IN THE MATTER OF THE TENANT FEES ACT 2019

ON THE INSTRUCTION OF DUTTON GREGORY SOLICITORS

OPINION

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1. I am instructed by Dutton Gregory Solicitors who in turn act for the Association of Residential Lettings Agents ("ARLA"). I am asked to provide an opinion in relation the Tenant Fees Act 2019 (the 'Act'). The Act applies to all assured shorthold tenancies, tenancies of student accommodation and licences to occupy housing in the private rented sector in England; it came into force on 1st June 2019.

2. The scope of the opinion sought is set out in my instructions dated 26th June 2019. I am asked to advise if fees/commissions charged by letting agents to their client landlords for services such as arranging repairs are recoverable as damages from tenants as part of a landlord's overall damages claim against a defaulting tenant; or if such sums are prohibited payments and therefore not recoverable by virtue of the Act.

Illustration

3. To illustrate the issue, those who instruct me have provided a typical example of when such fees and commissions might be levied. The example envisages a toilet that has become blocked. By s.11 of the Landlord and Tenant Act 1985 a landlord is required to keep in repair and proper working order the installations in the dwelling house for the supply of water, gas, electricity, sanitation, space heating and heating

water; this includes ensuring that the toilet(s) function correctly.

4. The given scenario envisages that there is no dispute the tenant is at fault. It is also assumed that the tenancy agreement imposes on the tenant a covenant that has been breached thereby entitling the landlord to recover damages from the tenant.

5. A plumber is instructed to repair the toilet; the landlord instructs a letting agent to make the necessary arrangements. The plumber charges the landlord £x for the repair; the agent charges the landlord an additional percentage (say, 10% of £x) for its time/services. If the plumber's fee is £100, the agent adds 10% providing an overall bill to the landlord of £110 which is paid.

6. My instructions suggest that the agent simply adds 10% to the plumber's invoice. It is unclear to me on what basis it would be permissible for the agent to do so. I therefore assume the landlord enters into distinct contracts with the plumber and agent and each renders a separate invoice.

7. The landlord later claims £110 for breach of covenant from the tenant (either by a deduction from the security deposit or by bringing a claim). The question that arises is whether the 10% agent's fee/commission, which is ultimately paid by the tenant, is a prohibited payment under the Act.

Provisions of the Act

8. Sections 1 and 2 of the Act set out the general ban against requiring tenants to

make a prohibited payment. Neither a landlord nor a letting agent may require a relevant person to make a prohibited payment in connection with a tenancy of housing in England. The relevant parts are as follows:

S1 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) A landlord must not require a relevant person to enter into a contract with a third party in connection with a tenancy of housing in England if that contract is—

(a) a contract for the provision of a service, or

(b) a contract of insurance.

(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.

9. By s.1(9) a "relevant person" is a tenant or person acting on behalf of, or who has guaranteed the payment of rent by a tenant[1].

(9) In this Act "relevant person" means—

(a) a tenant, or

(b) subject to subsection (10), a person acting on behalf of, or who has guaranteed the payment of rent by, a tenant.

10. There are similar provisions in s.2 of the Act that apply to letting agents:

S2 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) A letting agent must not require a relevant person to enter into a contract with the agent or a third party in connection with a tenancy of housing in England if the contract is—

(a) a contract for the provision of a service, or

(b) a contract of insurance.

(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

[1] S.1(9) is qualified in it applicability by s.1(10), none of the exceptions listed in ss.(10) are relevant for the purposes of this advice.

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

(e) 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.

11. By s.3(1) of the Act a payment is a prohibited payment unless it is a permitted payment under Schedule 1.

3 Prohibited and permitted payments

(1) For the purposes of this Act a payment is a prohibited payment unless it is a permitted payment by virtue of Schedule 1.

12. By s.4(1) and (2) of the Act a term in a tenancy agreement that is in breach of s.1 or 2 is not binding on a relevant person.

4 Effect of a breach of section 1 or 2

(1) A term of a tenancy agreement which breaches section 1 is not binding on a relevant person.

(2) A term of an agreement between a letting agent and a relevant person which breaches section 2 is not binding on a relevant person.

(3) Where a term of an agreement is not binding on a relevant person as a result of this section, the agreement continues, so far as practicable, to have effect in

every other respect.

(4) If a relevant person makes a loan to a person pursuant to a requirement which breaches section 1(5) or 2(4), the loan is repayable by the borrower to the relevant person on demand.

