Appeal numbers: PR/2018/0066. 0067, 0068, 0069

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PROFESSIONAL REGULATION)

WORLDWIDE TICKETS LIMITED **Appellants**
GARY HARVEY
ALAN GAMBIN
BLACK SYNC LIMITED

- and -

NORTH YORKSHIRE COUNTY COUNCIL **Respondent**

Before:
Judge Alison McKenna (CP)

Sitting in public at Havant Justice Centre on 19 March 2019
For the Appellants: Ben Douglas-Jones QC, instructed by Tuckers Solicitors
For the Respondent: Alison Lambert, Counsel, instructed by NYCC

Decision

1. These Appeals are allowed.
2. The four Final Notices are hereby quashed.

Reasons

A: Background

3. These appeals all concern "secondary ticketing", which is the re-sale of a ticket for a recreational, sporting or cultural event in the United Kingdom through a secondary ticketing website.

4. The Respondent, North Yorkshire County Council ("NYCC"), is a local weights and measures authority and so an enforcement authority for the purposes of sections 90 to 95 of the Consumer Rights Act 2015 ("the 2015 Act"). This is the legislation which regulates the terms on which the re-sale of tickets may take place.

5. The Respondent served a maximum £5,000 penalty on each of the Appellants for their breach of the relevant legal provisions, as shown in "test purchases" conducted in August 2017 by an officer of the Competition and Markets Authority. The Respondent served the Notices of Intent on the Appellants in July 2018 and served the Final Notices in September 2018. The Appellants exercised their right of appeal to this Tribunal.

6. The Appellants were represented by Ben Douglas-Jones QC and the Respondent by Alison Lambert, counsel. I am grateful to them both for their clear written and oral submissions. The four appeals were directed to be heard together. The Tribunal convened an oral hearing at Havant Justice Centre on 19 March 2019.

7. These four Appellants all accepted that they had breached the secondary ticketing rules in one way or another and gave the Respondent a variety of explanations[1]. However, they all challenged the imposition of the financial

[1] WWT – no seat number given; Gary Harvey – no row or seat number given; Alan Gambin – no seat number given and no information about restricted leg room given; Black Sync – no seat number given. There was a dispute between the parties about the meaning of a

penalties on procedural fairness grounds (ground one) and, in the alternative, submitted that the financial penalties imposed on them were too high in all the circumstances (ground three). By the time of the hearing, their ground two had been abandoned.

8. As these are the first secondary ticketing appeals to be heard by the Tribunal, I have attempted, without being prescriptive, to set out some useful considerations for enforcement authorities and appellants to bear in mind in any future cases.

B: The Legal Framework

9. The parts of the 2015 Act[2] which are relevant to these appeals provide as follows:

90 Duty to provide information about tickets

(1) This section applies where a person ("the seller") re-sells a ticket for a recreational, sporting or cultural event in the United Kingdom through a secondary ticketing facility.

(2) The seller and each operator of the facility must ensure that the person who buys the ticket ("the buyer") is given the information specified in subsection (3), where this is applicable to the ticket.

(3) That information is—

(a)where the ticket is for a particular seat or standing area at the venue for the event, the information necessary to enable the buyer to identify that seat or standing area,

(b)information about any restriction which limits use of the ticket to persons of a particular description, and

(c)the face value of the ticket.

(4) The reference in subsection (3)(a) to information necessary to enable the buyer to identify a seat or standing area at a venue includes, so far as applicable—

(a) the name of the area in the venue in which the seat or standing area is located (for example the name of the stand in which it is located),

(b)information necessary to enable the buyer to identify the part of the area in the venue in which the seat or standing area is located (for example the block of seats in which the seat is located),

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"restriction" under s. 90(3) (b) of the 2015 Act which I have not found necessary to determine, so I have not referred to alleged breaches of that nature here.

[2] http://www.legislation.gov.uk/ukpga/2015/15/contents

(c) the number, letter or other distinguishing mark of the row in which the seat is located,

(d)the number, letter or other distinguishing mark of the seat and

(e) any unique ticket number that may help the buyer to identify the seat or standing area or its location.

