



Appeal number: PR/2019/0026

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)**

NORTHWOOD (EASTBOURNE) LTD

Appellant

- and -

EAST SUSEX COUNTY COUNCIL

Respondent

TRIBUNAL: HER HONOUR JUDGE ANGELA MORRIS

**Sitting in Brighton Tribunal Hearing Centre
on Tuesday 20th August 2019**

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Decision

1. The Appeal is part-allowed.
2. The Final Notice dated 25th March 2019 is varied to the extent that the penalty is reduced from £5,000 to £3,000.

Reasons

Background

3. The Appellant (Northwood (Eastbourne) Ltd) is a letting agent. The Respondent, East Sussex County Council (“the Council”) is the enforcement authority which served a Final Notice on Paul Ryder, the Director of Northwood (Eastbourne) Ltd on 25th March 2019. The Notice imposed a financial penalty of £5,000 for breach of the Appellant’s the duty to publicise a full list of all relevant tenant fees in store and that the published list did not include fees listed on a Deposit Deduction Price List and the fees were given excluding VAT.
4. By its Notice of Appeal dated, 25th April 2019, the Appellant disputes the facts on which the Council relied when deciding to impose the financial penalty and also submits that the amount of the penalty is disproportionately high.
5. The parties and the Tribunal agreed that this matter was suitable for determination by oral hearing in accordance with rule 33 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.
6. The hearing took place on 20th August 2019 at the Brighton Tribunal Hearing Centre. Mr Garth Jones, Solicitor for the respondent attended together with Mr. Graham Wolstenholme and Ms Lucy Corrie. Mr. Paul Ryder attended as the Appellant supported by Ms Mandy Chandler.

The Legal Framework

7. Section 83 of the Consumer Rights Act 2015 requires letting agents to publicise details of relevant fees at its business premises and on its website. It came into force in May 2015.

8. Where the relevant enforcement authority is satisfied on the balance of probabilities that the letting agency has breached its duties under s. 83, it may impose a financial penalty under s.87 of that Act. It does so by serving a Notice of Intent and then a Final Notice on the letting agent concerned.
9. Schedule 9 paragraph 5 to the 2015 Act provides that a letting agent upon whom a financial penalty is imposed may appeal to this Tribunal. The permitted grounds of appeal are (a) that the decision to impose the 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. The Tribunal may quash, confirm or vary the Final Notice which imposes the financial penalty.

Evidence and Submissions

10. The hearing was an oral hearing and the statement of Mr. Gareth Wolstenholme was adopted as his evidence in chief. The Appellant was given the opportunity to question Gareth Wolstenholme to amplify and/or clarify areas of dispute. The Appellant also gave evidence before the Tribunal and was questioned by Mr Jones on behalf of the Respondent.

Evidence

11. The chronology of events is not disputed to the extent that the Respondent's notified the Appellant on 2nd January 2019 of their intended visit to the Appellant's premises in Eastbourne. The reason for the site visit was because the Respondent had received a complaint from a tenant about a large bill which the tenant had been asked to pay in respect of repairs to a property. There appeared to be a considerable disparity between the amount invoiced to the tenant and that paid over to the landlord. The disparity amounted to approximately £1,500 which appeared to have been retained by the Appellant.
12. At the site visit on 8th January 2019, Gareth Wolstenholme stated that the Deposit Deduction Price List was presented to him. He agreed that from the conversation he had with the Appellant, Mr Ryder appeared to hold the view that the Deposit Deduction Price List was not a fee which needed to be

displayed in accordance with Section 83 because it was not money which the Appellant kept; the money went from the tenant to the contractor via the Appellant. However, Mr. Wolstenholme's recollection was that he had told the Appellant at the time that in his opinion, if the money went directly from the tenant to the contractor that was not a "fee" within the legislation but where the money was paid to Northwood and then paid to the contractor that would be a fee which was caught by the legislation.

