



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : **LON/00BE/HNA/2022/0011**

**HMCTS code
(paper, video,
audio)** : **Remote : Video**

Property : **Flat 1, 3, Councillor Street, London SE5
0LY.**

Appellant : **Foxtons Ltd.**

Representative : **Mr. N. Grundy KC**

Respondent : **The London Borough of Southwark**

Representative : **Mr. N. Ham of counsel**

Type of Application : **Appeal against a financial penalty –
section 8 of the Tenant Fees Act 2019**

Tribunal : **Tribunal Judge S.J. Walker
Tribunal Member Mrs. L. Crane MCIEH**

**Date and Venue of
Hearing** : **13 October 2022 – video hearing**

Date of Decision : **11 November 2022**

DECISIONS

The appeal against a final notice issued on 21 January 2022 pursuant to section 8 of the Tenant Fees Act 2019 (“the Act”) by the London Borough of Southwark imposing a financial penalty of £5,000 for a breach of section 2 of the Act is allowed. Pursuant to the Tribunal’s powers under paragraph 6(5) of Schedule 3 of the Act the final notice is quashed.

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are set out below, the contents of which were noted. The Tribunal's determination is set out below.

Reasons

Introduction

1. This is the Tribunal's decision in respect of an appeal made by the Appellant against the imposition of a financial penalty by the Respondent which was imposed under section 8 of the Tenant Fees Act 2019 ("the Act") for a breach of section 2(2) of the Act which prohibits a letting agent from requiring a relevant person to make a prohibited payment to a third party in connection with a tenancy of housing in England.
2. There was no dispute about the factual background to this case, which is set out below. The issues in the appeal were ones of law and it is necessary to set that out in some detail.

The Legal Background

3. The Act, which came into force on 1 June 2019, imposes a number of prohibitions on both landlords and letting agents. These are set out in sections 1 and 2 of the Act. Section 1 applies to landlords and section 2 to letting agents. Although the provisions in these sections are broadly similar, they are not identical and the differences have some relevance in this case, so the relevant parts of both are set out below;

"Section 1 - Prohibitions applying to landlords

- (1) *A landlord must not require a relevant person to make a prohibited payment to the landlord in connection with a tenancy of housing in England.*
- (2) *A landlord must not require a relevant person to make a prohibited payment to a third party in connection with a tenancy of housing in England.*
- (3)
- (4)
- (5)
- (6) *For the purposes of this section, a landlord requires a relevant person to make a payment, enter into a contract or make a loan in connection with a tenancy of housing in England if and only if the landlord—*
 - (a) *requires the person to do any of those things in consideration of the grant, renewal, continuance, variation, assignment, novation or termination of such a tenancy,*

- (b) *requires the person to do any of those things pursuant to a provision of a tenancy agreement relating to such a tenancy which requires or purports to require the person to do any of those things in the event of an act or default of a relevant person,*
- (c) *requires the person to do any of those things pursuant to a provision of a tenancy agreement relating to such a tenancy which requires or purports to require the person to do any of those things if the tenancy is varied, assigned, novated or terminated,*
- (d) *enters into a tenancy agreement relating to such a tenancy which requires or purports to require the person to do any of those things other than in the circumstances mentioned in paragraph (b) or (c),*
- (e) *requires the person to do any of those things—*
 - (i) *as a result of an act or default of a relevant person relating to such a tenancy or housing let under it, and*
 - (ii) *otherwise than pursuant to, or for the breach of, a provision of a tenancy agreement, or*
- (f) *requires the person to do any of those things in consideration of providing a reference in relation to that person in connection with the person’s occupation of housing in England*
- (7) *.....*
- (8) *.....*
- (9) *In this Act “relevant person” means—*
 - (a) *a tenant, or*
 - (b) *.....*
- (10) *.....*

Section 2 - Prohibitions applying to letting agents

- (1) *A letting agent must not require a relevant person to make a prohibited payment to the letting agent in connection with a tenancy of housing in England.*
- (2) *A letting agent must not require a relevant person to make a prohibited payment to a third party in connection with a tenancy of housing in England.*
- (3) *.....*
- (4) *.....*
- (5) *For the purposes of this section, a letting agent requires a relevant person to make a payment, enter into a contract or make a loan in connection with a tenancy of housing in England if and only if the letting agent—*
 - (a) *requires the person to do any of those things in consideration of arranging the grant, renewal, continuance, variation, assignment, novation or termination of such a tenancy,*
 - (b) *requires the person to do any of those things pursuant to a provision of an agreement with the person relating to such a tenancy which requires or purports to require the*