(5) The reference in subsection (3)(c) to the face value of the ticket is to the amount stated on the ticket as its price.

(6) The seller and each operator of the facility must ensure that the buyer is given the information specified in subsection (7), where the seller is—

(a) an operator of the secondary ticketing facility,

(b) a person who is a parent undertaking or a subsidiary undertaking in relation to an operator of the secondary ticketing facility,

(c) a person who is employed or engaged by an operator of the secondary ticketing facility,

(d) a person who is acting on behalf of a person within paragraph (c), or

(e) an organiser of the event or a person acting on behalf of an organiser of the event.

(7) That information is a statement that the seller of the ticket is a person within subsection (6) which specifies the ground on which the seller falls within that subsection.

(8) Information required by this section to be given to the buyer must be given—

(a) in a clear and comprehensible manner, and

(b) before the buyer is bound by the contract for the sale of the ticket.

(9) This section applies in relation to the re-sale of a ticket through a secondary ticketing facility only if the ticket is first offered for re-sale through the facility after the coming into force of this section.

93 Enforcement of this Chapter
(1) A local weights and measures authority in Great Britain may enforce the provisions of this Chapter in its area.

(2) The Department of Enterprise, Trade and Investment may enforce the provisions of this Chapter in Northern Ireland.

(3) Each of the bodies referred to in subsections (1) and (2) is an "enforcement authority" for the purposes of this Chapter.

(4) Where an enforcement authority is satisfied on the balance of probabilities that a person has breached a duty or prohibition imposed by this Chapter, the authority may impose a financial penalty on the person in respect of that breach.

(5) But in the case of a breach of a duty in section 90 or a prohibition in section 91 an enforcement authority may not impose a financial penalty on a person ("P") if the authority is satisfied on the balance of probabilities that—

(a) the breach was due to—

(i) a mistake,

(ii) reliance on information supplied to P by another person,

(iii) the act or default of another person,

(iv) an accident, or

(v) another cause beyond P's control, and

(b) P took all reasonable precautions and exercised all due diligence to avoid the breach.

(6) 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).

(7) A local weights and measures authority in Scotland may impose a penalty under this section in respect of a breach which occurs in Scotland but outside that authority's area (as well as in respect of a breach which occurs within that area).

(8) Only one penalty under this section may be imposed on the same person in respect of the same breach.

(9) The amount of a financial penalty imposed under this section—

(a) may be such as the enforcement authority imposing it determines, but

(b) must not exceed £5,000.

(10) Schedule 10 (procedure for and appeals against financial penalties) has effect.

(11) References in this section to this Chapter do not include section 94.

10. Schedule 10 to the 2015 Act sets out the procedure to be followed by a local weights and measures authority which wishes to impose a financial penalty and provides a right of appeal against a Final Notice as follows:

1. Notice of intent

(1) Before imposing a financial penalty on a person for a breach of a duty or prohibition imposed by Chapter 5 of Part 3, an enforcement authority must serve a notice on the person 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 person's breach, subject to sub-paragraph (3).

(3) If the person is in breach of the duty or prohibition 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.

2. Right to make representations

A person on whom a notice of intent is served may, within the period of 28 days beginning with the day after that on which the notice was sent, make written representations to the enforcement authority about the proposal to impose a financial penalty on the person.

3. Final notice

(1) After the end of the period mentioned in paragraph 2 the enforcement authority must—

(a) decide whether to impose a financial penalty on the person, 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 person, it must serve a notice on the person (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.

4. Withdrawal or amendment of notice

(1) The enforcement 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 person on whom the notice was served.

5. Appeals

(1) A person on whom a final notice is served may appeal against that notice—

(a) in England and Wales and Scotland, to the First-tier Tribunal;

(b) in Northern Ireland, to a county court.

(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) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(4) On an appeal under this paragraph the First-tier Tribunal or the court may quash, confirm or vary the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than £5,000.

