GE/ 2787/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by M & M Europe Limited ("M & M"), brought by my permission given on 25th January 2018 after an oral permission hearing, does not succeed.** In accordance with the provisions of section 12 of the Tribunals, Courts and Enforcement Act 2007 I confirm the decision of the First-tier Tribunal (GRC) made on 21st July 2017 (written reasons) after a hearing on 19th July 2017 under reference PR/2017/0007. This is to the effect that M & M was and remained in breach of the requirements of the Consumer Credit Act 2015 in relation to published details of its relevant fees and membership of a relevant scheme and that a penalty of £5000 should be imposed.

2. I make this decision on consideration of the papers, neither party having requested an oral hearing.

The legal framework

3. The Consumer Rights Act 2015 requires all letting agents in England and Wales to publicise details of their relevant fees and certain other information. 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.
>
> (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 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.
>
> (5) Subsections (6) and (7) apply to a letting agent engaged 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.
> …
> (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 tot hat person in circumstances where the scheme applies

4. Other provisions deal with 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.
>
> (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 agency 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 £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 Newham ("the authority") is a local weights and measures authority in England. It was the enforcement authority in the present proceedings and is the respondent before the Upper Tribunal.

Non-statutory material

10. 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) in March 2015 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, as was also the case in my decision in London Borough of Camden v Foxtons [2017] UKUT 349 (AAC)) I am not sure of its legal status. For what it is worth the Guidance includes the following in Annex D on page 57:

> "**SECTION 1: FEES**
> **…**
>
> **Where the fees should be publicised**
>
> The agent must display a list of fees at each of their premises at which the agent deals face-to-face with persons using or proposing to use services to which the fees relate. The list must also be such that it is likely to be seen by customers.
>
> Ideally, someone walking into an agent's office should be able to see the list without having to ask for it and if someone does ask it should be clearly on view and not hidden for example in a drawer.
>
> **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.
> …
> In addition to the fees letting agents should publicise whether or not they are a member of a client money protection scheme and which redress scheme they have joined. Letting agents who are not members of a client money protection scheme must make this clear, silence on this subject is a breach of the legislation. As with fees this information should be prominently displayed in every office and on the website.

11. Section 3 of the same document (on page 60) states:

> "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 lettings agent or property manager makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; alternatively an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue which could be considered is whether a £5000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business.

12. This might be seen as helpful advice and it is open to an enforcement authority (or, on appeal, the First-tier Tribunal) to adopt this as its general approach, provided it is not regarded as a legally binding statement of law or practice and the authority considers whether to depart from it in an appropriate case.

Background and procedure

13. M & M Europe Limited is a letting agent. On 18th November 2016 its premises were visited by the authority's trading standards officer. He found that no notices about fees were displayed in the reception area (this is not disputed). M & M's explanation later offered to the First-tier Tribunal was that the office and the place where customers were seen by "the proprietor" was in another part of the premises (in fact an office by the reception area). There were two offices next to the reception area. One was used by Mr Q for an import/export business. He and M & M shared the reception area. Each conducted all business in their own office (I refer below to the separate M & M office as the "office room"). This respected the confidentiality of customers. M & M customers were seen in the M & M office room and that is why information about fees was kept there. It was on the wall of the office room but if there was cash in the office the door had to be kept locked while the proprietor was out. There were adverts on the wall of the reception area but these were for properties that had already been let. The trading standards officer said that when he visited there were people in the reception area. He had not been told that the notices were displayed in the office room – the first he had heard of this was in the course of the tribunal proceedings. Mr A, an employee of M & M whose base was in the reception area, had been there at the time of the visit. He told the First-tier Tribunal that he had told the trading standards officer that the notices were displayed in the office room – although this was not recorded in the trading standards officer's notes. What was recorded was Mr A saying that the notices were not there because the printer was out of order.

14. In due course, on 17th January 2017 the authority served a final notice on M & M, imposing penalties of £5000 for breach of the duty to publicise a list of fees and a further £5000 for breach of the duty to publicise whether M & M was a member of a client money protection scheme. On 13th February 2017 M & M appealed to the First-tier Tribunal against the final notice. Before the hearing took place the authority conceded that it had power only to impose one financial penalty in this case. The

First-tier Tribunal heard the appeal on 19th July 2017. Its decision was signed on 21st July 2017 and promulgated on 26th July 2017. It allowed the appeal to the extent of varying the penalty to one amount of £5000 but in other respects confirmed the authority's decision.

