



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

**Appeal Reference: PR/2017/0021**

**Between**

**TOP SUPPORTS ESTATE AGENTS LIMITED**

Appellant

**and**

**LONDON BOROUGH OF BARKING & DAGENHAM**

Respondent

**Judge**

**PETER HINCHLIFFE**

**DECISION AND REASONS**

***A. The Final Notice***

1. Top Supports Estate Agents Limited ("Top Supports") appealed against a Final Notice served on it by the Council of the London Borough of Barking & Dagenham ("Barking & Dagenham"), which is the local weights and measures authority for the geographical area in which Top Supports carries on business as a letting agent. The Final Notice is dated 15<sup>th</sup> May 2017 and imposes a penalty of £10,000 on Top Supports for two breaches of their obligations under section 83 of the Consumer Rights Act 2015 (the "Act"). The Final Notice records these breaches as;

*“Failed to publish a list of the agent’s relevant fees, and/or a statement saying whether you belong to a client money protection scheme at Top Supports Estate Agent Ltd, 251 Oxlow lane, Dagenham, RM107 YR ...” and*

*Failed to publish a list of the agent’s relevant fees, and or a statement saying whether you belong to a client money protection scheme on the company’s website...”*

2. The Final Notice sets out Barking & Dagenham’s conclusion that Top Supports was on 10<sup>th</sup> February 2017 engaged in letting agency work. Barking & Dagenham state that they had had regard to Top Supports representations made in response to the notice of intent dated 16<sup>th</sup> March 2017 (the “Notice of Intent”), which had been issued by Barking & Dagenham following a visit to Top Supports offices by a Principal Trading Standards Officer on 10<sup>th</sup> February 2017 (the “Visit”). The Notice of Intent sets out Barking & Dagenham’s conclusion that Top Supports was in breach of section 83 of the Act. It indicated that a penalty of £10,000 was likely to be imposed in respect of two breaches and invited Top Supports to make representations or objections in response to the Notice of Intent. The two breaches listed in the Notice of Intent were:

*“1. You have failed in your duty to publish a full list of all your relevant landlord fees.*

*2. You have failed in your duty to publish with the list of fees a statement as to whether you are a member of a Client Money Protection Scheme at the above premises”*

### **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. On 23<sup>rd</sup> June 2017 Top Supports submitted an appeal against the decision in the Final Notice. Top Supports asked for an extension of time, which was granted, and set out the grounds of their appeal, the principle points of which are:
  - The decision is very harsh and the amount of the monetary penalty is too much. Top Supports is a very small company and cannot pay the amount of the penalty.
  - There was no intention to mislead clients. All charges are stated on Top Supports’ website. Top Supports tried its best to display relevant information at their premises. All landlords knew their charges.
  - Since receiving the Final Notice they have displayed the required information in the right place at their premises.

Top Supports asked to be given a second chance and stated that the outcome they sought from the appeal was "leniency".

6. Top Support provided a copy of the new signs that they were using to notify clients of their charges together with the representations they had submitted to Barking & Dagenham in response to the Notice of Intent, their contract with landlords and their accounts for each of the financial years ending 31 October 2013, 31 October 2014 and 31 October 2015.
7. Barking & Dagenham responded to the grounds of appeal by reiterating the legal position and their view of the facts as set out in the Final Notice and the following additional points:
  - On 21<sup>st</sup> July 2017 Tops Support's website did not have sufficient breakdown of tenancy fees or a reference to membership or otherwise of a client money protection scheme.
  - Prior to the Visit they had gone to Tops Support's premises on 4<sup>th</sup> January 2017 and provide a letter and guidance as to the requirements that Top Supports had to meet and had provided advice verbally.
8. Barking & Dagenham provided a witness statement from Mr Elworthy, the Principal Trading Standards Officer who had visited Top Supports and dealt with the enforcement action against them. He outlined the history of Barking & Dagenham's dealings with Top Supports in some detail and provided copies of relevant material including; the programme that Barking & Dagenham had implemented on 1<sup>st</sup> December 2016 in order to enforce Sections 83 -88 of the Act, the letter of guidance issued to Top Supports in January 2017, photographic evidence of the signs and the layout at Top Supports' premises, the Notice of Intent and copies of pages from Top Supports website. Barking & Dagenham also provided a copy of the submission prepared by Trading Standards that was sent to the decision making panel of Barking & Dagenham together with the representations to the decision making panel that were received from Top Supports. A copy of the notes made by the two members of the decision making panel when recording their decision in relation to the issue of a final notice were also provided. Evidence of the second hand value of the car driven by the owner and director of Top Supports, Mr Mottah, and his personal ownership of a house was also provided by Barking & Dagenham.

