

Report appendix 1

# **Trading Standards Financial Penalties Policy for Letting Agents and Landlords**

1. This document sets out the London Borough of Southwark's policy in relation to deciding financial penalties that may be imposed for breaches of the following legislation. The financial penalties are civil penalties.
  - a) The Redress Schemes for Letting Agency Work and Property Management Work (Requirements to Belong to a Scheme etc.) (England) Order 2014
  - b) Consumer Rights Act 2015 (Chapter 3)
  - c) Tenant Fees Act 2019
  - d) Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019
2. The Council is an enforcement authority and the legislation empowers it to issue financial penalties with regard to the following matters:
  - a) Failure by letting agents to be a member of a redress scheme
  - b) Failure by letting agents to publish fees
  - c) Landlords or letting agents requiring the payment of a prohibited fee
  - d) Failure by letting agents to be a member of a client money protection scheme and to display or provide details of it
3. There are two pieces of statutory guidance to which enforcement authorities must have regard to in relation to enforcing the [Tenant Fees Act 2019](#) and the [Client Money Protection Schemes for Property Agents \(Requirement to Belong to a Scheme etc.\) Regulations 2019](#).
4. These statutory guidance documents recommend certain factors that an enforcement authority should take into account when deciding on the level of any financial penalty. They also create the expectation that enforcement authorities develop and document their own policy on determining the appropriate level of financial penalty in a particular case. Other guidance has also been published by government.
5. Consideration will always be given to informal action such as advice and/or warning letters in an effort to ensure compliance. However there is no obligation for the Council to do this before taking formal action.
6. Once the Council has determined that formal action should be taken it will, on a case by case basis, decide whether the formal action should be to serve a financial penalty in respect of any breaches or, in the case of a repeated breach of the Tenant Fees Act 2019, to instigate prosecution proceedings.
7. A financial penalty may only be imposed after a notice of intent has been issued. This affords the recipient to make representations about the intended penalty.
8. Any correction of a breach after receiving a notice of intent will not nullify a proposed penalty. Any reduction or withdrawal will only be considered where representations are made in the prescribed period allowed. Representations will be considered by an officer panel suitably independent of the decision to issue a notice of intent
9. The legislation has been in force for over a year and, in the case of redress scheme requirements, for over six years. Any lack of awareness is an indicator of very poor professional diligence and will not be considered as a mitigating factor in respect of any breaches.
10. The private rented sector has grown by 88% between 2001 and 2011, and now accounts for 25% of households in Southwark. The number of houses in multiple occupation has also increased significantly.

11. This policy takes into account higher levels of community concern with regards to housing in Southwark and London specific factors which increase the vulnerability of tenants, and prospective tenants, within the rental marketplace. This includes the transient business and residential population, the high level of occupancy, higher relative and increasing rents and the continued unaffordability of private rental accommodation.
12. This policy helps support the commitment to taking tough enforcement action against rogue landlords and letting agencies contained in principle 2 of Southwark's Long Term Housing Strategy to 2043. This was agreed in January 2015 and contains a vision for the future of housing in the borough whilst making specific reference to improving conditions in the private rented sector.
13. This policy is also prepared in light of the extensive body of First and Upper Tier Tribunal rulings that have been published further to penalty notices issued by trading standards in London and beyond.
14. In addition reference is made to the overarching principles of culpability, harm, aggravation and mitigation along with the five purposes of sentences (with emphasis on punishment, reduction, and protection) outlined in the Sentencing Council General Guideline.
15. When considering the culpability of letting agents attention is drawn to the professional status of the sector, the extensive guidance available from industry bodies and requirements for compliance from the statutory redress schemes.
16. Consideration of harm is taken to include the risk of harm to those interacting with letting agents and landlords, as well as the collective harm to a fair trading environment from illegal trading practices.
17. The Council will determine the level of a financial penalty so that it has a real economic impact on the recipient and also act as effective deterrent by demonstrating the consequences of not complying with legal obligations.
18. This policy has regard to the Council's Fairer Future Medium Term Financial Strategy and Integrated efficiency Plan 2017-18 to 2019-20. This seeks to maximise the council's income generation by seeking income streams in line with council policies and priorities. Discretionary fees and charges are reviewed annually and fees and charges capped by statute should be increased to the maximum level the cap allows.
19. Where there is evidence of other offences arising from the actions of letting agents or landlords, such as breaches of the Consumer Protection from Unfair Trading Regulations 2008, Fraud Act 2006 or the Proceeds of Crime Act 2002, the Council will consider instituting proceedings in addition to any action taken within the scope of this policy.
20. Any decision to prosecute will be taken in accordance with the Council's Enforcement Policy, the Regulators Compliance Code and the Code for Crown Prosecutors.
21. The Council will publicise details of agents who are issued with a penalty under any of the above legislation on the Mayor of London's Rogue Landlord and Agent Checker, operated by the Greater London Authority (GLA). There is a mechanism to make representations to the GLA about this.
22. Where the Council has determined that it would be appropriate to issue a financial penalty in respect of a breach of particular legislation the level of the penalty, and any consideration of representations, will

