



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

Appeal Reference: PR/2016/0046

Between

NORTHWOOD (YORK) LIMITED

Appellant

and

CITY OF YORK COUNCIL

Respondent

Judge

PETER HINCHLIFFE

DECISION AND REASONS

A. Background

1. Northwood (York) Limited ("Northwood") appealed against a Final Notice served on it by the Council of the City of York ("York"), which is the local weights and measures authority for the geographical area comprising the City of York. The Final Notice was dated 25th October 2016 and imposed a penalty of £1,250 on Northwood for a breach of their obligation under s.83 (2) of the Consumer Rights Act 2015 (the "Act") to display their fees and charges for tenants and landlords ("Fees") at their premises at 67 Micklegate in York on 5th October 2016.

2. The offices of Northwood are located at 67 Micklegate, York, which is within the City of York. A covering letter from York, also dated 25th October 2016 set out the terms of s.83 of the Act and provided further details of the basis upon which York concluded that Northwood were in breach of s.83 of the Act. The covering letter also set out the view that York had taken to the representations received from Northwood in response to a notice of intent that York had issued to Northwood on 6th October 2016. The notice of intent had been issued after a visit by officers of York to the premises of Northwood on 5th October 2016 (the "Visit"). The notice of intent set out York's conclusion that Northwood were in breach of s. 83 of the Act, indicated that a penalty of £5,000 was likely to be imposed in respect of such breach and invited Northwood to make representations or objections in response to the notice of intent.

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 S.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. Northwood submitted an appeal in a letter dated 25th November 2016. Northwood set out the grounds of their appeal in this letter, the principle points of which are:
 - The decision to issue the Final Notice was based on an error of fact. Their Fees were always displayed on their website and were not displayed at their premises at the time of the Visit as the office was undergoing a programme of re-decoration. A copy of the information on Fees would be given to any visitor to the office on request.
 - The decision in the Final Notice is unreasonable as Northwood were led to believe that a further visit would take place within seven days of the visit on 5th October 2016 in order to permit Northwood time to replace the information on Fees, which had been temporarily removed during the redecoration. The information on fees was re-hung on the wall of the office later on 5th October 2016.
 - The amount of the penalty is unreasonable as the only reason that the Fees were not on display at Northwood's office at the time of the Visit was the re-decoration of the office. The Fees were always visible on Northwood's website.

6. York 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 covering letter and with the following additional points:
- They accepted that Northwood's premises had recently been decorated and that two weeks of decorating work had been done. They had been told that this work had finished on Friday 30th September.
 - There was no reason why the Fees could not have been temporarily displayed on a desk or another place that was visible, whilst the redecoration was taking place.
 - They had taken into account that the decorating of the premises had led to the Fees not being displayed temporarily when reducing the penalty to £1,250 from a norm of £5,000.
 - Northwood had not been led to believe during the Visit that they had time to put things right before a penalty was imposed.
7. Northwood made further submissions in response and explained that:
- Their office was wet with paint at the time of the Visit.
 - They recognise that they could have displayed the frame that they use to display the fees on their walls on a desk and are disappointed that they failed to do so.
 - They still regard the penalty as unreasonable as the timing of the Visit during their redecoration was just bad luck.
8. York provided four witness statements; two from the officers who attended the Visit, who confirmed the position as set out in the Final Notice and the covering letter that accompanied it and who also stated that they had not led the staff at Northwood to believe they would be visited again within seven days in order to see if they had remedied the failure to display the Fees. Two other officers of York, who were involved in considering the submissions made by Northwood in response to the notice of intent and in deciding the level of penalty, submitted witness statements in which they recorded the basis upon which the penalty was set at £1,250. A penalty of £5,000 had been suggested in the notice of intent. The officer confirmed that this amount was subsequently reduced because York accepted that the Fees were at all times published on Northwood's website and the Fees were only not displayed at Northwood's premises because of the re-decorating. York also accepted that it was only an oversight that led to Northwood not displaying the Fees in a temporary area during the course of the redecoration. Nevertheless York concluded that a penalty of £1,250 was appropriate for Northwood's breach of the Act.
9. Both parties were content for the matter to be determined by the Tribunal without a hearing.