#### *E. The Hearing*

9. The hearing of the appeal took place on 11<sup>th</sup> October 2017. Top Supports was represented by Mr Mottah, the owner and director of Top Supports. Barking & Dagenham was represented by their counsel Mr Cantor. Mr Elworthy attended as a witness.
10. Mr Mottah produced a large bundle of documents at the hearing. These were copied and made available to Mr Cantor and to the tribunal. Mr Mottah agreed that he would refer to these and permit Barking & Dagenham and the tribunal time to review

them as and when he wished to refer to them in his case. The documentation mainly consisted of bank statements, the 2016 accounts of Top Supports and other details of Top Supports' financial position and various versions of the customer information sheets that it had produced. It was agreed that the papers would be admitted as evidence on this basis.

11. Mr Cantor stated as a preliminary matter that Barking & Dagenham had realised since submitting their response to the appeal that the breach of Article 83 of the Act set out in the Final Notice in respect of the contents of Top Supports' website had not been listed in the Notice of Intent. The website had been inspected by Barking & Dagenham after the date of the Notice of Intent. As a consequence Barking & Dagenham accepted that it was not able to proceed with the case in respect of a breach of the section 83 of the Act arising from a failure to publish on the company's website a list of the agent's relevant fees and a statement saying whether they belong to a client money protection scheme. Barking & Dagenham wished to pursue two breaches at this hearing; the failure to display at the premises of Top Supports information about fees and the failure to display at the premises of Top Supports clarification of whether Top Supports was a member of a client money protection scheme. The tribunal welcomed this clarification of the case and Mr Mottah confirmed that he understood the change in Barking & Dagenham's position.
12. It was common ground between the parties at the hearing that Top Supports was carrying on a letting agency business in respect of dwelling houses within Barking & Dagenham and was required to comply with section 83 of the Act. It was also accepted by both parties that Top Supports holds money on behalf on landlords in the course of its business.
13. During the course of the hearing Mr Mottah accepted that he has relied upon guidance from others and in particular the Property Ombudsman of which Top Supports is a member, in order to understand what was required of them by way of legal and regulatory obligations. Mr Mottah accept that it was not until the Property Ombudsman wrote to Top Supports on 14<sup>th</sup> September 2017 that he clearly understood what they were required to do in respect of clarifying their membership of a client money protection scheme.
14. The issues in dispute in this appeal was whether Top Supports on 10<sup>th</sup> February 2017 had displayed at their premises in 251 Oxlow Lane, Dagenham an adequate list of the fees that customers were liable to pay and if not whether the amount of the penalty was unreasonable in the particular circumstances of this case.

#### *F. Submissions*

15. Mr Mottah accepted the timescale of events and correspondence put forward by Mr Elworthy. He argued that he had displayed information about fees at the premises of Top Supports. He accepted that he was in the office on 10<sup>th</sup> February 2017 when Mr Elworthy visited. He said that this was the first time that he understood what was

expected of him. He had not been present when Mr Elworthy visited on 4<sup>th</sup> January 2017. He had been abroad after the death of his father. He was away between November 2016 and January 2017 and there was no one in charge of the business during this time, he merely had someone who took messages. Mr Mottah would administer existing contracts from abroad and he could still make payments and manage the bank account. He had had to lay off staff as business was not good. Top Supports had been a member of the Property Ombudsman for some time and he relied on them to keep him informed as to what was required of the business. He had sheets that set out the fees payable by landlords and by tenants; these were kept in document holders on the wall of Top Supports' office. Mr Mottah discussed and answered question at some length about the changes in the documents that set out the fees during the first half of 2017. Mr Mottah accepted that the documents that he had on display in February 2017 did not satisfy Mr Elworthy's requirements, but argued that this had been remedied by May or June 2017. He believed that in February 2017 Barking & Dagenham wanted all fee information on one sheet and that they wanted them displayed more clearly and he had achieved this with subsequent changes to the documents.