- person to do any of those things in the event of an act or default of a relevant person,*
- (c) *requires the person to do any of those things pursuant to a provision of an agreement with the person relating to such a tenancy which requires or purports to require the person to do any of those things if the tenancy is varied, assigned, novated or terminated,*
 - (d) *requires the person to do any of those things—*
 - (i) *as a result of an act or default of a relevant person relating to such a tenancy or housing let under it, and*
 - (ii) *otherwise than pursuant to, or for the breach of, an agreement entered into before the act or default, or*
 - (f) *requires the person to do any of those things in consideration of providing a reference in relation to that person in connection with the person's occupation of housing in England.*

.....

- 4. Section 3 of the Act provides that all payments are prohibited payments unless they are permitted by virtue of Schedule 1 of the Act.
- 5. By section 6 of the Act local weights and measures authorities – of which the Respondent is one - have a duty to enforce sections 1 and 2 of the Act.
- 6. By section 8 of the Act where an enforcement authority is satisfied beyond reasonable doubt that a person has breached sections 1 or 2 of the Act they may impose a financial penalty. Schedule 3 of the Act sets out the procedure which must be followed by an enforcing authority when imposing a financial penalty. Paragraph 6 of Schedule 3 of the Act gives a right to appeal to this Tribunal against both a decision to impose a penalty and the amount of that penalty. By paragraph 6(4) any appeal is a re-hearing of the authority's decision and by paragraph 6(5) on an appeal the Tribunal may quash, confirm or vary the notice imposing the penalty.
- 7. Section 30 of the Act makes a number of transitional provisions as follows;
 - (1) *Subject as follows, section 1 (prohibitions applying to landlords) does not apply to—*
 - (a) *a requirement imposed before the coming into force of that section, or*
 - (b) *a requirement imposed by or pursuant to a tenancy agreement entered into before the coming into force of that section.*
 - (2)
 - (3) *Subsections (5) and (6) apply in relation to a provision of a tenancy agreement entered into before the coming into force of section 1 if, had the agreement been entered into after that time,*

- that section would have applied in relation to the provision or a requirement imposed pursuant to it.*
- (4) Subsections (5) and (6) apply in relation to a provision of an agreement relating to a relevant statutory tenancy if, had the provision been included in a tenancy agreement entered into after the coming into force of section 1, that section would have applied in relation to that provision or a requirement imposed pursuant to it.*
 - (5) After the end of the period of one year beginning with the date on which section 1 comes into force, the provision ceases to be binding on the tenant or a relevant person in relation to the tenant (but the agreement continues, so far as practicable, to have effect in every other respect).*
 - (6) If, after the end of the period of one year beginning with the date on which section 1 comes into force—
 - (a) the landlord or a letting agent accepts a payment from a relevant person pursuant to the provision, and*
 - (b) the landlord or letting agent does not return the payment before the end of the period of 28 days beginning with the day on which it is accepted,*the landlord or letting agent is to be treated for the purposes of this Act as having required the relevant person to make a prohibited payment of that amount at that time.*
 - (7) Subject as follows, section 2 (prohibitions applying to letting agents) does not apply to—
 - (a) a requirement imposed before the coming into force of that section, or*
 - (b) a requirement imposed by or pursuant to an agreement between a letting agent and a relevant person entered into before the coming into force of that section.**
 - (8) Subsections (9) and (10) apply in relation to a provision of an agreement between a letting agent and a relevant person entered into before the coming into force of section 2 if, had the agreement been entered into after that time, that section would have applied in relation to the provision or a requirement imposed pursuant to it.*
 - (9) After the end of the period of one year beginning with the date on which section 2 comes into force, the provision ceases to be binding on the relevant person (but the agreement continues, so far as practicable, to have effect in every other respect).*
 - (10) If, after the end of the period of one year beginning with the date on which section 2 comes into force—
 - (a) the letting agent accepts a payment from the relevant person pursuant to the provision, and*
 - (b) the letting agent does not return the payment before the end of the period of 28 days beginning with the day on which it is accepted,*the letting agent is to be treated for the purposes of this Act as having required the relevant person to make a prohibited payment of that amount at that time.*

