



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

Appeal Reference: PR/2017/0044

**Decided without a hearing
on 13th March 2018**

Between

ABBEY PROPERTY HAMPSTEAD LTD

Appellant

and

LONDON BOROUGH OF CAMDEN

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Abbey Property Hampstead Limited (“Abbey”) appealed against a Final Notice served on it by the London Borough of Camden (“Camden”), which is the local weights and measures authority for Abbey’s premises at 94-96 Wigmore Street, London W1. The Final Notice is dated 4th October 2017 and sets out Camden’s conclusion that Abbey was on 16th August 2017 engaged in letting agency work and that its website was on that day in breach of two of the requirements imposed on Abbey under section 83 of the Consumer Rights Act 2015 (the “Act”). The Final Notice records these breaches as;

*“Failed to publish details of agents landlord fees on their website (S83.3)” and
Failed to publish details of whether or not the agent is a member of a client money protection scheme (S83.6)”*

Camden imposed a penalty on Abbey of £2,500 for each of the breaches, amounting to £5,000 in total.

2. Camden stated in the Final Notice that they had issued a notice of intent to Abbey on 16th August 2017 (the “Notice of Intent”) giving details of these breaches.

B. Legislation

3. The sections of the Act that are referred to in this decision or that are of greatest relevance to this appeal are set out below in Annex A to this decision.

C. Guidance

4. 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

5. Abbey submitted an appeal dated 2nd November 2017 against the decision in the Final Notice. Abbey set out a single ground of appeal; they state that the amount of the monetary penalty is unreasonable taking account of the size of Abbey, its turnover and the fact that the company has been incurring losses for the past few years. Abbey stated in the appeal that the reason for the failure to display the required information on their website; *“was because the person in charge of updating the website had left the company and we were unable to employ a new person on account of company’s financial position.”*
6. Abbey submitted a copy of their financial statements for the years ended 31 December 2016 and 31 December 2015 with the appeal. The 2016 accounts did not provide a profit and loss statement, but it included the balance sheet of Abbey. The balance sheet showed negative shareholder funds of £134,495 and that these had decreased by £17,000 since the previous year, which reflected the loss in the year. Abbey had debtors and cash in hand amounting to £71,970. In the 2015 accounts Abbey had reported losses of £97,989 on a turnover of £266,372 and it was apparent from these accounts that Abbey had made a loss of £36,158 on a turnover of £455,786 in 2014. The Directors remuneration was reported as being £6,000 in 2015 and £10,500 in 2014. No details of wages were provided for any year and no details of director remuneration in 2016 were apparent, although the directors’ loan account stood at £109,281 at the end of 2016.

7. In their appeal Abbey indicated that they wished the appeal to be heard on the papers. I consider that the appeal was suitable for determination on this basis.
8. Camden responded to the grounds of appeal by providing details of the correspondence that they had sent to Abbey, along with other lettings agent operating in Camden, on 30 June 2015 and 22 December 2015 explaining their obligations under the Act. They stated that they had visited Abbey's premises on 29 September 2015 and provided guidance and left a guidance leaflet regarding the Act for Abbey to review. Camden stated that on 16th August 2017 a case officer from Camden had checked the website of Abbey and found that they did not have any landlord fees listed on their website and that, furthermore, there was no information on the website about whether Abbey was a member of a client money protections scheme
9. Camden confirmed in their response to the appeal that they had considered the representations made by Abbey on 11th September 2017 in response to the Notice of intent. Abbey made their representations in a letter to Camden in which they explained that they had remedied the breaches since receiving Camden's Notice of Intent. They had explicitly stated on their website that they are not members of any client money protection scheme and they had listed their fees for landlords. They explained that when their website had been amended the fees for landlords had been separated from the fees for tenants and only the tenants' fees had been displayed on the website. Abbey asked that the two fines of £5,000 each that were proposed in the Notice Of Intent be reconsidered as it would be very difficult for the business to pay the penalties due to the loses they had made, their fall in turnover and the difficult time that the business was going through. They provided their financial statement to 31 December 2015
10. Camden explained in their response to the appeal that they had reduced the fine from £10,000 to £5,000 in the light of Abbey's representations. Camden said that this was done even though they were mindful 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. Camden attached an extract from the Guidance to confirm this point.
11. Camden provide a witness statement from a Consumer Protection Officer employed by them, which set out the information referred to above about the correspondence that Camden had had with Abbey since 30th June 2015 and attached copies of the relevant correspondence. Camden provided copies of the Notice of Intent issued to Abbey and a copy of non-compliance notice issued to Abbey on 29th September 2015, which referred to a failure at that time by Abbey to display landlord and tenant fees and information about membership of a client money protection scheme. Camden also provided a recording of the review of Abbey's website that they had conducted on 16th August that had led the Consumer Protection Officer to conclude that Abbey's website did not display its fees to landlords and did not indicate if it was a member of a client money protection scheme or not.

