FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/43UC/HTC/2020/0002
Property	:	7 Mentmore House, 35 Dalmeny Way, Epsom KT18 7EF
Applicant	:	Mr Robert Avery
Representative	:	---
Respondent	:	Mr James Taylor & Mrs Keiko Igarashi
Representative	:	---
Type of Application	:	Recovery of Prohibited Payment – Sections 15(3) and (5) of the Tenant Fees Act 2019
Tribunal Member(s)	:	Judge Tildesley OBE
Date of Decision	:	Decision on Papers 8 June 2020

DECISION

Due to the Covid 19 pandemic, communications to the Tribunal MUST be made by email to rpsouthern@justice.gov.uk. All communications must clearly state the Case Number and address of the premises.

Order

The Tribunal makes the following Order, pursuant to section 15 of the Tenant Fees Act 2019 ("the Act"):

(1) On or before 22 June 2020, the Respondents shall re-pay the Applicant the amount of £210 which has been withheld from the tenancy deposit for 7 Mentmore House, 35 Dalmeny Way, Epsom KT18 7EF

(2) In accordance with section 15(11) of the Tenant Fees Act 2019, such Order is enforceable by order of the County Court as if the amount payable under the Order were payable under an order of that Court.

Background

1. The Applicant tenant seeks under Sections 15(3) of the Tenant Fees Act 2019 ("the Act") the recovery of a deduction of £210.00 from a tenancy deposit of £1442.30 made by the Respondent landlord, upon termination of the Applicant's tenancy of 7 Mentmore House, 35 Dalmeny Way, Epsom KT18 7EF ("the property").

2. On 6 February the 2020 Tribunal determined that the Application be dealt with on the papers unless a party objected within 28 days. No party objected. The Tribunal directed that the Application with the attached documents shall stand as the Applicant's case and required the Respondents to provide their case by 25 February 2020. The Applicant did not exercise his right of reply. The Tribunal indicated that it would issue its decision within 21 days of 3 March 2020. Judge Tildesley apologises for the delay with the publication of the decision which is a result of the disruption caused by the Coronavirus Public Health emergency.

3. The Applicant said that the Respondents were in effect asking him to pay for a professional clean of the property at the end of the tenancy. The Applicant referred to the "Tenant Fees Act 2019, Guidance for Tenants" which advised that a landlord could not charge a tenant for a professional clean at check out[1]. The Applicant argued that the deduction was a prohibited payment under the 2019 Act and should be returned to him.

4. The Respondents relied on a term of the Tenancy Agreement which they said required the Applicant to professionally clean the property at the end of the tenancy. The Respondents asserted that the Applicant was in breach of contract because he did not return the property in the condition that he found it. The Respondent

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contended that a deduction from the tenancy deposit was not a prohibited payment. In this regard the Respondent relied on "Tenant Fees Act 2019, Guidance for Landlords and Agent" which said that a landlord could recover costs associated with returning the property to its original condition by claiming against the tenancy deposit[2].

Chronology

5. On 22 July 2019 the Applicant together with Mr Benjamin Avery and Mrs Supinda Avery took up the tenancy of the property under the terms of an assured shorthold tenancy agreement. The Respondents were named as the Landlord under the agreement.

6. On 22 July 2019 Ms Jacqueline Smith on behalf of Cairds, the letting agent, undertook an "Inventory and Check In" of the property. Ms Smith recorded under the "Cleanliness Schedule" that the (1)"overall general cleanliness", the kitchen and the bathroom were cleaned to a professional standard, (2) the flooring was cleaned to a professional standard, carpets would appear to be professionally shampooed, and (3) upholstery, curtains, lighting and electrical appliances were in a clean condition.

7. On 24 July 2019 the Applicant received the "Inventory and Check In" report. On 31 July 2019 the Applicant informed Ms Contizo-White of Cairds that the oven was not cleaned thoroughly and smoked when used. Ms Contizo-White agreed to add this comment to the Check In report.

8. On 4 September 2019 the Applicant advised the letting agent that he would be vacating the property on 18 September 2019. On 5 September 2019 Mr Clifford of Cairds responded by stating that he would arrange the Check Out Inventory for that date and enquired whether the Applicant would arrange for the property to be professionally cleaned. The Applicant replied by stating that under the tenancy agreement it was the Landlord's responsibility to have the property professionally cleaned and that the Applicant would ensure that the property was cleaned to the same standard as it was received.

