



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

Appeal Reference: PR/2018/0054

**Decided without a hearing
On 7th December 2018**

Between

AFM EXPRESS PROPERTIES-UK LTD

Appellant

and

LONDON BOROUGH OF BRENT

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. AFM Express Properties-UK Ltd (“AFM”) appealed against a Final Notice served on it by the London Borough of Brent (“Brent”), which is the local weights and measures authority for AFM’s premises at 562 Kingsbury Road, Kingsbury, London NW9 9HJ. The Final Notice is dated 13th August 2018 and sets out Brent’s conclusion that AFM was on 22nd June 2018 engaged in letting agency work and had failed to meet four of the requirements imposed on lettings agents under section 83 of the Consumer Rights Act 2015 (the “Act”). The Final Notice records these breaches in the following terms;

“At 562 Kingsbury Road, Kingsbury NW9 9HJK, the address where you deal face to face with person using or proposing to use the services of [AFM], you failed to publish:

1. A list of your relevant fees as there were no tenant fees displayed contrary to s.83(2) of the [Act]

and [AFM] failed to publish on the website www.afmexpress.co.uk

2. A full list of fees on the website contrary to s.83(3) of the [Act]

3. With the list of fees, a statement concerning membership of a client money protection scheme contrary to (s.83(6) of the [Act]”

4. With the list of fees, a statement concerning your redress scheme membership contrary to (s.83(7) of the [Act]”

Brent imposed a penalty on AFM in the Final Notice of £5,000 for each of the four breaches, amounting to £20,000 in total.

5. Brent stated in the Final Notice that they had issued a notice of intent to AFM on 22nd June 2018 (the “Notice of Intent”) giving details of the four breaches of the requirements of section 83 of the Act set out above and stating Brent’s intention to impose four fines of £5,000 and inviting representations from AFM

B. Legislation

6. 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.
7. 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.
8. 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

9. 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

10. AFM submitted an appeal dated 17th August 2018 against the decision in the Final Notice. AFM set their grounds of appeal and provided copies of the correspondence and notices they had received from Brent. AFM's ground of appeal are;
 1. Brent had sent a document headed "Inspection Summary" to them on 13th December 2017 addressed to AFM Express Properties Ltd and not AFM Express Properties-UK Ltd. AFM Express Properties Limited used to operate out of the premises at 562 Kingsbury Road, but had gone into liquidation.
 2. A second notice was also served on them on 22nd June 2018 in the name of the AFM Express Properties Limited (the "Liquidated Company"). AFM state that they should not be liable for notices served on a previous company
 3. Their office was being renovated and was not fully functional at the time of the visit by Brent on 22nd June 2018.
 4. The website referred to in the Final Notice and the Notice of Intent, which AFM erroneously refer to as www.afmexpress.com (rather than www.afmexpress.co.uk) was operated by the Liquidated Company and is not controlled by AFM, who are not able to log-in and are not allowed to gain access to the data on the website. AFM had ordered a new website from a supplier. They had kept the phone number of the Liquidated Company but otherwise had no connection with it.
11. In their appeal AFM indicated that they wished the appeal to be heard on the papers. Brent confirmed that they also wished to proceed on this basis. 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.
12. Brent submitted a response to the grounds of appeal and confirmed that the Final Notice was issued to AFM Express Properties-UK Ltd and not the Liquidated Company, which they accepted had ceased to trade. They confirmed that the Inspection Summary issued by them on 13th December 2017 was issued in the name of the Liquidated Company. Brent stated that on 22nd June 2018 Denise Power, a Senior Trading Standards Enforcement Officer at Brent, visited AFM's premises at 562 Kingsbury Road and met with Mr Al Hussynwy, the same person that she met during her visit on 13th December 2017. He explained that the Liquidated Company had been replaced by AFM. Another Inspection Summary was produced by Ms Power at this visit and e-mailed to AFM in the name of the Liquidated Company. The Notice of Intent was issued after this visit and was issued in the name of AFM. Brent state that any defect in or problem with the Inspection Summaries do not have any implications on the legitimacy of the Notice of Intent
13. Brent confirmed in their response to the appeal that no representations had been received from AFM in response to the Notice of Intent despite Brent sending reminders to AFM and AFM seeking more time to submit such representations.

