IN THE UPPER TRIBUNAL **Case No.** CH/1394/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (16 December 2014, Oxford, file reference SC 028/14/01086) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal **RE-MAKES** the First-tier Tribunal's decision as follows:

(1) Ms E's appeal against the local authority's decision of 26 September 2014 is allowed.

(2) The local authority's decision is replaced with the following decision.

(3) Under regulation 96(1)(c) of the Housing Benefit Regulations 2006, £101.16 of the housing benefit awarded to Ms E in September 2014 is payable to her former landlord Mr M. The remaining £764.22 is payable to Ms E.

REASONS FOR DECISION

1. In 2014 Ms E was awarded housing benefit for a property from which she was evicted some three years previously. Her local authority decided Ms E owed arrears of rent to her former landlord and so paid the award to him. These proceedings involve Ms E's challenge to that decision.

2. Ms E and her former landlord had agreed that, due to her rent arrears, he would retain her tenancy deposit. The authority decided that this could not be taken into account in determining her outstanding rent. I decide this was wrong and that the landlord's retention of Ms E's deposit reduced her outstanding rent for the purposes of regulation 96 of the Housing Benefit Regulations 2006 (which permits housing benefit to be paid to a former landlord where there is "outstanding rent").

Background

3. In 2010 Mr M granted Ms E an assured shorthold tenancy of a dwelling in Hemel Hempstead. The undated front page of the tenancy agreement was supplied to the First-tier Tribunal. It indicated that the tenancy began on 19 December 2010 and the monthly rent was £925. On the commencement of the tenancy, Ms E paid Mr M a deposit of £1,200 and three months' rent in advance.

4. Further pages of the tenancy agreement was supplied to the Upper Tribunal by Ms E in these proceedings. Mr M did not dispute the accuracy of the copies supplied or provide any of the remaining pages. These further pages:

(a) show Ms E was solely liable for water utility charges "during the period of the tenancy";

(b) contain no definition of "rent";

(c) provide that Ms E's £1,200 deposit "will be held as security by the landlord against non-payment of rent by the tenant and for any damage caused to the property by the tenant".

5. A notice of eviction dated 31 August 2011 specified an eviction date of 12 October 2011 (and Ms E says she was evicted on that date). Ms E's solicitor wrote on 6 October 2011 that she faced possession proceedings, on the ground of rent arrears, due to delays in processing her housing benefit claim.

6. On 6 October 2011 the local authority awarded Ms E housing benefit of £2348.06 for the period 4 July 2011 to 18 September 2011 but decided to pay benefit to her landlord because her rent was more than eight weeks in arrears.

7. On 21 October 2011, Mr M (whom I also refer to as the former landlord) emailed the local authority stating that Ms E owed him £4,415 in unpaid rent and requesting "prompt payments for any monies that she is entitled to so I can cover the arrears".

8. It appears Ms E had been content to leave matters as they stood at the end of 2011 but she changed her mind in 2013 after receiving a demand to pay unpaid council tax. She made inquiries about her entitlement to housing and council tax benefit during 2011.

9. By letter dated 1 July 2014 Ms E informed the local authority that her former landlord retained her £1,200 deposit to meet her rent arrears. For this reason, she requested that any 'backdated' housing benefit be paid to her. In a letter dated 16 September 2014, Ms E wrote that the dwelling was very dirty when she moved in and she had to clean it herself (in her view, her cleaning had a monetary value of £375). She also complained that her former landlord did not part-refund annual payments she made for a TV licence and water charges and that he kept tools she stored in the dwelling. Ms E argued she owed Mr M nothing

10. On 15 September 2014 the local authority emailed the former landlord: "I would be grateful if you could confirm the level of rent arrears…as of today". On 16 September 2014 he responded stating that, of the £4415 rental arrears owed at the date of eviction, only £3063.44 had been satisfied by housing benefit payments. £1351.56 was outstanding. Mr M added the

deposit "was held in case of breach of contract and not necessarily to make up payments for any rent arrears" and that unspecified "reasonable deductions" had been made.

11. On 26 September 2014 the local authority altered their 2011 housing benefit award (describing this as a revision decision) so that Ms E was entitled to a further payment of housing benefit. The authority informed Ms E that "a payment of £865.38 will be paid directly to your landlord as he has provided evidence that you owe rent arrears of £1351.38". A subsequent letter of 14 October 2014 informed Ms E that her housing benefit "underpayment" was in fact £1280.76 but the award was reduced by offsetting a separate housing benefit overpayment.