be determined with regard to the general points above as well as those detailed below for each piece of legislation.

23. Records of the decision making process will be documented and maintained in accordance with departmental retention schedules.

### **The Redress Schemes for Letting Agencies Work and Property Management Work (Requirement to Belong to a Scheme etc.) (England) Order 2014**

24. It has been a requirement since October 2014 for letting and managing agents to be a member of a government approved redress scheme. A failure to join a scheme is enforced by a civil penalty process with a maximum monetary penalty of £5,000.
25. The consequence of a business not being a member of a redress scheme is significant for both tenants and landlords. It means that they do not benefit from a method of resolving complaints and possible compensation awards without having to take recourse to legal action. Membership is not retrospective so even if a business later joins a scheme the clients who had a complaint arising prior to the date of membership will not be covered.
26. The Council considers this is an important access to justice issue. It represents a very serious breach because of the potential collective harm to both tenants and landlords.
27. Government enforcement guidance contained in the Ministry of Housing, Communities and Local Government (MHCLG) document "[Improving the Private Rented Sector and Tackling Bad Practice](#)" published in 2015 states that "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".
28. It also suggested taking consideration of whether a proposed penalty would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business.
29. Due to the serious detriment associated with lack of membership, the lack of professional diligence it indicates and the particulars of the London lettings market it is the Council's policy that when issuing an initial notice (notice of intent) against an agent for a breach of the order, the penalty will usually start at £5,000 subject to any extenuating circumstances.
30. This approach has been consistently supported by judges in the First Tier Tribunal (to whom a person who is served with a notice imposing a monetary penalty may appeal) and takes into account the above mentioned guidance.
31. The notice of intent will give the agent the option to submit representations to the Council within 28 days which will be considered and the penalty may then be modified in the final notice. The Council may at any time reduce the amount or withdraw a notice of intent or a final notice.
32. Each of the following factors may be considered in mitigation and in the Council's decision making process of whether to modify or withdraw a penalty. This is a non-exhaustive list:
  - a) The severity of the breach (for example, if redress scheme membership had briefly lapsed or whether the agent had never been a member)
  - b) The regulatory compliance history of the agent
  - c) Complaints received about the agent
  - d) The willingness of the agent to co-operate with the Council and resolve matters quickly

- e) Steps the agent has, or has not, taken to ensure compliance
- f) The level of the proposed penalty against the financial status of the agent and ability to pay (subject to the production of accounts, bank statements or other financial information covering at least 12 months trading)
- g) Other personal issues that may have had or be having an effect on the agent's business, the period of breach or ability to pay
- h) Any other factors that could amount to extenuating circumstances

