First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2016/0010

Heard at Fleetbank House
on 10 October 2016

Before

JUDGE PETER LANE

Between

FOXTONS LIMITED

Appellant

and

LONDON BOROUGH OF CAMDEN

Respondent

Representation:

For the Appellant: Ms L. Phillips, Counsel, instructed by Mr C Daly, Solicitor
For the Respondent: Mr C. Crowe, instructed by Ms L Cooke, Camden Legal Services Department

DECISION AND REASONS

A. The requirement for letting agents to publicise details of fees

1. The Consumer Rights Act 2015 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:-

"**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."

B. Enforcement

2. 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."

C. Financial penalties

3. The system of financial penalties for breaches of section 83 is set out in Schedule 9 to the 2015 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.

D. Appeals

4. 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.

E. Explanatory Notes and Guidance

5. In the present appeal, the parties made reference to 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. It is convenient to set out here relevant passages from both of these documents, without at this point expressing any view as to their significance.

6. 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."

7. 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".

8. 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".

F. Primary Authority Advice

9. Before setting out the background to the present appeal, it is necessary to mention one more non-statutory utterance. Under the Regulatory Enforcement and Sanctions Act 2008, eligible businesses can form partnerships with a local authority in relation to regulatory compliance. The local authority is known as the "primary authority".

10. Pursuant to the 2008 Act, a primary authority partnership exists between Warwickshire County Council Trading Standards, the National Federation of Property Professionals and the Property Ombudsman. In November 2015, Warwickshire Trading Standards issued "Primary Authority Advice" in relation to the question: *"is it misleading for a letting agent not to display tenant and landlord fees in their offices?"*

11. In this Advice, we find the following:-

> "**Assured Advice Issued:**
>
> Section 83 of the CRA requires letting agents to display their fees for tenants and landlords.
>
> These must be displayed at each of the agent's premises where people using or likely to use the agent's services are seen face-to-face. The fees must be displayed in a place where such people are likely to see them. People should not need to ask to see the fees as the list should be clearly on view.
>
> The fees must also be published on the agent's website, if there is one.
>
> It is considered good practice for agents to check that customers have seen the fees price lists before they enter into any agreements or contracts.
>
> The list of fees must include a description of each fee that enables people to understand what it relates to and how much it will be. In relation to fees payable by tenants, it should be clear whether each fee is per property or per tenant. Fees should be inclusive of VAT and any other taxes. …
>
> The list must be clear and comprehensive. Surcharges, hidden fees or vague expressions like 'admin fee' are not permitted".

G. Background

12. Foxtons Limited ("Foxtons") appeals against four final notices served on it by the Council of the London Borough of Camden ("Camden"), which is the local weights and measures authority for the geographical area comprising the Borough of Camden. Three of the notices relate to branch offices located respectively at 47 Heath Street, NW3, 128-130 West End Lane, NW6 and 120 Park Way, NW1. Each of these is within the Borough. The fourth notice relates to Foxtons' website, which is www.foxtons.co.uk.

13. Each notice set out details of the alleged breach. The notices are in all material respects identical:-

> "On 30th June 2015 and on 22nd December 2015 the London Borough of Camden wrote to Foxtons Limited advising them that as of 27th May 2015, all Letting Agents and Property Management Agents had to display ALL their fees to tenants and landlords, together with the details of the Redress Scheme of which they are a member. The letter also stipulated that it is now compulsory for all agents to display details of whether or not they are a member of a client money protection scheme at their trading premises and on the internet.
>
> On 10th September 2015, I e-mailed Lori Thompson, Director of Customer Services and Compliance at Foxtons Limited notifying them that the company fee

structure to tenants failed to comply with Section 83(4) of the Consumer Rights Act 2015 by only stipulate (sic) a one off 'Administration Charge' of £420.

On 11th February 2016 I [visited the office of Foxtons at *branch*] [checked the Foxtons' website www.foxtons.co.uk] and found that the company had failed to comply with the requirements of Section 83 Consumer Rights Act 2015 and had not amended their fee structure as requested. Foxtons was still displaying a one off 'Administration Charge' of £420, without a sufficient description of what services are included for this fee in contravention of Section 83(4).

On 11th February 2016 Camden Council issued you with a Notice of Intent to impose a monetary penalty giving details of the breach.

I am now issuing you with a Final Notice imposing a final penalty as detailed below:

After carefully considering your representations dated 9th March the Council has decided to confirm the monetary penalty in relation to your premises for the following reasons:

1. Foxtons continues to breach Section 83(4) of the Consumer Rights Act and continues to act contrary to Government Guidance to Local Authorities on improving the private rented sector (March 2015) – see attached.

