



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

**Appeal References: PR/2018/0051
PR/2018/0052
PR/2018/0053**

**Decided without a hearing
On 9th January 2019**

Between

ATCO ESTATES LTD

Appellant

and

LONDON BOROUGH OF BARKING AND DAGENHAM

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notices

1. Atco Estates Ltd (“ATCO”) has brought three appeals against three final notices dated 1st August 2018 served on it by the London Borough of Barking and Dagenham (“Barking and Dagenham”), which is the local weights and measures authority for ATCO’s premises at 704 Green Lane, Dagenham, London RM8 1YX. The three final notices set out Barking and Dagenham’s conclusion that ATCO was on 24th May 2018 engaged in letting agency work and it had failed to meet the following obligations

imposed on lettings agents under section 83-88 and Schedule 9 of the Consumer Rights Act 2015 (the "Act"):

(i) Publish a list of fees on its website. Final notice reference T/001418/CGE09037 (the "Fees Notice") imposes a monetary penalty of £2000 and records this breach in the following terms;

"Failed to publish a full list of all of your relevant landlord and tenant fees on the company's website at www.atcoestates.co.uk".

(ii) Publish a statement of whether the agent is a member of a client money protection scheme on its website. Final notice reference T/001418/CGE09038 (the "Client Money Notice") imposes a monetary penalty of £2,500 and records this breach in the following terms;

"Failed to publish a statement saying whether you belong to a Client Money Protection scheme on the company's website at www.atcoestates.co.uk".

(iii) Publish a statement that indicates that the agent is a member of a redress scheme and give the name of the scheme on its website. Final notice reference T/001418/CGE09039 (the "Redress Notice") imposes a monetary penalty of £2000 and records this breach in the following terms;

"Failed to publish a statement saying which redress scheme you belong to on the company's website at www.atcoestates.co.uk".

2. Barking and Dagenham stated in each of the Fees Notice, the Client Money Notice and the Redress Notice ("the Final Notices") that they had had regard to the representations made by ATCO in response to three notices of intent that they had issued to ATCO on 12th June 2018 in respect of the three breaches of the Act set out above. Each notice of intent stated that the Barking and Dagenham intended to impose a penalty of £5,000.
3. ATCO responded immediately to the three notices of intent with a brief e-mail confirming that *"in compliance with your instructions, we have updated our website and now it is according to your requirements"*. They included a link to their website to enable Barking and Dagenham to review the amended site

B. Legislation

4. 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 these appeals are set out below in Annex A to this decision.
5. 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.
6. 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

7. 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 Appeals

8. ATCO submitted three appeals dated 25th August 2018 against each of the Final Notices.
9. ATCO's ground of appeal against the Fees Notice are;
 - (i) They are a small lettings and estate agent.
 - (ii) They advertised their fees at their office and also on their website.
 - (iii) Their website was being updated at the time it was viewed by the Trading Standards Officer on 12th June 2018. The update was finished on that day. There was therefore an error of fact in the Fees Notice.
 - (iv) The amount of the penalty is unreasonable as the fees were on display on the website later on the day that the Trading Standards officer visited to ATCO and because ATCO cannot afford to pay a fine as large as £2,000.
10. ATCO's ground of appeal against the Client Money Notice are;
 - (i) They are a small lettings and estate agent.
 - (ii) They displayed their client money protection certificate at their office and also on their website.
 - (iii) Their website was being updated at the time it was viewed by the Trading Standards Officer on 12th June 2018. The update was finished on that day.
 - (iv) The Client Money Notice was wrong in law as there was no requirement to display the details of their client money protection scheme membership until the law changes on 1st April 2019.
 - (v) The amount of the penalty is unreasonable as the fees were on display later on the day that the Trading Standards Officer visited to ATCO and because ATCO cannot afford to pay a fine as large as £2,500.
11. ATCO's ground of appeal against the Redress Notice are;
 - (i) They are a small lettings and estate agent.
 - (ii) Their website was being updated at the time it was viewed by the Trading Standards Officer on 12th June 2018. The update was finished on that day. There was therefore an error of fact in the Redress Notice.

