



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

Appeal References: PR/2018/0038

**Decided without a hearing
On 15th January 2019**

Between

ACE PROPERTY FINDER LTD

Appellant

and

LONDON BOROUGH OF NEWHAM

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. The Final Notice

1. Ace Property Finder Ltd (“Ace”) has brought an appeal against a final notice dated 4th July 2018 served on it by the London Borough of Newham (“Newham”), which is the local weights and measures authority for Ace’s premises at Citygate House Business Centre, 246-250 Romford Road, London E7 9HZ. The final notice is described as a “varied final notice” and set out Newham’s conclusion that Ace was on 6th February 2018 engaged in letting agency work and it had failed to meet the following obligations imposed on lettings agents under section 83-88 and Schedule 9 of the Consumer Rights Act 2015 (the “Act”):

- (i) Failing to display on its website a list of fees as required by section 83 (3) of the Act.
- (ii) Failing to display on its website a statement about membership of a client money protection scheme on its website as required by section 83 (6) of the Act.
- (iii) Failing to display on its website details of their membership of a redress scheme as required by section 83 (7) of the Act.

The varied final notice of 4th July 2018 (the "Varied Final Notice") imposed a penalty of £4,500 in respect of these breaches.

2. Newham stated in the Final Notice that they had had regard to the representations and submissions made by Ace in response to a final notice issued on 27th March 2018, and a notice of intent that they had issued to Ace on 6th February 2018 that referred to the breaches of the Act set out above. The final notice and the notice of intent stated that the Newham intended to impose a penalty of £5,000.
3. Ace responded the notice of intent with an e-mail from their solicitors seeking time to submit representations. Ace were permitted 28 days in which to submit those representations, but failed to respond in this timescale. The final notice was then issued and thereafter there was significant correspondence between Newham and Ace in which additional evidence and submissions were made by Ace and Newham re-considered their position and made a fresh decision in relation to the breaches.
4. I have considered the submission of the parties and the evidence submitted by them and the overriding objective of the Tribunal to deal with case fairly and justly and in a proportionate and flexible manner where appropriate and I conclude that in the particular circumstances of this case the appeal should proceed against the Varied Final Notice and that the representations and submissions made by Ace after the initial final notice was issued should be considered by Newham. The parties have acted on the basis that the initial final notice and an interim varied final notice issued on 20th April 2018 have been superseded by the Varied Final Notice and I conclude that it is legitimate and just to proceed on this basis.

B. Legislation

5. Section 83 of the Act and other sections of the Act that are referred to in this decision or that are of greatest relevance to these appeal are set out below in Annex A to this decision.
6. Where the relevant enforcement authority is satisfied on the balance of probabilities that a letting agency has breached its duties under section 83 of the Act, it may impose a financial penalty under section 87 of the Act. It does so by serving first a notice of intent, considering any representations made in response, and then serving a final notice on the letting agent concerned.
7. 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

8. 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

9. Ace submitted an appeal dated 25th July 2018 against the Varied Final Notice.
10. Ace asked that their appeal be considered with compassion and that account be taken of their naivety and their lack of intention to be in breach and that the penalty be reduced to nil.
11. Newham submitted a response to the appeal in which they stated that they remained of the view that the Ace had been in breach of the requirements of the Act and that the fact their breach arose from a lack of knowledge of the Act and was unintentional is immaterial. Newham had however reconsidered their reasonableness of the penalty in the light of the additional evidence that Ace had provided about their financial position. Newham accepted that a penalty of £4,500 is unreasonable and that the appropriate financial penalty should be £1,000.
12. Ace submitted a reply to Newham's response. The reply represents the clearest as well as the most recent statement of the basis for Ace's appeal. Ace helpfully stated that they did not dispute the detailed background facts set out in Newham's response to their appeal. They then clarified the basis for their appeal in the following terms:
 - (i) They had failed to submit their account for Newham's consideration as they had thought they should be submitted only after they had been completed by their accountants and had not understood the timetables imposed by Newham or the tribunal.
 - (ii) They had now submitted their accounts for their first year of trading; the year to September 2017. They stated that they are a small lettings and estate agent.
 - (iii) They repeated that their mistakes were not intentional or deliberate and that they had acted promptly to rectify their mistakes.
 - (iv) Their website was taken down as it was not compliant but they had not been advised to take down their Facebook advertisement. They believed that they were not in breach of section 83 (3) as it refers to an agent's "website".
 - (v) The amount of the penalty is unreasonable and irrational even if it is reduced to £1,000 and is still not affordable as Ace is loss-making.

