



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Professional Regulation**

Tribunal Reference: **PR/2018/0002**
Appellant: **Up My Street Ltd**
Respondent: **London Borough of Camden**

Judge: **Angus Hamilton**

DECISION NOTICE

Legislation

1. Section 83 of the Consumer Rights Act (CRA) 2015 imposes certain obligations on letting agents:
 - (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 for 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.

2. Section 84 clarifies the letting agents to which these duties apply:

- (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.

3. Section 85 explains the fees that must be published:

- (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.

3. Section 87 deals with the enforcement of these obligations by local authorities:
 - (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.

.....

(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.

4. Schedule 9 of the 2015 Act deals with the procedure to be followed when a local authority imposes a financial penalty:

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”).

1(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 subparagraph (3).

1(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.

1(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.

3(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(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.

3(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.

4(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.

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.

5(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.

5(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.

5(4) If a letting agent appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

5(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.

5(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.

Recovery of financial penalty

6(1) This paragraph applies if a letting agent does not pay the whole or any part of a financial penalty which, in accordance with this Schedule, the agent is liable to pay.

6(2) The local weights and measures authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

6(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is –

(a) signed by the chief finance officer of the local weights and measures authority which imposed the penalty, and

(b) states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

6(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

6(5) A local weights and measures authority may use the proceeds of a financial penalty for the purposes of any of its functions (whether or not the function is expressed to be a function of a local weights and measures authority).

6(6) In this paragraph “chief finance officer” has the same meaning as in section 5 of the Local Government and Housing Act 1989.

The appeal

5. The Appellant, Up My Street Ltd, appeals against a final notice dated 20 December 2017 from Camden (the local authority), imposing penalties of £5,000 for failing to publish full details of agents’ landlord fees, £3000 for failing to publish details of the agents’ client money protection scheme and £3000 for failing to publish details of the agents’ redress scheme membership.
6. The grounds of appeal assert that the penalty in relation to the failure to publish details of any property redress scheme was based on an error of fact since the Appellant was a member of such a scheme. The grounds of appeal also set out reasons why the penalties were too high and complained of various alleged procedural irregularities and a failure to comply with various codes of good practice on the part of the local authority.
7. The appeal was dealt with at a hearing at Field House in London on 7 June. Mr Hunt, counsel, represented the local authority.

8. A preliminary issue arose from the Appellant's lack of formal legal representation. The company had previously notified the Tribunal that they had instructed solicitors and would be represented by counsel at the hearing. However, Mr Khan attended from the firm of solicitors but explained he was not a qualified solicitor or barrister and Mr Ali attended from the Appellant but explained he was not a director or secretary of the company. Mr Khan sought an adjournment of the hearing in order to arrange for a solicitor or counsel to attend and represent the company. The application was opposed by the local authority.
9. Having enquired into the matter I formed the conclusion that the Appellant had had ample time to arrange to be represented at the hearing - if the company concluded that that was required. The lack of a legal representative at the appeal hearing appeared to be due to disorganisation rather than an overwhelming intervening event. It was clear to me that alternative counsel could have been arranged or a solicitor from the instructed firm could have attended. No adequate explanation was offered as to why this had not occurred. Furthermore, Tribunal hearings are relatively informal proceedings designed to be accessible to litigants in person without the need for formal legal representation. I was concerned that the Appellant had not sent a director of the company to the hearing when it was known that there would be no legal representation. This was clearly a matter of choice rather than unavailability. Mr Ali described himself as a manager within the company and told the Tribunal that he was authorised to speak on the company's behalf although he had no confirmation of this from a company director.
10. Having concluded that this situation was very much of the Appellant's own making and bearing in mind the additional costs that would be involved in an adjournment - not least to the Council Tax payers of the local authority I refused the sought adjournment. It was agreed between Mr Khan and Mr Ali that Mr Khan would speak on behalf of the company.
11. There was an ancillary point here which is that Mr Khan sought, effectively, to give evidence on behalf of the company about events that had occurred leading up to the imposition of the penalty. I explained to Mr Khan that he could not do this - first because he was not actually the witness to such events and secondly because there had been a complete failure to obtain and serve witness statements dealing with such matters - thereby prejudicing the local authority. The Tribunal permitted Mr Khan to raise such points by way of an explanation of the Appellant's position but emphasised that his assertions could not really be given any evidential weight at all.
12. Apart from a consideration of the witness statement of Martin Harland, a Principal Trading Standards Officer with the local authority, who dealt with the procedural steps taken prior to imposing the penalties, the hearing was consequently effectively confined to representations from the parties.