- (iii) The amount of the penalty is unreasonable because ATCO cannot afford to pay a fine as large as £2,000.
12. ATCO provided a copy of an e-mail dated 16th August 2018 from the business that hosted their website that stated that the changes requested by ATCO in June 2018 had been applied to the website and sought ATCO's feedback on the changes.
13. In their appeal ATCO indicated that they wished the appeals to be heard on the papers. Barking and Dagenham 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.
14. Barking and Dagenham submitted a response to the grounds of appeal in each of the Final Notices in similar terms. For each of the Final Notices they stated that:
- (i) The relevant breach of the Act was identified in 24th May 2018 and this date is given in the notices of intent and the Final Notices. On that day as well as on 12th June ATCO's website did not comply with the Act. The website had been remedied on 12th June when ATCO received the notices of intent which suggested to Barking and Dagenham that ATCO were capable of modifying the website when they believed it to be necessary.
 - (ii) ATCO had received a letter on 4th January 2017 from Barking and Dagenham setting out the requirements of the Act that they had to meet.
 - (iii) Barking and Dagenham had offered to let ATCO pay the penalty through stage payments. Although ATCO's abbreviated accounts show low net shareholders' funds, (less than £1000 in the last three years,) the business is a going concern and their website shows 37 properties which are to let or which are currently managed
15. In responding to the Client Money Notice, Barking and Dagenham also stated that the obligation to display on their website whether they were a member of a client money protection scheme applied at the relevant time. ATCO had mistakenly referred in their appeal to this obligation not arising until April 2019. In fact this was the date on which letting agents would become obliged to belong to such a scheme.
16. ATCO made a further submission in which they repeated the basis for their appeals and went on to say that they were struggling financially, that advertising properties did not mean that they got revenue from them as landlords could find tenants themselves. They stated that the penalties will crush the company financially and asked that the tribunal reduce the penalties to a minimum level.
17. Barking and Dagenham provided a statement of truth from Cenred Elworthy, a Principal Trading Standards Officer, in which he outlined the steps taken on the way to the issue of the Final Notices and referred to the expectation with regard to penalties set out in the Guidance and to the decision of Barking and Dagenham to reduce the penalties proposed in the notice of intent to the levels set out in the Final

Notices. He provided photographs of the information on display in ATCO's premises on 12th June 2018 and a copy of ATCO's reports and account for the year to 31 January 2017. Mr Elworthy explained that he had reviewed the website www.atcoestates.co.uk of ATCO on 24th May 2018 and found the fees to be shown exclusive of VAT. On visiting ATCO's premises on 12th June 2018 he found that the fees on display at the premises were different to those displayed on the website on 24th May 2018.

D. Conclusions on the facts

18. 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.
19. The parties agree, and I concur, that on 24th May 2018 ATCO was engaged in lettings agency work within Barking and Dagenham. The Act came into force in 2015 and set out obligations that letting agents had to meet. Barking and Dagenham gave specific guidance to ATCO in January 2017 on their obligation under the Act.
20. I conclude from ATCO's responses that they accept that they hold money on behalf of clients and that they were required to be a member of redress scheme. I find that the evidence supports these conclusions.
21. With regard to the fees displayed on ATCO's websites, ATCO have not objected to Mr Elworthy's conclusions set out in paragraph 17 above and have only referred to the website being corrected on 12th June. I conclude that the website did not correctly display their fees on 24th May 2018 because they were either out of date or inaccurate as they conflicted with those displayed in their premises and they were shown exclusive of VAT.

E. Conclusions on the law

22. Section 83 (4) of the Act requires the amount of any fee to be inclusive of any applicable tax.
23. Section 83 (6) of the Act requires a letting agency to display or publish, with the list of fees, a statement of whether the agent is a member of a client money protection scheme. This obligation was in force on 24th May 2018. ATCO's reference in their appeal against the Client Money Notice to the obligation becoming mandatory in April 2019 appears to be a mistaken reference to a new obligation that requires letting agents to be a member of a client money protection scheme from that date.
24. In the light of the conclusion on the facts set out above, I conclude that on 24th May 2018 ATCO were in breach of their obligations under section 83 of the Act to publish on their website a list of the fees for their letting agency service and to include with such list of fees a statement of whether the agent is a member of a client money

protection scheme and a statement that indicates that the agent is a member of a redress scheme and gives the name of the scheme.

25. Barking and Dagenham chose to issue the Fees Notice, the Client Money Notice and the Redress Notice separately and to impose separate penalties for the breach of sections 83 (3), 83 (6) and 83 (7) of the Act. ATCO has appealed against each of these Final Notices. I note that subsection 83 (6) state that;

*“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”*

And section 83 (7) states

*“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.”