12. Ms E emailed the council on 15 October 2014. She complained that her former landlord had both kept her £1,200 deposit and received her backdated housing benefit award when in 2011 they agreed he would use the deposit to cover her rent arrears.

13. Ms E appealed to the First-tier Tribunal. She did not attend the hearing of her appeal on 16 December 2014 and the Tribunal proceeded in her absence. The authority's written submission argued Ms E's tenancy deposit argument was irrelevant because it was not "counted as rent".

The First-tier Tribunal's decision

14. Before the First-tier Tribunal, Ms E argued her former landlord retained her £1,200 tenancy deposit to discharge rent arrears. The First-tier Tribunal appears to have found that, as a matter of law, this was not possible. I think it agreed with the local authority that Ms E's claim that the former landlord retained her deposit could not assist her "because [the deposit monies] are not counted as rent". The Tribunal's statement of reasons says the council "cite authority that supports their argument" at pages 66-68 of the First-tier Tribunal appeal papers but I have not been referred to, nor can I locate, any such authority. Pages 66-68 contain a council letter which simply asserts, without supporting reasoning, that Ms E's tenancy deposit could not be counted as a payment of rent.

15. The First-tier Tribunal also stated that, had Ms E demonstrated that the deposit "was to meet unpaid rent", the result might have been different. In my view, this is difficult to reconcile with the Tribunal's acceptance of the local authority's argument that the deposit was categorically irrelevant. In any event, the Tribunal found no convincing evidence that the deposit was used to discharge rent arrears. The only evidence in support of this proposition were Ms E's own unsupported written statements whereas the landlord's emails made it "abundantly clear…that the deposit was towards breakages and breach of contract". I should observe that I have struggled to identify the evidential basis for that finding. Firstly, the emails do not refer to breakages at all. Secondly, the landlord's emails did not identify any alleged breach of contract; they simply stated that unspecified "reasonable deductions" were made from Ms E's deposit.

Legal framework

Housing Benefit Regulations 2006

16. Regulation 95 of the Housing Benefit Regulations 2006 sets out when housing benefit must be paid to a landlord. In this case, regulation 95 was not relied on. Instead, the authority relied on the powers to pay housing benefit to landlords conferred by regulation 96.

17. Regulation 96(1)(c) permits a local authority to pay benefit to a landlord where:

> "the person has ceased to reside in the dwelling in respect of which the [rent] allowance was payable and there are outstanding payments of rent but any payment under this paragraph shall be limited to an amount equal to the amount of the rent outstanding."

18. A claimant has a right of appeal to the First-tier Tribunal against a decision taken under regulation 96 (see Schedule 1(d) to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001).

19. The local authority do not argue that the offsetting rules in regulation 98 of the 2006 Regulations prevent Ms E from seeking payment to herself of her 2014 housing benefit award.

Tenancy deposits

20. Ms E entered into a residential tenancy with her former landlord in 2010. As a result, the giving, receipt and holding of her deposit must have been governed by the tenancy deposit scheme provisions of Chapter 4 of Part 6 of the Housing Act 2004. Section 212(8) of that Act defines "tenancy deposit", in relation to a shorthold tenancy, as:

> "any money intended to be held (by the landlord or otherwise) as security for –
>
> (a) the performance of any obligations of the tenant, or
>
> (b) the discharge of any liability of his,
>
> arising under or in connection with the tenancy."

21. Rent is a payment that a tenant is bound by contract (the tenancy) to pay to a landlord. An assured tenant clearly has an obligation to pay rent in accordance with the terms of the assured tenancy but, if there were any doubt about that, it is dispelled by the way in which the Housing Act 1988 frames the grounds for possession of a dwelling let under an assured tenancy. Ground 12 is "any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed", a provision which clearly operates on the basis that obligations of a tenancy include those related to the payment of rent.

22. A tenancy deposit scheme must be either a custodial or insurance scheme (Schedule 10(1)(1) to the 2004 Act). An insurance scheme involves tenancy deposits being paid to landlords who are to retain deposits "on the basis that, at the end of the tenancies…such amounts in respect of the deposits as are agreed between the tenants and the landlords will be repaid to the tenants" (Schedule 10(3)(b)). Since Ms E's deposit was paid to her landlord, it must have been protected by an insurance scheme.