15. On 24th August 2017 M & M applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal and on 29th August 2017 the First-tier Tribunal refused to give such permission. On 29th September 2017 M & M renewed that application direct to the Upper Tribunal and applied for suspension of the implementation of the First-tier Tribunal's decision pending the outcome of the appeal to the Upper Tribunal. On 6th October 2017 I directed that there be an oral hearing of the application and I also suspended the effect of the First-tier Tribunal decision but only in relation to the payment of all but £1000 of the £5000 penalty.

16. After an oral hearing of the application for permission to appeal, on 25th January 2018 (wrongly referred to in some of the documentation as 2017), attended by "the proprietor" but not by the authority, I gave M & M permission to appeal. I note here that the Upper Tribunal only has jurisdiction to interfere with the decision of the First-tier Tribunal if it was made in error of law.

The First-tier Tribunal

17. The First-tier Tribunal concluded that M & M had breached its legal obligation in respect of the requirement to publicise its fees and its membership of a client money protection scheme. The relevant information was not publicised at a place in the premises at which the list was likely to be seen by persons using or proposing to use the services provided. The "premises" in this case comprised the reception area and the offices functioning together as a single unit and whatever arrangement had been reached with Mr Q, it would not be consistent with the evidence to view the letting agency's office room alone as the "premises" where the letting agency work was conducted. Mr A's work station was in the reception area and M & M advertised its services through the shop window next to the reception area. Potential users of M & M's services could not access the information easily and without asking for it. Even if they had asked for it on the day of the visit by the authority's trading standards officer they were not likely to see it because it was in a locked room. The First-tier Tribunal gained the clear impression that the office room was often locked because it was the place where confidential information and cash were stored. This was the equivalent of keeping the information in a drawer. It was accepted that on the day of the visit the information was displayed in the office room.

18. M & M had claimed financial difficulties but the First-tier Tribunal decided that the penalty should not be reduced on that basis. The only evidence was a letter from M & M's accountants to the effect that in the year ended 28th February 2016 (17 months before the date of the hearing) there had been a loss of around £2500 (after payment of a dividend of £4000), and the anticipated loss for the following year was around £1000 greater. However, the accounts for the year ending 28th February 2017 had not been produced to the tribunal, with no reason being given for non-production. I note that at the permission hearing before me those accounts were produced and

showed a profit, although this cannot be relevant as to whether the decision of the First-tier Tribunal was made in error of law.

The Issues

19. I gave M & M permission to appeal in the following terms:

> "There is no basis on which to challenge the facts found by the First-tier Tribunal but the following points merit fuller consideration at this level: (a) whether on the facts found by the tribunal there was a breach of the statutory requirements (b) whether the financial state of the company should be taken into account in assessing the appropriate penalty (c) whether the maximum penalty should be reserved for the worst case and in this context (d) whether the availability of the necessary information somewhere on the premises and at some times is a mitigating factor".

20. M & M has made no submissions to the Upper Tribunal since permission was given, despite being invited to do so. The authority's counsel made written submissions on 12th April 2018.

21. I am satisfied that on the facts found and for the reasons given and in the manner specified by the First-tier Tribunal M & M was in breach of the requirements of the legislation.

22. The authority concedes that in determining the appropriate financial penalty the financial state of the company and other extenuating circumstances should be taken into account, although it argues that in the present case no relevant representations were made at the appropriate stage and the evidence did not show that the company was in such a poor financial state as to mitigate the penalty. I agree with all of this.

23. The authority takes the view that the evidence does not show that fees information was displayed at any time and that in any event the requirement was not to have the information on display somewhere on the premises but where it was likely to be seen and that in this case there had been "an abject failure to comply with the legislation".

24. However, the First-tier Tribunal found as a fact that on the day of the visit the information was displayed in the office room. Nevertheless, assuming that the maximum penalty should be reserved for the worst case, in this case the circumstances in which the information was displayed – in a room that was often locked and where people were waiting in the reception area, where the information was not displayed – was not adequate mitigation to reduce the maximum penalty.

25. For the above reasons I make the order set out in paragraph 1 above.

H. Levenson
Judge of the Upper Tribunal **3rd August 2018**