2. Foxtons are acting contrary to assured advice given to the National Federation of Property Professionals and The Property Ombudsman by the Primary Authority, Warwickshire, of which Foxtons are members (by virtue of their membership of the National Federation of Property Professionals). Please see attached.

3. The assured advice states that members [of] the National Federation of Property Professionals and The Property Ombudsman are prohibited from using the term 'administration charge'. Foxtons continues to use this term and remains in contravention of the assured advice given by the body of which they are members.

4. Since 15th July 2015, the Council has consistently advised Foxtons that it is in breach of the law and guidance in relation to Section 83 of the Consumer Rights Act 2015 to which Foxtons has disagreed.

Advise (sic) obtained by Foxtons further to the service of the notice of intent and referred to in the representations was not sought from the Primary Authority of which they are a member, but by a Trading Standards Officer who does not work at the industry Primary Authority.

Expert counsels' opinion obtained by the Council confirms the Council interpretation of the relevant legislation.

7. The Council consider that in all the circumstances the service to (sic) the Final Notice is reasonable."

14. In each case the penalty charge was stated to be £5,000.

15. On 24th September 2015 Foxtons had written by email to Camden regarding the "administration fee point". Having taken legal advice, Foxtons said:-

> "We note that you have objected primarily to our use of the word 'administration'. It is quite apparent that you are taking this objection from the guidance notes to the Consumer Rights Bill published by the Department for Communities and Local Government as Appendix D to the document entitled 'Improving the Private Rented Sector and Tackling Bad Practice: a Guide for Local Authorities'. The passage in the guidance that you are presumably relying on states:
>
> Ill-defined terms such as administration cost must not be used.
>
> This is nothing more than guidance issued by the Secretary of State. It is not statutorily approved and in no way represents the will of Parliament. The House of Lords (as was) has clearly expressed the view of the Courts in relation to explanatory notes and guidance in the case of *Westminster City Council v National Asylum Support Service* in which it made clear that whilst this can set context there are clear limits:
>
> What is impermissible is to treat the wishes and desires of the government about the scope of the statutory language as reflected in the will of parliament.
>
> It is our view that this guidance is little more than a view as to how the Act should be interpreted, based on an early version prior to it being passed by Parliament, and it should not therefore be relied on to interpret the legislation, especially where the guidance makes a very bald statement which has no support from the legislative wording.
>
> Our administration fee currently covers a range of different activities including, but not limited to: the collection and checking of identity
>
> - reference collating and checking
> - negotiation of the lease terms
> - preparation of the lease
> - collection and registration of the tenancy deposit
>
> as well as the time and cost involved in showing our customers properties. It is not possible to break these down to specific elements as each property and tenancy is unique as is each tenant or tenants. In addition, the scope of our administrative work is subject to considerable change at the current time. For example this will shortly include:

- checking of the tenant's Right to Rent in some areas as the provisions of the Immigration Act 2013 are extended beyond the West Midlands' Pilot area over the next few months;

- service of the How to Rent Guide and other information required by the Deregulation Act 2015; and

- provision and testing of smoke and carbon monoxide detectors as required by the Smoke and Carbon Monoxide Alarm (England) Regulations 2015.

… we believe that the term 'administration fee' is a concept that is clearly understandable by consumers. The fee covers exactly what it says, our time involved in a range of administrative tasks involved in setting up a tenancy … we believe that this term is compliant with s83(4)(a). As the fee is not variable there is no requirement for us to specify how it is calculated under s83(4)(c). …".

For the reasons set out above we do not believe that a further alteration in our fee statements is required at this stage. If you disagree we are prepared to reconsider this point if you can suggest some wording that will satisfy you while at the same time acknowledging that the fee covers work that is essentially flexible in nature and liable to change as new legal obligations are placed on us…"

16. On 16th February 2016, Camden wrote to Foxtons, pointing out that Camden had sent a further letter to the Foxtons' branches on 22nd December 2015:

"which stated that having a one-off 'administration charge' did not comply with the legislation and the guidance leaflet that was enclosed reiterated this. Mr Daly [of Foxtons] had already made it clear in his e-mail that as a company you were not prepared to change your fee structure, hence why you have been served with the notices".