Background and Agreed Facts

8. On 14 May 2019 Lauren Parr and Alexander West (“the tenants”) entered into an assured shorthold tenancy agreement with their landlord, Mr. Pierre Mazieres, under which they agreed to let the property for a period of fixed term commencing on 1 June 2019 and ending on 31 May 2021.
9. Under the terms of that agreement the Appellant was appointed as an agent on behalf of the landlord, and they acted as such. The Appellant was not, though, a party to or signatory of that tenancy agreement.
10. Clause 14.1 of this agreement was a covenant by the tenants;
“To pay to the landlord or Agent the reasonable cost of the checking of the inventory at the end or sooner termination of the tenancy”
11. On 24 May 2021 one of the Appellant’s employees e-mailed the tenants in the following terms;
“With the end of your tenancy coming up, we will need to book a check out. As per your tenancy agreement you will need to pay for this, which is a cost of £150 including VAT. When you log in to your My Foxtons portal you will be able to do this”
12. The tenants responded by pointing out that such a fee was no longer enforceable because of the Act. The Appellant’s employee responded;
“As it is in your tenancy agreement we can propose that a Tenant pays for the fee (as it is a legally binding document) but you are correct that we cannot enforce that you pay the fee at all due to the fee ban”
13. No payment was in fact made by the tenants.
14. The tenants complained to the Respondent. On 17 November 2021, having decided that they were satisfied that the e-mail of 24 May 2021 was a requirement to make a prohibited payment which was contrary to section 2(2) of the Act, the Respondent issued a notice of intent to the Applicant stating that they intended to impose a financial penalty of £5,000 (the maximum possible).
15. On 14 December 2021 the Appellant made representations to the Respondent. Among other things they argued that the Appellant had not required the tenants to make a prohibited payment because they had not required a payment in consideration of the termination of the tenancy.
16. The Respondent reviewed those representations and rejected them. On 21 January 2022 they issued a final notice to the Appellant imposing a financial penalty of £5,000.
17. On 2 February 2022 the Appellant made further representations and invited the Respondent to withdraw the notice. These new

representations argued that the Appellant was protected by the transitional provisions in section 30 of the Act and also challenged the level of the penalty set.

18. The further representations were rejected by the Respondent and on 15 February 2022 the Appellant commenced this appeal.

The Hearing

19. Both parties were represented at the hearing, which was conducted by video. The Appellant was represented by Mr. N. Grundy KC and the Respondent by Mr. N. Ham. The Tribunal had before it the following;
 - (a) a bundle from the Respondent of 296 pages;
 - (b) a bundle from the Applicant of 138 pages;
 - (c) a reply from the Respondent of 8 pages;
 - (d) 7 pages of outline submissions from Mr. Ham; and
 - (e) a 21-page skeleton argument from Mr. Grundy
20. Much of the material before the Tribunal related to the issue of the amount of penalty that should be imposed. However, it was clear that the main issue was whether or not there had been a breach at all and that this issue raised complex legal questions. It was agreed that the Tribunal should consider the question of breach as a preliminary issue and that it was only necessary to hear argument about quantum if it was satisfied that a breach had indeed occurred.
21. The hearing proceeded on the basis of legal submissions only, based on the agreed facts set out above.

The Issues and the Tribunal's Conclusions

22. A number of matters were not in dispute. There was no issue that the Appellant is a letting agent and no issue that the tenants are relevant persons for the purposes of the Act. There was also no dispute that the payment requested on 24 May 2021 was not one which fell within the scope of Schedule 1 of the Act and so it was a prohibited payment.
23. The Appellant's primary argument was that the demand that was made was protected by the transitional provisions. The basis of their argument was that the tenancy agreement had been entered into before the Act came into force and that, as no payment had actually been made, the protection provided by section 30(7) remained in place notwithstanding the fact that the demand was made more than 12 months after the Act came into force.
24. Their argument was that the transitional provisions worked as follows. Section 30(7) disapplied section 2 of the Act from two categories of requirements. Those in section 30(7)(a) were requirements imposed by any means, provided they were made before the Act came into force, and those in section 30(7)(b) were those requirements imposed by or pursuant to an agreement with the tenant which was entered into before the coming into force of the Act. For these it was immaterial

when the requirement was made, provided the agreement was made before the Act came into force.