### **Consumer Rights Act 2015 (Chapter 3)**

33. Chapter 3 of the Act makes it a duty for letting agents in England to publicise certain fees and other prescribed information. The requirements can apply to displays in premises and on websites including portals.
34. If a letting agent breaches this duty then the Council may impose a financial penalty at such a level as the Council determines but not exceeding £5,000 per breach.
35. Government enforcement guidance contained in the MHCLG document "[Improving the Private Rented Sector and Tackling Bad Practice](#)" published in 2015 states that "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".
36. The Council can issue a penalty for each separate breach so if a letting agent is in breach on their website, and in their office, this would amount to two breaches. If a letting agent has multiple branches, then a penalty of up to £5,000 may be imposed separately against each non-compliant branch.
37. For continued non-compliance further penalties of up to £5,000 can be issued for the same breach over a different period. There is no limit to the amount of penalties that can be imposed for a continued breach. Breaches should therefore be corrected as soon as possible after notification to avoid further penalties.
38. It is the Council's policy that when issuing an initial notice (notice of intent) against a letting agent for a breach of the duty the penalty will usually start at £5,000 subject to any extenuating circumstances.
39. The notice of intent will give the agent the option to submit representations to the Council within 28 days which will be considered and the penalty may then be amended in the final notice. The Council may at any time reduce the amount or withdraw a notice of intent or a final notice
40. Each of the following factors may be considered in mitigation and in the Council's decision making process of whether to amend or withdraw a penalty. This is a non-exhaustive list:
  - a) The severity of the breach and harm caused to either consumers or competitors (for example, if an agent is fully compliant but has not published VAT inclusive fees)
  - b) The regulatory compliance history of the agent
  - c) Whether an agent was in breach of some but not all aspects of the regulatory requirements
  - d) The period of non-compliance (for example, a short-term technical error on a website)
  - e) The willingness of the agent to co-operate with the Council and resolve matters quickly
  - f) Steps the agent has, or has not, taken to ensure compliance
  - g) The size and scale of the business (including number of staff)

- h) The level of the proposed penalty against the financial status of the agent and ability to pay (subject to the production of accounts, bank statements or other financial information covering at least 12 months trading)
- i) Other personal issues that may have had or be having an effect on the agent's business, the period of breach or ability to pay
- j) Any other factors that could amount to extenuating circumstances

## Tenant Fees Act 2019

- 41. The Tenant Fees Act 2019 makes it unlawful for a landlord or letting agent to require a relevant person to make a prohibited payment in relation to a tenancy or licence.
- 42. All payments are prohibited unless they are one of the permitted payments listed in Schedule 1 of the Act. Sections 1, 2 and 3 give further details on the specific breaches by a landlord or letting agent.
- 43. Each separate requirement to make a prohibited payment represents a breach of the Act for which the Council may impose a financial penalty.
- 44. The Act sets out the maximum financial penalties for agents and landlords that breach the legislation and require a relevant person to make a prohibited payment. The maximums are as follows:
  - a) £5,000 where a landlord or agent has required a tenant to make a 'prohibited payment'
  - b) £30,000 where a landlord or agent has required a tenant to make a 'prohibited payment' within five years of a previous conviction or the imposition of a financial penalty
  - c) £5,000 where a landlord or agent is in breach of the requirement to repay the holding deposit
- 45. The Council has a wide discretion in determining the appropriate level of financial penalty in any particular case but when making this policy has had regard to statutory government guidance and also to guidance issued by the appointed Lead Enforcement Authority.
- 46. In order to aid consistency of approach for the private rented sector in Southwark regard has also been had to the Private Sector Housing Prosecution and Civil Penalties Enforcement Policy adopted by this Council.
- 47. In accordance with the provisions of the Tenant Fees Act 2019 the level of financial penalty will be determined by this Council using the matrix and tables shown in Appendix A.
- 48. This matrix has been developed to ensure a fair and proportionate penalty is determined taking into account all relevant circumstances.
- 49. The factors in the matrix will form part of the Council's decision making process (including the consideration of any representations). This is not an exhaustive list:
  - a. The severity of the breach including any aggravating or mitigating factors such as
    - i. Concealment of the activity or materials
    - ii. Knowingly or recklessly supplying false or misleading material
    - iii. Intent to commit a breach or measures taken to try and prevent it
    - iv. The willingness to co-operate and resolve breaches
    - v. The extent of financial benefit or loss as a result of non-compliance
  - b. The deterrent effect of a financial penalty or prosecution and economic impact
  - c. Harm to tenants (including any distress)

- d. Size and scope of the business
- e. Regulatory compliance history of the agent or landlord

50. The Council will endeavour to use their powers under Schedule 5 of the Consumer Rights Act 2015 to make an assessment of a landlord or agent's assets and any income (not just rental or fee income).