Set-off

23. The current edition of Hill & Redman's Law of Landlord and Tenant (*LexisNexis*) states:

> ***"Set-off***
>
> **(a) Generally**
>
> 1725. Set-off is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off [*Re A Bankruptcy Notice* [1934] Ch 431].
>
> **(b) At common law**
>
> 1726. At common law, there is no general right to set-off against the rent sums due from the landlord to the tenant. However, where the tenant carries out works of repair which are the responsibility of the landlord, the tenant has a right to recoup his expenditure out of future rents payable by him to the landlord [*Taylor v Beal (1591) Cro Eliz 222*; *Waters v Weigall (1795) 2 Anst 575*; *Lee-Parker v Izzet* [1971] 3 Al ER 1099]. Further, it seems that where the tenant has paid money at the request of the landlord in respect of some obligation of the landlord connected with the land demised, the tenant may set such sum off against the rent [*Lee-Parker v Izzet*]. This right, however, only arises where there is a certain sum which the tenant has paid [*British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137]
>
> …**(d) Equitable set-off**
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> 1728. It was once thought that there was no equitable right of set-off against rent. However, it is now clear that a tenant has a right to set off against rent cross-claims which arise not only out of the same contract as the claim (ie the lease), but also where the cross-claim arises directly out of the relationship of landlord and tenant or out of an agreement for lease (*Smith v Muscat* [2003] EWCA Civ 962, [2003] 1 WLR 2853*)*, or otherwise where there is a sufficiently close connection between the transaction giving rise to the cross-claim for the equitable doctrine of set-off to apply [*Melville v Grapelodge Developments Ltd (1978) 254 Estates Gazette 1193)*. A set-off may be raised in defence to a claim for rent even though the cross-claim is unliquidated [*British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137]."

Proceedings before the Upper Tribunal

24. I granted Ms E permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on the following grounds:

(a) arguably the Tribunal misdirected itself in law by accepting the council's argument that a landlord's retention of a tenancy deposit could not operate to reduce outstanding rent for the purposes of regulation 96;

(b) arguably the Tribunal overlooked relevant evidence in finding that Ms E failed to show her retained deposit was used to meet her rent arrears. One of the former landlord's email stated the deposit was "not necessarily to make up payments for any rent arrears". That implied the deposit might be used for that purpose.

25. I also directed the local authority to notify Ms E's former landlord of these proceedings and to inform him that he could be made a party to the proceedings. I did so because the outcome of the appeal might affect his interests.

26. The council's response to the appeal was brief: "it is unclear whether the deposit was in fact used to meet unpaid rent and therefore it is requested that the Upper Tribunal refer the case back to the First-tier Tribunal for a new decision". In Ms E's reply, while she welcomed the authority's decision not to support the Tribunal's decision, she objected to her appeal being sent back to the First-tier Tribunal for re-hearing. She invited the Upper Tribunal to re-decide her appeal against the local authority's decision.

27. I directed that the former landlord be made a party to the appeal and directed the local authority to supply him with copies of the appeal papers. The former landlord was directed to supply any written arguments he wished to make within one month of the directions being issued. The directions notice informed the former landlord he could request a hearing of the appeal and put the parties on notice that, in the event that the Upper Tribunal allowed the appeal, it might re-decide Ms E's appeal against the local authority's decision rather than remit to the First-tier Tribunal for re-hearing. The directions were issued on 15 September 2015.

28. By email dated 19 October 2015, the former landlord stated he was working outside the UK, had difficulty accessing emails and kept all tenancy-related documentation in the UK. He said he would return to the UK on 10 November 2015 and requested additional time to consider the matter. A Registrar of the Upper Tribunal granted the former landlord an extension of time to which Ms E objected but I confirmed the extension.

29. On 4 February 2016, I gave directions setting a deadline for any further written submissions. The directions also informed the parties that the Upper Tribunal's provisional view was that it should re-decide Ms E's appeal against the local authority's decision in the event that her appeal to the Upper Tribunal was successful. At that time, it appeared that the former landlord had not responded to the appeal.

