MISC/ 0156/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by the London Borough of Camden succeeds**. In accordance with the provisions of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal (GRC) made on 26th October 2016 under reference PR/2016/0010. I substitute my own decision. This is to the effect that Foxtons Limited was and remained in breach of the requirements of the Consumer Credit Act 2015 in relation to published details of its relevant fees in each of three branches and on its website and that a penalty of £4500 should be imposed in respect of each breach (total £18,000).

Hearing

2. I held an oral hearing of this appeal on 1st June 2017 at Field House (London). The appellant local authority ("LBC") was represented by Cameron Crowe of counsel. Foxtons Ltd, the respondent ("the company"), was represented by James Byrne of counsel, instructed by Anthony Gold, solicitors. I am grateful to both parties for their assistance throughout, particularly as this is the first appeal in this jurisdiction to come before the Upper Tribunal.

The legal framework

3. The Consumer Rights Act 2015 requires all letting agents in England and Wales to publicise details of their relevant fees. The following provisions of the Act came into force on 27th May 2015 and are particularly relevant (references are to section numbers):

> **83**(1) A letting agent must, in accordance with this section, publicise details of the agent's relevant fees.
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> (2) The agent must display a list of the fees –
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> (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.
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> (3) The agent must publish a list of the fees on the agent's website (if it has a website).
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> (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 for 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.

4. Sections 83(5) to (9) deal with client money and redress schemes, which are not in issue in this appeal. Sections 84 and 86 define "letting agent" and "letting agency work" (it is not disputed in this appeal that the company is a letting agent). Section 85 defines "relevant fees" – also not in issue in this appeal.

5. Section 87 deals with enforcement:

> **87**(1) It is the duty of every local weights and measures authority in England and Wales to enforce the provisions of this Chapter [of the Act] in its area.
>
> (2) If a letting agent breached 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.
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> (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.
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> (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).
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> (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 agency in respect of the same breach.
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> (7) The amount of a financial penalty imposed under this section –
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> (a) may be such as the authority imposing it determines, but
> (b) must not exceed £5000.

(8) Schedule 9 (procedure for and appeals against financial penalties) has effect.

6. Sections 87(9) and (10) require local weights and measures authorities to have regard to guidance issued by the Secretary of State (in England) or Welsh Ministers (in Wales). Sections 87 (11) and (12) empower the Secretary of State (in England) or Welsh Ministers (in Wales) to make regulations amending provisions of section 87 or Schedule 9.

7. In relation to financial penalties **Schedule 9** provides as follows (references are to paragraph numbers):

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.

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.

3 (1) After the end of the period mentioned in paragraph 2 the local weights and measures authority must –

(a) decide whether impose a financial penalty on the letting agent, and
(b) if it does decide 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 set out –

(a) the amount of the financial penalty,
(b) the reasons for imposing a 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 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 notice in writing to the letting agent on whom the notice was served.

8. In relation to appeals **Schedule 9** further provides:

5 (1) A letting agent on whom a final notice is served may appeal against that notice to –

(a) the First-tier Tribunal , in the case of a notice served by a local weights and measures authority in England, or
(b) the residential property tribunal in the case of a notice served by a local weights and measures authority in Wales.

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

(a) the decision to impose a financial penalty was based on an error of fact,
(b) the decision was wrong in law,
(c) the amount of the financial penalty is unreasonable, or
(d) the decision was unreasonable for any other reason.

(3) [relates to Wales]

(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 … 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 that £5000.

9. It is not disputed that the council of the London Borough of Camden is a local weights and measures authority in England.

Non-statutory material

10. The First-tier Tribunal identified a number of potentially relevant documents. It referred to the explanatory notes to the Bill which became the 2015 Act, and to the November 2015 Primary Authority Advice issued by Warwickshire County Council (which had formed a regulatory compliance partnership with the National Federation of Property Professionals and the Property Ombudsman pursuant to the provisions of the Regulatory Enforcement and Sanctions Act 2008. It is not necessary to comment further on these documents.