D. Conclusions on the facts

10. I conclude from the submissions of the parties that there is a large measure of agreement between the parties. The parties agree and I concur that on 5th October 2016

Northwood was engaged in letting agency work, was carrying on business from premises within the City of York and was operating a website on which the Fees were published as required by the Act. Furthermore, I find that the evidence establishes that Northwood had displayed the Fees at their premises up to September 2016 when the frames displaying the fees had been removed from the walls of the office in order for them to be decorated and the Fees were displayed again on 5th October 2016 after the Visit had taken place and the decoration was complete.

11. There is a disagreement over whether Northwood's re-decoration of their premises had been completed four days before the Visit or was still being completed at the time of the Visit. There is also disagreement over whether Northwood were led to believe during the course of the Visit that they had a further period in which to display the Fees before a penalty would be levied. I am inclined to accept the evidence of the witnesses of York who say that they did not lead the Northwood to believe that they would have time to re-hang the frames showing the Fees before a subsequent visit from officers of York. However, neither of these issue amount to a challenge to a conclusion that Northwood was in breach of s.83 (2) of the Act by not displaying the fees at their premises on 5th October.

F. Findings

12. In reaching a decision in this case I have had regard to all of the written submissions, evidence and other documentation provided by the parties.
13. I conclude for the reasons set out above that on 5th October 2016 Northwood was engaged in lettings agency work and failed to display a list of the fees that it charged its clients at its premises. Northwood was therefore in breach of s.83 (2) of the Act at that time.

G. Penalty

14. The main issue in this appeal is, therefore, whether, in all the circumstances the amount of the penalty for Northwood' breach of their obligations under S.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, saying that "*It will be up to the enforcement authority to decide what such circumstances might be*". However, it goes on to indicate some considerations that may be relevant including the awareness of the letting agent in the early days of the Act and *whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business.*" Neither of these factors is relevant to Northwood. However, it's clear that there are extenuating circumstances in this case. This is accepted by York. Whatever arrangement is made to display fees in a lettings agent premises there is a possibility

of a temporary problem interrupting the display arrangements. In this case the redecoration of the premises led to the display of the Fees being removed from the walls, which were to be re-painted. A failure arising in these circumstances cannot be regarded as being of the same gravity, or giving rise to the same threat to consumers and clients, as a long-term failure to display, or a conscious decision not to display, information about fees to prospective clients. Northwood state that they would have reinstated the display of the Fees in any event upon completion of the re-decoration and I accept this. However, it is clear that alternative means of displaying the Fees could have been found and Northwood accept this and state that they are disappointed in themselves for not taking this step. I conclude that the extenuating circumstance was that the failure to display fees was temporary only and arose as direct result of the office walls being redecorated and without any desire to restrict the flow of information to clients and prospective client. York believes that they have already reflected the extenuating circumstance in deciding to reduce the fine to £1,250; 25% of the amount suggested as the 'norm' in the Guidance. It is clear that York have taken a measured and logical approach in taking account of the representations made by Northwood in response to the notice of intent.

15. Overall and after considering all of the submissions and evidence in this case I conclude that the penalty imposed by York does not take sufficient account of the extenuating circumstances relevant to Northwood's breach and a figure of £1,250 is unreasonable. I conclude that a penalty of £750 would be reasonable in all of the circumstance of this appeal.

F. *Decision*

16. The appeal is allowed and the Final Notice for Northwood's breach of s. 83 of the Act is varied so as to substitute a penalty of £750 in place of the penalty originally imposed by York.

Peter Hinchliffe
Judge of the First-tier Tribunal
13 June 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”.