



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

Appeal Reference: PR/2017/0036

**Heard at Alfred Place, London
On 28 February 2018**

Before

JUDGE JACQUELINE FINDLAY

Between

S M PROPERTIES UK LTD LIMITED

First Appellant

and

LONDON BOROUGH OF NEWHAM

Respondent

Appearances:

For the Appellant, Mr Siriwardena, Counsel

For the Respondent, Mr Thompson, Counsel

Witness:

Mr Chowdhury

In attendance:

Ms Exley Trading Standards Officer, London Borough of Newham

DECISION AND REASONS

Introduction

A. The requirement for letting agents to publicise details of fees

1. The Consumer Rights Act 2015 (“CRA 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:-

“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

2. 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

Notice of intent

1

- (1) Before imposing a financial penalty on a letting agent for a breach of a duty imposed by or under section 83, a local weights and measures authority must serve a notice on the agent of its proposal to do so (a "notice of intent").
- (2) The notice of intent must be served before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the agent's breach, subject to sub-paragraph (3).
- (3) If the agent is in breach of the duty on that day, and the breach continues beyond the end of that day, the notice of intent may be served--
 - (a) at any time when the breach is continuing, or
 - (b) within the period of 6 months beginning with the last day on which the breach occurs.
- (4) The notice of intent must set out--
 - (a) the amount of the proposed financial penalty,
 - (b) the reasons for proposing to impose the penalty, and
 - (c) information about the right to make representations under paragraph 2.

Right to make representations

2

The letting agent may, within the period of 28 days beginning with the day after that on which the notice of intent was sent, make written representations to the local weights and measures authority about the proposal to impose a financial penalty on the agent.

Final notice

3

- (1) After the end of the period mentioned in paragraph 2 the local weights and measures authority must--
 - (a) decide whether to impose a financial penalty on the letting agent, and

- (b) if it decides to do so, decide the amount of the penalty.
- (2) If the authority decides to impose a financial penalty on the agent, it must serve a notice on the agent (a “final notice”) imposing that penalty.
- (3) The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the 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 notice.

Withdrawal or amendment of notice

4

- (1) A local weights and measures authority may at any time--
 - (a) withdraw a notice of intent or final notice, or
 - (b) reduce the amount specified in a notice of intent or final notice.
- (2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the letting agent on whom the notice was served.

D. Appeals

4. Schedule 9 provides for appeals, as follows.

Appeals

5

- (1) A letting agent on whom a final notice is served may appeal against that notice to--
 - (a) the First-tier Tribunal, in the case of a notice served by a local weights and measures authority in England, or

- (b) the residential property tribunal, in the case of a 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.

E. Explanatory Notes and Guidance

5. 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.

6. 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."

7. 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".

8. Potentially relevant 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”.

The Appellant’s Case

2. The Appellant invites the Tribunal to allow the appeal on the grounds that a penalty should not be imposed.
3. In the notice of appeal, the Appellant submits the following grounds:
 - a) The Appellant has always been compliant with the statutory requirements and never had a problem in the past.
 - b) The Respondent never visited the premises to make sure of compliance notwithstanding that in a letter dated 16 August 2017 the Respondent stated that all letting agents in the Borough had been advised since October 2014 on numerous occasions about their responsibilities.
 - c) When Ms Exley visited the premises, there was a notice of fees and all that was missing was the fine details. As soon as the Respondent provided the template the notice was amended.
 - d) The Respondent should have provided proper evidence and guidance to the Appellant and if that had been done the breach would have been rectified.
 - e) The amount of the financial penalty is unreasonable. The amount of the penalty is very disproportionate to the financial condition of the business. The Reports and Accounts (pages 27 to 46) show that the Appellant is suffering losses.
 - f) The decision was unreasonable because Mr Chowdhury who looks after the business on a day to day basis was ill and admitted to hospital during the period of contention and accordingly there were no other senior staff in the office to resolve the issues apart from support staff.
4. Mr Siriwardena submitted at the hearing the following additional grounds:
 - a) Mr Chowdhury was seriously unwell from the beginning of 2017. He was discharged from hospital on 25 May 2017 and remained very weak for some time due to his kidney transplant.
 - b) The financial details of the company show that the Appellant is in financial difficulties and it is realistic to suggest that the company will go out of business if the financial penalty of £4,000 is imposed.
 - c) Mr Chowdhury did everything that he could to comply with the statutory requirements and should be given credit for this.

