

Thurrock Council Policy on Financial Penalties for the enforcement of consumer protection legislation relevant to Letting Agents and Landlords

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1 Introduction

1.1 On 1 June 2019, the Tenant Fees Act 2019 (TFA 2019), came into force, prohibiting landlords and agents from charging any fees to tenants, other than those 'permitted' by the Act. Any tenancy that was signed on or after 1 June must adhere to the new regulations.

1.2 The TFA 2019 applies to assured short-hold tenancies, student accommodation tenancies and licences to occupy housing in the private rented sector. The act only applies to landlords, agents and tenants in England.

1.3 Thurrock Council (the Council) Trading Standards has a duty to enforce the TFA 2019, and where there has been a breach of the Act and/or associated legislation, to determine the appropriate enforcement action. The following policy guidance has been issued by the Council pursuant to this duty and should be read in conjunction with our published Enforcement Policy.

1.4 In creating this policy guidance, the Council has had regard to the Tenant Fees Act 2019 Statutory Guidance for Enforcement Authorities and the National Trading Standards Guidance for Enforcement of Sales and Letting Businesses.

1.5 Guidance for tenants, landlords and letting agents explaining how the Act affects them is available here: <https://www.gov.uk/government/publications/tenant-fees-act-2019-guidance>.

2 Legal References

2.1 The TFA 2019 prohibits the charging of fees in respect of a tenancy other than those which are specifically permitted and amends other legislation applicable to Thurrock Council as follows:

- a. In respect of the duty of letting agents to publicise fees and memberships of Client Money Protection and Redress Schemes under Section 87 of the Consumer Rights Act 2015
- b. In relation to the duty placed on enforcement authorities to have regard to any guidance issued by the Secretary of State ("the SoS") relating to the enforcement of an order under S83(1) or 84(1) as per Section 85 of the Enterprise & Regulatory Reform Act 2013
- c. In relation to the meaning of 'Lead Enforcement Authority'; under Section 135 of the Housing and Planning Act 2019 (enforcement of client money protection scheme regulations).

3 Sanctions

3.1 The TFA 2019 provides that enforcement authorities may impose financial penalties of up to £30,000 depending on the breach as follows:

- a. In respect of Prohibited Payments under S1 & 2 of the TFA 2019 a financial penalty not exceeding £5,000 for a first breach.
- b. Under S12 of the TFA 2019 a second or subsequent breach within 5 years of the previous breach provides for a financial penalty not exceeding £30,000. There is also a power to prosecute in the Magistrates Court, where an unlimited fine may be imposed.

3.2 The Council will determine whether it is appropriate to impose a financial penalty or prosecute in any relevant case having due regard to our Enforcement Policy, the Tenant Fees Act 2019 Statutory Guidance for Enforcement Authorities and the National Trading Standards Guidance for Enforcement of Sales and Letting Businesses. In appropriate circumstances consideration will be given to informal action such as warning letters or advice, in an effort to secure compliance, in accordance with our Enforcement Policy.

4 Consequential Amendments brought about by the TFA 2019

4.1 Additionally, the TFA 2019 amends the legislation referred to in paragraph 1 above and which separately provides that penalties may be imposed as follows:

- a. In respect of a failure of Letting Agents to publicise their fees and alongside those fees, details of Client Money Protection and Redress Scheme membership as required by S83(3), (6) and (7) of the CRA 2015 a financial penalty not exceeding £5,000.
- b. In respect of a failure by a property agent who holds client money to belong to an approved or designated Client Money Protection (“CMP”) Scheme as required by Regulation 3 of the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019, a financial penalty not exceeding £30,000.
- c. In respect of a failure to obtain a certificate confirming membership or display that certificate as required or publish a copy of that certificate on the relevant website (where one exists) or produce a copy of the certificate free of charge to any person reasonably requiring it as required by Regulation 4(1) of the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 a financial penalty not exceeding £5,000.
- d. In respect of a failure by a property agent to notify any client within 14 days of a change in the details of an underwriter to the CMP scheme or that the membership of the CMP scheme has been revoked as required by Regulation 4(2) of the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 a financial penalty not exceeding £5,000.