11. The First-tier Tribunal also referred to a document entitled "Guidance on Consumer Rights Bill 2015: Duty of Letting Agents to Publicise Fees" ("the Guidance"). This was issued by the Secretary of State (DCLG) and presumably was intended to be the kind of guidance referred to in section 87(9) of the 2015 Act. However, it was issued while the Act was still a Bill and, so far as I am aware, has not been reissued or confirmed since the Bill became the Act. Accordingly, I am not sure of its legal status. For what it is worth the Guidance includes the following:

> "**SECTION 1: FEES**
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> **Which fees must be displayed**
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> 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
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> 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:
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> - 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".

Background and procedure

12. There is no dispute over the basic facts in this case. Foxtons Limited is a letting agent with many branches. Three of those branches were relevant for the purposes of this appeal and they were all located within the London Borough of Camden. The company also had a relevant website. In February 2015 LBC wrote to all the letting agents in the borough about its Fair Lettings Project which involved it in trying to raise the standards of letting agents in the Borough. On 30th June 2015 it wrote to them again to draw attention to the coming into force of the provisions to which I have referred above and to give some explanation and examples. One paragraph read:

> "The agent cannot simply put up a notice stipulating a total 'Administration Cost', the costs need to be specified and broken down as to exactly which costs are for which service e.g. credit check, referencing, inventory, marketing the property etc. It should also be clear whether the charges are per head or per dwelling".

13. On 15th July 2015 an LBC consumer protection officer visited the company's branch at 120 Parkway "to carry out a routine inspection", handed them a copy of the letter of 30th June, explained that simply describing their fees as an "Administration fee or charge" was contrary to the Act and also handed them a "Non Compliance Notice" which identified three issues to be addressed. These were the following:

- No clear prices or charges are on display within the store or on any documentation supplied to potential tenants.
- You are advertising the rent payable in weekly amounts when it can only be paid monthly.
- No information was displayed to tenants about any security deposit scheme when the management agent is a member of the scheme.

14. There followed a series of discussions between the company and LBC, disagreements over the legal requirements, and visits, as set out in the Witness Statement of 23rd September 2016 by LBC's Principal Trading Standards Officer. It seems that the main objection was that the company was still displaying a one-off "Administration Charge" of £420 without a sufficient description of what services were included for this fee.

15. On 11th February 2016 LBC issued a Notice of Intent to each of the three physical branches and also one in respect of the website, indicating an intention to impose a monetary penalty in respect of each of them, subject to written representations and objections, to be made within 28 days. Such representations were made but the arguments were rejected by LBC, which issued Final Notices in respect of each of the Notices of Intent confirming the imposition of the monetary penalties, totalling £20,000. The company had changed the wording of its scale of charges with effect

from 28th March 2016 but LBC took the view that the company was still in breach of the requirements.

16. The company appealed to the First-tier Tribunal against each penalty. The First-tier Tribunal heard the appeal on 10th October 2016 and its decision was issued on 26th October 2016. It allowed the appeal(s) to the extent of reducing each penalty to £3000. On 17th December 2016 the President of the GRC of the First-tier Tribunal refused LBC permission to appeal to the Upper Tribunal. It now appeals by my permission, given on 24th January 2017. On 22nd March 2017 I directed that there be an oral hearing of the appeal and, as indicated above, this took place on 1st June 2017. During the hearing I raised the question of whether it is proper for the relevant local authority to take account of a change of circumstances occurring between service of the notice of intent and service of the final notice, an issue on which the legislation is silent. At the end of the hearing I issued written Directions asking for written submissions from the parties on this issue. These were completed by 28th June 2017. I deal with this aspect further below.

The First-tier Tribunal: General

17. There were three grounds of appeal to the First-tier Tribunal. The first was that at the time of the service of the final notices, the company was not in breach of section 83. The second was that the section 87(6) permitted only one penalty to be imposed on the same agent in respect of the same breach and thus the maximum penalty was £5000 and not £20,000. The third was that the decision to issue the final notices was unreasonable because LBC had not explained coherently why it still considered the fee structure to be in breach of section 83.

18. The First-tier Tribunal found that the wording used prior to 28th March 2016 did not meet the requirements of section 83(4)(a). The use of the word "administration" on its own "contains no sufficient indication of what service or services are covered. It is, in particular, an inadequate descriptor of what Foxtons' revised wording reveals is included within the fee; namely the drawing up of a tenancy agreement" (paragraph 23 of the First-tier Tribunal Decision and Reasons). I agree with this conclusion and it has now been accepted by the company.

