of Next had increased from £378 on 31st May 2015 to £10,820 on 31st May 2016 according to the 31st May 2016 accounts. The 31st May 2017 accounts showed total net assets of £17,054 on 31st May 2016 and that this had increased to £26,992 by 31st May 2017. Mr Benson could not explain why different figures are given for the total net assets at 31st May 2016 in the two balance sheets and this is not material to my decision. I conclude from the information in the balance sheets that a fine of £5,000 would not lead to a risk of Next going out of business, but that it is a material amount for Next.

23. With regard to other mitigating or aggravating factors that might affect the size of the penalty, I find that Next did belatedly take steps to address the problems that Westminster had pointed out to them. However, Next were required to comply with the Act from May 2015 and it is their responsibility to ensure that they comply with the legal obligations that fall upon them as letting agents. There is no evidence to suggest that Next sought to take advantage of clients as a result of their failure to comply with the requirements of the Act. The breach appears to have arisen from a lack of capability and diligence that persisted for a long time.
24. In the circumstances, I conclude that whilst the proposed penalty will be material to Next, I do not believe it to be disproportionate to the severity of the breach or to the financial position of Next. I find that there are no other extenuating or mitigating circumstances that justify a conclusion that the amount of the financial penalty set out in the Final Notice is unreasonable.

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 Next's failure to publish on their website between 18th April and 24th July 2017 a list of the fees that they charged to landlords of their letting agency business put them in breach of section 83 (3) of the Act and that the financial penalty of £5,000 imposed by Westminster in respect of such breach is not unreasonable.
27. The appeal is dismissed

Peter Hinchliffe
Judge of the First-tier Tribunal
26 April 2018
Promulgation Date:

ANNEX

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.