5 Determining the level of the financial penalty

5.1 In accordance with the provisions of the TFA 2019 the level of financial penalties is to be determined by the Council. Although the statutory guidance recommends factors which may be taken into account it does not go into any significant level of detail in this regard. Each of those factors will be considered as a part of the Council's decision-making process and they are:

- a. The history of compliance/non-compliance
- b. The severity of the breach
- c. Deliberate concealment of the activity and/or evidence
- d. Knowingly or recklessly supplying false or misleading evidence
- e. The intent of the landlord/agent, individual and/or corporate body
- f. The attitude of the landlord/agent
- g. The deterrent effect of a prosecution on the landlord/agent and others
- h. The extent of financial gain as a result of the breach

5.2 Although the Council has therefore a wide discretion in determining the appropriate level of financial penalty in any particular case, regard has been given to the statutory guidance when making this policy.

5.3 Appendix 1 of this policy contains the processes that the Council will use in order to determine the level of financial penalty under the TFA 2019. All stages subsequent to the issue of a Notice of Intent are subject to statutory time limits and the impact of the exercise by the Landlord or Agent of the Appeal process.

Appendix 1 – The Council’s process for determining the level of penalty to set

STEP ONE – Determining the offence category

The council will determine the breach category using only the culpability and category of harm factors below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment. The Council may also apply a discretionary factor in order to reflect consistency across England and may consider decisions in other UK jurisdictions where they contain some relevant and persuasive content.

Culpability

Very high: Where the Landlord or Agent intentionally breached, or flagrantly disregarded, the law or has/had a high public profile¹ and knew their actions were unlawful

High: Actual foresight of, or wilful blindness to, risk of a breach but risk nevertheless taken

Medium: Breach committed through act or omission which a person exercising reasonable care would not commit

Low: Breach committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on the relevant occasion
- there was not warning/circumstance indicating a risk
- failings were minor and occurred as an isolated incident

Harm

The following factors relate to both actual harm and risk of harm. Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Category 1 – High Likelihood of Harm

- Serious adverse effect(s) in individual(s) and/or having a widespread impact due to the nature and/or scale of the Landlord’s or Agent’s business
- High risk of an adverse effect on individual(s) – including where persons are vulnerable²

Category 2 – Medium Likelihood of Harm

- Adverse effect on individual(s) (not amounting to Category 1)
- Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect.

¹ Which may include any significant role in a trade or business representative organisation

² A wide definition of vulnerability will be used. See Appendix 2 for a non-exhausted list

- Tenants and/or legitimate landlords or agents substantially undermined by the conduct.
- The Council's work as a regulator is inhibited
- Tenant or prospective tenant misled

Category 3 – Low Likelihood of Harm

- Low risk of an adverse effect on actual or prospective tenants.
- Public misled but little or no risk of actual adverse effect on individual(s)

We will define harm widely and victims may suffer financial loss, damage to health or psychological distress (especially vulnerable cases). There are gradations of harm within all of these categories.

The nature of harm will depend on personal characteristics and circumstances of the victim and the assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime of the victim.

In some cases, no actual harm may have resulted and the enforcement authority will be concerned with assessing the relative dangerousness of the offender's conduct; it will consider the likelihood of harm occurring and the gravity of the harm that could have resulted.

To the community

Some offences cause harm to the community at large (instead of or as well as to an individual victim) and may include economic loss, harm to public health, or interference with the administration of justice.

STEP TWO – Starting point and category range

Having determined the category that the breach falls into, the Council will refer to the following starting points to reach an appropriate level of civil penalty within the category range. The Council will then consider further adjustment within the category range for aggravating and mitigating features.

Obtaining financial information

The statutory guidance advises that local authorities should use their powers under Schedule 5 to the CRA 2015 to, as far as possible, assess a Landlord's or Agent's assets and any income (not just rental or fee income) they receive when determining an appropriate penalty. The Council will use such lawful means as are at its disposal to identify where assets might be found.

In setting a financial penalty, the Council may conclude that the Landlord or Agent is able to pay any financial penalty imposed unless the Council has obtained, or the Landlord or Agent has supplied, any financial information to the contrary. The subject of a Final Notice, or a Notice of Intent where the subject does not challenge it, will be expected to disclose to the Council such data relevant to his/her financial

position to facilitate an assessment of what that person can reasonably afford to pay. Where the Council is not satisfied that it has been given sufficient reliable information, the Council will be entitled to draw reasonable inferences as to the person's means from evidence it has received, or obtained through its own enquiries, and from all the circumstances of the case which may include the inference that the person can pay any financial penalty.

Starting points and ranges

The tables in Appendices 4-10 below give the starting points, minimum and maximum financial penalties of each harm category and level of culpability for each type of breach.

