

(GENERAL REGULATORY CHAMBER)

Between:

WAYNE AND SILVER LIMITED

Appellant:

and

LONDON BOROUGH OF CAMDEN

Respondent:

DECISION

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal.

REASONS OF THE TRIBUNAL

[1] INTRODUCTION

This decision relates to an appeal brought under Schedule 9 of the Consumer Rights Act 2015. It is an appeal against a Final Notice issued by London Borough of Camden (“the Council”), in which the Council imposed a financial penalty of £5,000 on the Appellant for failure to publish details of landlords and tenants fees.

[2] LEGISLATION

Fee Publicising

1. Section 83 of the Consumer Rights Act 2015 (‘the 2015 Act’) provides that:
 - (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
 - (5) 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),
 - (6) 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
 - (7) 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.
2. A letting agent is defined in section 84 as follows:
- (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 86 further defines 'letting agency 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. The fees to which this Chapter applies are set out in section 85:

(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.

5. Section 87 imposes a duty on the local weights and measures authority to enforce these provisions in its own area where it is considered on the balance of probabilities they have been breached. Breaches are considered to have occurred in the area of the local authority in which a dwelling house is situated to which any fees relate, but authorities can take enforcement action in the area of another local authority with the consent of that authority. Local authorities have the power to impose monetary penalties not exceeding £5,000 in the event of a breach.

6. The procedure for the imposition of monetary penalties and the rights of appeal are set out in Schedule 9 of the 2015 Act. The local authority is required to issue a 'notice of intent' to issue such a penalty within six months from the date the authority had sufficient evidence of a breach. The notice must set out the amount of the proposed financial penalty, the reasons for proposing to impose the penalty, and information about the right to make representations within 28 days of the sending of the notice. At the end of that period the authority must decide whether to impose a penalty and the amount of that penalty. The final notice must set out that amount, reasons for the imposition of the penalty and information regarding how to pay and how to appeal. Anyone served with such a notice has the right to appeal within 28 days, on one of four grounds:
 - (1) the decision to impose a financial penalty was based on an error of fact,
 - (2) the decision was wrong in law,
 - (3) the amount of the financial penalty is unreasonable, or
 - (4) the decision was unreasonable for any other reason.

[3] FINAL NOTICE

In the present case the Final Notice dated 11 March 2019 stated that the Council believed that on 22 January 2019 the Appellant had committed breaches of its duty to publicise a full list of agents landlord and tenants fees on its website contrary to s.83(3) of the 2015 Act.

[4] THE APPEAL

The Appellant appealed to the Tribunal on 5 April 2019 and stated that they had recently changed their website, and as soon as they were informed of the oversight the breach was rectified within hours. They claimed therefore that a £5,000 fine is unwarranted and would be unduly financially onerous on the company.

[5] RESPONSE TO APPEAL

The Council responded by noting that the Council had first detected the breach on 21 September 2018, and rather than a full list of fees as required, the website only noted a block 'administration fee'. The business should have been aware of its legal obligations, especially as a letter was sent to the Appellant on 3 September 2018 outlining its obligations. Nevertheless, the Council decided to reduce the fine to £3,000 in light of the Appellant's representations. The evidence in support of the Respondents case, was provided by Rebecca Bull, a Trading Standards Officer with the Respondent Council.

[6] TRIBUNAL HEARING

At hearing, the Appellant was represented by Mr Wayne, Director of the firm. The Council was represented by Ms Cooke solicitor, and Ms Bull and Mr Harland of Trading Standards. Mr Wayne accepted that the fees were not displayed on the website, but explained that it was under construction. He also alleged that the letter of 3 September 2019 was sent to another office of the company (the one displayed on the website is not the management address), and that the Council had failed in its duty to "*be sure and efficient in [its] duty to enforce compliance*" or give sufficient time from notification of breach to enforce compliance.

The Council responded that it had sent letters to both of the Appellant's offices, and noted that technically it could have also fined the Appellant for other breaches of the legislation. The evidence in support of the Respondents case was provided by Rebecca Bull, a Trading Standards Officer with the Respondent Council.