16. With regard to the amount of the penalty, Mr Mottah pointed to the accounts of Top Supports which showed profits before tax of £3,560, £15,504, £10,509 and £6,496 in the financial years from 2012 to 2015 respectively. At the hearing Mr Mottah produced a copy of Top Supports' accounts for 2016 which showed a profit before tax of £2,826. He said that he does not know how he would raise the money to pay a £10000 fine. His car is on finance and he cannot raise money from it. He only has ownership or any financial interest in one property and this is his home. He asked for leniency.
17. Mr Cantor for Barking & Dagenham submitted that no adequate list of fees was on display at Top Supports' premises on 10<sup>th</sup> February 2017. The documents to which Mr Mottah referred had a reference to a single administration fee of £250. This appeared to be a document intended for tenants. This is inadequate and does not comply with the requirements of the Act. The Guidance specifically states that: "*Ill-defined terms such as administration costs must not be used.*" In this case it was also not clear if the fee was per property or per tenant. The fees had to be displayed at a place where they could be seen. Putting a sheet in a poorly organised document holder on a wall, which contained other documents, was not good enough. No other fee information was displayed at that time. No clarification of Top Supports' membership of a client money protections scheme was displayed on 10<sup>th</sup> February 2017.
18. With regard to the amount of the penalty, Mr Cantor referred the tribunal and Mr Mottah to the Guidance, which clearly states that "*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.*" Mr Cantor stated that the Act had come into force on in May 2015 so it could not be regarded as a recent change in the law. Barking & Dagenham had made efforts to bring the obligations of Top Supports to their attention before it inspected their premises. He said that the issue of proportionality was for the tribunal to determine in this case. Mr Cantor sought

clarification from Mr Mottah of the accounts of Top Supports. Mr Mottah indicated that of the staff costs and expense only £7,200 was paid to him in salary. The travel expenses that he claimed reflected the travel that he had to undertake for the business. He has no other income. However his wife works and helps to support the family.

19. In answer to question from the tribunal, Mr Cantor indicated that Barking & Dagenham believed that a failure to display a list of fees and a failure to include with the list of fees a statement of whether the agent is a member of a client money protection scheme are two separate breaches of section 83 of the Act entitling Barking & Dagenham to impose two separate penalties. The proper interpretation of section 83 was discussed and in particular subsection 83 (6). Mr Cantor accepted that there was a legitimate question as to whether subsection 83(6) gave rise to a breach independently of subsection 83 (2) but confirmed that it was Barking & Dagenham's position that Top Supports had committed two distinct breaches; one of section 83 (2) as a result of their failure to display a list of fees and one of section 83 (6) as result of their failure to display a statement of whether they were a member of a client money protection scheme.

*D. Conclusions on the facts*

20. The parties agree and I concur that on 10<sup>th</sup> January 2017 Top Supports was engaged in letting agency work within Barking & Dagenham. I understand that Top Supports accept that they were not displaying any information in respect of their membership or otherwise of a client money protection scheme on 10<sup>th</sup> February 2017 and in any event my conclusion on the facts is that no such information was displayed at their premises at that time.
21. I found Top Supports position in relation to the information on fees that was on display at their premises on 10<sup>th</sup> February 2017 and subsequently to be confusing and lacking in clarity. This appears to reflect a genuine difficulty on Mr Mottah's part in recollecting when certain actions were taken and the order of events in his dealings with Barking & Dagenham. However, the events after 10<sup>th</sup> February are largely irrelevant to the issue of whether Top Supports were in breach of section 83 of the Act on that day. I conclude from the facts that Top Supports did not display a list of fees that were adequate to meet the requirement of subsection 83(4) and that the information that was on display was not displayed in a manner or in a place within the premises at which the list was likely to be seen by persons using or proposing to use the services as required by subsection 83(2)(b). Top Supports' progress in addressing their failing after that date can be relevant to the proportionality and reasonableness of the penalty and I conclude that Mr Mottah intended to address the failures promptly and effectively but that he lacked the understanding to do so without further guidance from others, including Barking & Dagenham and the Property Ombudsman.

