FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/44UD/HNA/2023/0009**
Property	:	**Flat 2B KMG Building, Bath Street, Rugby, Warwickshire, CV21 3JF**
Applicant	:	**Rajinder Kumar Kalia**
Representative	:	**Ms Hazelwood**
Respondent	:	**Warwickshire County Council**
Representative	:	**Mr McDermott**
Type of application	:	**Financial Penalty – Tenant Fees Act 2019**
Tribunal members	:	**Tribunal Judge Kelly (sitting alone)**
Venue	:	**Remote**
Date of decision	:	**12 January 2024**

DECISION

Application Overview

1. The Applicant is a private sector landlord. The Respondent is a local authority, which has power under the Tenant Fees Act 2019 ("the Act") to levy a financial penalty upon a landlord that contravenes certain of its provisions.

2. This Application is an appeal against the Respondent's imposition of a financial penalty, pursuant to section.8 of the Act, which permits the same to be imposed where an authority is satisfied beyond reasonable doubt that there has been a contravention of, in this instance, section 1, which prohibits a landlord requiring a "*prohibited payment*" to be made.

Factual background

3. Mr Stankiewicz, the Applicant's former tenant, entered into three tenancy agreements over three years with the Applicant: (a) 1 June 2019 to 31 May 2020 ("the 2019 Tenancy Agreement"), (b) 1 June 2020 to 31 May 2021 ("the 2020 Tenancy Agreement") and (c) 1 June 2021 to 31 May 2022 ("the 2021 Tenancy Agreement") ("the Tenancy Agreements"). The 2021 Tenancy Agreement is that with which we are principally concerned in this application, and it is dated 24 May 2021.

4. The Tenancy Agreements were all signed by the parties and the 2019 Tenancy Agreement contains a manuscript amendment to the monthly rent payable from £650 to £625. It additionally contains, on its face, what appears to be a set of bank details, presumably, although no evidence exists on the issue, to which payments should be made.

5. Accompanying each of the Tenancy Agreements is a document entitled "*Tenancy Deposit Protection Prescribed Information (Housing Act 2004)*", and again, each of these three documents is signed by the tenant and on behalf of the Applicant.

6. Mr Stankiewicz moved out of the property on 17 September 2021. This was before the 2021 Tenancy Agreement was due to expire, on 31 May 2022.

7. The Tenancy Agreements provide, insofar as relevant:

   "THE TENANT FURTHER AGREES AS FOLLOWS:

   A check out charge of £75.00 including VAT payable to the Landlord will become due one calendar month before the tenants vacation date. Should this balance remain outstanding upon vacation the tenants agree to the Landlord deducting this from their deposit."

8. Following the tenant's departure on 17 September 2021, a letter was sent to the tenant on behalf of the Applicant by "*Kalia Property Empire Developers*", which was dated 15 November 2021, enclosing a cheque for £285. The sum of £285,

and there is no dispute about this, was premised upon (a) a deposit having been paid by the tenant of £625, and (b) the following deduction having been made from the deposit sum:

a. £225 for cleaning of the Property and all white goods within the same;
b. £25 to take away rubbish within the Property; and
c. £90 – described as a "*checkout fee*".

9. Mr Stankiewicz later complained to the Respondent that the sums referenced had been unlawfully deduced from his deposit. As a result of that complaint, the Respondent investigated and considered that the deductions, all three of them in fact, amounted to a contravention of section 1 of the Act. On 16 January 2023, it served a notice of intention to levy a financial penalty, dated 15 January 2023 ("the Notice of Intent").

10. The Notice of Intent stated (insofar as relevant):

"Section 1 OF Tenant Fees Act 2019 (Prohibition applying to landlord)

Reasons for imposing the penalty:

The tenant … rented the following property from 1st June 2019 to 17th September 2021 …
The final tenancy agreement was between the landlord Mr Rajinder KALIA and the tenants … The Tenants moved out of the accommodation on 17 September 2021.

The tenant was charged for three things by deduction from the return of the deposit (these are considered to be prohibited payments as per the Tenant Fees Act 2019)

CHARGE 1 - £225 for cleaning of flat and all white goods within the flat.
CHARGE 2 - £25 to take away rubbish within the flat.
CHARGE 3 - £90 Checkout fee

The consumer states that he had left the flat having been cleaned and any items left were those left previously in the flat when I took it on. He states he did not leave rubbish in the flat."

11. The Notice of Intent was signed off by Mr Adam O'Donnell, a Trading Standards Officer with the Respondent. Mr O'Donnell provided evidence to the me in the application, to which I shall turn later.