19. In relation to section 87(6) the First-tier Tribunal had "no hesitation in rejecting this submission" (paragraph 35). There was a discrete statutory requirement in respect of each of the agent's relevant premises and section 87(6) was there to prevent more than one penalty being imposed on the same branch in respect of the same breach, possibly by different authorities. "The structure of section 83 and 87 is, however, plain. A breach in respect of two or more sets of premises constitutes two or more separate breaches" (paragraph 37). I agree with this too, and the argument has not been pursued by the company before the Upper Tribunal.

The revised wording

20. The main area of dispute before the Upper Tribunal is whether the First-tier Tribunal was correct in law to find that the revised wording of the fees and terms adopted from 28th March 2016 complies with the statutory requirements. I take the

revised wording from the first page of addendum 1 to Mr Byrne's written skeleton argument of 18th May 2017. The document is headed "Foxtons fees" and under the sub-heading "TENANT FEES" there appears the following:

> "**Standard fees**
>
> - Administration fee: £420 per tenancy.
> This is a fixed cost fee that can cover a variety of works depending on the individual circumstances of each tenancy, including but not limited to conducting viewings, negotiating the tenancy, verifying references and drawing up contracts. This charge is applicable per tenancy, and not per individual tenant.
> - Deposit for a long let tenancy: Equivalent to six weeks' rent
> - Deposit for a short let tenancy: £700 or equivalent to one weeks' [*sic*] rent (whichever is greater
>
> **Other fees**
>
> - Change of occupancy within an existing tenancy:£300
> - Letter sent by Foxtons regarding late or non-payment of rent: £60 for each letter sent
> - Tenant reference request: £35
> - Tenancy renewal: £96 per tenancy for long lets only
> - End of tenancy inventory check-out organised by Foxtons: £165 (where a landlord organises this inspection independently of Foxtons, the charge may vary)

The First-tier Tribunal and the revised wording

21. The First-tier Tribunal decided that there is nothing wrong *per se* with using the expressions "administration charge" or "administration fee" provided that it is accompanied by a description that is sufficient to enable a person to understand the service or cost that is covered by the fee or the purpose for which it is imposed. This is not now really disputed and I agree with the First-tier Tribunal on this point. The First-tier Tribunal said that the final notices had been wrong to state that the use of the term "administrative charge" was prohibited. The First-tier Tribunal then explained as follows (paragraphs 29 to 32):

> 29. … [What the provisions] … are saying about comprehensiveness is directed at the list of fees mentioned in the opening words of section 83(2) rather than at the description of those fees referred to in subsection (4)(a). A person who enters the premises of a letting agent as a prospective tenant needs to know precisely how much he or she will be required to pay in order to be installed as a tenant. A comprehensive list of fees achieves that aim.
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> 30. The purpose of section 83(4)(a) is to ensure that a person has an understanding of what is included or covered by the fee in question. This will enable him or her to compare different agents' fees, in order to decide which

> provides best value for money or otherwise is most likely to suit his or her needs.
>
> 31. I am satisfied that a person reading the rubric now set out by Foxtons under the heading "Administration Fee £420" will thereby be able "to understand the service or cost that is covered by the fee". The specified services … can be the subject of a price comparison …
>
> 32. The fact that the list of services contained in the Foxtons rubric is not exhaustive stems, I find, from the fact that … cases may not be identical and some additional services might be included within the Administration Fee in a particular case. Anyone reading the current Foxtons' complete list of fees … will be able to deduce, from a process of elimination, whether any other, potentially relevant service falls within the list of "Other Fees", such as "end of tenancy inventory check-out". If not, then by a simple process of elimination, he or she will know that the service in question will be encompassed within the Administration Fee.

22. On the basis that the revised wording complied with the statutory requirements but that the company was in breach from 27th May 2015 until 28th March 2016, a breach which could not "be downplayed or ignored" (paragraph 48), the First-tier Tribunal decided that the appropriate penalty was £3000 for each breach (total £12,000) rather than £5000 (total £20,000).

