



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

Appeal Reference: PR/2018/0023

**Heard at Fleetbank House, London
on 5th October 2018**

Between

**MOHAMMED ASIF and another trading as MORTGAGE
ADMINISTRATION**

Appellant

and

LONDON BOROUGH OF WALTHAM FOREST

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Mr Mohammed Asif who carries on business with a partner under the name Mortgage Administration (“Mortgage Administration”) appealed against a Final Notice dated 16th April 2018 served by London Borough of Waltham Forest (“Waltham Forest”). In the Final Notice Waltham Forest stated that Mortgage Administration was on 2nd February 2018 engaged in letting agency and property

management work in Waltham Forest and was in breach of the duty imposed on letting agents and property managers under section 83 of the Consumer Rights Act 2015 (the “Act”). The Final Notice set out the breach in the following terms:

“The Council is satisfied on the balance of probabilities that you are engaged in letting agency and property management work and have breached the duty under the Consumer Rights Act 2015 in particular you have:

- *Failed to publish on the business website – <http://www.mortgage-admin.com> a list of fees, charges or penalties payable to the agent by a landlord or tenant in respect of letting agency work and property management work carried on by the agent.*

2. In the Final Notice Waltham Forest imposed a monetary penalty of £5,000 on Mortgage Administration for this breach. Waltham Forest stated in the Final Notice that they had issued a notice of intent to impose a monetary penalty to Mortgage Administration on 7th February 2018 (the “Notice of Intent”) and that no representations had been received from Mortgage Administration in response to the Notice of Intent prior to the issue of the Final Notice.

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 the Annex which forms part of this decision.
4. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under section 83 of the Act, it may impose a financial penalty under section 87 of that 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.
5. 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

6. 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 section of the Guidance that is of greatest relevance to this appeal is set out below:

“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."

D. The Appeal

7. Mortgage Administration submitted an appeal dated 12th May 2018 against the decision in the Final Notice in which Mortgage Administration set out the following grounds of appeal:
 - They have been unable to access their website in order to amend it since the company that hosts the website is bankrupt and they have been unable to find the authorisation code that would permit them to amend the website.
 - They had eventually found a computer expert, who could access the website, but they could only add content to the existing website and they could not alter or delete existing content.
 - They are law abiding citizens and had no complaints against them.
 - They had listed their fees in their office and were regulated by the Property Redress Scheme ("PRS").
 - Mortgage Administration is an extremely small business and a fine would destroy their business and they would have to close down.
8. Waltham Forest responded to the grounds of appeal by stating that:
 - It was too late for Mr Asif to claim ignorance of Mortgage Administration's duty under the Act, which had been in force since 2015.
 - Mr Asif had failed to make written representations in response to the Notice of Intent.
 - Mortgage Administration or its contractor could have accessed the website and placed the relevant fees information on it or migrated the website to another website hosting company.
 - When a member of Waltham Forest's trading standards team visited Mortgage Administration's premises on 1st February 2018 Mortgage Administration had failed to comply with their legal obligations to display their fees at their premises and to be a member of a Government approved redress scheme,
9. Mortgage Administration responded to Waltham Forest's assertions and gave more details of their reasons for appealing. They stated that their website was completed in 2009 and they never received the password or log in details. The website is really

old and of no use to them as a marketing tool. All customers are told verbally of the fees charged by Mortgage Administration before any business is done.

10. At the time of the visit by Waltham Forest's trading standards officer Mr Asif said that they had taken down the signs at their premises that showed their fees and their membership of PRS as the premises were damaged and were leaking following an accident next door. They had finalised their membership of PRS and put this information on display at their premises, together with details of their fees, immediately after the visit of 1st February 2018. They had sent photos of the display to Waltham Forest trading standards. They repeated that they are in no position to pay the penalty of £5,000 as they are a very small business.

D. The hearing

11. Mr Mohammed Asif attended the hearing and represented himself and his business partner, Mr Mohammed Akram, who together trade as Mortgage Administration. Waltham Forest was represented by Ms Samantha Sheriff and Waltham Forest provided a witness statement from Ms Cordelia Cornelius, the Trading Standards Enforcement Officer who had visited Mortgage Administration on 1st February 2018 and who signed the Notice of Intent and the Final Notice.
12. Mr Asif briefly set out the basis for the appeal, as summarised above, and explained the eleven year history of Mortgage Administration and the difficulties that he has had with the website of Mortgage Administration and the dealings that he has had with Waltham Forest in respect of the alleged breach of the Act. He produced photographs of the accident to the property next door that had caused damage to their premises. He did not feel it necessary to question Ms Cornelius.
13. Ms Sheriff set out the basis upon which Waltham Forest had issued the Final Notice and why it believed the monetary penalty should be imposed and then questioned Mr Asif on the steps that Mortgage Administration had taken to change the website, display their fees at their premises and join PRS.
14. It was apparent from the submissions at the hearing and from the written submissions that preceded it, that the parties agreed on many of the facts that are relevant to the outcome of this appeal. I sought to clarify the common ground that existed between the parties at the hearing, and I am grateful to both parties for their willingness to assist me in this respect. The parties agreed during the course of the hearing, and I find it was the proper conclusion from the evidence and the submissions of the parties, that on 2nd February 2018:
 - Mortgage Administration was carrying out letting agency work and property management work.
 - Mortgage Administration operated from premises within Waltham Forest and fell within Waltham Forest's jurisdiction as an enforcement authority under the Act.

