



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

Appeal Reference: PR/2018/0028/0029

**Determined without a hearing
On 10 April 2019**

Before

JUDGE JACQUELINE FINDLAY

Between

MARYLEBONE PROPERTIES INTERNATIONAL LIMITED

Appellant

and

WESTMINSTER CITY COUNCIL

First Respondent

DECISION AND REASONS

A. The legislation

The requirement for letting agents to publicise details of fees

1. The Consumer Rights Act 2015 (“the CRA 2015”) imposes a requirement on all letting agents in England and Wales to publicise details of their relevant 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.”

Enforcement

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.”

Financial penalties

SCHEDULE 9

DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

Section 87

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.

Appeals

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.

Explanatory Notes and Guidance

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.

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.”

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”.

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”.

Any representations made about a penalty reduction will be considered on a case-by-case basis. Account may be taken of:

- The size of the business committing the breach may be a factor to consider.
- Whether the maximum fine of £5,000 fine (sic) may be disproportionate to the turnover/scale of the business.
- May lead to the organisation going out of business.

A lower fine may be charged if the enforcement authority is satisfied that there are extenuating circumstances.”

The Final Notices

1. The first Final Notice dated 7 June 2018 (pages 110 and 111) states as follows:

“As a letting agent a failure to comply with the duty to publicise fees.

You have failed to:

- Publish a list of your relevant fees on your website in accordance with section 83(3) and 83(1) of the Act.
- Display the said fees in relation to properties (dwelling-houses) located in Westminster.

Date of breach: 26th March 2018 to 11 April 2018

Details of breach: As a letting agent you have failed to publicise on your website (www.marylebonepropertiesint.com) the amount of your landlord fees.

The Council is therefore satisfied, on the balance of probabilities that you are or have failed to publicise/publish your relevant fees in breach of sections 83(1) and 83(3) of the Consumer Rights Act 2015. The Council has therefore issued you with this Final Notice imposing a monetary penalty.”

2. The second Final Notice dated 7 June 2018 (pages 112 and 113) states as follows:

“As a letting agent a failure to comply with the duty to display or publish on your website, with a list of fees, a statement of whether you are a member of a client money protection scheme.

You have failed to:

Display or publish on your website, with a list of fees, a statement of whether you are a member of a client money protection scheme in accordance with section 83(6) of the Act.

Do this in relation to properties (Dwelling-houses) located in Westminster.

Date of breach: 26th March 2018 to 11 April 2018

Details of breach:

As a letting agent you have failed to publicise on your website (www.marylebonepropertiesint.com) with a list of your fees, a statement of whether you are a member of a client money protection scheme.

The Council is therefore satisfied, on the balance of probabilities that you as a letting agent have failed to display or publish a relevant client money protection statement with your fees in breach of section 83(6) and therefore failed to comply with the duty imposed under section 83(3) of the Consumer Rights Act 2015. The Council has therefore issued you with this Final Notice imposing a monetary penalty.”

The hearing

3. I have determined this appeal on the papers at the request of the parties. I am satisfied that in all the circumstances, I can justly do so. I have considered the Respondent’s

Response and bundle of documents numbered 1 to 147 and the hypercam video recording of the Appellant's website on 3 April 2018. I have considered it is fair and just to determine this appeal on the basis of the papers taking into account rules 2 and 32 of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009. The parties have consented to a determination on the papers and I am satisfied I can properly determine the appeal without a hearing

Background

4. Ms Alexandra McKeown served two Notices of Intent on the Appellant on 11 April 2018 advising of the Respondent's intention to impose two penalties totalling £10,000. The Appellant made no representations. Two Final Notices were issued dated 7 June 2018.
5. Romina Giordano, Director of the Appellant company emailed Ms McKeown on 19 June 2018 to ask what could be done to correct the website (pages 118 and 119).
6. The Notice of Intent (pages 7 and 8) states as follows:

“As a letting agent a failure to comply with the duty to display or publish, with a list of fees, a statement as to whether or not you are a member of a client money protection scheme.

As a letting agent you have failed to:

Display or publish on your website, with a list of fees, a statement as to whether or not you are a member of a client money protection scheme in accordance with section 83(6) of the Act.

Do the above in relation to properties (dwelling-houses) located in England.

Date of breach: 26 March and Continuing.

Details of breach:

As a letting agent you have failed to publicise on your website (www.marylebonepropertiesint.com) with a list of your fees, a statement as to whether or not you are a member of a client money protection scheme.

The Council is therefore satisfied, on the balance of probabilities that you as a letting agent have failed to display or publish a relevant client money protection statement with your list of fees in breach of section 83(6) and therefore the duty imposed under section 83(3) of the Consumer Rights Act 2015. The Council therefore intends to issue you with a Final Notice imposing a monetary penalty.”

The Appellant's Case

7. The Appellant appeals on the following grounds:
 - a) The monetary penalty is not fair.
 - b) The Appellant is a small company trying to do things right.