13. The Tribunal was able to deal quickly with the ground of appeal asserting that the penalties were in part based on an error of fact. The failure in relation to any property redress scheme is a failure to publish details of membership and not a failure to be a member. Thus, the Appellant's membership of such a scheme might be a point of mitigation but it did not mean that that particular penalty was based on an error of fact. Mr Khan sensibly quickly agreed with this point.
14. The Tribunal then considered the allegations by the Appellant that there had been various procedural irregularities and breaches of codes of good practice. This was in the context of the Appellant's failure to present any formal evidence on these matters (see paragraph 11 above). Some of the assertions could be considered by reference to published codes of practice but other assertions required evidence from the Appellant's staff which was absent. For example, it was claimed, amongst other points, that the local authority's enforcement officer, Ms McKeown, had hand-delivered a letter to the Appellant's office in relation to this matter without marking it as urgent or for the attention of a director. The letter had therefore not been considered for some time. I formed the view, on the balance of probabilities, that this particular incident, was in any event due to organisational failures at the Appellant's offices – any well-run company should have a proper correspondence-opening procedure supervised by someone at a senior level within the company so that important correspondence is not overlooked.
15. The assertion by the Appellant that the local authority had failed to comply with codes of practice was also dealt with fairly briefly since the only procedural requirements preceding the imposition of this type of penalty are those set out in Schedule 9 to the 2015 Act (see the description of the relevant law at the start of this judgment) and there was no dispute between the parties that those requirements had all been met.
16. The Tribunal then considered the points raised by the Appellant in relation to the level of the penalties. The Appellant asserted that the penalties were too high for a relatively small company that was struggling financially. The Appellant submitted accounts in support of this assertion. The Appellant also asserted that no real harm had been caused by the breaches.
17. The local authority's response to these points can be summarised as follows:
 - a. There was a complaint about the failures leading to the penalty form a member of the public.
 - b. The company's turnover is significant and increasing
 - c. One of the penalties had already significantly reduced by the local authority.

- d. The Appellant's claim not to have been aware of its obligations was not mitigation but, in any event, the local authority had sent the company notice of those obligations.

18. I am aware of the guidance to local authorities in these matters which reads, in part:

The expectation is that a £5,000 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 lettings agent or property manager 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; nevertheless, 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 which could be considered is **whether a £5,000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business.** It is open to the authority to give a lettings agent or property manager a grace period in which to join one of the redress schemes rather than impose a fine.

19. I am a little concerned by this guidance as it would appear to set a starting point of £5000 which will only be reduced if extenuating circumstances are established or the company's existence is threatened. I think that there is a counter-argument that the 'starting point' for the fine should be at a lower level and the fine then increased or decreased based on the establishment of aggravating or mitigating factors. To put it another way the maximum fine should be reserved for the 'very worst' rather than the ordinary case.

20. A 'bad' case may arise, for example, when the following factors are present:

- a. Actual complaints from the public
- b. Lack of co-operation with local authority
- c. Failure to take prompt corrective action
- d. Lack of remorse and failure to acknowledge obligations
- e. Total non-compliance as opposed to partial non-compliance e.g. - some but not all fees are published
- f. Evidence of poor running of office e.g. officers/managers not being on premises

This list is neither definitive not exhaustive.

21. In this case there had been a complaint from a member of the public. It was asserted by the company that it was now and had been at the relevant time a member of a property redress scheme but no evidence of this was

adduced. Mr Khan invited the Tribunal to check membership online with the particular scheme which I did but using several variations of the company's name and address but this search produced no confirmation. The Tribunal also gave Mr Ali and opportunity to call his office to obtain such confirmation, but he was not able to do so. I indicated that I would treat this point neutrally – that is, there would be no aggravation of the basic breach but also mitigation of it based on this point.

22. I did form the conclusion, based on all the material before me and the poor organisation in relation to representation at the hearing, that the Appellant was not a well-run company – correspondence was not being considered in a timely fashion; the director (Ms Begum) appeared to be absent from the business for long periods; and although the local authority had given notice of the various obligations here the Appellant had failed to consider and act on that notice.
23. The company provided financial information for 2 years (a single set of accounts but with information for 2016 and 2017). I think it is more illuminating to look at the company's turnover rather than profit since 'profit' is far too amenable to accountancy adjustments and turnover tends to give a better idea of how a company is performing. Poor turnover may of course be a further indication that a company is not well-run which is then not a particularly good point of mitigation.
24. Here the turnover of the company was c £80,000 in 2016 and c £83,000 in 2017 which are not negligible sums and do indicate an increase in turnover of about 3.75%.
25. There are, as mentioned, some aggravating factors here, and the turnover figures provided by the company are not a persuasive source of mitigation. Nevertheless, I think it would be wrong to categorise this as one of the very 'worst' cases and I therefore discount the two £5000 penalties by 10% bringing them down to £4500 each. I do not further discount the £3000 penalty as I consider that the local authority has already taken into account all available mitigation on this penalty.
26. I would mention for the benefit of the appellant that there has been some debate between Judges of the First Tier Tribunal (FTT) as to whether it is correct to impose more than one fine in cases such as these. See, for example the decision of Judge Hinchliffe in Top Supports Estate Agents Limited. [http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKFTT/GRC/2017/2016_0037.html&query=\(%22GENERAL+REGULATORY+CHAMBER%22\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKFTT/GRC/2017/2016_0037.html&query=(%22GENERAL+REGULATORY+CHAMBER%22))
27. Decisions of fellow FTT Judges are not binding on me but in any event, I consider that the issue has been settled by the Upper Tribunal (whose decisions are binding on FTT Judges) by Judge Levenson in Camden v Foxtons Ltd [2017] UKUT 349 (AAC) which I believe clarifies that it is quite

appropriate for the local authority to impose more than one fine in cases such as this one.

28. This appeal is accordingly allowed to the extent mentioned above.

Angus Hamilton

Tribunal Judge

Dated 22 June 2018

Promulgation Date: 27 June 2018