12. Having received the Notice of Intent, representations were made by the Applicant to the Respondent. The representations regarding "CHARGE 1" and "CHARGE 2", were essentially along the lines that the payments were damages, for damage done to the property, and thus, that they were not "*prohibited payments*" under

the Act. The Respondent accepted those representations and the issues before the tribunal relate only to "CHARGE 3", the "c*heckout fee*". A fundamental question for determination is whether this is a prohibited payment contrary to section 1. The Respondent disagrees and believes the payment is a prohibited payment and that it was entitled to levy a financial penalty. There are further issues that arise, to which I turn below, but this is the fundamental starting point.

The Tribunal's directions

13. Directions were given by the tribunal on 5 June 2023. They included the following requirements:

    a. the Respondent to prepare a bundle of relevant documents by 30 June 2023, to include (i) "*a full statement of the steps taken prior to and the reasons for imposing the financial penalty, including the factors taken into consideration when deciding the amount …*" and (ii) "*any response at this stage to the grounds of appeal advanced by the Applicant*".

    b. the Applicant to prepare a bundle of documents by 21 June 2023, to include (i) "*any witness statement of fact relied upon*", and (ii) "*an expanded statement of the reasons for the appeal, which should include any additional grounds upon which the Applicant wishes to rely and any response to the Respondent's case*";

14. The tribunal clarified to the parties by email of 19 June 2023 that the date in the directions for the Applicant to respond should have been 21 July 2023. By that clarification, it was clear that the Respondent was to set out in detail the reasons for making its decision, with the Applicant responding accordingly with any expanded grounds of challenge.

15. Those directions were substantively complied with, and the matter was then listed for final hearing on 4 October 2023.

The parties' positions

The Applicant's position

16. In his Application Notice to the tribunal, the Applicant's position, is that the £90 checkout fee is a damages payment which is a permitted payment (and not a prohibited payment) in accordance with paragraph 5, schedule 1, of the Act. In support of that position, he states that:

    a. the tenant had not returned to the Property in accordance with the tenancy agreement and that costs were incurred, including the need to attend the Property and take a photographic schedule to evidence items left at it, which had to be removed and disposed of;

b. the £90 checkout charge that is not charged to all tenants (it being charged here due to the issues identified above);

c. that the 2019 Act does not prevent a landlord's entitlement to recover damages for breach of a tenancy and that the £90 amount is a reasonable sum to address the costs incurred;

d. that the Respondent had "*misinterpreted the tenancy agreement*";

e. that the Respondent has adopted an enforcement policy used by Bristol Council, and it "*questions whether this is appropriate*"; and

f. that the penalty imposed of £1,250 is "*extremely excessive*" when considering the payment of £90 upon which it is based.

The Respondent's position

17. In its Application Notice to the tribunal, the Respondent stated that:

a. the nature of the £90 "*check out*" charge is a prohibited payment, as it is not listed in Schedule 1 to the 2019 Act;

b. that there was no evidence, whether photographic or otherwise, showing disrepair, but that in fact, but instead, they show items left in the Property or areas of unsatisfactory cleaning and that the costs of removal of those items and cleaning was covered by the other two charged levied;

c. the Applicant had not provided evidence of breach of the "*repairing*" (it means cleaning) obligations.

d. that there is a requirement to attend the Property by the Applicant and that charging for such a visit is not within the meaning of damages in Schedule 1 to the 2019 Act.

e. that the £90 sum charged is not reflective of any actual costs incurred by the Applicant in attending the property to take photographs and that the £90 is disproportionate and, in effect, a penalty clause.

Development of the Applicant's position

18. In the expanded reasons for the appeal, permitted by the tribunal's directions of 5 June 2023, the Applicant rehearsed the grounds set out above, and included a new ground, in the following terms:

"(g) Notwithstanding the drafting of the tenancy agreement, it remains disputed that a deposit was ever paid by the Tenant and that it is subject of a separate allegation brought by the Tenant against the Applicant. The letter dated 15

November 2021 is an administration error which resulted in a sum being paid to the Tenant incorrectly. The Applicant's intention was to invoice the charges (including the charge subject of this Appeal) to the Respondent together with rent arrears amounting to £4,500. Such point remains separate to this Appeal and it is appreciated that the Respondent may not be aware of this. Nonetheless, it is worth noting as the Applicant believes the Tenant complained to the Respondent maliciously."

19. The witness evidence of Naresh Kumar, accompanying the expanded grounds of appeal, stated:

"10. Due to an administrative error however, although a deposit was never paid by the Tenant at the start of his occupation, a letter was sent to the Tenant stating a sum would be deducted from the Tenant's deposit – that is the subject of a separate matter with the Tenant.

