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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 21/12/2017

IN THE COUNTY COURT FOR NORTHERN IRELAND

SITTING IN BELFAST

BY THE DISTRICT JUDGE

—————
PAUL LOUGHRAN

Plaintiff

v

PINEY RENTALS LIMITED

First Defendant

and

F5 PROPERTY LIMITED

Second Defendant

—————
DISTRICT JUDGE GILPIN

Introduction

[1] In this matter the Plaintiff (“the Tenant”) seeks the recovery of certain monies he paid to letting agents in the course of renting residential properties in Belfast for his use while he was a student at Queen’s University.

[2] He argues he is entitled to recovery of these monies due to the provisions of the Commission on Disposal of Lands (Northern Ireland) Order 1986 (“the Order”).

[3] In addition he seeks an ancillary remedy, namely a declaration, that certain charges levied by letting agents upon tenants or prospective tenants are in breach of the Order.

[4] The Order is short and for the sake of convenience is set out in extenso.

**"The Commission on Disposals of Land
(Northern Ireland) Order 1986**

Title and commencement

1.-(1) This Order may be cited as the Commission on Disposals of Land (Northern Ireland) Order 1986.

(2) This Order shall come into operation on the expiration of four months from the day on which it is made.

Interpretation

2. The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

Certain stipulations concerning disposals of land and revision of rents to be void

3.-(1) Where, on a disposal of land, an agent acting for the person making the disposal is entitled to be paid a commission, any stipulation made on the disposal to the effect that the person acquiring the land shall pay the whole or any part of the commission shall be void.

(2) Paragraph (1) applies only in relation to contracts for the disposal of land made after the coming into operation of this Order.

(3) Paragraph (1) does not apply to the acquisition of land by agreement by a person or body authorised or capable of being authorised under a statutory provision in force at the date of the agreement to acquire that land compulsorily.

(4) *Where, in relation to a letting of land, an agent acting for the landlord is entitled to be paid a commission for or in connection with*

(a) *the undertaking of a review of the rent payable under the letting; or*

(b) *the extension or renewal of the letting;*

any stipulation to the effect that the tenant shall pay the whole or any part of the commission shall be void.

(5) *Paragraph (4) applies only in relation to agreements made after the coming into operation of this Order.*

(6) *Any money paid under a stipulation to which paragraph (1) or (4) applies shall be recoverable by the person by whom it was paid.*

(7) *In this Article-*

"agent" means an auctioneer, estate agent or any other person acting as an agent;

"commission" includes fees, charges, disbursements, expenses and remuneration;

"disposal" includes any dealing mentioned in paragraphs (a) to (f) of section 45(3) of the Interpretation Act (Northern Ireland) 1954;

"letting" includes a letting by way of Agreement and a letting by way of any agreement conferring a right to use land for cropping or grazing, and the expressions "landlord" and "tenant" shall be construed accordingly; and

"statutory provision" has the meaning given in section 1(f) of the Interpretation Act (Northern Ireland) 1954.

(8) *The Commission on Sales of Land Act (Northern Ireland) 1972 is hereby repealed; but nothing in this paragraph shall be taken to validate any stipulation that*

was void immediately before the coming into operation of this Order."

Background

[5] The Tenant was at the time proceedings were instituted the Vice President for Student Activities of the Student's Union at Queen's University Belfast.

24 Ridgeway Street

[6] For the academic year 2014/2015 the Tenant along with two others, rented residential property situate at and known as 24 Ridgeway Street, Belfast, BT9 5FB governed by a Tenancy Agreement dated 6 May 2014 ("the 2014 Tenancy Agreement").

[7] The landlord of this property was a Kieran Mooney ("the Landlord").

[8] Piney Rentals Limited, the First Defendant ("the Letting Agent") acted for the Landlord as his letting agent but did not act thereafter as his Managing Agent.

[9] The Letting Agent charged the Landlord a fee of £675.00 + VAT being, what the invoice termed, a "Letting Fee."

