



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

**Appeal Reference: PR/2016/0044**

**Held on the papers**

**Before**

**JUDGE CLAIRE TAYLOR**

**Between**

**MCCARTNEY LETTINGS**

Appellant

**AND**

**CITY OF YORK COUNCIL**

Respondent

**Decision**

The appeal is allowed to the extent set out below.

## **DECISION AND REASONS**

1. This is an appeal by McCartney Lettings (the 'Appellant') against a penalty charge of £2,500 issued by the City of York Council ('the Council') related to failure to publicise details of fees on its website in accordance with the legislative requirements set out below.

### **A. The Law: The requirement for letting agents to publicise details of fees**

2. The Consumer Rights Act 2015 (the 'Act') 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, as follows:

#### **"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**

3. 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." (Emphasis Added).

### **Financial penalties**

4. The system of financial penalties for breaches of section 83 is set out in Schedule 9 of the Act:

#### **"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**

5. Finally, 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.”*

## **Guidance**

6. The Guidance for Local Authorities issued by the Department for Communities and Local Government (the ‘Guidance’), during the passage of the Bill, concerning the duty to publicise fees includes the following at Annex D:

a. ***“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."

(Page 56 of the Guidance)

**b. 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". (Page 57 of the).

**c. Penalty for breach of duty to publicise fees**

"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. 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. 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". (Page 60 of the Guidance).

## ***B. Background***

7. On 27 September 2016, the Council served on the Appellant a 'notice of intent' notifying McCartney Lettings that it was not complying with certain duties to publicise its fees in accordance with the relevant legislation. It made clear its intention fine the agent £5,000 as a consequence of non-compliance.
8. Gill McCartney subsequently made representations.
9. On 25 October 2016, an officer of the Council issued a detailed 'final notice'. It stated that the Appellant was required to pay a penalty because fees charged to landlords were not displayed on the Appellant's website or at its premises. However, the penalty was reduced to £2500 to take account of the fact that tenant fees had been displayed.

## ***C. The Appeal***

10. The Appellant appealed to the Tribunal. Both parties were content for the matter to be determined without a hearing. I am satisfied that, in all the circumstances, I can justly do so. I have read and considered all material presented to me, even if not specifically referred to below.

### *Submissions*

11. I have benefited from well-presented and argued positions from both parties. The submissions and evidence advanced by the parties is substantial. I set out what I consider to be a summary of the most pertinent points below.
12. Gill McCartney made submissions on behalf of the Appellant (which I have organised for ease of reference). These included:

#### The Amount of the Monetary Penalty is Unreasonable:

- a. The Appellant is a small independent family business with a modest turnover. There are currently three members of staff including Mr and Mrs McCartney .
- b. Health: Mr McCartney joined the business in 2015 to support his wife. She had recently been diagnosed with a chronic form of leukaemia.
- c. Effects: A penalty of £2,500 is disproportionate to the scale of the business and technical breach complained of. It equates to approximately 6% of the annual net profit. The fine would likely mean the third staff member either being made redundant or (at the very least) having to reduce his hours by half which would have a great affect upon him.

- d. This penalty will have a huge impact on Ms McCartney's family causing financial hardship - their youngest daughter has just started university. They would have to borrow the money.

The Decision is Unreasonable

- e. Despite the Council furnishing them with lots of information on new legislation and courses there was no information regarding the advertising of landlord fees within the emails.
- f. In October 2015, the Council sent a form to complete (asking for confirmation of details of our fees, details of the website and where the fees and charges could be found; and whether the fees were displayed in our commercial premises. It also asked whether they would like to receive further information regarding training, upcoming events/laws and potential financial assistance etc. The Appellant answered "yes". It was disingenuous of the Council to ask if they would like to receive further information, and continue to work with them during the course of the following year (luring them into a false sense of compliance) and then fine them £5,000 for not displaying the fees correctly. It was grossly unfair and smacked of sharp practice on the part of the Council leaving the Appellant with a feeling of having been financially ambushed by them.
- g. The Appellant committed the offence because of a mistake. On becoming aware of this breach, they rectified it the same day and notified the Council.
- h. They had taken all reasonable measures and precautions to avoid knowingly or recklessly allowing their conduct to fall below the standards of professional diligence. They pride themselves on our professionalism and integrity and are diligent agents. The Appellant set out courses undertaken, the robust training methods, and so on. They also provided evidence of a winning a Best Managing Agent award.
- i. It was not necessary or proportionate for the Council to have taken action. It begs the question whether the Council was looking at these penalties as a one off windfall income.
- j. As to the response of 28 October 2015 to the Council confirming that all the fees were on the website and on display, the Appellant was mistaken that their obligation was to only provide information on tenant fees. They had always communicated landlord fees directly to

landlords. A landlord chooses whether or not to use our services once they are furnished with details of fees and services. Prior to advertising a landlord's property, they are given two copies of our terms of business which both parties have to sign and these Terms and Conditions set out clearly our fees and services. Landlords can be charged different fees. The Appellant believed it was in the landlord's interest to discuss their fees with them individually rather than advertise a standard rate.