11. Although the statement from the Tenant submits that a deposit was paid, no deposit has ever been received and there is no record of this. Paragraph 7.6 of the Tenant's witness statement is strongly disputed and is the subject of a separate matter."

20. The directions of 5 June 2023 appear to anticipate a potential further pleading from the respondent, because it provided that the Respondent should provide "*any response <u>at this stage</u> to the grounds of appeal advanced by the Applicant*". (*<u>my emphasis added</u>*). There is nothing in the papers before me which suggests such a direction was subsequently sought.

21. No steps were seemingly taken by the Respondent to seek to address the expanded grounds by a further statement of case, in particular, the issue of whether in fact a deposit had in face been paid, perhaps because (a) it envisaged this issue was sufficiently addressed in any event because it was addressed in the witness statement obtained from the tenant which went to the provision of the deposit, and (b) the tribunal made no further directions in relation to statements of case, whether of its own motion or upon application of the parties.

22. Following submissions at the end of the initial hearing, on 4 October 2023, I identified what I considered to be a further point that might be relevant. Broadly, my observation related to the basis upon which the Notice of Intent had been prepared, because it only contained details relating to the alleged prohibited payment by way of deduction of monies from a depot. Yet, there are, as will be seen below, various circumstances in which the law deems a prohibited payment to be made, which include the provision of a clause in a tenancy agreement which requires such a payment be made – in other words, there is no need for the payment to actually be made to contravene the prohibition in section 1. Thus, On 10 October 2023, upon my request, the parties were emailed by the tribunal office to ask whether, if I were to conclude that I was not satisfied beyond reasonable doubt that a deposit had in fact been paid, what would the position be if I were

satisfied that the 2021 Tenancy Agreement nonetheless contained a clause which amounted to a prohibited payment instead.

23. As the point had not been argued before me, I invited the parties to make submissions, preferably in writing, but the Respondent requested a further hearing. I agreed to that request. I subsequently drew the parties' attention to the relevant paragraphs of Schedule 3 of the Act, and I provided copies of two authorities of interest to them, in advance of the hearing, which have been relevant: *Waltham Forest LBC -v- Younis [2019] UKUT 0362 (LC)* and *Maharaj -v- Liverpool City Council [2022] UKUT 140 (LC)*.

24. The Applicant made written submissions and the Respondent requested a further hearing, which I granted. That subsequent hearing took place on 24 October 2023.

25. The Respondent's position at the subsequent hearing was essentially that the Application Notice set the scene for the scope of the dispute, and that it amounted to a practical admission that no deposit has been paid, because it all related to seeking to justify a deduction from the tenant's deposit by reference to the amount being a damages payment to compensate for damage done the property. The Applicant said that it should be entitled to argue about the absence of the deposit and that I needed to be satisfied beyond reasonable doubt it had been paid. Further, the Respondent's position was that the Notice of Intent and Final Notice, drafted in their present form, was not something that should trouble the tribunal in determining that a prohibited payment had been made on the alternative basis, namely the inclusion of a clause in the 2021 Tenancy Agreement requiring a prohibited payment to be made, there being no prejudice to the Applicant in reaching such a conclusion.

26. I am satisfied that the dispute about the existence of the tenant's deposit was a live issue in these proceedings, and that there was no "*admission*", on the terms of the application that the deposit had in fact been paid. The late introduction of this new ground of challenge, does not mean it cannot be argued, because the 5 June 2023 directions permitted it, but if anything, it goes to the credibility of the Applicant's position.

The Legal Framework

(a) The basis of the hearing

27. It is common ground that this appeal proceeds by way of re-hearing, pursuant to paragraph 6(4) of Schedule 3 to the 2019 Act. This tribunal may consider matters that the Respondent was unaware of the time of reaching its decision, although any such matters must have been in existence at that time of its decision to impose the financial penalty (*London Borough of Waltham Forest -v- Nasim Hussain [2023] EWCA Civ 733*).

(b) the Tenant Fees Act 2019 – the substantive prohibition

28. Section 1 of the Act states:

"1 (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.

…

(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 and Wales 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 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 required or purports to require the person to do any of those things in the event of an act or default of a relevant provision,

(c) requires the person to do any of those things pursuant to a provision of a tenancy agreement relating to such a tenancy which required 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."

29. A prohibited payment is defined in section 3 of the 2019 Act as being any payment that is not permitted by Schedule 1 of the said Act.

30. Schedule 1 contains a number of payments that are permitted, but the type of payment relied upon by the Applicant in the Application is that in paragraph 5:

"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."