9. On the 18 September 2019 the Applicant and his family vacated the property. Before they left Ms Smith carried out an Inventory and Check Out. According to the Applicant, Ms Smith commented that she could see no reason why the Applicant would not receive a full refund of the deposit.

10. On 20 September 2019 Ms Contizo-White of Cairds emailed the Applicant asking about whether the property had been professionally cleaned and to provide a receipt if it had been done.

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The Applicant replied that he did not have the property professionally cleaned, and referred to his previous email that he considered this to be a Landlord's obligation. The Applicant said that he and his wife had cleaned the property thoroughly and to a higher standard than when they moved in. There followed various emails the same day between the Applicant and Cairds about whose responsibility it was to undertake a professional clean of the property.

11. On 23 September 2019 the Applicant received a copy of the Check Out report compiled by Ms Smith who recorded that "the tenant had occupied the property for less than six months. Generally the property has been kept in a good condition for that duration with no changes to the inventory". Under the "Cleanliness Schedule" Ms Smith found overall that the property had been cleaned to a very good domestic standard throughout which included the flooring, the kitchen and the bathroom. The glazing, upholstery/furniture, curtain/blinds, lighting and electrical appliances were in the same clean condition as check in.

12. The Applicant then exchanged emails direct with the Respondents who were adamant that the Applicant was required under the tenancy agreement to have the property professionally cleaned.

13. The Respondents instructed Cairds to advise the Deposit Protection Scheme (DPS) to withhold £210 from the tenancy deposit to cover the costs of a professional clean of the property. The figure of £210 was based on the cost of the last professional clean.

14. On 6 October 2019 the Applicant rejected the proposed deduction via the DPS web portal. The Applicant said that he checked the DPS portal periodically to ascertain the status of the dispute. The portal showed status as "Claim in dispute – awaiting evidence". The Applicant assumed that this referred to the Respondents' evidence.

15. On 28 October 2019 the Respondents arranged for YBC Professional Cleaning Services to clean the property. The Respondents produced an invoice in the sum of £280 plus VAT of £56 making a total of £336 and a copy of the bank transaction exhibiting payment of that amount to YBC..

16. On 2 November 2019 the Applicant contacted DPS by phone and discovered that an email had been sent to him on 17 October 2019 requesting evidence by 31 October 2019. DPS advised that as the deadline had passed for the receipt of evidence in accordance with its conditions of service DPS had instructed Cairds, the letting agent, to release the deduction of £210 from the deposit to the Respondents.

17. The Applicant said he had not seen the email from DPS dated 17 October 2019 because it had been directed to junk email. The

Applicant requested DPS to extend the deadline for submission of evidence but that was refused on 9 November 2020.

18. On 12 November 2019 the Applicant sent a letter to the Respondents with a copy to Cairds requesting return of the £210 on the ground that it was not a permitted fee under The Tenants Fees Act 2019. The Applicant received no response. On 25 January 2020 he made application to the Tribunal.

19. The Tribunal understands that the £210 is being held by Cairds, the letting agent, pending resolution of the dispute.

The Tenancy Agreement

20. The term of the tenancy was from 22 July 2010 to 21 November 2019 but with a mutual break clause of two months notice which was given by the Applicant at the beginning of the tenancy.

21. The rent payable under the agreement was £1,250 per calendar month with a deposit of £1,442.30. The Applicant paid two months rent in advance in the sum of £2,500. The deposit was held under the Deposit Protection Scheme.

22. Clause 2(d) of the agreement set out the purposes for which the deposit had been taken. Clause 2(d)(2) stated the "reasonable costs incurred in compensating the Landlord for, or for rectifying or remedying any major breach by the Tenant of the Tenant's obligations under the Tenancy agreement including those relating to the cleaning of the Property, its fixtures and fittings".

23. Clauses 2(l) to 2(m) set out the agreement of the parties in the event of a Tenant's dispute in respect of the deduction from the deposit. Essentially if the dispute over the allocation of the deposit remained unresolved it would be submitted to the Alternative Dispute Resolution Service for adjudication with all parties agreeing to co-operate with the adjudication. Clause 2(n) stated that the statutory rights of the parties to take legal action through the County Court was unaffected by clauses 2(l) to (2m).