- Appendix 4 First breach in respect of a Prohibited Payment
- Appendix 5 Second & subsequent breach in respect or a Prohibited Payment
- Appendix 6 Breach of requirements to publish Fees and details of Client Money Protections and Redress Scheme memberships
- Appendix 7 Breach in respect of membership of a Client Money Protection Scheme
- Appendix 8 Brach in respect of certificates in respect of a Client Money Protection Scheme
- Appendix 9 Breach of transparency requirements in respect of a Client Money Protection Scheme

Context

Below is a list of some, but not all factual elements that provide the context of the breach and factors relating to the Landlord or Agent. The Council will identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In particular, relevant recent convictions³ are likely to result in a substantial upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range which will not exceed the statutory maximum permitted in any case.

Factors increasing seriousness

Aggravating factors:

- Previous breaches of the TFA 2019
- Previous convictions, having regard to:
 - the nature of the offence to which the conviction relates and its relevance to the current breach; and,
 - the time that has elapsed since the conviction:

³ See Appendix 3 for a list of relevant convictions

Other aggravating factors may include:

- Motivated by financial gain
- Deliberate concealment of illegal nature of activity
- Established evidence of wider/community impact
- Obstruction of the investigation
- Record of poor compliance
- Refusal of advice or training or to become a member of an Accreditation scheme

Factors reducing seriousness or reflecting personal mitigation

- No previous or no relevant/recent breaches
- No previous convictions or no relevant/recent convictions
- Steps voluntarily taken to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good record of relationship with tenants
- Self-reporting, co-operation and acceptance of responsibility
- Good character and/or exemplary conduct
- Mental disorder or learning disability, where linked to the commission of the breach
- Serious medical conditions requiring urgent, intensive or long-term treatment and supported by medical evidence

STEP THREE – General principles to consider in setting a penalty

The Council will finalise the appropriate level of penalty so that it reflects the seriousness of the offence and the Council must take into account the financial circumstances of the Landlord or Agent if representations are made by the Landlord or Agent following the issue of a Notice of Intent.

The level of financial penalty should reflect the extent to which the conduct fell below the required standard. The financial penalty should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the breach; it should not be cheaper to breach than to take the appropriate precautions and a fundamental principle involved is that there should be no financial gain to the perpetrator from the commission of the breaches.

If issuing a financial penalty for more than one breach, or where the offender has already been issued with a financial penalty, the Council will consider whether the total penalties are just and proportionate to the offending behaviour and will have regard to the factors in STEP EIGHT below.

STEP FOUR – Issue Notice of Intent

The Council will issue a Notice of Intent within 6 months of the enforcement authority for having sufficient evidence that the Landlord or Agent has breached the TFA 2019. If the breach is ongoing the 6-month deadline continues until the breach ceases. A Notice of Intent can be served spontaneously.

While there are slight variations in the Statutory Requirements according to which breach is being addressed a Notice of Intent will typically contain the date of the Notice, the amount of the proposed penalty, the reason for imposing the penalty and how the recipient can make representations concerning the penalty.

Examples of Notices of Intent may be found in the National Trading Standards Guidance.

STEP FIVE – Consideration of representations and review of financial penalty where appropriate

On consideration of representations, the Council should review the penalty and, if necessary adjust the initial amount reached at STEP FOUR, and represented in the Notice of Intent, to ensure that it fulfils the general principles set out below.

Any quantifiable economic benefit(s) derived from the breach, including through avoided costs or operating savings, should normally be added to the total financial penalty arrived at in step two. Where this is not readily available, the Council may draw on information available from enforcing authorities and others about the general costs of operating within the law. Whether the penalty will have the effect of putting the offender out of business will be relevant but in some serious cases this might be an acceptable outcome.

STEP SIX – Reductions

The Council will consider any factors which indicate that a reduction in the penalty is appropriate and in so doing will have regard to the following factors relating to the wider impacts of the financial penalty on innocent third parties; such as (but not limited to):

- The impact of the financial penalty on the Landlord or Agent's ability to comply with the law or make restitution where appropriate
- The impact of the financial penalty on employment of staff, service users, customers and the local economy.

The following factors will be considered in setting the level of reduction. When deciding on any reduction in a financial penalty, consideration will be given to:

- The stage in the investigation of thereafter when the offender accepted liability
- The circumstances in which they admitted liability
- The degree of co-operation with the investigation

The maximum level of reduction in a penalty for an admission of liability will be one-third. In some circumstances there will be a reduced or no level of discount. This may occur for example where the evidence of the breach is overwhelming or there is a pattern or breaching conduct.