30. It then transpired that, on 10 November 2015, the former landlord emailed the council about the appeal (he should have communicated with the Upper Tribunal) but it was some four months before his email was supplied to the Upper Tribunal 2016. In this email, the former landlord argued:

(a) Ms E's total rent arrears at the end of the tenancy were £4415;

(b) by November 2015, he had received housing benefit payments of £3928.82 so that £486.18 remained outstanding;

(c) Ms E's £1,200 deposit was "to cover any breach of contract" and she had breached her contract by not paying rent on time. In this email Mr M did not argue that Ms E had breached any other obligation of the tenancy;

(d) he incurred costs of £495 in securing Ms E's eviction (£250 for filing a possession claim; £110 in obtaining a warrant of possession; £135 in locksmith's costs);

(e) he conceded the property was not professionally cleaned before Ms E moved in but it was "very clean and habitable". He did not agree to pay her for cleaning but pointed out he had not sought to impose an end-of-tenancy professional cleaning charge;

(f) he was not responsible for Ms E's TV licence and she should take that up with the TV licensing body;

(g) concluded by stating he would leave it to the Upper Tribunal to "make a judgement on this matter".

31. The other parties were given the opportunity to respond in writing. Ms E argued the former landlord's arguments should not be admitted (I have decided to admit them) because they were supplied late. In any event Ms E:

(a) disputed the claimed eviction-related costs. She supplied a copy of a claim form showing a court fee of £100 and a copy of an order for possession which required her to pay the former landlord's costs of £100;

(b) stated she could not prove or disprove the costs of £110 in obtaining a warrant of possession;

(c) did not believe any locksmith's costs were incurred but could not prove it. However, she suspected the former landlord changed the locks himself at a cost of no more than £15. Ms E also said this was the first mention of any locksmith's costs;

(d) disputed that the property was clean and habitable at the start of the tenancy;

(e) supplied further pages of her tenancy agreement and drew attention to the deposit clause:

> "The tenant is required to pay a deposit of £1200. The deposit will be held as security by the landlord against non-payment of rent by the tenant and for any damage caused to the property by the tenant and for any damage caused to the property by the tenant. The deposit will be returned to the tenant within 14 days from the end of the tenancy less any deductions for sums properly incurred by the landlord under this tenancy";

(f) E supplied a letter dated 16 August 2011 to the "environment officer" complaining about cold, noisy heating, damp, a leaking toilet and a faulty gas cooker, and a response from the local authority's private sector housing department stating the authority had written to the landlord about her complaints.

32. Having been supplied with Ms E's final written representations, neither respondent had anything further to add.

Conclusions

Why the First-tier Tribunal erred in law

33. I decide that the First-tier Tribunal misdirected itself in law by accepting the local authority's argument that Ms E's tenancy deposit, if retained by her landlord, could not affect the amount of her outstanding rent for the purposes of regulation 96 of the Housing Benefit Regulations 2006.

34. Regulation 96 does not confer a free-standing power on local authorities to pay housing benefit to landlords. Certain conditions must be satisfied for the power to arise. In a regulation 96(1)(c) case these are:

(a) the claimant has ceased to reside in the relevant dwelling; and

(b) there are "outstanding payments of rent".

35. If those conditions are met, the power is exercisable. However, regulation 96(1)(c) goes on to limit the payment that may be made to "an amount equal to the amount of the rent outstanding". The amount of the rent outstanding is a matter of fact and it may be affected by dealings between the former landlord and tenant since they are free, as contracting parties, to come to an agreement as to rent owed.

36. The tenancy deposit legislation does not, at least in the case of a deposit protected under an insurance scheme, prevent landlords and tenants from agreeing that the landlord will retain a deposit on account of rent arrears. This is shown by Schedule 10(3)(b) to the Housing Act 2004 which refers to an insurance scheme for protecting deposits as one in which, at the end of the tenancy, "such amounts in respect of the deposits as are agreed between the tenants and the landlords will be repaid to the tenants".

37. The First-tier Tribunal's decision is set aside because it involved an error on a point of law. It wrongly decided that a landlord's retention of a tenancy deposit could not affect a former tenant's outstanding rent.

The outcome of Ms E's appeal against the local authority's decision

38. No party asked the Upper Tribunal to hold a hearing in the event that it decided to re-determine Ms E's appeal against the local authority's decision. I am satisfied I can fairly re-decide the appeal without holding a hearing. I know what the parties' arguments are and I doubt a hearing would generate any better evidence than that contained within the appeal papers.