24. Under clause 3(d) "The Manner of Use of the Property", the Tenant promised (1) To use and look after the property in a proper and tenant-like manner throughout the tenancy. (2) To protect the property, and in particular to keep the inside of the property and all furniture fixtures contents and effects described in the inventory.

25. The agreement contained a special clause as an addendum which read "to have all rooms within the property professionally cleaned including the carpet at the end of the tenancy including the kitchen and bathroom, all furniture, fittings contents and effects listed in the inventory check".

Consideration

26. The stated aims of the Tenant Fees Act 2019 are to make renting fairer and more affordable for tenants by reducing costs at the outset of a tenancy, and to improve transparency and competition in the private rental market[3]. The 2019 Act achieves its aims by placing restrictions on the type and extent of fees that landlords and agent can charge tenants. Under section 1 subsections (1) & (3) of the 2019 Act a landlord must not require a relevant person to make a prohibited payment or enter into a contract for the provision of services. Under section 3(1) a payment is prohibited unless it is a permitted payment by virtue of schedule 1 to the 2019 Act.

27. The 2019 Act applies to relevant persons which under section 1(9) means a tenant and the payment must be in connection with a tenancy of housing in England which includes an assured shorthold tenancy (section 28). Both these requirements are met in this case.

28. The agreement in this case was entered into on 22 July 2019 which was after the 1 June 2019 when the 2019 Act came into force.

29. The issue for the Tribunal is whether the deduction of £210 from the tenancy deposit is a prohibited payment under section 1 of the 2019 Act. Before the Tribunal addresses the issue it is necessary to deal with the status of the referral to DPS.

30. The parties agreed to resolve their differences under the dispute resolution scheme run by DPS where the adjudicator's decision is final and legally binding upon the parties. However, in this case there was no decision by the adjudicator because the Applicant did not submit his evidence by the deadline. In such circumstances DPS is required by its "Custodial Terms and Conditions" May 2018 (21) to return the disputed amount to the other party, which is what happened in this case with the release of the disputed amount of £210 to the Respondents' letting agent. The Tribunal's jurisdiction to hear the application is not affected by the decision of DPS to release the deposit.

31. The Tribunal now turns to the facts of the case which are set out in the Chronology. In their submissions the Respondents referred to an email from the letting agent which contained feedback from a prospective buyer of the property, namely "that the property is in a good location but the flat was a complete mess and filthy, struggled to see past this". The Tribunal placed no weight on this email as it was not relevant to the issues in this case and that feedback from a prospective buyer must be treated with circumspection.

[3] Tenant Fees Bill Explanatory Notes

32. The Tribunal considers the facts as set out in the Chronology speak for themselves. The Tribunal is satisfied that at the end of the tenancy the Applicant left the property in good condition and it was clean which was supported by the Check Out report compiled by Ms Smith. The Applicant, however, did not engage professionals to clean the property.

33. The substantive factual dispute between the parties was the characterisation of the £210 deduction. The Applicant said that the deduction constituted a payment for a professional clean of the property. The Respondents, on the other hand, stated that the deduction represented damages for the Applicant's breach of the tenancy agreement.

34. The parties relied on the non-statutory Guidance on the 2019 Act for Tenants and Landlords to substantiate their respective positions. The Applicant placed emphasis on the statement that a landlord cannot require a tenant to pay for a professional clean at the end of the tenancy. The Respondents position depended upon the Guidance which said that a landlord could request that a property is cleaned to a professional standard and that if it is not the landlord could recover the costs of returning the property to its original condition from the tenant.

35. The Tribunal is governed by the wording of the legislation not by the Guidance. The 2019 Act does not specifically mention fees for professionally cleaning the property. Instead as explained earlier the 2019 Act prohibits landlords from requiring payments from tenants in connection with the tenancy unless it is permitted under schedule 1.

36. Paragraph 5 to schedule 1 states that a payment for damages for breach of a tenancy agreement is a permitted payment. The scope of paragraph 5 to extend to a wide range of potential payments is restricted by the wording in section 1(6)(b) of the 2019 Act which states that

> "For the purposes of this section (*section 1)* 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 – 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".