13. Mr. Wolstenholme also agreed that Mr Ryder had indicated they did not believe this was a list of fees which needed to be displayed because this was how other agencies approached this matter they followed the same procedure. Mr Wolstenholme agreed that he had indicated to the Appellant that he would go away and consider the matter further because he did not want to put the Appellant at a disadvantage to other agents.
14. Having considered the matter further Mr. Wolstenholme sent Mr Ryder an email at 10:58 on 9th January 2019 confirming that the Deposit Deduction Price List was a relevant fee under the legislation because it was "in respect of property management work carried on by the agent" and, therefore, had to be displayed.
15. Ms Corries statement was accepted as her evidence and no further evidence from her was required to be given.
16. Mr. Ryder gave evidence that he had concluded that the Deposit Deduction Price List was not a "fee" charged by the agent under an assured shorthold tenancy and, therefore, not caught by the legislation. He stated that the List was not a mandatory fee but one given to the potential tenant at the time the tenancy agreement was signed. In essence Mr. Ryder stated that the list was a series of process which had been quoted by local contractors and which gave the potential tenant an idea as to the sort of fees which might be charged at the conclusion of the tenancy. He stated that this was done in order to enhance the service between the potential tenant and the Appellant (as the letting agent) and also to provide a better service with contractors.
17. Mr. Ryder stated that the fees were not retained by the Appellant but were an indication of the sort of figures which a tenant at the conclusion of the tenancy

might be charged by a contractor and the Appellant acted merely as the conduit through which the fees would be passed from the tenant to the contractor and thus money which the tenant was accountable for.

18. Mr. Ryder was asked to explain to the Tribunal why, if the Appellant was merely acting a sa conduit for the money to pass from the tenant to the contractor the document was headed “Deposit Deduction Price List”. Mr. Ryder’s explanation was that if necessary the money would come from the deposit if the tenant did not give the property back in a fit state and to that extent it was another method by which the payment went directly from the tenant to the contractor. He accepted that the heading was potentially misleading and that there was nothing displayed on the tenant fee list at his office to indicate there was a deposit deduction price list if a person wanted to see it.
19. Mr. Ryder referred to the example given at page 57 of the bundle¹ which gave the example of the letting agent recommending a gardener for a property and arranging to pass the fee from the landlord to the gardener without taking a cut or adding a fee for this service. He stated that he thought that the Deposit Deduction Price List fell within that example and that is why it had not been displayed. He stated that this was, from his researches, how other agents had conducted matters and so felt that he was acting in accordance with the legislation.
20. Mr. Ryder accepted that there was nothing on the List which indicated to the tenant that the list of charges was a fee which would go directly from the tenant to the contractor. He accepted that they had the List because, in his experience, a tenant does not go to the contractor and negotiate directly with them and so it was designed to inform the tenant of the sort of fees which a contractor might charge for particular work.
21. Mr. Ryder questioned how a letting agent was able to create an exhaustive list of fees; in his opinion it was impossible to cover everything in a fee list. Mr

¹ Guidance on the Consumer Rights Bill 2015: Duty of Letting Agents to Publicise Fees

accepted that the document was a list of common charges which a tenant might be liable for at the end of a tenancy and was more in line with a dilapidation deduction

22. Mr. Ryder was asked about the breach of section 83 in 2017. He stated that he had no knowledge of this matter until raised during the course of this appeal. He stated the matter was dealt with by his manager Amy Byrne and she never informed him about it. He stated that he did not notice any change to procedures after the matter was resolved in 2017 and had never seen the warning letter from the Respondent. Amy Byrne is a not a director of the company.
23. No audited accounts were provided to the Tribunal as to the financial health of the company.

Submissions

24. By the Notice of Appeal dated 25th April 2019, the Appellant relied on several Grounds of Appeal that:
 - (i) The document headed “Deposit Deduction Price List” was not a compulsory fee but a list of prices designed to help tenants when moving from the property as examples of the charges they may incur if they failed to leave the property in a clean state,
 - (ii) The company has a good working relationship with the Respondent and assisted them to identify rouge agents and bad practices,
 - (iii) The company has always reacted quickly to any guidance given and
 - (iv) The breaches were rectified immediately.
 - (v) The imposition of the maximum penalty was unfair because there have been no complaints from any member of the public or any other body regarding the failure to display some of the tenant fees or to include the VAT on one of the charges,
25. The Council’s Grounds of Opposition were that:
 - (i) They attended the Appellant’s premises after complaint was made. It was due to their attendance at the premises the failure to display the Deposit Deduction Price List” was discovered and the Appellant has

received a previous warning in June 2017 for a previous breach of its Section 83 duties.