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C: Evidence

11. The parties agreed a bundle of documentary evidence, which the Respondent prepared for the hearing. This consisted of one ring-binder of materials for each Appellant and a common "core bundle" of legislation and legal authorities. In total, the bundle ran to well over 1000 pages. I appreciated the production of a chronology, although it would have been even more useful if it had included references to the relevant page numbers in the hearing bundle.

12. Each ring-binder contained the key material for that Appellant, such as pleadings and witness evidence, but it also included voluminous schedules of that Appellant's historic re-selling activities. These were referred to in the Respondent's decision as to the level of financial penalty but, for the reasons I have given below (see paragraph 44), I am not persuaded that information about historic activities is relevant for the enforcement authority to consider in relation to the imposition of a penalty for a specified breach under s.93 CA 2015.

13. The Respondent also produced for the first time at the hearing itself the agenda for a meeting which took place between the Competition and Marketing Authority ("CMA") and National Trading Standards, on 19 July 2017, together with Nicola Pearson's notes from her attendance at that meeting. These documents were admitted into evidence with my permission, but clearly should have been served in advance of the hearing and included in the bundle.

14. The key documentary evidence for me to consider in these appeals is that which proves the particular qualifying transactions in relation to which the Notice of

Intent and Final Notice were served in each appeal. This information is located in each Appellant's file as follows:

WORLDWIDE TICKETS LIMITED: Final Notice dated 12 September 2018, in relation to a test purchase sale effected by CMA on 16 August 2017 (see pages 262 to 269 WWT file). Details of this test purchase are contained in Nicola Pearson's exhibits 5 to 9 to her witness statement, pages 17 to 39 of the WWT file.

GARY HARVEY: Final Notice dated 18 September 2018, in relation to a test purchase sale effected by CMA on 2 August 2017 (see pages 208 to 210 of the GH file). Details of the test purchase are contained in Nicola Pearson's exhibits 6 to 9 to her witness statement, pages 17 to 33 of the GH file.

ALAN GAMBIN: Final Notice dated 18 September 2018, in relation to a test purchase sale effected by CMA on 16 August 2017 (pages 106 to 109 of the AG file). Details of the test purchase are contained in Nicola Pearson's exhibits 6 to 9 to her witness statement, see pages 19 to 43 of the AG file.

BLACK SYNC LIMITED: Final Notice dated 21 September 2018, in relation to a test purchase sale effected by CMA on 16 August 2017 (see pages 182 to 184 of the BSL file). Details of the test purchase are contained in exhibits 7 to 10 of her witness statement, see pages 21 to 41 of the BSL file).

15. A number of witness statements were filed. Not all of them were strictly necessary. In the event, only two witnesses were required to attend the hearing for cross examination. These were the Respondent's witness Nicola Pearson, who attended in person, and the Respondent's witness Matthew O'Neill who appeared, with the Tribunal's permission, via a combination of skype and telephone. The only difficulty with taking his witness evidence in this way arose because he had not been provided with access to the hearing bundle. There is no problem with witnesses attending hearings remotely in future, provided they have the relevant documents in front of them, as they would if they were in the hearing room.

16. Nicola Pearson is a Divisional Officer employed by NYCC and works for the National Trading Standards e-Crime Team, which is hosted by NYCC. Her witness statements explain that the CMA has responsibility for enforcing consumer protection legislation but that it is not itself a local weights and measures authority for the purposes of the 2015 Act, so the enforcement in this case was brought by NYCC. She describes in her witness statement how, in July 2017, an officer from CMA had sent her a spreadsheet of information harvested from secondary ticketing platforms. In August 2017, CMA had sent her further information showing the top sellers on those platforms. These spreadsheets are referred to further below.

17. Ms Pearson's witness statement says that in the summer of 2017, following receipt of grant funding, she was engaged in putting together the necessary procedures for undertaking enforcement action in relation to the secondary ticketing provisions of the 2015 Act. This involved drafting policies, procedures, forms and guidance. She says she took external legal advice as part of that process. She states she became aware that the necessary "Justice Impact Test" had not been prepared so that the statutory appeal mechanism created by the 2015 Act had not yet been brought into effect and steps needed to be taken to rectify this.