13. The Act restricts substantially sums that a relevant person may be required to pay. It bans all fees and charges other than those that are expressly permitted. A fee that is not permitted, is a prohibited payment and not recoverable.

14. By paragraph 5 of Schedule 1 of the Act, a payment of damages for breach of a tenancy agreement or an agreement between a letting agent and a relevant person is a permitted payment.

5 A payment of damages for breach of a tenancy agreement or an agreement between a letting agent and a relevant person is a permitted payment.

Damages

15. The object of an award of compensatory damages for breach of contract is to place the claimant, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed. *Robinson v Harman* (1848) 1 Exch 850 and *Livingstone v Rawyards Coal Co*. (1880) 5 App. Cas. 25 @ 39 - per Blackburn LJ the measure of damages is:

"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

16. Damages may be for pecuniary or non-pecuniary loss. The former comprises all

financial and material loss incurred; the latter other losses such as physical pain or injury to feelings.

17. Not all losses sustained as a consequence of a breach are recoverable. There must be a sufficient nexus between the breach and the loss; the loss must be proximate to the breach, not too remote. The loss must be causally connected to the breach as well, if the loss was inevitable damages are not recoverable.

18. If these conditions are satisfied a defendant's liability for the loss is restricted to those losses which he ought reasonably have been contemplated at the time of the contract would be likely to flow from the breach - *Jackson and another v Royal Bank of Scotland* [2005] UKHL 3. A defendant is liable only for those losses as may fairly and reasonably be considered as arising naturally from the breach i.e. according to the usual course of things so that any claimant would be likely to suffer the loss in question - *Hadley v Blaxendale* (1854) 9 Exch 341. A defendant is also liable for such loss as may reasonably be supposed to have been in the contemplation of the parties, at the time of the contract, as a probable result of its breach.

19. Where a claimant is able to establish that he has suffered a loss that is in the contemplation of the parties at the time of the contract, it is a cardinal rule that he must take reasonable steps to mitigate his loss. He must refrain from unreasonable acts which could increase his loss and must take such positive steps to reduce his loss as are reasonable in the circumstances. The burden of proving a failure to mitigate is on the defendant.

20. Unfortunately, where damages are awarded, these will often not represent the claimant's actual loss, instead they will reflect what the law considers it just for him to recover. Damages are not generally recoverable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation caused by the breach even where it was in the contemplation of the parties that the breach would expose the parties to distress - *Watts v Morrow* [1991] 1 WLR 1421 per Bingham LJ

"A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."

21. This case is often cited in support of the principle that the inconvenience of having to deal with a breach of contract is not generally compensable.

The issue - opinion

22. Where a landlord instructs an agent to act on his behalf, that agent assumes the responsibility to discharge those functions it has contracted with the landlord to perform; an agency contract is entered into between landlord and agent wherein the precise terms of engagement are recorded and agreed.

23. Typically, there are three levels of service offered by letting agents to their landlords; (i) full management; (ii) tenant find and tenancy set-up only[2]; (iii) rent

[2] Sometimes this is divided into two services (i) tenant find; (ii) tenancy set-up.

collection only. It is not uncommon for agents to be instructed to provide a combination of services - for example tenant find and rent collection, the landlord assuming direct responsibility for day-to-day management. A landlord may initially instruct an agent to find a tenant and set up the tenancy and only later ask another agent to collect the rent or fully manage.

24. Invariably the fee charged for a full management service is higher than for other services. Typically, agency fees are paid by the landlord to the agent from rent and are not directly recoverable from the tenant[3]. Agency fees do not feature in Schedule 1 of the Act and would therefore be a prohibited payment if the landlord required a relevant person to pay them.

25. The precise wording of the agency agreement will always be relevant to determine the scope of the services provided; however, in my view, where a landlord opts for a fully managed service, arranging repairs will probably be included in the service provided by the agent. The agency fees are not a consequence of the breach as the landlord is contractually bound to pay them in any event. It follows that the landlord will have no additional costs and is unlikely sustain any damage in that respect as a consequence of the breach. The fee/commission is not recoverable.

26. Where the landlord assumes direct control of the day-to-day management of the tenancy the position is more complicated. Once the agent has fulfilled its remit - tenant found, rent collected etc - it has no further contractual duty to the landlord; it is

[3] Query however the extent to which some landlords may increase rents overall in order to cover the costs management fees - not a breach of the Act.

not obliged to arrange repairs or undertake any further management duties. It is often made clear to the tenant that s/he should contact the landlord directly if management issues arise.