39. I make the following findings of fact:

(a) on the termination of Ms E's tenancy, she and Mr M agreed that he would retain her £1,200 deposit on account of her rent arrears. By Mr M's final written submission, he accepted this;

(b) Ms E and Mr M did not agree that the deposit would be retained on account of any other breach of Ms E's obligations under the tenancy. The question whether there were such breaches has remained in dispute;

(c) Ms E's tenancy required her to pay a monthly rent of £925;

(d) Ms E's tenancy began on 19 December 2010 and she was evicted on 12 October 2011. At the monthly rent of £925, Mr M was therefore due to receive £9,036 for Ms E's occupation of his property (10 months' rent minus one week's rent);

(e) Ms E's rent book shows she paid the first five months' rent - £4,625 – which left £4,411 rent owing to Mr M. He was paid housing benefit of £3,063.44 during 2011 which left arrears of £1347.56.

40. The landlord's eviction-related costs cannot be added to the outstanding rent. I have not been taken to any special provision of the tenancy that seeks to define these costs as rent. I decide that Mr M cannot rely on these costs to increase the amount of outstanding rent owed by Ms E.

41. What of Ms E's arguments that the outstanding rent was to be reduced on account on certain expenditure and services provided?

42. I am satisfied it is correct, in determining outstanding rent, to take account of the fact that a claimant would, on the balance of probabilities, successfully argue for a set-off in the event that he or she faced an action for rent arrears. This reflects reality. The amount of rent arrears is not whatever amount a landlord or tenant says it is. In the final analysis, it is the amount adjudged to be owed by a civil court (although in most cases there will not be a court judgment so that decision makers have to address the matter themselves doing their best on the available evidence). I decide that quantifying outstanding rent should take account of the amount of any set-off that the claimant shows he or she would achieve if faced with an action for recovery of rent arrears. It is of course for an appellant to prove that point and unfocussed arguments that a landlord's conduct should result in a reduction in outstanding rent can, as a general rule, be swiftly rejected.

43. My conclusions on this aspect of the appeal are:

(a) *The cleaning costs*. These do not relate to works of repair nor are they sums paid at the landlord's request to discharge an obligation of his. And the evidence does not permit me to make a finding that Ms M could bring a successful claim (or counter-claim) against Mr M for those costs. The law of set-off cannot be relied on to reduce outstanding rent on account of the sums claimed for cleaning;

(b) *The T.V. licence*. My understanding, although no submissions have been made on the point, is that Ms E could have applied to the TV licensing body for a refund once she was evicted and no longer watching terrestrial television. There is no basis on which this sum could be taken into account for regulation 96 purposes;

(c) *The tools*. There is insufficient evidence to support a finding that Mr M wrongly retained tools belonging to Ms E. But even if such a finding were open to me I do not

see how the law would permit me to take the next step and decide that the value of the tools operated to reduce Ms M's outstanding rent.

(d) *The water utility payments*. Mr M has not disputed that Ms E paid the water bill for the whole of the 12 month term of the tenancy. In fact, he has not directly disputed her argument that he should account to her for that portion of the bill which relates to post-eviction supply of water services. I am satisfied that, on a civil action for recovery of rent arrears, Ms E would be able to set-off her payment of water utility charges for the period after her eviction. This payment ranks as expenditure incurred at the landlord's request to discharge an obligation of his as owner of the dwelling. Had it not been paid by Ms E, I am sure Mr M would have had to pay it.

44. Those findings result in the following conclusions:

(a) After retention of Ms E's deposit, her rent arrears stood at £147.56;

(b) At the date of Ms E's eviction, there were two months and one week left of the initially agreed 12 month term. The portion of the water utility charges, in monetary terms, referable to that period is £46.40. That sum is deducted from the arrears to give Ms E's outstanding rent;

(c) The outstanding rent was therefore £101.16.

43. Ms E's appeal against the local authority's decision of 26 September 2014 succeeds. In its place, I decide that £101.16 of Ms E's 2014 housing benefit award is payable to Mr M and the balance is payable to Ms E. I decide to exercise the power under regulation 96(1)(c) because I am satisfied Mr M incurred quite significant expenditure as a result of Ms E's failure to comply with her obligation to pay rent. These conclusions are reflected in the decision set out at the start of these reasons.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
14 February 2017