18. Ms Pearson's witness statement states that on 8 February 2018, she served a formal request on CMA asking for "*details of test purchases undertaken by CMA on secondary ticketing platforms, including the seller details and any screenshots taken during the test purchases*". This request (produced in evidence)[3] was served by NYCC under paragraph 14 of schedule 5 to the 2015 Act, which provides that "*An enforcer or an officer of an enforcer may give notice to a person requiring the person to provide the enforcer with the information specified in the notice".*

19. Ms Pearson stated that she received the information she had thus requested on 16 February 2018 and that this was therefore the date on which NYCC had "sufficient evidence" of the breaches committed by the Appellants in these appeals to empower it to serve them with the Notices of Intent under paragraph 1 of Schedule 10 to the 2015 Act (see paragraph 10 above). Her evidence in chief was that, as the "sufficient evidence" was received in February 2018 and the Notices of Intent were served in July 2018, they fell within the six-month period imposed by paragraph 1(2) of Schedule 10.

20. Mr Douglas-Jones QC cross examined Ms Pearson on the basis that information in the possession of CMA was available to NYCC from July 2017 onwards because of their joint membership of the "Consumer Protection Partnership". She replied that she did not know about this arrangement as it pre-dated her taking up her post in June 2017.

21. Cross examined about the meeting with CMA in July 2017, Ms Pearson produced the agenda and her notes from that meeting[4]. She said there were no formal minutes of that meeting. She said her understanding at that time was that CMA's work would involve targeting the internet platforms on which tickets were sold, but that NYCC's role was to take enforcement action against the sellers. She said that NYCC had at that stage anticipated making its own test

[3] See, for example, the WWT file page 14

[4] She later produced a short additional witness statement exhibiting these.

purchases but that it had later decided to rely on CMA's test purchases for these cases.

22. Ms Pearson described how she was shown a spreadsheet of information at that meeting ("on a screen") but confirmed that it had later been sent to her by e mail. She said had not used her formal powers to request that information from CMA, and it had been shared with her voluntarily in July 2017. She said she was later sent another spreadsheet by CMA in August 2017, in respect of which she had also not used her formal information-gathering powers.

23. Ms Pearson produced extracts from the schedule sent to her by CMA and dated 31 August 2017. These included information about live listing breaches by Gary Harvey[5], Alan Gambin[6] and Black Sync Limited[7] as follows. The schedule sets out CMA's assessment that, at the time of inspection, 69% of Gary Harvey's live listings involved a seat number-related breach of the 2015 Act. The CMA's assessment for Alan Gambin was that 83% of his live listings were similarly non-compliant on one platform and 95% of those on another platform. The CMA's assessment for Black Sync Limited was that 68%, 73% and 87% of live listings were non-compliant for the three different platforms which had been investigated. Ms Pearson's evidence was that she had not at that time thought the information relevant, she said she had not given it much thought and that she had not discussed it with anyone else.

24. Mr Douglas Jones asked Ms Pearson in cross examination if there had been any communication between CMA and NYCC between July 2017 and February 2018 which had informed the wording of her formal request for information in February 2018. She initially answered no, then said that she didn't remember, and then said that she didn't know. Mr Douglas-Jones put to Ms Pearson in unequivocal terms that she was not being honest with the Tribunal in giving those answers. She replied that she honestly did not know. He put to her that NYCC had asked CMA not to share any more information about test purchases until it was ready to take enforcement action, and that the formal request for information was therefore a "device" to circumvent the six-month time limit for serving a Notice of Intent in relation to the test purchases which CMA had made in August 2017. Ms Pearson then agreed with him that this was the case. She accepted that she had received "sufficient evidence" to serve the Notices of Intent in the summer of 2017 but that she had not taken any action in respect of the information in her possession while she awaited the establishment of the formal enforcement and appeal procedures.

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[5] GH file page 13.

[6] AG file page 14.

[7] BSL file page 16.