- d) The breaches were relatively minor and the financial penalty should be reduced accordingly.
- e) Mr Chowdhury tried on numerous occasions to telephone Ms Exley without success. He was unable to obtain the proper advice and assistance he required.

The Respondent's case

- 5. The Respondent invites the Tribunal to dismiss the appeal.
- 6. Ms Exley, a Trading Standards officer with the Respondent attended the premises of the Appellant on 23 January 2017, 4 May 2017 and 1 June 2017. Ms Exley sent an email dated 4 May 2017 setting out what the Appellant needed to do to rectify its breach of the requirements of section 83 of the Consumer Rights Act 2015.
- 7. Ms Exley in response to a request from the Appellant sent a template list of fees on 5 July 2017.
- 8. The list of fees was partially revised but did not describe what work or service was carried out, or provided, in return for the landlord fees and what work or service was carried out in return of the tenant fee.
- 9. The Respondent submits the following points:
 - a) That it is irrelevant that the Respondent never inspected the Appellant's premises before.
 - b) The appellant was first notified of the breaches of s 83 of the Consumer Rights Act 2015 on 23 January 2017 and the breaches continued until 5 July 2017.
 - c) There were attempts to remedy the breaches but these did not commence until after Ms Exley's second visit to the premises on 4 May 2017.
 - d) The two attempts at amendments failed to address the requirements that the notice of fees describe the fees with sufficient clarity to allow a person to understand the service or cost that is covered by the fee and/or the purpose for which it is imposed.
 - e) It is not the responsibility of the Respondent to provide the Appellant with the material it needs to ensure its compliance with its statutory obligations.
 - f) The business accounts of the Appellant were never provided to the Respondent until the notice and grounds of appeal were lodged.
 - g) The Respondent took into account that Mr Chowdhury, manager of the Appellant, was unwell and the financial penalty was reduced from £5000 to £4000 for that reason.

Findings of Fact and Reasons

10. Mr Chowdhury at all material dates was the manager of the Appellant and is the correct person to be responsible for the acts and omissions of the Appellant. He describes himself as the manager and has held that responsibility for 6 years. Mr Chowdhury's wife, is the sole Director of the Appellant but is not involved in the running of the business and delegated all responsibilities of the business to Mr Chowdhury. When Mr Chowdhury was unwell he delegated the responsibility for running the company and for compliance with the statutory requirements to Mr Abdul Mumin.
11. English is not Mr Chowdhury's first language. He was offered the option to have the hearing adjourned to enable him to have the benefit of an interpreter but he declined and confirmed he wished to proceed. Although communication was at times difficult and it was necessary to repeat many of the questions put to Mr Chowdhury I was satisfied that he understood the proceedings, was able to present his case with the assistance of Mr Siriwardena and there was no injustice to Mr Chowdhury in proceeding to determine the appeal.
12. The Appellant company is a letting agent and handles between 15 and 20 Properties and has two part-time employees. In oral evidence Mr Chowdhury stated he employed three full time employees including Mr Mumin. In his witness statement dated 27 February 2018 he stated he had two part-time employees. I prefer the evidence in his witness statement which was prepared for him after receiving advice and more likely to be correct. Three of the properties managed by the Appellant are flats owned by Mrs Chowdhury. Mrs Chowdhury takes no income from the business. Mr Chowdhury was unable to provide a breakdown of the salaries and wages recorded in the profit and loss accounts.
13. Mr Chowdhury was discharged from Hospital on 25 May 2017 after an emergency admission for cadaveric renal transplant on 19 May 2017 (page 47).
14. Ms Exley, a Trading Standards officer with the Respondent attended the premises of the Appellant on 23 January 2017, 4 May 2017 and 1 June 2017. Ms Exley sent an email dated 4 May 2017 setting out what the Appellant needed to do to rectify its breach of the requirements of section 83 of the Consumer Rights Act 2015.
15. Ms Exley in response to a request from the Appellant sent a template list of fees on 5 July 2017.
16. The list of fees was partially revised but did not describe what work or service was carried out, or provided, in return for the landlord fees and what work or service was carried out in return of the tenant fee.
17. The Appellant was first notified on the breaches of section 93 of the CRA 2015 on 23 January 2017. The breaches continued until 5 July 2017. The fact that Mr Chowdhury was unwell was taken into consideration and the financial penalty was reduced from £5,000 to £4,000.
18. A Final Notice was served on 13 September 2017 pursuant to paragraph 3 of schedule 9 of the CRA 2015.