31. The permitted payment type relied upon by the Applicant in this case is that in paragraph five of the second schedule ot the Act:

"Payment in the event of a default

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

32. By section 10 of the Act, a direction may be given, as indeed it was in this case, by the Respondent, to require the repayment of any prohibited payment. The Respondent required the sum of £90 to be repaid to the tenant, together with interest. Interest is permitted to be claimed pursuant to section 11 of 2019 Act.

(c) Procedural requirements

33. In order to lawfully impose a financial penalty, the procedure set out in schedule three of the 2019 Act must be followed. Broadly, this requires the service of a "*notice of intent*", the tenant having the opportunity to make representations, a consideration of the representations by the relevant authority, and then, should it decide to issue a penalty, and the issue of a "*final notice*". Relevant for present purposes are the requirements of paragraph 2, schedule three, which states:

"Notice of intent

2(1)This paragraph applies where an enforcement authority proposes to impose a financial penalty for a breach of section 1 (prohibitions applying to landlords) or 2 (prohibitions applying to letting agents) or Schedule 2 (treatment of holding deposit).
(2)Before imposing the financial penalty, the enforcement authority must serve a notice on the landlord or letting agent of its proposal to do so (a "notice of intent").
(3)The notice of intent must be served before the end of the period of 6 months beginning with the first day on which the enforcement authority has sufficient evidence of the breach, subject to sub-paragraph (4).
(4)If the breach is committed on that day, and the breach continues beyond the end of that day, the notice of intent may be served—
(a)at any time when the breach is continuing, or
(b)within the period of 6 months beginning with the last day on which the breach occurs.
(5)The notice of intent must set out—

(a)the date on which the notice of intent is served,
(b)the amount of the proposed financial penalty,
(c)the reasons for proposing to impose the penalty, and
(d)information about the right to make representations under paragraph 3."

34. Any notice of intent must set out the factual basis upon which the penalty is being imposed (Schedule 3, paragraph (5(c)).

35. Paragraph 3, Schedule 3, then provides a right for a recipient of a notice of intent to make representations:

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

36. Following representations, the authority must decide whether to impose a financial penalty. If it intends to do so, it must provide a "*final notice*" containing prescribed information, which includes, the reasons for imposing the penalty (Paragraph 4, Schedule 3).

The Evidence

(a) Overview

37. Evidence was given before me by:

a. Naresh Kumar (described as an Employee of the Applicant managing a number of his properties) (for the Applicant);
b. Adam O'Connell (for the Respondent); and
c. Martin Harland (for the Respondent).

(b) Absent witnesses

38. Witness Statements were provided by Kiren Soggi (for the Applicant) and, as part of the exhibit to Mr O'Connell's evidence, in a criminal procedure form, by Mr Kacper Stankiewicz, the former tenant (for the Respondent).

39. Mr Stankiewicz's was not called to give evidence, and he did not produce a witness statement in the form expected in civil proceedings and instead, produced a witness statement for Mr O'Donnell, in the form expected in criminal proceedings. Whilst I would not necessarily hold the issue of format of the statement against the admission of such evidence by itself, in this case, given the absence of good reason for Mr Stankiewicz's failure to provide a statement in the correct form and to attend at the hearing to be cross examined, I conclude it is inappropriate to give any weight to his evidence at all.

40. Mr Stankiewicz's evidence would have been fundamental in determining whether a deposit had in fact been paid.

41. The admissibility of evidence in tribunal proceedings is different to that in the civil courts, in that Rule 18(6) of the Tribunal Procedure (First Tier tribunal) (Property Chamber) Rules 2013, permits the tribunal to admit evidence that would not be admissible in a civil trial, but the question of weight to be given to evidence is a different matter. So, whilst I recognise that it is open to the tribunal to admit the evidence of Mr Stankiewicz, I choose to give it no weight, because it contains evidence which is challenged in these proceedings by the Applicant and which would have, I have no doubt, been subject to cross examination on the part of the Applicant.

42. As to Kiren Soggi, this evidence related principally to cleaning/redecorating works being carried out following the tenant's departure. No explanation was given for Kiern Soggi's absence. This does not add anything to that evidence provided by Mr Kumar and I do not consider it appropriate to provide any weight to this evidence either.

(c) Application to re-convene after final hearing to produce Mr Stankiewicz

43. As noted above, Mr Stankiewicz did not attend to give oral evidence.

44. Following the final hearing, and in response to the observations made by me as communicated the parties on 10 October 2023, the Respondent sought a further hearing as I noted above, and sought permission to ask the tenant to give evidence at that further hearing. Whilst I agreed to a further hearing, the purpose was limited to making submissions on the point I had raised wit the parties. I declined to permit Mr Stankiewicz to attend to provide evidence.