25. I noted that Ms Lambert did not re-examine her witness about the allegation of untruthfulness. When I asked her about this, she said that I should regard it as her own error and not a reflection on Ms Pearson.

26. I asked Ms Pearson to explain the value of "test purchasing" as opposed to any other evidence of transactions which breached the 2015 Act. She helpfully explained that test purchasing is not the only way of evidencing a breach of the legislative provisions but that it is the optimum method because it creates an environment in which the entire transaction is controlled and evidenced, with screen shots taken at each stage. She thought that a member of the public purchasing a ticket from a secondary ticketing website would be unlikely to retain such evidence.

27. Matthew O'Neill is the Assistant Director of NYCC with responsibility for its trading standards work. He made the formal decisions to issue the Notices of Intent and Final Notices on the basis of the information provided to him by Ms Pearson. Giving his evidence by skype and phone, he appeared to be referring to some notes which had not been provided to the Appellants' legal team or the Tribunal, so he was asked not to use these. Cross examined by Mr Douglas-Jones, he was in some difficulty without having the hearing bundle in front of him. He frequently asked to defer to Ms Pearson's evidence (without of course knowing what she had said).

D: Submissions

28. In so far as Gary Harvey, Alan Gambin and Black Sync Limited were concerned, Mr Douglas-Jones' submission was that NYCC had "sufficient evidence" of their breaches by 31 August 2017 at the latest, because Ms Pearson then received the spreadsheets from CMA which included information about the test purchases which was later relied upon by NYCC to serve the Notices of Intent. In relation to World Wide Tickets Limited (and this submission was extended to the other Appellants in the alternative), it was submitted that the partnership between CMA, NYCC and National Trading Standards was such that NYCC should be understood to have had "sufficient evidence" of the test purchases on the day that they were conducted by CMA because they were conducted on behalf of and with the knowledge of all three statutory entities involved in the partnership.

29. Mr Douglas-Jones described Ms Pearson's evidence as "woefully unedifying". He submitted that there was clear evidence before the Tribunal that the enforcing authority had issued the Notices of Intent out of time because it had "sufficient evidence" of the breaches with which the Tribunal was concerned more than six months prior to the date of the Notices of Intent. He submitted that the wording of Ms Pearson's formal request to CMA in February 2018 demonstrated that she knew what she was asking for, and that her claim not to know whether any discussion had taken place between CMA and NYCC in the period from July

2017 to February 2018 was not credible in these circumstances. He described Ms Pearson as having affected a "Nelsonian blindness" in relation to the free-flow of information between CMA and NYCC prior to February 2018. He relied on her admission that NYCC had "sufficient evidence" to serve the Notices of Intent from its unprompted receipt of the schedules in the summer of 2017. He submitted that the admitted use of the statutory information request as a "device" to circumvent the statutory time limit should persuade the Tribunal to quash the Final Notices in these cases.

30. Counsel helpfully referred me to a number of authorities concerning breach of the time limits for commencing proceedings in a variety of contexts. There are as yet no decisions from the higher courts concerning the correct interpretation of the "sufficient evidence" test under the 2015 Act. The judgments which I found most useful were as follows. *R (Donnachie) v Cardiff Magistrates Court* [2007] 1 WLR 3085, in which the Administrative Court held that a body corporate can only act through its officials and hence it is the knowledge attributable to them which is relevant to the test of when a breach was "discovered" for the purposes of the body corporate taking action. In *RSPCA v Johnson* [2009] EWHC 2702 (Admin), Pill LJ commented that the prosecuting authority is not entitled to "pass papers from hand to hand" to delay the running of time. In *Tesco Stores Limited v London Borough of Harrow* [2003] EWHC 2919 (Admin), Newman J took the approach that "discovery" for the purposes of the legislation took place when all the facts relevant to found the relevant charge were disclosed to the appropriate officer. The judgment continues (at [26], [27] and [29]:

> *"Parliament can be taken to have intended that once the commission of an offence is disclosed there should be a duty on the prosecuting authority to investigate it.*
>
> *The relevant discovery is one which is most likely to give rise to investigation….*
>
> *…it may be worthwhile emphasising that the decision as to when time begins to run does not involve an investigation of the prosecutor's actions at the time, or forming a view as to the legitimacy of any judgment, if any, which the prosecuting authority might have made at that date. It cannot have been intended by Parliament, for example, that where a prosecuting authority makes no judgment with the facts as disclosed, the absence of a judgment can prevent time running".*

31. Ms Lambert responded to the Appellants' submissions on ground one by submitting that most of the information relied on by NYCC had been provided by CMA in response to the formal request in February 2018, and that Ms Pearson had not been in a position to know that test purchases had been made in relation to these Appellants at an earlier date. She submitted that the schedules

sent to Ms Pearson in the summer of 2017 did not contain evidence of specific test purchases in relation to these Appellants, so the Tribunal should find that NYCC did not have "sufficient evidence" to serve the Notices of Intent until February 2018.

32. In respect of the legal authorities, Ms Lambert submitted that the situation in these cases was very different from one of "passing the papers from hand to hand" because there was a good reason for CMA to be involved while the enforcement procedures at NYCC were being put into place.

33. In respect of ground three, Ms Lambert accepted in response to a question from the Tribunal that the historic transactions referred to in NYCC's decision logs ought not to be taken into account by the Tribunal when reaching its own decision as to the appropriate financial penalty for the specified breaches. Mr Douglas-Jones characterised this as a concession by the Respondent that the penalty decisions made in these cases were both unreasonable and wrong in law because they penalty decisions expressly had regard to historic transactions.

E: Conclusions

34. As noted above, paragraph 5 (2) of schedule 10 to the 2015 Act provides that the permissible grounds of appeal against a Final Notice are that the decision to impose a financial penalty was (a) based on an error of fact, (b) that the decision was wrong in law, (c) that the amount of the financial penalty is unreasonable, or (d) that the decision was unreasonable for any other reason.

35. The Appellants' cases all fell into the category of "(b) wrong in law" in respect of ground one, and (c) "financial penalty unreasonable" in relation to ground three. Both grounds might also be said to fall into the final category.

Ground One

36. Having considered this matter carefully, I am troubled by a number of issues. First, I am troubled that Ms Pearson received on behalf of NYCC clear evidence of 2015 Act breaches by named persons/companies in August 2017 but took no steps in relation to that evidence until the following February. I completely understand that NYCC was then engaged in the work necessary to establish procedures for imposing penalties under the 2015 Act, but it seems to me that, if it had decided not to serve Notices of Intent within six months of receiving the August 2017 schedule, it should have undertaken fresh test purchases before deciding how to proceed on the basis of its own evidence.

37. I am also troubled by NYCC's decision to use a "device" to seek to overcome the statutory bar to its proceeding in reliance on the evidence obtained by CMA in August 2017. Ms Pearson's evidence was that this was a deliberate ploy to circumvent the statutory time limit. Drawing an analogy with the situation

considered by the Administrative Court in the *Tesco Stores* case, I conclude that Ms Pearson, on behalf of NYCC, was in August 2017 given sufficient information to conclude that further investigation was required. Her decision to do nothing with the information she received about Gary Harvey, Alan Gambin and Black Sync Limited in August 2017 seems to me to fall into the category of cases referred to in *Tesco Stores*, where the absence of a judgement by the prosecuting authority was held not to stop time from running. If follows that I consider the Notices of Intent to have been served out of time in these three appeals.

38. In relation to Worldwide Tickets Limited, I accept that Ms Pearson did not receive specific information about this company in the schedule in August 2017. However, I accept Mr Douglas-Jones' submission that there was an informal free-flow of information between CMA and NYCC in 2017 and that the purpose of the formal information request made to CMA by NYCC in 2018 was to try and re-set the clock so as to be able to use CMA's test purchase evidence. The Worldwide Tickets appeal therefore seems to me to fall into a separate category, where there was a "passing papers from hand to hand" between the statutory authorities involved in the partnership. I reject Ms Lambert's submission that there was a good reason for this. Once again, this causes me to conclude that the Notice of Intent was filed out of time, because I am satisfied that CMA's information about the company's activities was available to NYCC informally long before it was formally requested.