17. In response to the Notices of Intent, Foxtons wrote to Camden on 9th March 2016. Foxtons expressed concern at Camden's attitude, in particular its reaction to the Foxtons' e-mail of 24th September 2015, which "contained matters of law that required your consideration and response". Foxtons accordingly had expected some acknowledgement of this correspondence before Notices of Intent were served:-

"Having previously dealt with several London borough councils and even Camden council, this was not the conduct we had ever experienced and genuinely believed that there may have been an oversight in the matter. Hence, we immediately wrote to the Authorising Officer inquiring whether our representations of 24th September had been considered and requested the Notices to be put on hold whilst an agreement on acceptable wording was reached.

Regretfully, the Authorising Officer informed us that she was not prepared to hold the Notices, on the basis that she did not consider it necessary to simply repeat what she had already advised us and because Foxtons had already made it clear that it was not prepared to change its fees structure. Indeed, both reasons to dismiss Foxtons' requests were flawed, as Foxtons have raised issues of law that

had not previously been discussed and demonstrated a willingness to consider alternative wording

… … … … …

3. Proposed New Wording

It is incorrect to state that Foxtons was unwilling to change its fees structure, as our e-mail of 24th September 2015 clearly demonstrates otherwise.

Although you have not responded to us for alternative wording, we have since been in contact with the Wandsworth Trading Standards and their Senior Trading Standards Officer, Mr Christopher Jones, has approved the use of the following wording:

Administration fee £420*

This is a fixed cost fee that can cover a variety of works depending on the individual circumstances of each tenancy, including but not limited to conducting viewings, negotiating the tenancy, verifying references and drawing up contracts. This charge is applicable per tenancy, and not per individual tenant.

Foxtons is in the process of implementing the above wording within the business, including all displays at our offices, our website and our terms".

H. The appeal

18. In its grounds of appeal, Foxtons confirmed that the list of fees had been revised in accordance with the wording set out in the letter of 9th March. (An e-mail from Foxtons of 15th April 2016 confirmed that the revision had been implemented on 28th March 2016, both in relation to Foxtons' website and to its offices).

19. As a result, ground 1 contended that, at the time the Final Notices were served on 11th April 2016, Foxtons was not in breach of section 83. Ground 2 asserted that the issuing of Final Notices was in contravention of section 87(1) of the 2015 Act, which required only one penalty to be imposed on the same letting agent in respect of the same breach. It was submitted that the Final Notices related to identical wording used by Foxtons in its list and the maximum penalty was, accordingly, £5,000 (rather than £20,000).

20. The third and final ground of appeal contended that Camden continued unreasonably to maintain that Foxtons' "fee structure/contract terms are in breach of section 83 CRA but has not offered a coherent explanation as to why it considers this to be the case". The decision to issue the Final Notices was, accordingly, said to be unreasonable.

21. The hearing of the appeal took place on 10th October 2016. No oral evidence was called. I heard submissions from Ms Phillips on behalf of the appellant and Mr

Crowe on behalf of the respondent. I am grateful for their elucidation of the issues. In reaching a decision in this case I have had regard to those oral submissions and also to the written submissions, evidence and other documentation contained in the hearing bundle.

I. Discussion

(a) The pre-28 March 2016 wording

22. The first question is whether the pre-28th March 2016 wording used by Foxtons; namely "Administration Fee: £420 per tenancy" met the requirements of section 83(4)(a) of the 2015 Act. There is no question that a list of fees was displayed. Foxtons contends that the expression "Administration Fee" was sufficient. Camden contends that it was not.

23. Even without the Departmental Guidance (which is "statutory", in the sense that section 87(9) requires local authorities to have regard to it), I find that the word "administration" is not, in the words of section 83(4)(a), "sufficient to enable a person who is liable to pay [the fee] to understand the service or cost that is covered by the fee or the purpose for which it is imposed". The word "administration", used on its own, contains no sufficient indication of what service or services are covered. It is, in particular, an inadequate descriptor of what Foxtons' revised wording reveals is a key service included within the fee; namely, the drawing up of a tenancy agreement.

24. In my view, the Departmental Guidance does no more than make plain this basic point. The same is true of paragraph 458 of the Explanatory Notes. Far from introducing an impermissible "gloss" on the wording of section 83(4)(a), both the Guidance and the Explanatory Notes do no more than highlight a paradigm of a description of a fee that does not meet the requirements of section 83(4)(a). The same is true of the Primary Authority Advice from Warwickshire Trading Standards, which in fact does no more than reiterate what is found in the Departmental Guidance.

(b) The 28 March 2016 wording

25. The next question is whether the revised wording adopted on 28th March 2016 meets the requirements of section 83(4)(a).