Any reduction should not result in a penalty which is less than the amount of gain from the commission of the breach itself.

STEP SEVEN – Additional actions

In all cases the Council must consider whether to take additional action. This may include further enforcement action itself or reference to other organisations where appropriate.

STEP EIGHT – Totality of breaching conduct

Where the offender is issued with more than one financial penalty, the Council should consider the following guidance from the definitive guideline on Offences Taken into Consideration and Totality which appears to the Council to be an appropriate reference and guide.

As the total financial penalty is inevitably cumulative the Council should determine the financial penalty for each individual breach based on the seriousness of the breach and taking into account the circumstances of the case including the financial circumstances of the Landlord or Agent so far as they are known, or appear, to the Council.

The Council should add up the financial penalties for each offence and consider if they are just and proportionate. If the aggregate total is not just and proportionate the Council should consider how to reach a just and proportionate total financial penalty. There are a number of ways in which this can be achieved.

For example:

Where a Landlord or Agent is to be penalised for two or more breaches of where there are multiple breaches of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious breach a financial penalty which reflects the totality of the conduct where this can be achieved within the maximum penalty for that breach. No separate penalty should be imposed for the other breaches. Where a Landlord or Agent is to be penalised for two or more breaches that arose out of different incidents, it will often be appropriate to impose separate financial penalties for each breach. The Council should add up the financial penalties for each breach and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the Council should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be imposed. Where separate financial penalties are passed, the Council must take care to ensure that there is no double-counting.

STEP NINE – Recording the decision

The officer making a decision about a financial penalty will record their decision giving reasons for coming to the amount of financial penalty that will be imposed.

Appendix 2 – Non-exhaustive list of vulnerable people

Young adults and children

Persons vulnerable by virtue of age

Persons vulnerable by virtue of disability or sensory impairment

People on a low income

Persons with a drug or alcohol addiction

Victims of domestic abuse

Children in care or otherwise vulnerable by virtue of age

People with complex health conditions

People exploited where English is not their first language

Victims of trafficking of sexual exploitation

Refugees of Asylum seekers

People at risk of harassment or eviction

People at risk of homelessness.

Appendix 3 – Non-exhaustive list of relevant offences/breaches

Housing law or landlord and tenant related offences under:

- The Public Health Acts of 1936 and 1961
- The Building Act 1984
- The Environmental Protection Act 1990
- The Town and Country Planning Act 1990
- The Prevention of Damage by Pests Act 1949
- The Protection from Eviction Act 1977
- The Local Government (Miscellaneous Provisions) Acts of 1982 and 1976
- The Housing Grants, Construction and Regeneration Act 1996
- The Local Government and Housing Act 1989
- The Housing Act 2004

Offences involving fraud

Offences in which the victim has been deprived of money, property or other benefit by misrepresentation/deception on the part of the offender including:

- Theft
- Burglary
- Fraud
- Benefit fraud (particularly where tenants are in receipt of Housing Benefit)
- Conspiracy to defraud
- Obtaining money or property by deception
- People trafficking
- Being struck off as a company director

Offences involving violence

A conviction for the offence of:

- Murder
- Manslaughter
- Arson
- Malicious wounding or grievous bodily harm
- Grievous bodily harm with intent
- Actual bodily harm
- Robbery
- Criminal damage where the intent was to intimidate or was racially aggravated
- Common assault
- Common assault which is racially aggravated
- Assault occasioning actual bodily harm
- Possession of an offensive weapon
- Possession of a firearm

Offences involving drugs

- Consideration should be given to the nature of the offence and what bearing it could have on the Landlord or Agent's business activities. The nature, quantity, purity and class of drugs should be taken into account. In addition, where an offence of possession with intent to supply is involved regard should be had to the role and importance of the subject in the supply chain.

Offences involving sexual offences

- An offence contained in Schedule 3 of the Sexual Offences Act 2003.

Unlawful discrimination

- Unlawful discrimination can include findings of an Industrial Tribunal on unlawful employment practice such as discrimination under the Disability Discrimination Act. Consideration should be given to the nature of the unlawful discrimination and what bearing it could have on the management of a licensable property.

Other offences

- Modern Slavery/Human Trafficking
- Offences by persons for the purpose of exploitation but not considered to be the primary offender (for example involvement in the recruitment, transportation, transfer, harbouring or receipt of persons) are likely to attach a lower level of culpability.