39. This leads me to conclude that all four appeals should be allowed. It is of course unpalatable to allow appeals to succeed in circumstances where the Appellants admit that they breached the relevant statutory provisions. Nevertheless, Parliament clearly intended for there to be a time limit of six months only between an enforcement authority having sufficient evidence of a breach and the service of the Notice of Intent in respect of that breach. I conclude that NYCC had "sufficient evidence" as of August 2017 in respect of three Appellants as a result of the information served which should have prompted further action. In the fourth case, I find that NYCC had "sufficient evidence" by virtue of its informal access to information through the partnership. I do not accept that that sufficient evidence only became available to NYCC when it served the formal information request.

40. For all these reasons, I have concluded that these four appeals must be allowed. The Final Notices are hereby quashed.

Ground Three

41. Whilst my conclusion in relation to ground one is sufficient to dispose of these appeals, it may be helpful if I comment on the Respondent's approach to the calculation of the financial penalties in these appeals.

42. I note that the amount of a penalty is within the discretion of the Respondent and that £5,000 is the maximum penalty it can impose under s. 93 (9) of the 2015 Act.

43. Mr Douglas-Jones QC put to Ms Pearson and to Mr O'Neill in cross examination that the Respondent had mis-directed itself when calculating the penalty, by failing properly to address the Appellants' submissions made in response to the Notices of Intent. He suggested that the Respondent had rejected valid mitigating factors on the basis that they failing to disclose a defence. Without needing to reach a conclusion on that issue, I observe that the Respondent's acceptance or rejection of the matters raised by the Appellants' submissions could have been much clearer, and I suggest that there was also a need for clarity as to the weight placed on any accepted mitigating factors when setting the level of financial penalty.

44. I also note that the Respondent made express reference, when deciding to impose the maximum possible financial penalty on each of these Appellants, to their previous history of re-selling, as disclosed by the schedules to which I have referred above[8]. My understanding of the 2015 Act is that it permits an enforcement authority to impose one appropriate penalty for one specified breach of the duty imposed by s. 90 of the 2015 Act. I am not presently persuaded that there is power for it to "take into consideration" any other historic breaches, especially where these had not been notified to the person on whom the Notice of Intent was served. There had been no due process of fact-finding by NYCC in respect of those matters, and the information may of course have been disputed by the Appellants if they had been aware of it. I doubt that it would be ever be fair for an enforcement authority to set the level of a financial penalty with reference to undisclosed information, even if the statutory scheme did clearly permit them to have regard to the trader's history. NYCC's approach to setting the penalty level therefore appears to me to have been procedurally unfair.

45. Finally, when setting the level of a financial penalty in future cases, it may be helpful for enforcement authorities to consider the Upper Tribunal's guidance on the imposition of financial penalties under another part of the 2015 Act, namely in relation to the duties of letting agents. The relevant principles have been considered in only two cases so far: *London Borough of Camden v Foxtons Limited (Estate agents)* [2017] UKUT 349 (AAC)[9] and *M and M Europe Ltd v London Borough of Newham (Estate agents)* [2018] UKUT 271 (AAC)[10] but it may be useful to adopt an analogous approach.

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[8] See, for example, WWT file page 272.

[9] https://assets.publishing.service.gov.uk/media/59ba676ded915d1966a0f76b/MISC_0156_2017-00.pdf

[10] https://assets.publishing.service.gov.uk/media/5b8e6b3bed915d1eb703f882/GE_2787_2017-00.pdf

46. Mr Douglas-Jones indicated that he would be making a costs application under rule 10 of the Tribunal's Rules. I refer the parties to the Decision of the Upper Tribunal (Lands Chamber) in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC)[11], which sets out the principles I would apply in determining any such application.

(Signed) **Dated: 10 April 2019**

Judge Alison McKenna **Promulgation Date: 12 April 2019**

Chamber President

[11] https://www.bailii.org/uk/cases/UKUT/LC/2016/290.html