37. The inter-relationship of paragraph 5 and section 1(6)(b) of the 2019 Act is best illustrated by reference to Hansard and the House of Commons Consideration of House of Lord Amendments on the Third Reading 23 January 2019 Vol 653. The Tribunal does not rely on Hansard in a *Pepper v Hart* context but as relevant background for the construction of a term of a tenancy agreement. Mrs Heather

Wheeler Parliamentary Under-Secretary (Housing, Communities and Local Government) at 261:

> "Lords amendment 48 clarifies that landlords and agent will still be able to charge for any damages for contractual breaches as they do now.... It has never been the intention that the Bill affects a landlord or an agent's right to recover damages for breach of contract under common law. That is why we brought forward Lords amendment 48 to clarify the position and to ensure that such payments will not be outlawed under the ban. I want to reassure hon. Members that this does not create a back door to charging fees. I repeat: it does not create a back door to charging fees. Damages are generally not meant to do anything more than put the innocent party back in the position they would have been in had the contract not been breached. No reasonableness test is therefore needed. There are already large amounts of case law that deal with what is appropriate in a damages case. If an agent or a landlord attempts to insert a clause that requires a payment—for example, saying, "If you do X, you must make a payment"—this will be prohibited under clause 1(6)(b) or clause 2(5)(b). Further, landlords or agent are required to go to court if they want to enforce a damages claim, or they could seek to recover them from the tenancy deposit. In both cases, they would need to provide evidence to substantiate any claim, and they would only be awarded any fair costs".

38. In the Tribunal's view, the correctness of the respective parties' position depends on the construction of the special clause in the tenancy agreement:

> "to have all rooms within the property professionally cleaned including the carpet at the end of the tenancy including the kitchen and bathroom, all furniture, fittings contents and effects listed in the inventory check".

39. The Respondents relied on this clause to state that the Applicant was in breach of the tenancy agreement. The Respondents said that this clause required the Applicant to deliver the property at the end of the tenancy clean to a professional standard.

40. The Tribunal acknowledges that the special clause under the tenancy agreement applied to the tenant and not to the landlord as suggested by the Applicant. The Tribunal, however, disagrees with the Respondent's construction of the special clause. The Tribunal is satisfied that the ordinary and natural meaning of the words used in the clause is to require the Applicant to engage professionals to clean the property. The Tribunal interprets the use of "professionally" in the phrase "professionally cleaned", as qualifying the activity of cleaning. In contrast the use of "professional" in the phrase "cleaning to a professional standard" is qualifying the criterion not the activity. Thus it follows that "professionally cleaned" can only be met if carried out by

professionals, whereas "cleaning to a professional standard" does not determine who delivers the cleaning but the standard to be achieved.

41. The Tribunal concludes that the effect of the special clause is to require the Applicant to enter into a contract with a third party to clean the property which is prohibited under section 1(3) of the 2019 Act.

42. By virtue of section 4 of the 2019 Act a term of the tenancy which breaches section 1 of the Act is not binding on the relevant person. Thus the Applicant's failure to comply with the special clause is not a breach of contract.

43. It, therefore, follows the retention of £210 from the tenancy deposit by the Respondents cannot amount to damages because no breach of contract has occurred. Instead the Respondent has required the Applicant to pay £210 for his default to engage professional cleaners which is not a permitted payment under schedule 1 of the Act, and, therefore, is prohibited under section 1(1) of the 2019 Act.

44. In the alternative if the Tribunal's construction of the special clause is incorrect, and that it does not amount to a requirement for the Applicant to enter into contract with a third party to provide services, it is incumbent upon the Respondents to demonstrate on the balance of probabilities that they are entitled to damages of £210 for breach of contract. The Respondents do not have the benefit of a court judgment or a decision of an adjudicator to support their assertion that a breach of contract had occurred.

45. The Respondent's case was the Applicant had not returned the property in the condition that he had found it. The Respondent's evidence to substantiate a breach of contract was, in the Tribunal's view, weak and unconvincing.

46. The Respondents relied on the Check in report completed by Ms Smith but that was found wanting in relation to the state of the oven. The Respondents' letting agent acknowledged that the Check In report would have to be changed in this regard.