45. The final hearing is the final hearing, or put another way, to quote Lewinson LJ, in *Fage UK Ltd -v- Chobani UK Ltd [2014] EWCA Civ 5* "*The trial is not a dress rehearsal. It is the first and last night of the show*". Accepting, of course, that this was an observation made in the context of civil court proceedings, with the approach of the tribunal being perhaps flexible and informal, I consider it wrong on the facts of this case to permit at a subsequent hearing, further evidence to be called by a witness who could, and should, have attended at the first hearing and did not do so without good reason. The Respondent would have likely considered, in light of my observations on 10 October 2023, that I may conclude that there was an evidential deficit on the part of the Respondent as to whether the deposit had been paid.

46. Whilst I accept that there are times when it may well be appropriate to re-convene to permit a further hearing for evidence to be called, in this instance, given the absence of any good reason for Mr Stankiewicz not being called at the final hearing, and indeed, given the risk of perception of the lack of impartiality of this tribunal were it to permit further evidence on the back of observations made

by me after the conclusion of submissions by the parties, I did not accede to the request to reconvene for the Respondent to adduce Mr Stankiewicz's evidence.

47. As to the remaining witnesses:

Naresh Kumar

48. Mr Kumar was acting as a property manager on behalf of the Applicant landlord, Mr Kalia.

49. Mr Kumar gave fairly short answers to most questions, inevitably leading to many follow up questions. Essentially, Mr Kumar told me that:

    a. He took photographic evidence at the Property on 17 September 2021 and that there was some disrepair. I accept his evidence that there was some disrepair, which he sought to identify by the photographs provided (although the quality of these in the bundle provided was poor and extend of any damage was difficult to see).

    b. The £90 deduction was possibly the check-out fee referred to in the Tenancy Agreements, which refers to £75 plus VAT. Mr Kumar was frank about that, and content to accept that it was a charge that was likely £75 plus VAT, and he accepted that such a checkout fee would be unlawful.

    c. The Applicant had incurred the £90 charge to a third party in respect of the photographs. Mr Kumar's evidence was that he had taken the photographs, but that a "*processing*" charge had been incurred to a third party in respect of them. In a follow-up answer, he said the processing charge was for a third party to put the photographs onto his computer systems. Mr Kumar could not identify the third party who supposedly charged for taking his photographs from his camera and putting them on his systems.

    d. That there was a separate dispute with the tenant, because it had been discovered that he had not in fact paid the initial deposit of £625 and that monies were therefore wrongly paid to him. Mr Kumar accepted that he signed the letter sending the monies to the tenant but that he did not prepare the letter, this would have been done he said by "*the girls in the office*".

50. Mr Kumar seemed initially to be a straight-forward witness, but, I developed real concerns for the veracity of some of his evidence, because I simply cannot accept that he paid the sum of £90 to a third party who he cannot identify, for the sole purpose of uploading photographs Mr Kumar is said to have taken to his own computer systems. Not only is that a substantial sum of money for such a task, I would have expected Mr Kumar to know who was accessing his computer systems as a matter of course. No invoice or receipt was produced for the £90 sum, as indeed, such was provided for the other costs deduced from the deposit amount

and that is a striking omission in circumstances where the sum was paid out, because those preparing this case has the good sense to obtain such a receipt from Kiren Soggi.

51. Such is the magnitude of the incredibility of the payment of £90 to an unknown third party, for such a simple task, that I treat his evidence with considerable caution indeed.

Adam O'Donnell (two witness statements)

52. Mr O'Donnell was a straight-forward witness and I accept his evidence in full.

53. Mr O'Donnell set out background to the penalty being issued, which followed a complaint from Mr Stankiewicz. There is no dispute about the chronology of events in this case. He set out the process by which he arrived at a conclusion on liability and quantum and this was not challenged (the amount was said to be excessive, but the process for arriving at it was not disputed).

54. On quantum, he told me that he considered the culpability of the Applicant to me medium and that the harm was medium. He told me that he did not have any detail of the financial circumstances of the Applicant available to him and that he had no details of the effect of the payment of £90 being made. Although, Mr O'Donnell was of the view that any deduction would be adverse to the interests of the person subject to that deduction.

55. The Bristol policy for enforcement was exhibited to his evidence and the photographs of the property taken by Mr Kumar were reproduced as an exhibit.

56. Mr O'Donnell felt that his assessment of the penalty sum was fair and reasonable, in light of the enforcement policy.

Martin Harland

57. Mr Harland's evidence was not contested and I accept it in full.

58. In essence, Mr Harland explained that the Respondent had adopted as its own the enforcement policy that used by Bristol Council, and thus, he explained the apparent oddity that the Respondent's policy is headed as being that of Bristol council.