- c) The Appellant does not have an expansive legal department or internet IT experience or skills.
- d) The Appellant made a mistake and tried to sort it out.
- e) The Appellant considers the description of the fees to be clear enough to enable a person who is liable to pay to be able to understand the services and costs.
- f) The fees information has been amended.
- g) The list of fees is clearly visible in the office and displayed on the table at the entrance to the shop
- h) The information that the Appellant is a member of a money protection scheme is included on the website.
- i) The website has been amended to make it easier to find the link to fees.
- j) The Monetary Penalties will put the Appellant out of business. The bank statement forwarded on 22 August 2018 (page 60) demonstrates that there was not enough money to pay the penalties.
- k) Immediately on receipt of the Notice of Intent steps were taken to comply with the law and make sure all the requirements were satisfied.
- l) When the officers came to the office only three new young members of staff were there and did not explain that the fees were displayed on a table next to the door and visible from outside.
- m) The fees on the website have been amended. The website is still being developed and details are missing but the Appellant is doing its best.
- n) As soon as the Appellant became a member of the client money protection scheme this was put on the website.

The Respondent's case

- 8. The Respondent submits the following:
 - a) The Notices of Intent and Final Notices were correctly served and the dates of breaches in both final notices are for the period from 26 March 2018 to 11 April 2018.
 - b) Even after the Notices of Intent were served and before the Final Notices were served the Appellant's website remained in breach of the Act. The Appellant chose not to engage with the Respondent during this period and made no representations within the 28 days period allowed.
 - c) The Appellant made some changes to the website after the Notices of Intent were served but the changes did not go far enough.

- d) There was no legal requirement on the Respondent to write to the Appellant to offer advice about their legal obligation under the Act. The Appellant is expected to be aware of the law and of the legislative responsibilities.
- e) The Respondent gave a grace period of over a year and only started taking action under the Act in September 2016.
- f) The Respondent has been lenient and could have issued further monetary penalties for non-compliance.
- g) The period of non-compliance is significant and should not be downplayed.

Findings of Fact and Reasons

- 9. There are two Final Notices issued on 7 June 2018 relating to a breach under sections 83(1) and (6) of the Consumer Rights Act 2015 (“the Act”) for a failure to display the required Fees and Client Money Programme information on the website and therefore a breach of the duty imposed under section 83(3) of the Act. The dates of the breaches are for the period from 26 March 2018 to 11 April 2018.
- 10. The Appellant does not deny the breaches.
- 11. I find that at all material dates the Appellant was not displaying the landlord and tenant fees and had no client money protection information on display.
- 12. Even after the Notices of Intent were served and before the Final Notices were served the Appellant’s website remained in breach of the Act. The Appellant did not make any representations within the 28 days allowed.
- 13. The Appellant is expected to be aware of the law and take steps to comply with the obligations placed upon it. There is no legal requirement on the Respondent to write to the Appellant to advise of their obligations.
- 14. The Act has been law for almost three years and the breaches are for a significant period of time.
- 15. During the visit on 11 April 2018 when the Notices of Intent were served with a guidance leaflet the breaches were brought to the attention of the staff and it was explained that the Respondent was not issuing further penalties for these breaches.
- 16. The Appellant was advertising 125 properties, domestic and commercial, across London.
- 17. The Appellant has submitted bank statements for the period 29 December 2017 to 1 October 2018.
- 18. The Appellant has two business accounts purporting to show balances of £26.01 and £7252.65 as at 22 August 2018 (page 60). This is a snapshot only and is not a reliable indicator of the Appellant’s financial health.

19. I find that the information in the email of 22 August 2018 was not accurate and was sent to the Respondent in order to persuade the Respondent to accept that the Appellant had insufficient money to pay the Monetary Penalties. I find on the basis of the evidence at page 35 that this email was deliberately misleading.
20. There is a discrepancy between the email of 22 August 2018 (page 60) which purports to show a balance of £7252.65 in account number 95129472 on 22 August 2018 and the copy bank statement for account number 95129472 for the period 1 January 2018 to 1 October 2018 (pages 35 and 36) which show a credit balance of £14,829.21 on 2 August 2018 and £13,229.21 on 31 July.
21. I do not find the submission that the Monetary Penalties would put the Appellant out of business because I do not accept that the financial situation of the Appellant is as stated. I do not find the Appellant's evidence about its financial situation to be reliable.
22. The Appellant has had ample opportunity to submit the financial accounts and has chosen not to do so. I consider it fair and just to determine the appeal on the basis of the financial information provided.

The Decision

23. I dismiss the appeal. There are no extenuating circumstances to support a reduction in the Monetary Penalties amounting to £10,000.
24. Having considered all the evidence I do not find that the Monetary Penalties amounting to £10,000 are unreasonable

Signed: J R Findlay

Judge of the First-tier Tribunal

Date: 10 April 2019

Signed: 18 April 2019

Promulgation Date 30 April 2019