47. The other main plank of the Respondents' evidence was the comparison of the Check Out Report with the Check In Report. The Tribunal observes that there were eight items on the cleanliness schedule in the reports. Ms Smith recorded on the Check Out that the condition of cleanliness of five of the items were the same as Check in. Of the remaining three items one of which was the kitchen which presumably was downgraded because of the state of the oven the difference was that on Check In the three items were cleaned to a professional standard throughout whilst on Check Out the three items were cleaned to a very good domestic standard. There was no explanation of the distinction between the two standards. The Tribunal is satisfied a very good domestic standard

is an explicit statement that the property was left very clean. throughout. The Tribunal also notes that there were a further 107 items considered in the reports and the Check Out report recorded for each of the 107 items, "As Check In".

48. The Tribunal considers that the Respondents would have an uphill task in establishing on the evidence presented that the Applicant had not returned the property in the condition he found it.

49. The Tribunal concludes in the alternative that the Respondents had not demonstrated on the balance of probabilities that a material breach of contract had occurred to justify an award of damages.

50. The Tribunal finds in the alternative that the sum of £210 paid by the Applicant did not constitute damages, and therefore, was not a permitted payment.

Decision

51. The Tribunal decides that the £210 retained by the Respondents was a prohibited payment under section 1(1) of the 2019 Act, and Orders the Respondents to return the £210 to the Applicant on or before the 22 June 2020.

52. The Applicant also requested an Order for costs in the sum of £200. The Tribunal as a rule is a "No Costs" forum, and would only consider the question of costs if a party acted unreasonably in relation to the proceedings. Acting unreasonably is a high threshold and it has not been met by the Respondents in this case. The Tribunal, therefore, makes no order for costs.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case. The Application must be made by email to rpsouthern@justice.gov.uk.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix 1: Relevant Sections of Tenant Fees Act 2019

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.
(4) Subsection (3) does not apply if the contract is for—
(a)the provision of a utility to the tenant, or
(b)the provision of a communication service to the tenant.
(5) A landlord must not require a relevant person to make a loan to any person in connection with a tenancy of housing in England.
(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.

S3. 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.

S4. 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.

15 Recovery by relevant person of amount paid

(1) Subsection (3) applies where—
(a) a landlord or a letting agent breaches section 1 or 2, as a result of which the landlord or letting agent, or a third party, receives a prohibited payment from a relevant person, and
(b) all or part of the prohibited payment has not been repaid to the relevant person.
(2) Subsection (3) also applies where—
(a) a landlord or letting agent breaches Schedule 2 in relation to a holding deposit paid by a relevant person, and
(b) all or part of the holding deposit has not been repaid to the relevant person.
(3) The relevant person may make an application to the First-tier Tribunal for the recovery from the landlord or letting agent of—
(a) if none of the prohibited payment or holding deposit has been repaid to the relevant person, the amount of the prohibited payment or holding deposit;
(b) if part of the prohibited payment or holding deposit has been repaid to the relevant person, the remaining part of the prohibited payment or holding deposit.
(4) Subsection (5) applies where—
(a) a landlord or letting agent breaches section 1 or 2, as a result of which a relevant person enters into a contract with a third party, and
(b) the relevant person has made a payment or payments under the contract.
(5) The relevant person may make an application to the First-tier Tribunal for the recovery from the landlord or letting agent of the amount of the payment or (as the case may be) the aggregate amount of the payments that the relevant person has made.

(6) Subsection (3) does not apply in relation to a prohibited payment or holding deposit if or to the extent that, with the consent of the relevant person—

(a)the prohibited payment or holding deposit, or the remaining part of it, has been applied towards a payment of rent under the tenancy, or

(b)the prohibited payment or holding deposit, or the remaining part of it, has been applied towards the tenancy deposit in respect of the tenancy.

(7) Subsection (3) or (5) does not apply where an enforcement authority has commenced criminal proceedings against the landlord or the letting agent for the same breach.

(8) Subsection (3) or (5) does not apply where an enforcement authority has required the landlord or letting agent to pay to the relevant person all or part of the amount or (as the case may be) the aggregate amount referred to in that subsection.

(9) On an application under subsection (3) or (5), the First-tier Tribunal may order the landlord or the letting agent to pay all or any part of the amount or (as the case may be) the aggregate amount referred to in that subsection to the relevant person within the period specified in the order.

(10) A period specified under subsection (9) must be a period of at least 7 days but not more than 14 days beginning with the day after that on which the order is made.

(11) An order of the First-tier Tribunal under this section is enforceable by order of the county court as if the amount payable under the order were payable under an order of that court.

SCHEDULE 1 Permitted payments

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.