### **The Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme Etc.) Regulations 2019**

51. Property agents in the private rented sector holding client money are required to be a member of a government approved or designated client money protection scheme and obtain a certificate.
52. Transparency provisions require the display of the certificate in premises where prospective clients may see it, and it must be published on the agent's website. A copy of it must also be produced on demand to anyone who may reasonably require it.
53. Agents must notify clients of any change in the status of its membership of an approved scheme within 14 days of the occurrence.
54. Mandatory client money protection is intended to give landlords and tenants confidence that their money is safe when it is being handled by an agent. Where an agent is a member of a government approved client money protection scheme, it enables a tenant, landlord or both to be compensated if all or part of their money is not repaid. This is an additional requirement to the obligations on tenancy deposits.
55. The consequence of a business not being a member of a client money protection scheme is potentially significant for both tenants and landlords. It means they are exposed to the risk of financial loss and will not benefit from a mechanism that could compensate them without having to take recourse to legal action. Retrospective membership would not be possible so even if a business later joins a scheme clients who have lost money prior to the date of membership will not be covered.
56. The Council considers this is an important safety net and non-membership represents a very serious breach because of the potential financial harm to both tenants and landlords.
57. Where an agent breaches the membership requirement, the regulations empower the Council to impose a financial penalty of an amount which it may determine, but not exceeding £30,000.
58. Where an agent breaches a transparency requirement the regulations empower the Council to impose a financial penalty of an amount which it may determine, but not exceeding £5,000.
59. The government has issued statutory guidance on enforcement which states the Council has discretion when determining the appropriate level of financial penalty but there is an expectation that each breach should be considered on a case by case basis and for the maximum amount to be reserved for the worst offenders.
60. The guidance also states the actual amount levied in any particular case should be fair and proportionate reflecting the severity of the breach as well as taking into account the agent's previous record of non-compliance.
61. In accordance with the provisions of the regulations the level of financial penalties will be determined by this Council using the matrix and tables shown in Appendix B.

62. This matrix has been developed to ensure that a fair and proportionate penalty is determined taking into account all relevant circumstances.
63. In order to aid consistency of approach for the private rented sector in Southwark regard has also been had to the Private Sector Housing Prosecution and Civil Penalties Enforcement Policy adopted by this Council.
64. The factors in the matrix will form part of the Council's decision making process (including the consideration of any representations). This is not an exhaustive list:
  - a. The severity of the breach including any aggravating or mitigating factors such as:
    - i. The length of time of the breach and any reason for it
    - ii. Concealment of the activity or materials
    - iii. Knowingly or recklessly supplying false or misleading material
    - iv. The intent to commit a breach or measures taken to try and prevent it
    - v. The willingness to co-operate and resolve breaches
    - vi. The extent of financial benefit or loss as a result of non-compliance
  - b. The deterrent effect of a financial penalty and its economic impact
  - c. Harm to tenants or landlords
  - d. The size and scope of the business (including number of staff)
  - e. Regulatory compliance history of the agent

# Appendix A - Financial Penalty Calculation Matrix

## Penalties relating to breaches of the Tenant Fees Act 2019

Each breach receives its own financial penalty calculated using the matrix below. A score for each of the five factors is chosen depending on the category of each area. The total score is then used to determine the penalty by reference to one of the tables below depending on whether the breach followed a financial penalty or relevant conviction in the last five years.