12. Abbey made no further submissions.

D. Conclusions on the facts

13. 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.
14. The parties agree, and I concur, that on 16th August 2017 Abbey was engaged in lettings agency work within Camden and had a duty, which they were failing to meet, to display the fees that they charged to landlords and whether or not they were a member of a client money protection scheme. I understand that Abbey accept that on 16th August they were in breach of these requirements and argue that this was due to an oversight that they remedied promptly when Camden brought it to their attention. I find that the evidence supports the conclusion that on 16th August 2017 Abbey were in breach of their obligations under section s 83 (3) and 83 (6) of the Act to display the fees that they charged to landlords and whether or not they were a member of a client money protection scheme.
15. The issue in this appeal is, therefore, whether in all the circumstances the amount of the penalty for Abbey's breaches of their obligations under section 83 is unreasonable. In deciding that issue, which is left open by the primary legislation, I accept that it is helpful and appropriate to have regard to the Guidance. The Guidance says the expectation is a "*fine*" (i.e. penalty) of £5,000 and that a lower sum should be imposed only if the authority is satisfied there are "*extenuating circumstances*". The Guidance does not purport to be exhaustive as to what might constitute extenuating circumstances; however, it goes on to indicate some considerations that may be relevant. It recognises that an issue that should be considered in this regard is whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is clear that the Act must take precedence over the Guidance and that, in any event, enforcement authorities such as Camden 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.
16. 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.
17. I note that Camden decided to reduce the penalties to a total of £5,000 in response to Abbey's representations about their poor financial position. I have considered the financial information provided by Abbey in order to determine if a further reduction in the penalties is appropriate. The information provided does not tell a clear story. There is no profit and loss account for 2016 or 2017 and it is not clear how much the

directors or controllers of Abbey are paying to themselves and whether this impacts on the losses reported. The losses and the material decline in turnover in 2015 show that Abbey had serious problems in that year. I note that Abbey also made a loss in 2014 despite a significant turnover in excess of £450,000. The business appears to have recovered a little in order to produce a much smaller loss in 2016. It is not clear if the remuneration of the owners and controllers is set at a level that produces losses in the company and I do not have recent information on the directors' loan account. I am aware that the information that I have been provided with may not reflect the recent position. The 2016 accounts show that Abbey had adequate cash in hand to pay a fine of the magnitude levied by Camden. I conclude that Abbey is facing some financial difficulties and that these would amount to extenuating circumstances that justify a reduction from the maximum penalty of £5,000 for each breach of section 83 of the Act. However, in all of the circumstances of this case, I find that the evidence before me is insufficient for me to conclude that the monetary penalty of £2,500 for each of the two breaches of the Act that Camden imposed on Abbey in the Final Notice is unreasonable. Camden has taken constructive steps to point out Abbey's obligation under the Act in the past and Abbey have no reasonable excuse for permitting the breaches to take place and to remain unremedied. Their financial difficulties have led to the penalties being halved by Camden from the maximum figure described as a "norm" in the Guidance. A penalty should act as deterrent and an amount of £2,500 for each of the breaches is not unreasonable given the information that has been provided about the size of Abbey's business.

18. I conclude that that the penalties set out in the Final Notice are reasonable.

F. Decision

19. This appeal is dismissed.

Peter Hinchliffe
Judge of the First-tier Tribunal
16 March 2018
Promulgation Date: 19 March 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”.