Arguments and conclusions on the revised wording

23. The issues have been greatly dressed up by both sides in their written and oral submissions and arguments but in my opinion they can be quite easily summarised (although not necessarily so easily resolved). LBC's principal argument is that the revised wording "fails to sufficiently describe the administration fee so as to enable a person who is liable to pay it to understand the service or cost that is covered and … requires consumers to undertake a process of elimination and deduction to understand" (Respondent's application of 10th January 2017 at paragraph 5(c)). The description of "Administration fee" refers to a "variety of works", particularises some and suggests others may form part of the service but fails to indicate what they might be. Accordingly the First-tier Tribunal was wrong to find that revised wording was in compliance and the original penalties should be restored.

24. The gist of the company's argument is that whether the description in the revised wording is adequate was a question of fact for the First-tier Tribunal and that there was no error of law.

25. At the hearing before me Mr Byrne, for the company, said that the Administration fee" could and would never exceed £420. In my view, had the wording actually stated that and indicated that any further services not specified under the heading "Other fees" would never increase the administration fee, there would be no doubt but that the revised wording would have been compliant. However, the wording did not state that. The relevant part of the wording referred to a "fixed cost fee that can cover a variety of works depending on the individual circumstances of each tenancy,

including but not limited to conducting viewings, negotiating the tenancy, verifying references and drawing up contracts". It is the use of the phrase "can cover" that bothers me. It encompasses the idea of "might not cover" and therefore the wording is not clear that there will be no services (not listed under "Other fees") which incur or might incur a further charge. The failure of the First-tier Tribunal to appreciate this implication of the wording goes beyond a finding of fact and amounts to an error of law. As I have explained it, the revised wording does not provide "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 for which it is imposed" and accordingly does not meet the requirements of section 83(4)(c) of the Consumer Rights Act 2015.

The change of circumstances issue

26. On 1st June 2017 I directed the parties to make written submissions on the following matter:

> "Paragraph 1 of Schedule 9 to the Consumer Rights Act 2015 provides for the authority to serve of notice of intent to impose a financial penalty. Paragraph 2 provides 28 days to make written representations about the proposal. Paragraph 3(1) and (2) provides that at the end of that period the authority must decide whether to impose a penalty (and the amount) and if so to serve a final notice. The issue (on which the legislation is silent) is whether it is proper for the authority to take account of a change of circumstances occurring between service of the notice of intent and service of the final notice."

27. In a submission of 10th June 2017 Mr Crowe, for LBC, argued that schedule 9 of the Act provides for notice of intent to be served at any time during a continuing breach, includes reasonableness a consideration in the approach to be taken, including in relation to the amount of any penalty, and does not limit matters that may be included in representations to the local authority after the notice of intent has been served. A local authority would be acting unreasonably if it failed to consider any change of circumstances, and any change of circumstances should properly be taken into account in relation to any penalty.

28. In his submission of 28th June 2017 Mr Byrne, for the company, agreed with the above and added that such an approach was consistent with the whole purpose of the provisions ad that it would be wrong to prevent a letting agent from being able to rely on the fact that it has now remedied the breaches identified in the notice of intent.

29. I accept the above arguments, but prefer to put it this way. The overall purpose is to protect consumers. If letting agents are not in compliance, they should be encouraged to come into compliance. Allowing changes of circumstances that are beneficial to consumers to be taken into account before the final notice is issued contributes to this.

Penalty and disposal of this appeal

30. Having decided that the First-tier Tribunal decision involved the making of an error of law, I set it aside. In the circumstances there is little point in sending the matter back to the First-tier Tribunal to be considered afresh by a judge sitting alone. Accordingly, I substitute my own decision.

31. The First-tier Tribunal took the view that a penalty of £3000 for each breach was appropriate in respect of the wording in operation from 27th May 2015 until 28th March 2016. I accept that. However, I have decided that the revised wording also breached the statutory requirements. Nevertheless, credit should be given for the company's attempt to design a compliant revised wording, although it was unsuccessful in this attempt. I would assess this credit as meriting a 25% discount (£500 in respect of each breach) from the maximum penalty (a further £2000 for each breach) to which the company would otherwise be liable in respect of the period after the issue of the revised wording. Accordingly I substitute a penalty of £4500 for each of the four breaches, totalling £18,000.

32. For the above reasons this appeal by the London Borough of Camden succeeds to the extent indicated above and I make the order set out in paragraph 1 above.

H. Levenson
Judge of the Upper Tribunal
25th August 2017