***F. Findings***

22. In reaching a decision in this case I have had regard to all of the oral submissions at the hearing and also to the written submissions, evidence and other documentation contained in the hearing bundle and provided at the hearing.
23. I accept and agree with Barking & Dagenham's position that it cannot pursue the breach set out in the Final Notice arising from any failure by Top Supports to publish a list of fees on their website as such failure was not set out in the Notice of Intent.
24. I find that the evidence establishes that on 10<sup>th</sup> February 2017 Top Supports failed to publish a list of the fees that they charged landlords for their letting agency service as required by section 83(2) of the Act and failed to display, with the list of fees, a statement of whether they were a member of a client money protection scheme.
25. I note that subsection 83 (6) states that; *"the duty imposed on the agent by subsection (2) .... includes a duty to display ....with the list of fees"* the required information about the membership of a client money scheme. I conclude from this phrasing that the Act treats the duty created by subsection 83 (6) as being part of the duty imposed under subsection 83 (2).
26. Section 87 of the Act sets out the basis upon which penalties can be levied for breaches of subsection 83. Section 87 (6) states that:  
*"Only one penalty under this section may be imposed on the same letting agent in respect of the same breach"*  
Although this section appears to be primarily intended to avoid different local weights and measures authorities imposing penalties for the same breach, it can also be construed as having a wider effect. Subsection 87 (7) limits the amount of any financial penalty under section 87 to £5,000. Subsection 87(8) states that Schedule 9 of the Act shall have effect and Schedule 9 sets out the power of the Tribunal on appeal and states that a final notice may not be varied by the Tribunal so as to impose a financial penalty of more than £5,000.
27. The Guidance states in Section 3 that a fine of up to £5,000 can be imposed where a letting agent has failed to *"publish their fees and other details"*. The *"other details"* in this context can only refer to the information required to be published under section 83 other than that about fees, such as information about membership of a client money protection scheme.
28. Having reviewed the legislation and taken account of the Guidance, I conclude that Top Supports' failure on 10<sup>th</sup> January to display at their premises both their fees and a statement of whether or not they were a member of a client money protection scheme put them in breach of their obligation under section 83 (2) and should properly be regarded as giving rise to a single breach and not two separate breaches. The maximum penalty that can be imposed in respect of a breach of s. 83 (2) is £5,000.
29. The last issue in this appeal is, therefore, whether, in all the circumstances the amount of the penalty for Top Supports' breach of their obligations under section 83 is

unreasonable. In deciding that issue, which is left open by the primary legislation, it is helpful and appropriate to have regard to the Guidance, to which I have earlier made reference. 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 and says:

*“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.”*

30. Top Supports is a small business. Its accounts make this clear. There is no indication that suggests that the profits are reduced due to material benefits that Mr Mottah as owner and sole director is receiving directly or indirectly from the business. Mr Mottah has stated repeatedly that the business cannot afford to pay a debt of £10,000 and the evidence does suggest that the business has little cash at present and has only limited capability to generate cash from its trading activities.
31. There is no requirement or expectation that enforcement authorities must publicise or take active steps to ensure that letting agents are aware of the coming into force of legislation that creates an obligation on them before taking any action to enforce those obligations. Top Supports were and are carrying on business as letting agents, it is their responsibility to ensure that they are aware of the regulatory and legal requirements affecting letting agents and that they comply with any change in these requirements. By February 2017 they had had 18 months to become aware of their legal obligations under the Act and Barking & Dagenham had offered some assistance in this regard. Top Supports showed seems confusion and lack of capability even after their failures to meet the requirement of the Act had been pointed out to them. 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.
32. In all of the circumstances of this case, I find that it is reasonable for the financial penalty payable by Top Supports to be set at £3,000 in respect of their failure on 10<sup>th</sup> February 2017 to display at their premises their fees and a statement of whether or not they were a member of a client money protection scheme.

#### **F. Decision**

33. By virtue of paragraph 5(5) of Schedule 9 to the Act, the Tribunal may quash, confirm or vary a Final Notice.
34. The appeal is allowed in part and the Final Notice is varied. The Final Notice served on Top Supports erred in law in finding Top Supports to be breach of section 83 of the Act as a result of a failure to publish on the company’s website a list of the agent’s



relevant fees, and a statement saying whether they belong to a client money protection scheme when no such breach had been mentioned in the Notice of Intent. I find that Top Supports' failure to display in their premises both a list of the fees that they charged customers of their letting agency business and also a statement of whether they were a member of a client money protection scheme gives rise to a single breach of s.83 and that a financial penalty of £3,000 in respect of this breach would be reasonable and proportionate in view of the limited financial scale and resources of Top Supports. The Final Notice is therefore varied so as to impose a penalty of £3000 for a single breach of section 83 of the Act.

**Peter Hinchliffe**  
**Judge of the First-tier Tribunal**  
**26 October 2017**  
**Promulgation Date: 31 October 2017**

## **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”.