13. In their appeal Ace indicated that they wished the appeal to be heard on the papers. Newham confirmed that they also wished to proceed on this basis. Having considered the subject matter of the appeal, the evidence and submissions provided by the parties and the capability of the parties I consider that this appeal is suitable for determination on this basis.

D. Issues in Dispute

14. 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. I am grateful to the parties for the helpful manner in which they have both developed their positions as the issues between them have emerged. I note in particular the pragmatic and constructive approach adopted by Newham in reconsidering their position in the light of the new information very belatedly provided by Ace.

15. The parties agree, and I concur, that on 6th February 2018 Ace was engaged in lettings agency work within Newham. The Act came into force in 2015 and set out obligations that letting agents had to meet. Newham gave specific guidance to Ace in July and October 2017 on the obligations that they had to meet under the Act.

16. I conclude from Ace's reply that they accept that their Facebook site did not correctly display their fees on 6th February and did not include a statement clarifying if they were or were not a member of a client money protection scheme. Ace also accept that they hold money on behalf of clients and that they were required to be a member of redress scheme, but had not given details of which redress scheme they were a member of on their Facebook site. I find that the evidence supports these conclusions.

17. In order to resolve this appeal, it is necessary for me to resolve the two remaining issues that the parties disagree on: Firstly, whether the internet presence that Ace had on Facebook on 6th February 2018 amounts to a website for the purpose of the Act. Secondly, whether the penalty proposed by Newham of £1,000 is reasonable and proportionate in all of the circumstances of this case and in particular in the light of the weak financial position of Ace.

18. The Act does not provide a definition of a website. Ace's Facebook pages on 6th February 2018 contained details of the properties that they were offering to let, supportive references from clients, advertisements for the service that they offer and has an index dividing their Facebook pages into 7 sections. It permits prospective tenants and landlords to contact them in order to do business with them. Ace has not suggested that access to its contacts are restricted to any significant extent. I find that as a matter of fact that Ace's Facebook pages are a site on the worldwide web and constitute a Website within the terms of the Act.

E. Conclusion on Penalty

19. Ace has argued in their appeal that the amount of the monetary penalty is unreasonable and unaffordable. In deciding on the reasonableness of the penalty, which is left open by the primary legislation, I accept that it is helpful and appropriate to have regard to the Guidance. The Guidance says the expectation is a “*fine*” (i.e. penalty) of £5,000 and that a lower sum should be imposed only if the authority is satisfied there are “*extenuating circumstances*”. The Guidance does not purport to be exhaustive as to what might constitute extenuating circumstances; however, it goes on to indicate some considerations that may be relevant. It recognises that an issue that should be considered in this regard is whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is clear that the Act must take precedence over the Guidance and that, in any event, enforcement authorities such as Newham 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.
20. 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.
21. I have considered the financial information provided about Ace in order to determine if a further reduction in the penalties is appropriate. The accounts for the year to 30 September 2017 provided by Ace show that in its first year Ace had a turnover of £8,366, staff costs of £5,513 and incurred a loss of £7,258. Ace has a very weak balance sheet with net assets of minus £7,158. Ace has not provided any information about their current finances but they remain in business. I accept that their poor financial position constitutes extenuating circumstances that justify a penalty well below the “norm” proposed by the Guidance. Newham have proposed a penalty of £1,000 after receiving the accounts of Ace. I find that it is not appropriate to reduce the penalty to nil as Ace seeks. Newham had taken constructive steps to point out Ace’s obligation under the Act in January 2017 and that the Act has been in force since May 2015. I conclude that Ace had no reasonable excuse for permitting the breaches to continue and to remain unremedied until February 2018. A financial penalty is appropriate given the potential harm to consumers of non-compliance with the Act. I conclude that the penalty of £1,000 proposed by Newham for the breaches of the Act identified in the Varied Final Notice is reasonable for a business of Ace’s size.

F. Decision

22. By virtue of paragraph 5 (5) of Schedule 9 to the Act, the Tribunal may quash, confirm or vary a Final Notice.
23. I conclude that ACE’s failure on 6th February 2018 to publicise on their website a list of the fees for their letting agency service and to include with the list of fees a statement of whether the agent is a member of a client money protections scheme and a statement that indicates that the agent is a member of a redress scheme and gives the name of the

scheme gives rise to a single breach of section 83 of the Act. A financial penalty of £1,000 should be imposed in respect of this breach and such a penalty is reasonable and proportionate.

24. The Varied Final Notice is therefore confirmed.

Signed

Peter Hinchliffe
Judge of the First-tier Tribunal
15th January 2019
Promulgation Date 25 Jan. 19

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 appeal 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. Appeal

4. Finally, Schedule 9 provides for appeal, as follows.

Appeal

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 appeal 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.