26. I agree with Foxtons that Camden incorrectly interpreted the legislation (and, for that matter, the Guidance), insofar as Camden considered that the use of the expression "Administration Charge" or "Administration Fee" was prohibited. There is nothing wrong *per se* with the use of such a label, provided that it is accompanied by "a description … that is sufficient to enable a person … to understand the service or cost that is covered by the fee or the purpose for which it is imposed". It is in this

light that the Primary Authority Advice, regarding "vague expressions like 'admin fee'", must be understood.

27. Camden's misunderstanding of the legislative requirements finds its starkest expression in paragraph 3 of the Final Notices, where it is baldly stated that "members … are prohibited from using the term 'administration charge'". They are not.

28. The real issue, upon which both Counsel rightly concentrated at the hearing, is whether the descriptive rubric which Foxtons has attached to its "Administration Fee £420" since 28th March 2016 is statutorily compliant. Mr Crowe submits that it is not. He relies upon the description of the requirement in the Departmental Guidance as "a comprehensive list of everything that a landlord or a tenant would be asked to pay" and that the "list of fees must be comprehensive and clearly defined; there is no scope for surcharges or hidden fees". By the same token, the Primary Authority Advice is that the legislation requires the list of charges to be "clear and comprehensive".

29. I reject this submission. One does not have to subject the provisions of the Guidance, Notes and Advice to a detailed exegesis in order to see that what they are saying about comprehensiveness is directed at the list of fees mentioned in the opening words of section 83(2), rather than at the descriptions of those fees referred to in subsection (4)(a). A person who enters the premises of a letting agent as a prospective tenant needs to know precisely how much he or she will be required to pay in order to be installed as a tenant. A comprehensive list of fees achieves that aim.

30. The purpose of section 83(4)(a) is to ensure that a person has an understanding of what is included or covered by the fee in question. This will enable him or her to compare different agents' fees, in order to decide which provides best value for money or otherwise is most likely to suit his or her needs.

31. I am satisfied that a person reading the rubric now set out by Foxtons under the heading "Administration Fee £420" will thereby be able "to understand the service or cost that is covered by the fee". The specified services include negotiating the tenancy, verifying references and drawing of contracts, all of which can be the subject of a price comparison with a letting agent who chooses to use the "model" form of list apparently emanating from the National Association of Letting Agents, which Camden regards as an exemplar (page 52 of the bundle).

32. The fact that the list of services contained in the Foxtons rubric is not exhaustive stems, I find, from the fact that (as Foxtons pointed out in its letter of 24th September 2015) cases may not be identical and some additional service might be included within the Administration Fee in a particular case. Anyone reading the current Foxtons' complete list of fees (to be seen, for example, on page 24 of the bundle) will be able to deduce, from a process of elimination, whether any other, potentially relevant service falls within the list of "Other Fees", such as "end of tenancy

inventory check-out". If not, then, by a simple process of elimination, he or she will know that the service in question will be encompassed within the Administration Fee.

33. It follows that I find Foxtons has not been in breach of the requirements contained in the 2015 Act since 28th March 2016. I shall return in due course to the significance of this finding.

(c) The nature of the breaches

34. Foxtons asserts that the decision to issue Final Notices in respect of its three branches in Camden, and also in respect of the national website, falls foul of section 87(6), whereby "only one penalty under this section may be imposed on the same letting agent in respect of the same breach".

35. I have no hesitation in rejecting this submission. So far as branches are concerned, it is plain from section 83(2) that a discrete statutory requirement to display a list of fees is imposed on a letting agent in respect of each of that agent's premises falling within subsection (2)(a). It is, in my view, clear that section 87(6) is a qualification of (and only of) the provisions to be found in subsections (3) to (5), whereby an authority may impose a penalty in respect of a breach occurring outside that authority's area, so long as it has the consent of the authority in whose area the breach occurred.

36. It would, I consider, thwart Parliament's intention in enacting section 83 if large organisations, such as Foxtons, having branches across the country, were liable only to one penalty in respect of a failure to display a list of fees in all of its branches, thereby effectively placing the organisation in the same position as a small letting agent, which runs only a single office. The harm to the public is, manifestly, greater in the first case than in the second.

37. Ms Phillips submitted that the difference could be addressed by setting the level of financial penalty higher in the first case than in the second. The structure of sections 83 and 87 is, however, plain. A breach in respect of two or more sets of premises constitutes two or more separate breaches.

38. In any event, the Guidance provides that "the expectation is that a £5,000 fine (sic) 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", such as where a £5,000 penalty would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. At this point, there can be no danger of treating the Guidance as a gloss on the meaning of the 2015 Act. Rather, it is guiding local authorities across the country on how to arrive at a penalty that is, in all the circumstances, reasonable. It also has the merit of encouraging a measure of consistency in the setting of penalties.