| Factors   | Category   |   |   |
|---|--|---|---|
|   | Low  | Medium  | High  |
| <b>a) Severity of breach</b>                              | <b>Score 5</b><br>Low level breach                           | <b>Score 15</b><br>Medium level breach                                | <b>Score 25</b><br>Serious breach   |
| <b>b) Deterrence &amp; prevention and economic impact</b> | <b>Score 5</b><br>High confidence of deterrence and impact   | <b>Score 15</b><br>Medium confidence of deterrence and impact         | <b>Score 25</b><br>Low confidence of deterrence and impact                    |
| <b>c) Harm to tenants</b>                                 | <b>Score 5</b><br>Low level harm                             | <b>Score 15</b><br>Moderate level harm                                | <b>Score 25</b><br>High level harm  |
| <b>d) Size and scope of business</b>                      | <b>Score 5</b><br>Small                                      | <b>Score 15</b><br>Medium   | <b>Score 25</b><br>Large  |
| <b>e) History of compliance</b>                           | <b>Score 0</b><br>First time single breach, no other history | <b>Score 15</b><br>Multiple breaches, other history of non-compliance | <b>Score 25</b><br>Repeat breach within five years of a penalty or conviction |

| No previous convictions or penalties in last five years |                        | For repeat breaches within five years of a conviction or penalty |                        |
|---|------------------------|--|------------------------|
| Score up to   | Penalty to be incurred | Score up to  | Penalty to be incurred |
| 20  | £250                   | 45   | £5,000                 |
| 30  | £500                   | 55   | £7,500                 |
| 40  | £1,000                 | 65   | £10,000                |
| 50  | £1,500                 | 75   | £12,500                |
| 60  | £2,000                 | 85   | £15,000                |
| 70  | £2,500                 | 95   | £17,500                |
| 80  | £3,000                 | 105  | £20,000                |
| 90  | £3,500                 | 115  | £25,000                |
| 100   | £4,000                 | 125  | £30,000                |
| 115   | £5,000                 | -----  | -----                  |

# Appendix B - Financial Penalty Calculation Matrix

## Penalties relating to breaches of the client money protection requirements

Each breach receives its own financial penalty calculated using the matrix below. A score for each of the five factors is chosen depending on the category of each area. The total score is then used to determine the penalty by reference to one of the tables below depending on whether the breach relates to failure to obtain membership of a scheme or the transparency requirements (publishing, displaying, notification and production requirements).

| Factors                                       | Category   |   |   |
|---|--|---|---|
|   | Low  | Medium  | High  |
| a) Severity of breach                         | <b>Score 5</b><br>Low level breach                                   | <b>Score 15</b><br>Medium level breach                                | <b>Score 25</b><br>Serious breach                               |
| b) Deterrence, prevention and economic impact | <b>Score 5</b><br>High confidence of deterrence and impact           | <b>Score 15</b><br>Medium confidence of deterrence and impact         | <b>Score 25</b><br>Low confidence of deterrence and impact      |
| c) Harm to tenants and/or landlords           | <b>Score 5</b><br>Low level harm                                     | <b>Score 15</b><br>Moderate level harm                                | <b>Score 25</b><br>High level harm                              |
| d) Size and scope of business                 | <b>Score 5</b><br>Small  | <b>Score 15</b><br>Medium   | <b>Score 25</b><br>Large  |
| e) History of compliance                      | <b>Score 0</b><br>First time single breach, no other adverse history | <b>Score 15</b><br>Multiple breaches, other history of non-compliance | <b>Score 25</b><br>Repeat breach within five years of a penalty |

| Failure to obtain membership |                        | Breach of transparency requirements |                        |
|------------------------------|------------------------|-------------------------------------|------------------------|
| Score up to                  | Penalty to be incurred | Score up to                         | Penalty to be incurred |
| 20                           | £2,000                 | 20                                  | £250                   |
| 30                           | £3,500                 | 30                                  | £500                   |
| 40                           | £5,000                 | 40                                  | £1,000                 |
| 50                           | £7,500                 | 50                                  | £1,500                 |
| 60                           | £10,000                | 60                                  | £2,000                 |
| 70                           | £12,500                | 70                                  | £2,500                 |
| 80                           | £15,000                | 80                                  | £3,000                 |
| 90                           | £17,500                | 90                                  | £3,500                 |
| 100                          | £20,000                | 100                                 | £4,000                 |
| 115                          | £25,000                | 115                                 | £4,500                 |
| 125                          | £30,000                | 125                                 | £5,000                 |