13. In response to the Council's response summarised in paragraph 14 below, the Appellant gave further submissions and evidence, including the following:
- a. She had not originally explained her illness, because she would have preferred to keep it private. She provided a letter from her doctor confirming her condition.
  - b. She presented detailed research to show why the business was not amongst the top 5 letting agencies in the city. She considered it more likely that it was in the bottom 5.
  - c. A letter from Smith Wilson Accountants confirmed: (a) Mr McCartney left his job (forfeiting his separate income of £30,000) to join McCartney Lettings as a result of his wife becoming ill. (b) The couple have no savings and a penalty of £2,500 would have to be paid from the business overdraft, causing pressure on the business. (c) The accounts for the year ended 2016 showed a net profit of £45,061 divisible between the couple.
14. The Council's submissions included the following:
- a. The penalty amount is not unreasonable. The Guidance states the expectation that a £5,000 fine should be considered the norm.
  - b. To date, the Appellant has provided no evidence in relation to the accounts of the business to support the contention that a £2,500 penalty is unreasonable.
  - c. No documentation was submitted in support of the claim that the penalty would lead to losing a member of staff or reducing his hours.
  - d. A search of the Respondent's database reveals that the Appellant's business extends to more than 200 properties, making it one of the top 5 Lettings Agencies in York in terms of property portfolio. The Guidance set out above clearly anticipated that large and small businesses alike would face the £5,000 penalty as a norm. Additionally, it is not asserted by the Appellant that the penalty would lead to the closure of the business but rather that it would reduce the level of profit.
  - e. Although ill-health has been a factor considered by the Respondent in reducing the penalty in other cases,

- i. This was not a matter that was raised in the Appellant's reply to the Notice of Intent.
    - ii. no medical evidence has been received by the Respondent in relation to Mrs. McCartney's illness.
    - iii. Mrs. McCartney does not appear to be claiming that the illness affected her work as a letting agent or contributed in any way to the commission of the breach.
    - iv. Mrs McCartney is not the sole Partner in the business.
  - f. The Appellant claims that in view of the unintentional nature of the breach and the rectification of the same it is not reasonable to impose a penalty. At the time of the breach the legislation had been in force for a considerable period of time, some 16 months.
  - g. The Respondent decided upon a programme of awareness-making, followed some 11 months later by a City-wide compliance exercise. Enclosed with the advisory letter sent to the Appellant in October 2015 was a form. The Appellant declared on the completed form that all fees were being displayed on the website of the business and in the commercial premises. The Appellant admits to charging both landlords and tenants fees and to not displaying landlords fees on the website or at the office premises at the time of the compliance inspection on 26th September 2016, despite the declaration on the form that all fees were being displayed.
  - h. If the Appellant had been in doubt as to how to display fees, it is apparent from email correspondence that he would have answered the query.
15. Witness statements from the Council included testimony from the officer who visited the Appellant's premises. Mrs McCartney had explained to him that she had not thought she had to publish landlord fees, just those for tenants. She had explained how she complied with other legislation. A second officer explained the four elements that the Council considered so as to provide consistence when reviewing the level of fine.
16. Evidence included a form completed by Mrs McCartney of 10 October 2015 in which she had confirmed that all fees and charges were displayed in commercial premises.

#### **D. Findings**

17. The Tribunal's role is to decide whether the Council's decision to impose a financial penalty was based on an error of fact or was wrong in law or unreasonable; or whether the amount of the penalty is unreasonable.

Depending on the finding I make, I may quash, confirm or vary the final notice.<sup>1</sup>

*Was the amount of the penalty or decision unreasonable?*

18. I have seen no arguments advanced that show the Council having made any material legislative or procedural breaches.
19. Accordingly, I turn whether, in all the circumstances (as found by me), either the amount of the penalty or the decision was unreasonable. In deciding if the amount of the penalty or decision to award a penalty is unreasonable, it is necessary to have regard to the statutory Guidance, to which I have earlier made reference. This says that the expectation is a "fine" (i.e. penalty) of £5,000 is the norm and that a lower sum should be imposed only if the authority is satisfied there are "extenuating circumstances". The Guidance does not purport to be exhaustive as to what might constitute extenuating circumstances. It states that "*It will be up to the enforcement authority to decide what such circumstances might be*".
20. As I have seen nothing before me to suggest that the Council's actions were in any way unreasonable. On the contrary, it undertook efforts to ensure advance knowledge of the legal requirements, and established a policy that enabled consistency in treatment of agents. In all ways it seems to have acted in a fair manner and to have been able to illustrate their actions in this appeal an impressive manner. It was wholly proportionate for the Council to have taken action. The Appellant had received notice well in advance and the Council were fulfilling their statutory duty.
21. As regards the Appellant having not known about the legal requirement, it is clear that the agent was informed in good time by the Council.
22. I do not accept the argument that the Appellant should have been informed by the Council more specifically as to their duties. The Appellant argues that the Council should have used the words "all landlord and tenant fees displayed". However, the wording from the Council of "all fees and charges displayed" seems adequate, and if in doubt, further research should have been undertaken by the agent. In any event, it is for the agents as professionals to ensure they are fully apprised of the legal requirements appertaining to their own business.

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<sup>1</sup> See further paragraph 5 above.

23. It may be that McCartney Lettings chose not to comply because they preferred not to display landlord fees. However, I think it far more likely that the breach was an oversight and unintentional. This is because there was partial compliance; Mrs McCartney's immediate explanation given to the officer when he visited the premises seems credible; and the agents illustrated that they take training and their reputation very seriously.
24. As to the effect a £2,500 fine would have on the business, I have seen nothing to justify that it would result in losing a third staff member or having his hours reduced. On balance, I do accept that the business is not one of the top five agencies in the city. It is clear that the partners have to contend with the challenges of illness and consequent loss of income. I also accept the information provided by Smith Wilson Accountants. This is not something that had been properly made clear to the Council when making its decision. The desire to keep sensitive information private is understandable, but the cost of the illness is a relevant factor that should have been made clear. The Appellants clearly went to extensive efforts to present their case. However, most regrettably, no accounts have been provided, despite the Council making this absence clear.
25. In all the circumstances, I find that it is reasonable for the Final Notice to be varied, so that the financial penalty payable in respect of it is the sum of £1,000.
26. The appeal is allowed to the above extent.

**Dated**

**Judge Claire Taylor**  
**22 June 2017**