19. Although Mrs Chowdhury is the sole Director of SM Properties (UK) Ltd, Mr Chowdhury was at all material times responsible for the running of the company and is the correct person to represent the company and at all dates was the person responsible for the acts and omissions of the Appellant.
20. Mr Chowdhury submitted in support of the appeal the Report and Accounts for the company to 30 June 2015, The profit and loss account for the year ended 30 June 2015 shows a turnover of £59,935, administrative expenses of £60,358 and a loss for the financial year of £420. The administrative expenses, set out at page 36, include wages and salaries of £40,253 and rent of £10,650.
21. Mr Chowdhury lodged at the hearing the Report and Abridged Accounts for the year ended 20 June 2016 which showed a gross profit of £62,462, administrative expenses of £58,631 and a profit of £3,831. The profit and loss account showed wages and salaries of £45,095 and premises costs of £11,227.
22. The Appellant was in breach of the statutory requirement to display a list of fees on the premises as required by section 83(2) of the CRA 2015. The landlord fees and tenant fees displayed did not clearly describe what work was included for the amount charged.
23. The Notice of Intent and the Final Notice included all the necessary information as required and was served on the correct person, Mr Chowdhury, who is the acknowledged manager of the Appellant.
24. In relation to level of the financial penalty I have taken into account that Mr Chowdhury had provided only limited financial information about the Appellant's situation. He was able to provide no useful information in oral evidence. Without a detailed breakdown of the wages and salaries I am unable to accept that the Appellant company's financial situation is as stated. I do not accept that the Appellant would cease to trade as a consequence of the financial penalty. On the basis of the evidence available the Appellant has continued to trade notwithstanding that the accounts lodged suggest the business has been operating at a loss since 2013 and has made only a small profit in 2016.
25. I find it inherently improbable that Mr Chowdhury took only £8320 gross as salary for the year ended 20 June 2016 as claimed. The wages and salaries for the year ended 20 June 2016 are recorded as £45095. If the figures provided were correct that would mean Mr Chowdhury paid two part time employees £36,775 while paying himself less than the minimum wage. If this was an accurate summary of the Appellant's financial situation trading would have already ceased as the situation is not viable.
26. I have borne in mind when considering the financial penalty, the size of the business and that it had a turnover of £62,462 for the year ended 30 June 2016 and that there are no accounts available for the year ended 30 June 2017. I do not consider that the penalty is disproportionate to the turnover of the business and I do not accept that the financial penalty would lead to the Appellant going out of business. The lower penalty took into account the extenuating circumstances. The breaches continued for a long time and it was the responsibility of Mr Chowdhury to ensure the Appellant complied with the statutory requirements. I accept that he was unwell but the responsibility was on him as the manager of the company to ensure that he was aware of the obligations on the

Appellant and that the Appellant was compliant. If he delegated this responsibility he should have ensured that the person dealing with these matters was competent but the ultimate responsibility was his. It was not the responsibility of the Respondent to advise and ensure that the Appellant was compliant.

27. Mr Chowdhury did not indicate in his oral evidence that he took the statutory responsibilities of the Appellant seriously or that he had in place, at any time, any system to ensure compliance by the Appellant. He expressed the view in oral evidence that he considered that compliance was the responsibility of the Respondent to make sure that the Appellant was compliant and that the situation had arisen because the Respondent did not provide all the assistance and advice the Appellant required to be compliant.
28. I find that it was the responsibility of the Appellant and Mr Chowdhury as the manager to ensure the Appellant complied with its statutory responsibilities and duties. The breaches arose because the Appellant and Mr Chowdhury as the manager did not take the necessary steps to ensure compliance.
29. I do not consider the breaches are minor and should attract, therefore, a reduced financial penalty. The statutory requirements are not onerous and the burden was on Mr Chowdhury to find out what needed to be done and ensure the requirements were satisfied. There were breaches as described and accordingly a financial penalty applies.
30. I am not satisfied that Mr Chowdhury has provided a full and frank disclosure of the financial situation of the business of the Appellant and accordingly I cannot accept that a financial penalty of £4,000 will put the Appellant out of business.

The Decision

31. The Respondent has reduced the penalty from £5,000 to £4,000, having regard to the Appellant's representations. In all the circumstances, that reduction was entirely reasonable. No further reduction is called for. This appeal is dismissed.

Signed: J R Findlay

Judge of the First-tier Tribunal

Date: 28 February 2018

Signed: 18 May 2018