14. Brent stated that the Final Notice had been issued in the name of AFM. They denied that they were holding AFM liable for breaches committed by the Liquidated Company.
15. Brent did not dispute that cosmetic renovations had been carried out at the premises at 562 Kingsbury Road between the visits on 13th December 2017 and 22nd June 2018. The walls had been painted and the fascia replaced. However Brent does not accept that on 22nd June AFM's office wasn't arranged and fully functional.
16. Brent states that AFM was responsible for the content or lack of content on the website www.afmexpress.co.uk on 22nd June 2018. They gave the following reasons for this conclusion :
 1. The website contained the telephone number and e-mail address used by AFM.
 2. Photos taken in AFM's offices showed headed paper of AFM with the email address of info@afmexpressproperties.com, which is an e-mail address used by AFM and shown on the www.afmexpress.co.uk website
 3. Mr Al Hussynwy's business card for his role at AFM included the website address www.afmexpress.com and the contents of this website were identical to those of www.afmexpress.co.uk.
 4. The owner of AFM, Ms Razzouki, had indicated to Ms Power that she would ask for the website www.afmexpress.co.uk to be removed.
 5. Brent asserts that AFM is a "phoenix" of the Liquidated Company and stated that the Property Redress Scheme ("PRS") to whom the Liquidated Company belonged and to whom AFM continue to belong, share this view. PRS informed Brent that the Liquidated Company had failed to comply with an adjudication against them by PRS.
17. Brent point out that AFM have not appealed on the basis that the amount of the penalty is unreasonable. Nevertheless they explained 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. Brent attached an extract from the Guidance to confirm this point. They also referred to and attached a copy of the decision of the Upper Tribunal in the case of London Borough of Foxtons Limited [2017] UKUT 349 (AAC) as justifying their decision to impose four separate penalties of £5,000 for each breach of section 83.
18. Brent provide a witness statement from Ms Power, in which she described her visit to AFM on 22nd June 2018 and enclosed relevant photographs of the premises and the information displayed there and the business card used by Mr Al Hussynwy. In her evidence Ms Power confirmed that on 21st June 2018 she had examined the website www.afmexpress.co.uk and found that no changes had been made to it since she had seen it in December 2017. At that time it had failed to meet the requirements of the Act and Mr Hussynwy had agreed to amend its contents to make it compliant. I understand from Ms Power's evidence that on 22nd June Mr Al Hussynwy, who then worked for AFM, told Ms Power that the business was having a website built and relied on word of mouth and property platform sites to market its properties at that

time. Ms Power states that Mr Hussynwy was then working for AFM and his business card used the website address www.afmexpress.com. Ms Power met Ms Razzouki during the visit of 22nd June 2018 and Ms Power states that Ms Razzouki stated that she had sent e-mails to a web designer instructing him to remove the website www.afmexpress.co.uk from the internet. Ms Power encouraged Ms Razzouki to send copies of these e-mails to Brent with AFM's representations, but no such information was received from AFM. Ms Power found that the site www.afmexpress.co.uk and www.afmexpress.com were mirror images of each other. Ms Power provided screen shots of the both sites; the screen shot of www.afmexpress.co.uk was taken on 13th December 2017 and the screen shot of www.afmexpress.com was taken between her visit on 22nd June 2018 and 26th June 2018. The contents had not changed during this period and the same six properties were advertised as being to let with the same photos, description and errors. Ms Power confirmed that the website www.afmexpressproperties.com was reserved on the internet but was not then in use. She confirmed the absence of information about AFM's fees to tenants at their premises and on the website www.afmexpress.co.uk and explained that this led Brent to set out the four breaches of section 83 of the Act in the Final Notice.

19. AFM made no further submissions.

D. Conclusions on the facts

20. 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.
21. The parties agree, and I concur, that on 2nd June 2018 AFM was engaged in lettings agency work within Brent.
22. I find that the issue of the two Inspection Summaries in the name of the Liquidated Company is not relevant to the validity of the Notice of Intent or the Final Notice.
23. It is accepted by both parties that AFM did not display their fees to tenants at their premises on 22nd June 2018. AFM state that the renovation work that was being carried out meant that the office was not arranged and was not in a fully functional condition. AFM provide evidence of such refurbishment work in the form of an invoice dated 21st June 2018 in respect of work to "repaint walls" and "install new cupboards". Ms Power confirmed that the walls had been painted. She noted that the fees to landlords were displayed together with information about AFM's membership of PRS and AFM not being a member of a client money protection scheme. Ms Power met with an employee, the manager Mr Al Hussynwy and the owner Ms Razzouki who was working in a back office. AFM have not responded to Ms Power's statement, nor have they provided any other information to justify their argument that the premises were not fully functioning. I note that AFM described their premises as not fully functioning rather than closed or not in use at all. The obligation

under section 83(2) of the Act applies to premises that are used to deal face-to-face with persons using or proposing to use their services. I conclude on the balance of probabilities from the evidence and the submissions of the parties that the premises were in such use on 22nd June 2018 and therefore AFM's failure to display their fees to tenants put them in breach of their obligation under section 83(2).

24. The Notice of Intent and the Final Notice both expressly refer to the failure to publish information on the website www.afmexpress.co.uk. AFM's position with regard to this website is set out in their appeal:

"We are not allowed to access the previous companies data. As the previous company liquidate we don't have hold over the previous website www.afmexpress.com and their log in credentials. So we're not liable for the content on the mentioned website...."