Appendix 4 – Financial Penalty in the case of a first breach in respect of Prohibited Payments

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £5,000

	Starting Point (£)	Min (£)	Range Max (£)
Low culpability			
Harm category 3	1250	250	2250
Harm category 2	1500	500	2500
Harm category 1	1750	750	2720
Medium culpability			
Harm category 3	2000	1000	3000
Harm category 2	2250	1250	3250
Harm category 1	2500	1500	3500
High culpability			
Harm category 3	2750	1750	3750
Harm category 2	3000	2000	4000
Harm category 1	3250	2250	4250
Very high culpability			
Harm category 3	3500	2500	4500
Harm category 2	3750	2750	4750
Harm category 1	4000	3000	5000

Appendix 5 – Financial Penalty in the case of a second or subsequent breach in respect of Prohibited Payments within 5 years of a previous breach

The table below gives the starting points, minimum and maximum financial penalties for each harm category and the level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £30,000

	Starting point (£)	Min (£)	Range Max (£)
Low culpability			
Harm category 3	3500	2000	8000
Harm category 2	6500	4000	10000
Harm category 1	8500	4500	15000
Medium culpability			
Harm category 3	6500	4750	17000
Harm category 2	10500	5000	20000
Harm category 1	12500	5500	22000
High culpability			
Harm category 3	10500	5500	20000
Harm category 2	15000	6250	24000
Harm category 1	18000	7000	26000
Very high culpability			
Harm category 3	15000	7000	24000
Harm category 2	17500	7250	28000
Harm category 1	20000	7500	30000

Appendix 6 – Financial Penalty in the case of a breach in respect of the publication of Fees or details of Client Money Protection and Redress Scheme memberships (Consumer Rights Act 2015 S.83)

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £5,000.

	Starting point (£)	Min (£)	Range Max (£)
Low culpability			
Harm category 3	1250	250	2250
Harm category 2	1500	500	2500
Harm category 1	1750	750	2750
Medium culpability			
Harm category 3	2000	1000	3000
Harm category 2	2250	1250	3250
Harm category 1	2500	1500	3500
High culpability			
Harm category 3	2750	1750	3750
Harm category 2	3000	2000	4000
Harm category 1	3250	2250	4250
Very high culpability			
Harm category 3	3500	2500	4500
Harm category 2	3750	2750	4750
Harm category 1	4000	3000	5000

Appendix 7 – Financial Penalty in the case of a breach in respect of a failure to obtain membership of a Client Money Protection Scheme

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £30,000.

	Starting point (£)	Min (£)	Range Max (£)
Low culpability			
Harm category 3	3500	2000	8000
Harm category 2	6500	4000	10000
Harm category 1	8500	4500	15000
Medium culpability			
Harm category 3	6500	4750	17000
Harm category 2	10500	5000	20000
Harm category 1	12500	5500	22000
High culpability			
Harm category 3	10500	5500	20000
Harm category 2	15000	6250	24000
Harm category 1	18000	7000	26000
Very high culpability			
Harm category 3	15000	7000	24000
Harm category 2	17500	7250	28000
Harm category 1	20000	7500	30000

Appendix 8 – Financial Penalty in the case of a breach in respect of issues relating to certificates of evidence of Membership of a Client Money Protection Scheme

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted level of £5,000.

	Starting point (£)	Min (£)	Range Max (£)
Low culpability			
Harm category 3	1250	250	2250
Harm category 2	1500	500	2500
Harm category 1	1750	750	2750
Medium culpability			
Harm category 3	2000	1000	3000
Harm category 2	2250	1250	3250
Harm category 1	2500	1500	3500
High culpability			
Harm category 3	2750	1750	3750
Harm category 2	3000	2000	4000
Harm category 1	3250	2250	4250
Very high culpability			
Harm category 3	3500	2500	4500
Harm category 2	3750	2750	4750
Harm category 1	4000	3000	5000

Appendix 9 – Financial Penalty in the case of a breach in respect of transparency issues relating to Membership of a Client Money Protection Scheme

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £5,000.

	Starting point (£)	Min (£)	Range Max (£)
Low culpability			
Harm category 3	1250	250	2250
Harm category 2	1500	500	2500
Harm category 1	1750	750	2750
Medium culpability			
Harm category 3	2000	1000	3000
Harm category 2	2250	1250	3250
Harm category 1	2500	1500	3500
High culpability			
Harm category 3	2750	1750	3750
Harm category 2	3000	2000	4000
Harm category 1	3250	2250	4250
Very high culpability			
Harm category 3	3500	2500	4500
Harm category 2	3750	2750	4750
Harm category 1	4000	3000	5000