[10] The Letting Agent was not a party to the 2014 Agreement, the parties being only the Landlord and the Tenant.

[11] The Agreement contained at clause 11, under the heading "Fees", the following wording:

"A one off Administration fee of £30 per Tenant is due within 1 week of signing this agreement."

[12] The Tenant's evidence, which is not disputed by the Letting Agent, is that he paid the said sum of £30 ("the Administration Fee") in accordance with clause 11 of the 2014 Agreement at the time of entering into his tenancy along with a deposit and his first month's rent.

[13] In July 2016 the Tenant made contact with the Letting Agent and asked that the Administration Fee be returned to him with no success.

[14] The court agrees with the submissions of both the Tenant and the Letting Agent that if the finding of the court is that the Administration Fee is due to be returned to the Tenant, the Letting Agent is the appropriate entity to seek recovery from.

23 St Albans Gardens

[15] For the academic year 2015/2016 the Tenant, along with two others, rented residential property situate at and known as 23 St Albans Gardens, Belfast, BT9 5DR governed by an undated Tenancy Agreement (“the 2015 Agreement”).

[16] The landlord of this property was Eoin Cleland.

[17] F5 Property Limited acted for Mr Cleland as his letting agent.

[18] The Tenant’s evidence is that along with his deposit and first month’s rent he paid to F5 Property an Administration Fee of £36 in or around 17 August 2015.

[19] In July 2016 the Tenant made contact with F5 Property and asked that the Administration Fee be returned to him with no success

The Proceedings

[20] The proceedings come before the court for determination by way of an Amended Amended Civil Bill dated 26 May 2017.

[21] By consent it was agreed that the court would initially determine the Tenant’s case against the Letting Agent and that the proceedings against F5 Property be stayed.

[22] The Tenant filed an affidavit sworn on 5 June 2017. He also relies on an affidavit of Janet Hunter, the Director of the Housing Rights Service, also sworn on 5 June 2017.

[23] An affidavit on behalf of the Letting Agent was sworn by one of its directors, Hastings Campbell, on 14 June 2017.

[24] The Tenant and Hastings Campbell gave oral evidence and were cross-examined.

[25] I am grateful to Ms Anyadike-Danes QC who appeared with Mr Hayward BL for the Tenant, on a pro-bono basis, and Mr Solomon BL who appeared for the Letting Agent, for their skeleton arguments and their submissions. I am also grateful to their respective instructing solicitors from the Housing Rights Service and Tughans for their preparation of this case.

The Law

[26] If the Tenant is to succeed in his case against the Letting Agent he must satisfy the court that what occurred in 2014 comes within the reach of Article 3(1) of the 1986 Order which provides:

“3.(1) Where, on a disposal of land, an agent acting for the person making the disposal is entitled to be paid a commission, any stipulation made on the disposal to the effect that the person acquiring the land shall pay the whole or any part of the commission shall be void.”

The Matters in Agreement

[27] There is no dispute between the parties in relation to a number of the elements of Article 3(1).

[28] Thus they agree that:

- The situation in the instant case involves a disposal of land given that the definition of ‘disposal’ in the Interpretation Act (NI) 1954, that Article 3(1) encompasses the letting of property to a tenant.
- An agent, namely the Letting Agent, was acting.
- the Letting Agent acted for the person making the disposal in this case the Landlord.
- the Letting Agent was entitled to be paid a commission and
- if the Tenant satisfies all the elements of Article 3 (1) any stipulation requiring him to pay the whole or any part of the Letting Agent’s commission is void.

The Matters in Dispute

[29] There are however two essential elements of Article 3(1) that the parties do not agree are met namely:

- (i) The stipulation element; and
- (ii) The commission element

The Stipulation Element

[30] In relation to the stipulation element Article 3(1) provides:

“...any stipulation made on the disposal to the effect that the person acquiring the land shall pay the whole or any part of the commission is void.”