It is noteworthy that AFM refer to the www.afmexpress.com website in their grounds of appeal and not to the www.afmexpress.co.uk that Brent refers to in the Final Notice. AFM go on to state that they are having a new website built which will use the name www.afmestates.com and they provide a copy of an invoice for the purchase of website design services from a website designer dated 1 Feb 2018 to support their assertion.

25. Brent's response on this aspect of the appeal is summarised at para 16 above.
26. The Act does not offer any guidance on how to assess whether a website is the responsibility of a letting agent. . It is clear from section 83 (3) that a letting agent is not required to have a website. The Guidance does not clarify this issue, it merely refers to whether or not "an agent has a website". I conclude therefore that the question of whether a letting agent is responsible for a website is a matter of fact and that for the agent to have such responsibility they must be using the website in their letting agency work. Section 86 (1) of the Act offers a definition of "letting agency work":

"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. "

I conclude from this that the website must be in use for the purposes of enabling a person to seek accommodation of the sort identified in section 86 (1) of the Act. I also find that for a letting agent to be using a website in its business and to have legal responsibility for the contents of a website, the agent must have, or have had in the past, some practical or legal control over the contents or the continued existence of the website.

27. In this instance the evidence indicates that on 21st June 2018 the website www.afmexpress.co.uk had not been updated or corrected since 13th December 2017. I accept that a new website had been commissioned by AFM by June 2018. The website www.afmexpress.co.uk was not of any practical use to any person seeking to

market or to find accommodation at that time as the six properties listed on it had been there for at least six months and very little information was provided about them.

28. The submission from Brent suggests that the website was still an internet presence that advertised the role of AFM and provided e-mail and phone addresses that might enable a prospective client to contact AFM. I have considered the argument summarised in paragraph 16 above regarding AFM's responsibility for the website www.afmexpress.co.uk. I accept Brent's submission that the website contained the telephone number and an e-mail address used by AFM. I note the fact that Mr Al Hussynwy's business card for his role at AFM included the website address www.afmexpress.com, which is a different website address to that set out in the Notice of Intent and Final Notice but it has the same content as www.afmexpress.co.uk, and AFM in its appeal appears to conflate the two sites. The assertion of the owner of AFM, Ms Razzouki, that she would ask for the website www.afmexpress.co.uk to be removed is unpersuasive as she does not follow up on her comment with any action or proof of her capability and Mr Al Husseywy had contradicted this statement in his discussion with Ms Power. I conclude from the evidence and submissions that AFM is a "phoenix" of the Liquidated Company, however this does not carry with it legal responsibility for the website of the Liquidated Business unless AFM is making use of it within its lettings agency work and has the practical or legal capability to amend the contents of the website or to delete the website.
29. I therefore find that it is only the presence on the contact page of the www.afmexpress.co.uk website of the phone and e-mail address in use by AFM on 22nd June 2018 that connects the website to AFM's letting agency business. I take the view that it is inherently unlikely that a letting agent would leave a website unmodified and uncorrected for six months if it was in use in the business. Having an up to date list of available properties is fundamental to the usefulness of a website for a letting agency. In this case the website named in the Final Notice had, on the evidence of Brent, been unmodified and uncorrected for such a period. On the balance of probabilities I conclude from the evidence that AFM were not using the out of date website of their predecessor company in the course of their letting agency business on 22nd June 2018 and they were not in a position to control its content or its continued existence
30. As a consequence I find that the financial penalties imposed by Brent in respect of the failure to display information on the website www.afmexpress.co.uk are not valid.
31. Brent has imposed a penalty of £5,000 on AFM in respect of their failure to display their fees to tenants at the premises on 22nd June 2018. AFM have not sought to argue that this penalty is unreasonable. I have taken account of the particular circumstances in which the breach occurred and I conclude that in all of the circumstances of this appeal a penalty of £5,000 for this breach of the Act is reasonable and should be imposed on AFM.

F. Decision

32. By virtue of paragraph 5(5) of Schedule 9 to the Act, the Tribunal may quash, confirm or vary a Final Notice.
33. I find that AFM's failed to display a list of their fees to tenants and perspective tenants at their premises on 22nd June 2018 as required by section 83(2) of the Act and that a financial penalty of £5,000 should be payable in respect of this breach and that such a figure is reasonable and proportionate. I find that the Final Notice contained an error of fact in attributing responsibility under the Act on 22nd June 2018 for the website www.afmexpress.co.uk to AFM and I conclude that the financial penalties imposed in the Final Notice in respect of the content of such website are quashed. The Final Notice is therefore varied so as to impose a penalty of £5,000 for a single breach of section 83 of the Act.

Signed

Peter Hinchliffe
Judge of the First-tier Tribunal
14 December 2018
Promulgation date 19 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

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.

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?”

All fees, charges or penalties (however expressed) which are payable to the agent by a landlord or tenant in respect of letting agency work and property management work carried out by the agent in connection with an assured

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

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

... ..

How the fees should be displayed

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

Examples of this could include individual costs for:

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

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

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.

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”.