39. Not only would Ms Phillips' submission run counter to this part of the Guidance; it is also inherently inapt. To follow her approach and impose a £5,000 penalty upon an organisation whose breach extended to, say, hundreds of premises, and, say, a £500 (or £50) penalty on a business with only one set of premises, would in no sense reflect the extent of the harm caused by the national organisation. In addition, by depressing the penalty that would otherwise be appropriate for the single-premises operator, the submission would preclude justice being done in the second case also.

(d) The website breach

40. I turn now to the issue of the website. As can be seen, section 83(3) imposes a discrete requirement on a letting agent to publish a list of fees on its website, if it has one. A breach of the section 83(3) requirement is treated, for the purposes of section 87, as having occurred in each authority's area in which a dwelling-house to which the fees relate is located (section 87(2)). Plainly, then, a breach that occurs in respect of the agent's website is a discrete breach, as to which any authority may take enforcement action. Accordingly, the restriction in section 87(6) applies, so that only one penalty may be imposed in respect of the website breach.

41. My attention was not drawn to anything in the 2015 Act which requires authorities to agree which one is to take enforcement action in respect of a website breach. The effect of section 87(2) is that the breach is taken to have occurred in each authority's area, with the result that section 87(5) has no application.

42. In the present appeal, there is no evidence or other indication that Foxtons has been required by any authority other than Camden to pay a financial penalty in respect of the website breach described in the Final Notice served on Foxtons on 11th April 2016. As with the Final Notices relating to the Camden branches, I find that there was not only power in law to serve the Final Notice in respect of the website but also that it was reasonable to do so. A potentially different and far larger group of persons (namely those looking at the website) would have been provided with legally inadequate information about Foxtons' fees.

(e) Disposal

43. I turn to the disposal of the appeal. I remind myself that by virtue of paragraph 5(5) of Schedule 9 to the 2015 Act, the Tribunal may quash, confirm or vary a final notice.

44. On the basis of my findings, each of the Final Notices served on Foxtons contained an error of fact and/or law, insofar as the notices contended that the use of the term "Administration Charge" was prohibited by the legislation and that Foxtons remained, as at 11th April 2016, in contravention of its legal obligations. Nevertheless, on the basis of my findings, Foxtons was in breach from 27th May 2015 until 28th

March 2016. There was, thus, a legal basis for imposing financial penalties on Foxtons.

45. The last issue, therefore, is whether, in all the circumstances (as found by me), either the amount of the penalty or the decision was unreasonable. In deciding that issue, which is left open by the primary legislation, it is necessary to have regard to the statutory Guidance, to which I have earlier made reference. The Guidance says the expectation is a "fine" (ie penalty) of £5,000 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, saying that "It will be up to the enforcement authority to decide what such circumstances might be".

46. In the present case, it is common ground that the annual turnover and general financial position of Foxtons are such that it will not be put out of business by a requirement to pay £5,000 in respect of each of the notices.

47. This is not, however, the end of the matter. I consider it more likely than not that Camden's refusal even to engage in discussion with Foxtons regarding the wording eventually introduced on 28th March, stemmed from Camden's mistaken belief that the expression "Administration Charge" or "Administration Fee" was illegal *per se*. I have also found that Camden's view of the sufficiency of the words contained in the new rubric to the expression "Administration Fee", for the purposes of section 83(4(a), is wrong. The upshot was that, in setting the level of penalty, Camden had no regard to the fact that, even though Foxtons had been in breach for a significant period of time, that breach had been rectified. It therefore falls to the Tribunal to put itself in the place of the Council and consider whether and to what extent the circumstances I have set out call for a reduction in penalty.

48. A 10 month breach cannot, in my view, be ignored or downplayed. It should have been apparent to Foxtons, from a proper reading of the primary legislation itself, not to mention its correct explanation in the Explanatory Notes and Guidance, that the bare use of the term "Administration Fee" was non-compliant.

49. Accordingly, a significant penalty needs to be imposed, in respect of each of the breaches, whilst having due regard to the fact that the breach had been remedied in March 2016, on Foxtons' own initiative. I am satisfied that, had Camden appreciated this, it would have reduced the penalty in respect of each Final Notice.

50. In all the circumstances, I find that it is reasonable for the Final Notices to be varied, so that the financial penalty payable in respect of each of them is the sum of £3,000, rather than £5,000.

J. Decision

51. The appeal is allowed to the above extent.

Judge Peter Lane
26 October 2016