Discussion and conclusions

59. The starting point is to identify what constitutes a contravention of section 1 of the 2019 Act.

60. Section 1(1) of the Act is clear: a landlord must not require a relevant person (e.g. a tenant) to make a prohibited payment to the landlord in connection with a tenancy of housing in England. What is meant by that, is expanded upon by section 1(6), which lists, as I set out above, the requirements that amount to the

making of a payment. In this case, it is accepted that a charge of a checkout fee itself, non-referable to breach, would constitute a breach of section 1 – it would likely fall within section 1(6)(a) or (b), and the facts of this case would fall within both of those provisions.

61. In addition, on the facts of this case, the Tenancy Agreements contains a clause that requires payment of a "*checkout fee*" which is not referable on the fact of the agreement to any breach. It seems to be an administrative charge. The very entry into of such an agreement is likely to be considered to require a prohibited payment to be made by section 1(6)(d), which states that "*making a prohibited payment*" can include where a landlord "*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 paragraphs (b) or (c)*"; the circumstances in (b) and (c) in this case can be summarised as meaning in relation to a breach scenario.

62. The second point, in relation to the entry into of the 2021 Tenancy Agreement, is not mentioned in the parties statements of case and no amendment application was made by the Respondent. However, having raised this with the parties, I deal with it below.

Was a deposit paid?

63. The first significant factual finding required to be made is whether a deposit was in fact paid.

64. The only real evidence that I gave weight to from the Respondent as to the payment of the deposit was the evidence from Mr O'Donnell, relaying what the former tenant had told him. I have no reason to doubt Mr O'Donnell in relation to that and indeed, this evidence was not challenged. I accept that he has faithfully prepared a statement from Mr Stankiewicz that sets out what he had told him.

65. Mr Stankiewicz himself, in his statement to which I give no weight, notably says that he paid the deposit in cash, when the tenancy first started (so, presumably around 2019) and there are various references to the Tenancy Deposit Service and prescribed information being given in the accompanying terms to the Tenancy Agreements, but it all seems standard form, with no specific deposit references or anything that would constitute a receipt or acknowledgment of actual protection of the deposit in this case (and, more importantly, receipt of the disputed deposit payment). Yet, there was no suggestion of any complaint by the tenant about the deposit having not been protected, which I might have expected to see some reference to if it had been paid, although it might simply be that Mr Stankiewicz was unaware of his rights to claim 3x to 5x the deposit amount at court if the deposit was not protected.

66. As I did not hear from Mr Stankiewicz, there is no good first-hand evidence of the deposit having actually been made. Of course, I note the payment made back to Mr Stankiewicz, but the Applicant's statement of case says this was an error.

67. Each of the Tenancy Agreements referenced a deposit being paid. However, I accept the Applicant's submission that this is standard form and does not necessarily mean that the deposit was in fact paid. I note, also, that the 2019 Tenancy Agreement appears to contain bank payment details, quite why is unclear, although I expect this was for ongoing rental payments and it is not clear why the deposit would not have been paid in the same way.

68. Mr Kumar's evidence is the best evidence before me as to the position on the ground, as it were, as to whether the deposit was paid. But, as I noted above, I have real reservation in accepting Mr Kumar's evidence on this point.

69. In short, I reach the conclusion that, although I do accept Mr Kumar's evidence on the £90 payment sum likely being an intended checkout charge, this being a sensible and frank admission, it seemed to me, the other parts of his evidence I am more reluctant to accept.

70. I remind myself that I must be satisfied beyond reasonable doubt, that the deposit was indeed paid, in order for there to have been a prohibited payment. It is not for the Applicant to prove that the deposit was not paid, but rather, for the Respondent to prove beyond reasonable doubt that it was. In light of the absence of direct evidence on the payment of the deposit, in light of the Applicant's position being that there was an administrative mistake, there is a separate dispute with the tenant, I am not satisfied that the Respondent has discharged the evidential burden it faces in relation to the payment of the deposit.

71. In this instance, therefore, the Respondent has failed to satisfy me to the required criminal standard that the deposit was paid. For this reason alone, for reason I develop below, I must allow the Applicant's application.

Was the payment of £90 a permitted payment?

72. Given the position I have reached in relation to the deposit, it is not strictly necessary to consider matters further. However, I consider it sensible and, I hope, helpful to the parties to do so and understand the decision made on the arguments raised.