The Council argued that the breach has been occasioned; that is not in dispute. The Council is not obliged to ensure that all businesses within its purview are fully aware of their statutory obligations: see *Metropole Properties Ltd v Westminster Council* PR/2016/0050. Where businesses choose to operate in a particular sphere, it is their obligation to inform themselves of their legal obligations and ensure that, at all times, they are operating in compliance with all relevant laws. The Council has shown evidence that it did attempt to inform the Appellant, but whether it did or did not is immaterial to the determination of whether an actionable breach of the legislation occurred.

[7] THE PENALTY

Turning then to the amount of the fine, the Tribunal refers to Guidance for Local Authorities published by the Department for Communities and Local Government in March 2015. Since the introduction of the Consumer Rights Act 2015 (which came into effect on 27 May 2015), progress has been made to improve property standards, professionalise the sector, strengthen consumer protection for tenants and tackle rogue landlords and letting agents. The legal framework underpinning the private rented sector aims to build a fair and robust sector that protects tenants, supports landlords and empowers local authorities. In March 2015, Guidance on Improving the Private Rented Sector and Tackling Bad Practice, A Guide for Local Authorities was published. This guidance was to assist local authority officers to effectively tackle poor and illegal practices by landlords and letting agents. It provided advice on the identification, prosecution and removal from the sector, the small proportion of landlords and letting agents who break the law, exploit tenants and provide a poor service to their customers. The law requires a comprehensive list of everything that a landlord or tenant would be asked to pay by the letting agent at any time before, during or after a tenancy must be displayed. As a result of section 83(3) of the Consumer Rights Act 2015, there should be no surprises; a landlord and tenant will know or be able to calculate exactly what they will be charged and when.”

“Penalty for breach of duty publicise fees and are as follows;

The enforcement authority can impose a fine of up to £5,000 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 £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 makes during the 28 day period following the authority’s notice of intention to issue a fine.*

The Guidance states that 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”.

[8] FACTS IN THIS APPEAL

1. Letters were sent to the appellants in June 2015 and December 2015, detailing what should be done. The advice leaflet that accompanied the letter clearly stated the term ‘Administration Costs’ should not be used as these costs need to be specified and broken down.
2. The council sent a further letter on the 3 September 2018 – reminding agents of the requirements under the law; a guidance leaflet was also included. This was sent to the appellant also.
3. On 21 January 2019, the appellants were in breach of the law.
4. The appellants were also in breach of the law on the 24 September 2019.
5. The appellants did not submit any company accounts when appealing the fine
6. The Council noted the company had two premises in Heath Street
7. The company is currently trading with a statement of capital in Companies House
8. The appellants have advised that they have been trading since 1991. As well established estate agents in the area, they really should have complied with the law at all times.
9. As an established company, it is not acceptable for the website to be a “work in progress” in breach of the law. (from 24 September 2018 to 21 January 2019 at least)
10. All agents should have complied with the Consumer Rights Act 2015 by the 27 May 2015.
11. The landlord fees were not listed at all.
12. The appellant is not disputing the above.
13. These offences were not committed in the ‘early days’ of the requirement coming into force, where a lack of awareness could be considered
14. In light of the above, the Council argues it has been very generous to reduce the fine from £5K to £3K.

[9] THE PENALTY

The Guidelines indicate that the expectation is that the imposition of the maximum fine should be the norm, save where there are clear extenuating circumstances. Local Authorities are obliged to consider this Guidance under s.87(9) of the Act. The Council

has already reduced the fine to £3,000 for prompt compliance once the breach was notified to the Appellant, but it would be inappropriate to waive the fine completely as there is evidence that the website was in breach from September 2018 to January 2019. The Appellant accepted at hearing that the company was in the financial position to service the penalty; the submission was simply that the penalty was not justified. I disagree, and find that there is no reason to interfere with the decision of the Council to impose a penalty of £3,000.

[10] CONCLUSION

In the circumstances and for the reasons above, the Tribunal refuses the appeal in its entirety.

Brian Kennedy QC

14 October 2019.

Promulgation Date 16 October 2019