[31] The Tenant argues that the stipulation requiring the Tenant to pay is set out in Clause 11 of the 2014 Agreement which provides under the heading “Fees”:

“A one off Administration fee of £30 per Tenant is due within 1 week of signing this agreement.”

[32] The Tenant argues that this clause imposes a stipulation, namely an obligation to pay monies on him and that this is sufficient to satisfy this element of Article 3(1). He goes further than this and says in his oral evidence, which the court accepts, that during his dealings with the Letting Agent leading up to the 2014 Agreement the fact that he had to pay this Administration Fee was conveyed to him as being essential if he wanted to lease the property.

[33] The Letting Agent concedes that clause 11 does impose on the Tenant an obligation to pay monies. However, they argue that despite the fact that they were not a party to the 2014 Agreement, of which this clause forms part, the reality was that the obligation on the Tenant to pay monies was not to pay them to the Landlord but rather to pay them to the Letting Agent and this removes such an obligation from falling within Article 3 (1).

[34] The Letting Agent submits it was an error that the obligation clause 11 imposes ever found its way into the 2014 Agreement. In support of this they point to the fact that neither in their contract with or invoice to the Landlord is there mention of an Administration Fee. The submission made is that if the Administration Fee was to be something involving the Landlord mention would be found of it in one or perhaps both of these documents.

[35] Having considered the competing arguments of the parties I have come to the conclusion that in the particular circumstances of this case there was a stipulation to pay monies imposed on the Tenant as part of the letting of the property and that such an obligation was to pay those monies to the Landlord.

[36] The Tenant was a party to the 2014 Agreement. It was made between the Landlord and the Tenant. The Letting Agent was not a party to it. In my view clause 11 of the 2014 Agreement is clear beyond peradventure as to it imposing on the Tenant an obligation to pay the Administration Fee and, as a matter of contract, to pay it to the Landlord.

[37] Even if, as a matter of fact, as appears to have happened in this case the Administration Fee was charged by the Letting Agent to the Tenant it does not change the legal basis upon which such a fee was sought. It was sought pursuant to clause 11 by the Letting Agent, in their capacity as agent, on behalf of their principal, the Landlord.

[38] The attempt by the Letting Agent to seek to sever clause 11 from the 2014 Agreement and suggest it forms part of some other agreement they reached quite separately with the Tenant is in my view not well founded.

The Commission Element

[39] In relation to the commission element if the Tenant is to succeed he must also prove that the Administration Fee he paid is considered to be "commission" for the purposes of the Order.

[40] As noted above the Order provides at Article 3 (7) in relation to commission:

"commission" includes fees, charges, disbursements, expenses and remuneration;....."

The parties contentions on the meaning of commission

[41] The Tenant argues that the Administration Fee he paid was commission within the meaning of the Order. He suggests that as Article 3(7) of the Order provides that commission is to include "fees" and since what he paid was termed in the 2014 Agreement as an "Administration Fee" (emphasis mine) ergo what he paid was commission.

[42] The Letting Agent regards this interpretation of commission as overly simplistic. Simplistic in the sense that the mere appellation of the words Administration Fee to what the Tenant paid does not mean what was paid was necessarily commission within the meaning of the Order. Instead the Letting Agent argues that a proper interpretation of what commission is, for the purposes of the Order, involves considering not only Article 3(7) but also a much broader consideration of what commission means in the context of Article 3 (1). They argue that Article 3(7) does not offer a definition of commission but rather gives some examples of what it might encompass. In seeking to define commission the Letting Agent suggests that the court, while it must have regard to Article 3 (7), must not confine itself to the examples set out therein but should take a broader view. The Letting Agent proffers for consideration by the court the Oxford English Dictionary (online) definition of commission as being “a sum, typically a set percentage of the value involved, paid to an agent in a commercial transaction”. In the specific statutory context of Article 3(1) the Letting Agent thus argues that commission is the payment by a landlord to a letting agent for services provided to the landlord by the letting agent.