25. The protection under section 30(7)(b) was, however, also subject to the further provision in section 30(10). Under that, notwithstanding section 30(7), once a year has passed since the Act came into force, a letting agent is deemed to have required a prohibited payment if a payment is both accepted and not returned within 28 days. The Appellant's case was that section 30(10) did not apply because no payment was actually made, so the protection under section 30(7) remained.
26. The Respondent's first response to this, which was advanced by Mr. Ham in his oral submissions, was that section 30(7) only applied to requirements which were imposed before the Act came into force. His argument was that section 30(7)(a) applied to requirements made otherwise than in an agreement – eg a demand for key money – and section 30(7)(b) applied to requirements which were imposed by or pursuant to an agreement but only if both the agreement and the requirement were made before the Act came into force.
27. The Tribunal rejected that argument. If Mr. Ham's argument were correct, then section 30(7)(b) would be redundant as all requirements made under it would also fall within section 30(7)(a). As all requirements imposed before the Act fall within section 30(7)(a) it must be the case that section 30(7)(b) applies to a category of requirements made after commencement.
28. Mr. Ham's second argument was based on the wording of section 30(7)(b). This only exempted those requirements imposed by or pursuant to "*an agreement between a letting agent and a relevant person*". In this case the requirement was made pursuant to the tenancy agreement between the landlord and the tenants to which the Appellant was not a party. The requirement was not, therefore, one imposed by or pursuant to an agreement between a letting agent and a relevant person so section 30(7)(b) simply did not apply.
29. On the face of it this is a strong argument as it was clear to the Tribunal that the Appellant had not entered into any agreement with the tenants.
30. However, on careful consideration of the whole of section 30 this would appear to have an anomalous effect. Sections 30(1) to 30(6) deal with the transitional effect of section 1, which imposes prohibitions on landlords rather than letting agents. Although the provisions are similar to those in sections 30(7) to 30(10) they are not the same. Section 30(1) exempts section 1 from two categories of demand and there is a similar reduction of protection after a year in section 30(6). However, there is a crucial difference in the wording of section 30(1)(b). This applies to;
"a requirement imposed by or pursuant to a tenancy agreement entered into before the coming into force of that section"

31. The demand for payment in this case was made pursuant to clause 14.1 of the tenancy agreement, which was made before the Act came into force. Therefore, if the requirement to pay had been made by the landlord rather than the letting agent, the transitional protection would be in place.
32. In the view of the Tribunal, it would be very strange for the legislation to provide greater transitional relief for a landlord as opposed to a letting agent in otherwise similar circumstances.
33. The Tribunal therefore explored with the parties the wording of the central parts of the Act in more detail so as to ascertain whether this apparent anomaly could be explained.
34. The Tribunal noted that a similar distinction between tenancy agreements and agreements with letting agents appeared in sections 1 and 2.
35. Sections 1 and 2 of the Act work in the same way. They both prohibit the making of requirements to make payments in connection with a tenancy of housing. In order to amount to a breach of the Act the payment sought must meet two requirements. Firstly, it must be a payment "*in connection with a tenancy of housing*" and secondly it must be a prohibited payment. If the payment does not fall within Schedule 1 then it is prohibited. There is no doubt that the payment in this case was prohibited.
36. However, there still remains the requirement for the payment to be made in connection with a tenancy of housing. What is meant by such a payment is expressly defined in the Act. For landlords, the definition is in section 1(6), and for letting agents it is in section 2(5). If, and only if, the requirement that is made falls within section 1(6) or section 2(5) will there be a breach, regardless of whether the payment is prohibited or not.
37. Sections 1(6)(a) and 1(6)(b) both refer to requirements to do things "*pursuant to a provision of a tenancy agreement*" whereas the corresponding provisions applying to letting agents, sections 2(5)(b) and 2(5)(c), only apply if a letting agent requires things to be done "*pursuant to a provision of an agreement relating to such a tenancy*". This appears to maintain the distinction found in the transitional arrangements between tenancy agreements (in the case of landlords) and agreements with the letting agent.
38. Given this, the Tribunal invited submissions on the actual extent of section 2(5) and whether, irrespective of the transitional arrangements, the requirement imposed in this case was one which fell within the scope of section 2 at all.