- (ii) The Deposit Deduction Price List does include fees and, therefore, fell within the legislation because they were charges which the Appellant managed. If the Appellant was merely a conduit then there would be no necessity to have the list at all. Generally speaking, where money was comes out of the deposit, the Appellant received an administration fee and so whichever way the matter was resolved, the tenant did incur a fee which was given to the Appellant.
- (iii) The Deposit Deduction Price List was a fairly common list which many tenants were likely to incur.
- (iv) The legislation was clear that where there was a potential fee to be incurred by the agent that must be displayed in advance and not handed to the potential tenant at the time the tenancy is signed.
- (v) The Appellant had been the subject of a previous warning and, therefore, alive to the issues regarding the display of all matters which may be regarded as a fee.,
- (vi) The Notice of Intent was served on the Appellant on 12th February 2019, the Appellant responded to this Notice in a written document dated 8th March 2019 which in essence submitted that the Appellant did not understand that this price list was considered a “fee” for the purposes of the legislation and regarded it as more akin to a dilapidation deduction.
- (vii) The Respondent considered the Appellant’s written response and decided to issue the Final Notice dated 25th March 2019. The Council took into account the Appellant’s representations, but in light of the fact that this was a second breach of its Section 83 duties, and following government guidance and the recent Ministerial direction, the Council issued a Penalty Charge Notice in the sum of £5,000.
- (viii) The Appellant has not identified any error of fact or law in respect of the Final Notice or given any reason why the amount of the financial penalty was not reasonable. The Council received no evidence of

financial hardship and there were no extenuating circumstances which would justify a reduction to the amount of the fine imposed.

Conclusions

26. I am satisfied that the fees stated within the Deposit Deduction Price List fall within section 83 of the Consumer Protection Act 2015. By the very name at the top of the list, it infers the fees will be taken from the tenant deposit which is held by the Appellant acting as the letting agent on behalf of the landlord.
27. I am further satisfied that this fee list did not include the addition VAT as required by the legislation. The fact that the document stated at the bottom in small print “the prices are subject to VAT” is inconsistent with the Appellant’s assertion that this was a charge solely between the tenant and the contractor. If the contractor’s business fell below the VAT threshold, no such VAT charge would be incurred. It follows, therefore that the Appellant, by heading the list as he did, must have contemplated that the fee would be taken from the tenant deposit held by them and that in addition, as the document itself states “an administration fee as detailed in the Tenant Fee Guide” would be charged.
28. I am satisfied that the Tenant Fee Guide did not indicate that there was a Deposit Deduction Price List in existence. As the Appellant admitted this document was only provided to the potential tenant at the time the tenancy agreement is signed and was held in a drawer at the Appellant’s premise and provided to the Respondent at the site visit.
29. I conclude, therefore, that on the basis of the evidence before me and on the balance of probabilities that the Appellant did breach its legal obligations in respect of the publication of the Deposit Deduction Price List and that failed to include the VAT as part of that fee.
30. I am satisfied that it was reasonable for the Council to impose a financial penalty in the circumstances. In particular, I have taken into account the fact that this was a second breach of the duty. I find that whether Mr. Ryder was aware of the previous breach or not, is no excuse for not ensuring compliance with the legislation. As the sole director of the company it is incumbent upon him to ensure legislative compliance with the regime.

31. I have considered whether the amount of the financial penalty was unreasonable. I note that the amount of a penalty is within the discretion of the Council and that £5,000 is the maximum penalty it can impose under the legislation. The Council has not set out for me its approach to the calculation of penalties and Mr Ryder did not put forward any accounts to assist me regarding the health of the company.
32. I have had regard to whether this breach was an egregious disregard of the legislation or a genuine if mistaken misunderstanding of it. I am not satisfied this was an egregious disregard of the legislation and this is not a case where there was a comprehensive failure to display fees.
33. Taking into account the nature of this breach and the fact that this is a second occasion when the Appellant has breached its legal responsibilities, I am satisfied that the financial penalty was lawfully imposed. I do not consider that it was unreasonable for the Council to impose a penalty in these circumstances but I question whether it was correct to impose the maximum penalty on this occasion, having regard to the particular circumstances of this case.
34. I have concluded that the maximum amount of £5,000 was unreasonable in this case and that the financial penalty imposed by the Council should be reduced to £3,000.
35. Accordingly, the appeal is dismissed in respect of the breach by the Appellant. The Final Notice dated 25th March 2019 is varied from £5,000 to £3,000.

(Signed)

Dated: 30th August 2019

Her Honour Judge Angela Morris