73. Mr Kumar's evidence was that the £90 fee was likely to have been the checkout fee referenced in the agreements. This is the position adopted by the Respondent too. The sum of £90 was, I find, indeed intended to be taken from the deposit and that this sum was not referable to damage to the premises. It was a payment required simply as a matter of contract upon leaving the property – in any instance, whether in a breach scenario or otherwise.

74. Mr Kumar's evidence that the sum of £90 was taken to pay for uploading a schedule of photos I do not accept for the reasons I have given.

75. The Applicant argued that the failure by the tenant to return to the property at the end of the term was in breach and thus, the schedule of photographs and expense incurred to upload them was a payment of damages. I see nothing in the 2021 Tenancy Agreement that requires the tenant to live in the Property for the entire term, and indeed, that sooner vacation might arise is contemplated by clause 2(13a) and clearly would not amount to a breach of the said agreement so long as notice was given.

76. The Applicant's argument that the sum of £90 is not charged to all tenants is not accepted by me. Mr Kumar's evidence was that the sum was payable to a third party for uploading images to his computer. He told me photographic schedules were undertaken whenever a tenant moves out – whether a breach scenario exists or not – and that in those circumstances, that the £90 charge might not be enforced save in a breach scenario might have permitted the payment to be considered damages, but as I have said, I do not accept his evidence in relation to this. Further, it would be incredible to suggest, as Mr Kumar does, that the liability incurred to a third party to upload photos is only charged to tenants upon breach.

77. I am quite satisfied, beyond reasonable doubt, that the £90 sum deducted in this case had nothing to do with breach. It was a pure administrative payment simply by reason of Mr Stankiewicz leaving the property.

Has there been a misinterpretation by the Respondent of the 2021 Tenancy Agreement?

78. There has been no "*misinterpretation*" by the Respondent of the 2021 Tenancy Agreement as the Applicant contended. The Respondent's interpretation of the agreement's provisions is consistent with my conclusions that the checkout fee is not a payment required solely upon breach.

79. I am satisfied beyond reasonable doubt that the sum of £90, had it have been deducted from a deposit, would have been a prohibited payment, because it is not referable to breach on the part of the tenant and it is not a payment of the kind listed in Schedule 1of the 2019 Act. It follows, therefore, that payment of the checkout fee would be a prohibited payment.

Is the application of the enforcement policy from Bristol Council relevant?

80. The Applicant appeared to accept the explanation given the by the Respondent and this point was not seemingly pursued. In any event, I am satisfied that the Respondent was entitled to adopt, as per the evidence of Mr Harland, the enforcement policy from Bristol Council.

81. To the extent therefore that any challenge was pursued on this ground, it fails.

Was the penalty excessive?

82. In light of the findings made, this issue falls away, however, I do not consider the penalty to have been excessive at all. The evidence from Mr O'Donnell, which I accept in full, explained clearly how the sum of £1,250 was determined.

83. Mr O'Donnell concluded that this was:

    a. A case of medium category of harm, defined by the policy as being a "breach committed through act or omission which a person exercising reasonable care would not commit"; and

    b. A category two case of "medium likelihood of harm". The policy refers to harm as including an adverse effect on the tenant and harm includes financial loss. It was reasonable for Mr O'Donnell to conclude that causing a person to make a payment which is unlawful would cause an adverse effect to the tenant.

84. When looking at the table of penalties, the starting point would be £2,250. The lowest end of the scale is £1,250 and the highest, £3,250.

85. Mr O'Donnell initially sought to levy a penalty of £2,250, when "CHARGE 1" and "CHARGE 2" were said to be prohibited payments, but chose to reduce the penalty, by reference to the number of issues reducing.

86. I am satisfied, therefore, that there had been a proper consideration of the issues by Mr O'Donnell and that he has applied the policy criteria appropriately and that the penalty of £1,250 set out in the Final Notice was no in any way excessive by reference to those criteria properly applied. This is a sum that the Respondent was entitled to levy and is not, as the Applicant contends, "*extremely excessive*".

87. I agree entirely with Mr O'Donnell's assessment and would have imposed the same level of penalty had I been satisfied of a contravention under section 1.

88. Does it matter that the Notice of Intent / Final Notice relate only to the deduction from the disputed deposit, or can other particulars of non-payment be relied upon, such as the landlord entered into a tenancy agreement with clauses that require a prohibited payment to be made?

89. Strictly, this is not an issue that was relied upon in the statement of case prepared by the Respondent and it arises by reason of my observations to the parties of 10 October 2023.

90. The Act requires, before a final notice can be issued, a notice of intent to be served. The purpose, of course, is to allow representations to be made, such that might influence a local authority's view of liability or the amount of any penalty –

as indeed, happened in this case successfully for the Applicant, because the Respondent agreed that "CHARGE 1" and "CHARGE 2" were not prohibited payments (or at least it was not an issue it would pursue) and it reduced the amount of the penalty accordingly.