39. Section 2(5) makes it clear that a letting agent only requires a person to make a payment if, and only if, the letting agent does something which falls within any of sub-sections (a) to (e). The Tribunal reminded itself that a financial penalty could only be made if it was satisfied beyond reasonable doubt that a prohibited payment had been required and so invited Mr. Ham to explain which of subsections 2(5)(a) to (e) applied in this case.
40. Mr. Ham argued that the request in this case fell within section 2(5)(a). This applies if the letting agent;
“requires the person to do any of those things in consideration of arranging the grant, renewal, continuance, variation, assignment, novation or termination of such a tenancy”
His case was that the payment of the inventory fee was in consideration of arranging for the termination of the tenancy. Mr. Grundy argued that this section could not apply because there was no consideration – the point that had been made in the Appellant’s original representations - and that, in any event, the payment was not for the arrangement of the termination of the tenancy.
41. The Tribunal preferred Mr. Grundy’s arguments. In its view the payment was not required in return for arranging the termination of the tenancy. The obligation in clause 14.1 of the lease was created when the lease was entered into, and the tenants’ promise to pay the inventory fee was made in consideration of the creation of the tenancy. The money demanded was not in consideration of anything, it was a demand made pursuant to an existing agreement.
42. In addition, the Tribunal bore in mind that this was a tenancy which came to an end by effluxion of time – this is made clear by the e-mail demand made on 24 May 2021. The tenancy was granted for a fixed term which ended on 31 May 2021 (see page 29 of the Respondent’s bundle) and the e-mail demand stated *“with the end of your tenancy coming up”*. It followed that nothing further needed to be done to end the tenancy and so the payment cannot be regarded as consideration for ending the tenancy.
43. Mr. Ham argued that the word “arranging” in section 2(5)(a) had a very broad meaning and that arranging for the termination of a tenancy could include doing things connected with bringing the tenancy to an end, such as conducting an inventory. The Tribunal rejected that argument. It considered the parallel provisions in section 1(6)(a) which apply to landlords, where the requirement is one made in consideration of the grant, renewal, termination etc. of a tenancy. In its view both provisions relate to the bringing about of a new state of affairs between the landlord and the tenant, whether this be the creation of a new tenancy, or changes to an existing tenancy, including its termination. The different wording in the section 1 and section 2 provisions is necessary because a letting agent cannot itself grant, vary or terminate a tenancy, but it can arrange with the landlord for that to happen.

44. In the Tribunal's view the scope of section 2(5)(a) is limited to the bringing about of a new or changed contractual relationship between the landlord and the tenant, it is not concerned with demands requiring existing contractual arrangements to be met.
45. The Tribunal considered whether any of the other sub-paragraphs applied in this case. As previously identified, both sections 2(5)(b) and 2(5)(c) only apply to requirements made pursuant to a provision in an agreement relating to a tenancy. In the view of the Tribunal this must be an agreement with the letting agent, which therefore does not include this tenancy agreement.
46. This interpretation makes sense of the apparent anomaly in the transitional arrangements. Sections 1(6)(b) and (c) apply to demands made pursuant to a provision of a tenancy agreement. To give transitional protection from section 1 it is, therefore, necessary to refer in section 30(1) to demands made pursuant to a tenancy agreement, which is what it does.
47. If sections 2(5)(b) and (c) only apply to requirements made pursuant to an agreement with the letting agent, then the protection provided under the transitional arrangements needs only to apply to agreements with the letting agent, which is what is found in section 30(7). The letting agent does not need transitional protection if it demands a payment pursuant to a term in a tenancy agreement to which it is not a party, as such a demand does not fall within the scope of sections 2(5)(b) or (c) in any event.
48. The Tribunal concluded that section 2(5)(d) did not apply in this case as this only applies to demands made in respect of acts or defaults "*otherwise than pursuant to, or for the breach of, an agreement entered into before the act or default*". Even if the taking of an inventory were an act or default to which the requirement to pay related, the right to payment arose in the tenancy agreement, which was entered into well before.
49. Section 2(5)(e) clearly does not apply as it relates to the provision of references.
50. In the course of his submissions Mr. Ham also drew attention to section 2(6) of the Act which excludes from the scope of section 2 requirements to make payments if the letting agent gives the person the option of making such a payment as an alternative to complying with another requirement imposed by the agent. He argued that this exemption did not apply in this case as no such alternative was put forward. The Tribunal agreed with that part of his analysis.
51. Having considered the arguments the Tribunal concluded that it was not satisfied that a breach of section 2 of the Act had occurred. The demand for the payment of a fee for conducting an inventory did not fall within any of the categories set out in section 2(5) of the Act and so

the Appellant cannot be treated, for the purposes of the Act, as having required a relevant person to make a payment in connection with a tenancy of housing.

52. That being so, there was no need for the Appellant to rely on the transitional provisions in section 30 which, in any event, would not have applied because of the limited scope of section 30(7) identified above.
53. There was, therefore, no basis for imposing a financial penalty and so the Tribunal quashed the final notice made by the Respondent on 21 January 2022.

Name: Tribunal Judge S.J.
Walker

Date: 11 November 2022

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.
- If a party wishes to appeal against this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
- The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.