27. In this scenario, the landlord has a choice. He may arrange the repairs himself – which is consistent with his intentions when he opted not to have a fully managed service. No agency fees/commission arise.

28. Alternatively, the landlord may instruct an agent to arrange the repairs. That agent might not be a letting agent – it could, for example, be the landlord's builder or the plumber. But suppose the landlord asks a letting agent to arrange the repairs, it seems to me in this scenario that the agent is being asked to perform an ad hoc management service for the landlord, particularly where the fee/commission for the service provided (as in the illustration) is distinct from the cost of the repair.

29. Schedule 1 of the Act very clearly defines those fees a relevant person may be required to pay – these do not include letting agency fees and so the additional fee/commission is not, on the face of it, recoverable.

30. In order to recover the fee/commission as damages the landlord will first need to demonstrate that there was a sufficient nexus between the breach and the need to instruct an agent. In my opinion a court may not accept that such a nexus exist if, at the commencement of the tenancy, the parties had contemplated that the landlord himself would be responsible for general management. As set out above, the loss must

be causally connected to the breach.

31. The landlord must also show that he has mitigated his loss. If he has not, his damages will be reduced and assessed at that level as if he had. With respect to the fee/commission my view is that a court may not accept that the landlord has mitigated his loss by instructing an agent to undertake a management task, that the landlord could perform himself, in circumstances where at the commencement of the tenancy the tenant had been given to understand that the landlord would self-manage. If so, damages will be reduced accordingly to exclude the fee.

32. If the landlord had required the tenant to pay the management fee/commission, and they are in the first instance paid by the tenant, but those fees are deemed not to be damages, the landlord and/or agent will be exposed to the risk of a penalty being imposed for breaching s.1(1) and (6)(b) and s.2(1) and (5)(b) of the Act.

33. Clearly, there will circumstances in which it is arguable that it was reasonable to instruct an agent. Suppose a landlord is not available when the repair is required - perhaps on holiday unable to return; or falls ill and can not make the arrangements. The repairs are urgently needed (suppose causation and therefore liability have not (yet) been determined or agreed), there are good reasons why landlord is unable to co-ordinate the repair. In such a scenario, instructing an agent may be the landlord's only real option. Arguably, it must have been in the reasonable contemplation of the parties at the commencement of the tenancy that, if the landlord was unable to manage the property himself, he would need to ensure someone acted on his behalf to

do so.

34. Whilst not instructed to advise specifically on this point, the position will probably be different if the landlord contracts directly with the letting agent for it to carry out the repairs. I am aware that some agents offer this service.

35. The agent is the repair contractor who must make the necessary arrangements as a precursor to executing the repair. In this way the agent is in the same position as a plumber instructed directly by the landlord. The landlord has merely instructed a contractor (albeit one that acts also as a letting agency) to undertake works of repair, a part of which necessarily involves making arrangements with the tenant for the repairs to be carried out. A single invoice is rendered by the agent for its service, the sum payable being the damages for breach.

36. For the avoidance of doubt, my opinion above does not mean that an agent may not charge a landlord for its services, merely that those charges, in most cases, may not be recovered as damages from a relevant person.

Caveat and overriding approach

37. I need to caveat my opinion by making clear that it is not possible to provide definitive advice on how the Act will be interpreted by the courts, this is my opinion of how the Act may apply provided in the absence of any decided cases. It is only once the rules introduced by this piece of legislation have been fully ventilated and argued in the higher courts that, over time, a clearer understanding of its applicability

will come about.

38. The Ministry of Housing Communities and Local Government has provided guidance (the 'Guidance[4]') on how the Act ought to be applied. The Guidance is not binding in law but, I suspect, will be persuasive on a court should interpretation of the Act be called into question. It is a reasonable assumption that a court will be sympathetic to a landlord or agent who has followed the Guidance yet finds its application of the Act subject to challenge.

39. A financial penalty of up to £5000 may be imposed for a breach. If a further breach is committed within five years of the imposition of a financial penalty or conviction for a previous breach, this will be a criminal offence which might lead to an unlimited fine. Alternatively, the enforcement authorities may impose a financial penalty of up to £30,000 as an alternative to prosecution.