The court's finding on the meaning of commission

[43] Article 3(7) of the Order is its interpretation clause. Within it ‘commission’ is not expressly defined. Rather it states that “commission includes” a number of matters namely “fees, charges, disbursements, expenses and remuneration.” In my view the use of the word “includes” in an interpretation clause such as Article 3(7) suggests that the word being interpreted, in the instant case, ‘commission,’ is to be extended beyond the usual meaning it would otherwise bear by also encompassing the matters set out.

[44] Both the Tenant and the Letting Agent suggest that if the court is of the view that the meaning of the Order is ambiguous, obscure or that its literal meaning would lead to an absurdity the court is entitled to consider the legislative history of the Order. Based on a range of authorities including Pepper (Inspector of Taxes) v Hart [1993] AC 593; Fothergill v Monarch Airlines [1981] AC 25; Melville Dundas Ltd v George Wimpy UK Ltd [2007] UKHL and Wilson v First County Trust Ltd (No2) [2003] UKHL it is of course permissible in certain circumstances for the court to delve into the legislative history of legislation.

[45] The Tenant argues in the instant case that if such consideration is given the conclusion that should be drawn is that the mischief the Order was enacted to remedy was not only landlords requiring tenants to pay their letting agent’s

professional fees for letting property but also tenants being required to pay additional fees often referred to colloquially as key money or letting agent's fees.

[46] The Letting Agent suggests the legislative history tells another story and that the mischief the Order sought to remedy was the narrow one of namely landlords seeking to pass on the professional fees of their letting agent to tenants.

[47] However, in this case neither the Tenant nor the Letting Agent suggests that I need go beyond the plain meaning of the Order.

[48] Despite the time taken with it at hearing and as interesting as the historical review of how the Order came to be enacted and the role of what is often termed the "Prior Assembly" played in it was, I intend to follow the urgings of both the Tenant and the Letting Agent and resist the temptation to consider the legislative background as an aid to interpretation. I do not consider the Order to be ambiguous, obscure or that its literal meaning would lead to an absurdity by the court.

[49] Furthermore, the parties also suggest that the court might be assisted in interpreting the Order by engaging in a comparative law exercise and have regard to how the other jurisdictions of the United Kingdom have addressed these issues. Again the parties suggest if such an exercise is undertaken it assists their respective cases. Thus the Letting Agent argues that in Scotland the legislative provisions of the Private Rented Housing (Scotland) Act 2011, which essentially prohibits letting agents charging a tenant a fee, are in such contrast to the legislation in Northern Ireland that the Order cannot be properly interpreted as prohibiting this in Northern Ireland. As for England & Wales the Letting Agent suggests that letting agents can charge a tenant a fee and thus the law there is analogous to that in Northern Ireland.

[50] The Tenant's rejoinder to this is that the law of landlord and tenant in Northern Ireland being a devolved matter should be considered without reference to the situations that may pertain elsewhere. However, they argue that if the court is of the view that the situation in other jurisdictions merits consideration, that the court should consider that all that happened in Scotland by the 2011 Act was that it fell into line with what had existed in Northern Ireland since the coming into force of the Order back in 1986.

[51] I also intend to resist the temptation to consider the legislative provisions that pertain in other jurisdictions as an aid to interpretation of the Order. I decline to do so since I do not consider it either necessary or helpful for me to do

so in that both jurisdictions brought to the attention of the court have their own law of landlord and tenant developed in distinct ways from this jurisdiction and thus have limited bearing here.

[52] I do not regard the word commission as a term of art. Rather in my view commission has a plain meaning. It is the remuneration paid to an agent for the work they have been commissioned to do.

[53] Using this definition of commission when considering the Order as a whole it seems to me to allow a tenant to recover any monies he has had to pay towards the remuneration of a letting agent for work the letting agent has done for the landlord in letting a property.