- Mortgage Administration operated a website on which it was required to publish its fees for landlords and tenants.
- Waltham Forest had properly delivered the Notice of Intent and the Final Notice to Mortgage Administration's premises.
- Mortgage Administration did not submit any representations in response to the Notice of Intent.
- The only breach that is set out in the Final Notice is the failure to display fees payable by a landlord and tenant on Mortgage Administration's website on 2nd February 2018.
- On the visit by Waltham Forest to Mortgage Administration's premises on 1st February 2018 the fees for landlords and tenants were not displayed and that this was remedied later that day.
- Mortgage Administration became members of PRS on 1st February 2018, after the visit by Waltham Forest to their premises, and they displayed the information about their membership at their premises later that day.
- On 2nd February 2018 the website of Mortgage Administration was operating and could be accessed by clients and the fees charged by Mortgage Administration to its clients were not set out on the website.
- Mortgage Administration's client fees were subsequently added to its website by a computer specialist, who could only make limited changes.

D. Conclusions on the facts and law

15. In reaching a decision in this case I have had regard to all of the written submissions, evidence and other documentation provided by both parties during the course of this appeal and to the evidence and submissions provided in the course of the hearing.
16. As a consequence of the agreement of the parties and my conclusions on the points listed in paragraph 13 above, I find that on 2nd February 2018 Mortgage Administration was in breach of its duty under section 83 (3) of the Act to publish on its website a list of the fees that are payable by a landlord or tenant in respect of the letting agency work and property management work carried on by Mortgage Administration. Mr Asif accepted this conclusion.
17. The sole matter that remained in contention between the parties and which I need to decide in order to determine this appeal is the reasonableness of the size of the monetary penalty imposed in the Final Notice after taking account of any extenuating, mitigating or aggravating circumstances and the impact of any penalty on Mortgage Administration's financial position.
18. In deciding this 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 Waltham Forest 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.

19. 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.
20. Mr Asif, on behalf of Mortgage Administration, was consistent in arguing in the appeal, in his submissions ahead of the hearing and at the hearing that a monetary penalty of £5,000 would be unaffordable for Mortgage Administration and may cause Mortgage Administration to close down. He was unable to provide any accounts or other written evidence about the turnover, profitability or balance sheet of Mortgage Administration to Waltham Forest or to the tribunal during the course of these proceedings or at the hearing. However, he repeatedly referred to the practical economic difficulties that the business faced and did so in an unprompted and credible manner. I asked him to provide details of the profitability of Mortgage Administration during the hearing and he stated that last year he and Mr Akram received £16000 in salary each and he believed that the business then reported profits of £2-3,000 according to their accountant. He said that most of these profits would be required to cover the cost of repairing the damage to the premises caused by the accident next door in the event that the Motor Insurance Bureau did not make a payment to them. When pressed, Mr Asif suggested that a penalty of £6-700 would be affordable for the business.
21. Waltham Forest stated that they had had no information from Mr Asif that supported his claim for financial hardship and they had been unable to take this matter into account as a consequence of the lack of information. At the hearing Ms Sheriff confirmed that they were content to leave me to decide the level of penalty that would be reasonable.
22. With regard to other mitigating or aggravating factors that might affect the size of the penalty; I accept that Mortgage Administration's control over the contents of their website was hindered by the problems that they had with the supplier and host of the website, I also find that Mortgage Administration did take prompt steps to address the other problems in complying with their legal obligations that Waltham Forest had pointed out to them during the visit of 1st February 2018. However, Mortgage Administration was required to comply with the Act from May 2015 and it is their responsibility to ensure that they are aware of and can comply with the legal obligations that fall upon them as letting agents or property managers. Whilst the

difficulty in amending their website provides some mitigation, they had been aware of this difficulty since before the Act came into force and the practical problems that they faced in publishing their fees on their website in accordance with the Act were not insurmountable and the cost of doing so was not prohibitive to a business of the size of Mortgage Administration. However, I accepted Mr Asif's assertion that a fee had been paid in 2014 for the hosting of the website for a number of years and that he had not been able close the website down by simply not paying an annual fee.

23. In the circumstances, I conclude that whilst the proposed penalty of £5000 will be material to Mortgage Administration, I do not believe, on the basis of the figures provided by Mr Asif, that it will cause Mortgage Administration to go out of business. However, I find that some reduction in the penalty is reasonable in order for the penalty to be proportionate to the severity of the breach after taking account of the mitigating factors set out above and the small scale of Mortgage Administration's business. I find that a penalty of £4000 is reasonable in all of the circumstances of this case.

F. Decision

24. By virtue of paragraph 5(5) of Schedule 9 to the Act, the Tribunal may quash, confirm or vary a Final Notice.
25. I find that Mortgage Administration's failure on 2nd February 2018 to publish on their website a list of the fees that they charged to landlords of their letting agency and property management business put them in breach of section 83 (3) of the Act and that a financial penalty of £4,000 in respect of such breach is reasonable in all of the circumstances of this case.
26. The appeal is upheld in part and the Final Notice is varied as set out above.

Peter Hinchliffe
Judge of the First-tier Tribunal
12th October 2018

ANNEX

The Consumer Rights Act 2015 imposes a requirement on all letting agents in England and Wales to publicise details of their relevant fees and other information. 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

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 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.

Right to make representations

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.

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 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 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 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.