40. It follows that there is substantial risk associated with implementing a policy which is be found to have breached the rules; the penalties are heavy. A cost/benefit analysis of the risks and rewards of seeking to recover agency fees/commissions should be undertaken. Fees/commission might be quite low relative to the penalty. If fees/commission were 10% of the repair costs, a penalty of £5000 would equate to management fees on £50,000 of repair work; and the fee is repayable.

41. My overriding advice therefore is that the Act should be construed conservatively

[4] Tenant Fees Act 2019: Guidance for landlords and agents. The Government has also provided guidance for tenants and local authorities.

with due regard given to the Guidance and a cautious approach taken to implementing its provisions. Once the Act has had time to 'bed-in', it may be necessary to review the position in the light of any court decisions.

Conclusion

42. Where a landlord instructs an agent on a full management basis, management fees are due irrespective of a breach of covenant; the costs of arranging repairs are not recoverable as damages from the tenant.

43. Where the landlord assumes responsibility for the day-to-day management of the tenancy, in my opinion the cost of instructing an agent will amount to an ad hoc management fee falling outside of the payments permitted under Schedule 1 of the Act.

44. To recover the fee as damages the landlord will need to show that it is a loss which is proximate to the breach - not too remote; and is a loss which was reasonably contemplated would flow from the breach at the time the contract was entered into.

45. Where it was contemplated at the outset that the landlord would self-manage, a court may reject the notion that the management fee was in the contemplation of the parties.

46. A court may regard the instruction of the agent as unnecessary where the landlord has opted to self-manage, particularly where the landlord has a duty to mitigate loss.

47. There may be circumstances when, for good reason, the landlord is unable to arrange repairs necessitating the instruction of an agent - in such circumstances the fee may be recoverable as damages.

48. The penalties for breaching the Act are severe. Serious consideration needs to be given to the risk that a penalty may be imposed in attempting to recover what will probably be relatively small amounts of money.

49. I trust the above is clear. Should those who instruct me have any questions arising out of my opinion herein, they should contact me in the normal way.

Erol Topal
Lamb Chambers
Temple/London
10th July 2019

ADDENDUM

2nd September 2019

1. In the light of the opinion I provided above, those who instruct me have reverted to me seeking clarification and my view on two further issues.

2. First, I am instructed that, whilst my assumption of the three tier charging system operated by letting agents is fairly accurate, even on a fully managed basis, agents will take a commission on repair/project work as it tends to be unforeseen and cannot be budgeted for at the start of a relationship with the landlord. Across the industry commission payments are therefore more prevalent than one might think. They are almost always covered in the terms of business signed by landlords at the outset.

3. My view in relation to this query is that, clearly, there is no difficulty with agents charging their landlords commissions/fees etc if provided for under the agency agreement; however I struggle to see why it should be permissible to charge the tenant too where there is a management agreement in place. I recognise that that might be what is actually happening, but it seems to me that agents charging both landlords and tenants fees for a single service is the type of activity that the Act was introduced to eradicate. I think there is a significant risk that if a tenant is charged, a court might deem those sums as additional fees and see through a landlord seeking to recover those fees/commissions from a tenant as damages. Regrettably, no one can quantify

how significant that risk might be given that the legislation has only been in force for 3 months or so.

4. Secondly, I have been asked if a clause is added to the standard assured shorthold tenancy agreement recording the fact that any damages sought by a landlord for a tenants default will include monies paid to a third party for arranging/ supervising repair works, whether I agree that this should help with and proximity argument on foreseeability.

5. I think that might help, particularly if it is made clear that the landlord may recover as damages such additional, proximate costs and expenses as may be incurred by instructing a third party agent or contractor to arrange supervise etc repairs arising from a tenant's breach of covenant. It seems to me that any such clause should specify that it extends to such costs/expenses as may be incurred that are not covered by the landlord's agency agreement. So, for example, check-out fees are banned, but if there is damage caused which is not fair wear and tear which is discovered during the check-out inspection, the costs of repair (being damages for breach of covenant) are recoverable - not the check-out inspection fees.

6. I recognise that 'definitive' advice is sought, however it needs to be understood that it is not possible to give definitive advice at present. First, because the legislation has not yet been tested and it is therefore difficult to predict how it will be interpreted by

the courts; and secondly because of the range of circumstances that may arise as a consequence of which a landlord may wish to recover expenditure from a tenant. A court might consider such a clause in an AST to be a sham devised merely to get around the Act; having said that, the Act does not prevent damages from being recovered so it is arguable.

Erol Topal
Lamb Chambers
Temple/London
2nd September 2019

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OPINION

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