I conclude from the express provisions of the sub-sections that I have marked in bold above that the Act treats the duties created by subsection 83 (6) and 83 (7) as being part of the duty imposed under subsection 83 (3).

26. 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”

Although this section appears to be primarily intended to avoid different local weights and measures authorities imposing penalties for the same breach, it is also to be construed as having a wider effect. Subsection 87 (7) limits the amount of any financial penalty under section 87 to £5,000. Subsection 87 (8) states that Schedule 9 of the Act shall have effect and Schedule 9 sets out the power of the Tribunal on appeal and states that a final notice may not be varied by the Tribunal so as to impose a financial penalty of more than £5,000.

27. The Guidance states in Section 3 that a fine of up to £5,000 can be imposed where a letting agent has failed to *“publish their fees and other details”*. The *“other details”* in this context can only refer to the information required to be published under section 83 other than that about fees, such as information about membership of a client money protection scheme or a redress scheme.

28. Having reviewed the legislation and taken account of the Guidance, I conclude that ATCO’s failure on 24th May 2018 to publicise on their website a list of the fees for their letting agency service and to include with the list of fees a statement of whether the agent is a member of a client money protection scheme and a statement that indicates that the agent is a member of a redress scheme and gives the name of the scheme should properly be regarded as giving rise to a single breach at that time and not three separate breaches. The maximum penalty that can be imposed in respect of a single breach of s. 83 (3) is £5,000. In coming to this conclusion I have considered other decisions by the First Tier Tribunal on this issue and I have taken particular note of the decision of the Chamber President, Judge Alison McKenna, in Hamilton’s Sales

And Lettings Ltd vs Westminster City Council [2018] UKFTT PR 2018 0001 (GRC) (18 June 2018) which concludes that:

“S. 83 (3) imposes a duty to create and publicise on the website a single " list", which list must include both the fees required by sub-section (4) and, in relevant cases, the additional details required by sub-sections (6) and (7). S. 87 (2) then refers back to breach of that duty (in the singular), and s. 87 (6) provides that a single financial penalty may be imposed in respect of one breach. S.87 (7) limits the amount of that single penalty to £5,000.”

F. Conclusion on Penalty

29. ATCO has argued in their appeal that the amount of the monetary penalty is unreasonable and unaffordable. In deciding on the reasonableness of the penalty, 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 Barking and Dagenham 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.
30. 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.
31. I have considered the financial information provided about ATCO in order to determine if a further reduction in the penalties is appropriate. ATCO have failed to provide any information to support their submissions. The financial information provided by Barking and Dagenham show that ATCO has a very weak balance sheet with net assets of £554 at the 2017 year-end and £436 at the preceding year end. ATCO has had the opportunity to provide further evidence supporting its contention that the level of its financial difficulties amount to extenuating circumstances that justify a reduction from the maximum penalty for the breaches of section 83 of the Act. It has not done so. I am not able to discern whether the low net worth results from the level of remuneration that the owners and managers of the business have received or from the business being barely profitable.
32. I note that Barking and Dagenham had taken constructive steps to point out ATCO’s obligation under the Act in January 2017 and that the Act has been in force since May 2015. I conclude that Atco Estates had no reasonable excuse for permitting the

breaches to continue and to remain unremedied until May 2018. However, I note that they did respond quickly and effectively when they were compelled to do so.

33. In all the circumstances of these appeals I find that a penalty of £4,000 for the breaches of the Act identified in the Final Notices is reasonable for a business of ATCO's size.

F. Decision

34. By virtue of paragraph 5 (5) of Schedule 9 to the Act, the Tribunal may quash, confirm or vary a Final Notice.
35. I conclude that ATCO's failure on 24th May 2018 to publicise on their website a list of the fees for their letting agency service and to include with the list of fees a statement of whether the agent is a member of a client money protections scheme and a statement that indicates that the agent is a member of a redress scheme and gives the name of the scheme gives rise to a single breach of section 83 of the Act. A financial penalty of £4,000 should be imposed in respect of this breach and such a penalty is reasonable and proportionate. The Fees Notice, the Client Money Notice and the Redress Notice are therefore varied so as to be construed as a single final notice and a penalty of £4,000 is imposed in place of the three penalties amounting to £6,500 originally imposed under the Final Notices.

Signed

Peter Hinchliffe

Judge of the First-tier Tribunal

9th January 2019

Promulgation date 11th January 2019

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.