91. In *Maharaj -v- Liverpool City Council [2022] UKUT 140 (LC)*, the Upper Tribunal concluded that the content of a notice of intent relating to breaches of licensing conditions under Part 3 of the Housing Act 2004, said:

"… Those too must be sufficiently clearly and accurately expressed to enable the recipient landlord to decide whether to exercise the right of appeal to the FTT … In the Tribunal's judgment, those reasonable must be directly referable to the condition of the license in relation to which it is said that there has been a failure to comply on the part of the landlord; and those reasons must identify clearly, and accurately, the particular respects in which it is said that there has been non-compliance on the landlord's part. The Tribunal does not regard the reasons for imposing a financial penalty, or proposing to do so, merely as giving a factual background to the offence; they should be treated as providing particulars of the offence…

The Tribunal does not regard this point as a mere technicality because it gives rise to the risk that a landlord might be found guilty of a non-existent offence, or of one that has not been properly identified to the landlord …"

92. In *Waltham Forest LBC -v- Younis [2019] UKUT 0362 (LC)*, the Upper Tribunal considered a notice of intent which, in the view of the first instance tribunal, contained insufficient particulars of the offence concerned. In that case, the Upper Tribunal held that an overly technical approach to construing a notice should not be adopted, and the absence in that case of specific details such as the date and duration of specific license condition breaches were unnecessary to ensure the notice of intent was valid. This decision is not at odds with the principle that the particulars of in a notice should set out the basis upon which the penalty is being made, or proposed to be made, sufficient that the recipient knows on what basis he is responding and the matters of which he is accused as having committed an offence.

93. The Notice of Intent and the Final Notice were both premised in this case on the deduction from the deposit of monies. They were not premised upon the existence of a tenancy agreement that the Applicant caused be entered into, on the basis that it included a provision which required a prohibited payment be made.

94. The Respondent says there has been no prejudice in this issue not being set out in the said notices, and that if I find there was no deposit, I should nonetheless uphold the financial penalty. The Applicant says there has been a prejudice, in that he could have sought to argue about the historic nature of the Tenancy Agreements, and focus on the circumstances in which they were entered into.

This is, it was said, something that could potentially have impacted on whether a penalty should be imposed at all and, if so, in what amount.

95. As this issue arose in submissions, there was no evidence led on it by Mr O'Donnell as to the decision that the Respondent would have likely have made and the factors if might have considered relevant. No application was made to adduce evidence on this particular aspect of matters.

96. I accept the Applicant's argument that its submissions, had it received a notice of intent, relating ot the content of the clause, its submissions might well have been different. The Respondent might, or might not, have proceeded with enforcement action on this basis, I simply do not know. If I were to proceed to uphold the penalty on a different basis than that set out in the Notice of Intend, I believe it would cause prejudice to the Applicant in him not having been able to argue that with the Respondent first, or indeed, in the course of this application by reference to all appropriate evidence that might arise – including, of course, questioning Mr O'Donnell on those very issues and the Respondent enforcement practices and whether it would indeed to have proceeded to enforce by reason of the inclusion of the clause concerned.

97. Accordingly, I do not consider that I can uphold the financial penalty based on a different reason for making a prohibited payment.

Conclusions

98. I am not satisfied beyond reasonable doubt that:

    a. a deposit was paid by the tenant;

    b. that any monies were therefore deducted from a deposit, such that this deduction could be considered to amount "*mak[ing] a payment*" for the purposes of section 1; and

    c. the alleged deduction therefore amounted to a contravention of section 1.

99. The procedural requirements of Schedule 3, which are mandatory, must set out the facts relied upon as grounding liability for the contravention of section 1(1), and in order to have been effective in this case, needed to cite the existence of the clause in the offending tenancy agreement and thus provide an opportunity to make representations on the point. Further, the stage at which the issue was addressed in the application meant no evidence was provided on the issue and no opportunity provided to the Applicant to cross examine Mr O'Donnell on the issue and that is a further reason it would be inappropriate to uphold the penalty on a different basis.

100. Accordingly, the financial penalty is quashed. The Applicant is not required to pay the penalty or pay the sum of £90 to the tenant.

TRIBUNAL JUDGE KELLY

APPEALS

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission to appeal must be made to the First-tier Tribunal at the Regional Office which has been dealing with this case.

2. 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.

3. 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 reasons for not complying with the 28-day time limit; the Tribunal will then look at such reasons and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. Any application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. provide the date, the property and case number) and set out the grounds of appeal and state the result the party making the application is seeking.