The Instant Case

[54] This then leads the court to consider in the instant case did the Tenant pay the Letting Agent for work they did for the Landlord in letting the property to him.

[55] There is no dispute in this case that the Landlord commissioned the Letting Agent to provide a service to him namely to let his property. This was the import of the evidence of Hastings Campbell. Confirmation of this can be found in the fact that it was the Letting Agent who signed the 2014 Tenancy Agreement which contained an attestation clause which provided it was "Signed by the Agent on behalf of the Landlord." Furthermore, the court had sight of the terms and conditions between the Landlord and the Letting Agent in which the Letting Agent was appointed as the Landlord's agent to let the property. In his oral evidence Mr Campbell stated succinctly "We are a tenant finding service." Finally, I note that the invoice issued by the Letting Agent to the Landlord dated 4 June 2014 describes the sum sought as being their "Letting Fee."

[56] There is also no dispute in this matter that the Landlord did not commission the Letting Agent to be his managing agent to manage the property on his behalf during the currency of the 2014 Agreement. Again this was the evidence of Hastings Campbell. Confirmation of this can be seen in the 2014 Agreement which contains the following statement about the property "This is managed by the Landlord." It is also supported by the evidence of the Tenant, which the court accepts, that on two occasions after the commencement of the Agreement he contacted the Letting Agent, on one occasion about a mattress and on another about a shower, to be told by the Letting Agent they were not managing the property and he would need to contact the Landlord directly.

[57] The Letting Agent said that as well as work the Landlord had commissioned them to do, the Tenant separately instructed them to provide certain services for him.

[58] The Letting Agent said there would be nothing amiss in acting for both the Landlord and the Tenant. The Letting Agent argues that while they had a relationship of agency with the Landlord they can and in this case did also enjoy a form of agency relationship with the Tenant as well. They rely on the judgment of Lord Brown-Wilkinson in Kelly v Cooper [1992] 3 WLR 936 where he said:

"In the case of estate agents, it is their business to act for numerous principals... Yet despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they would be unable to perform their function."

[59] The submission of the Letting Agent is that this is authority for the proposition that an agent can act for more than one principal without there necessarily being a conflict of interest.

[60] The Tenant drew the courts attention to para 6.048 of Bowstead and Reynolds on Agency which notes that Kelly was not a case of an agent acting for both sides of a transaction but rather for competing principals and thus they comment "while acting for competing sellers in the same market might be an acceptable implication, it is unlikely that an entitlement to act for both a buyer and seller or indeed any two parties with opposed interests would be acceptable."

[61] My own view is that given the fiduciary duty cast on any agent to avoid conflicts of interest a letting agent will find it difficult not to breach this duty if they act for both a landlord and at the same time a tenant in the letting of a property.

[62] I note by way of analogy that solicitors in Northern Ireland are precluded from acting for both the vendor and purchaser of a transfer of land for value or a lender and a borrower of monies unless one of the specific exemptions provided for in The Solicitors Practice Regulations 1987 (as amended) applies.

[63] However, I see nothing wrong in principle with a letting agent acting solely for the landlord in the letting of a property and if they are not retained thereafter to manage the property and to accept instructions to act for a tenant in

any issues he may have with the property after the landlord's retainer to act in the letting has ceased.

[64] The evidence of the Tenant in this case was however that at no time did he enter into an agreement with the Letting Agent to provide any services to him.

[65] He denies discussions about this took place when he viewed the property. He denies discussion took place about it when attended at the Letting Agent's offices to sign the 2014 Agreement.

[66] Rather his evidence was that the first he became aware that the Letting Agent was alleging that in 2014 he had reached an agreement with him about providing various services to him was during an exchange of emails with the Letting Agent in July 2016 when he had begun to query as to why he had paid the Administration Fee.

[67] The Tenant also gave evidence that after the 2014 Agreement commenced he contacted the Letting Agent and asked for the Landlord's contact details in order to discuss with him a broken shower and on another occasion a soiled mattress. His evidence was that on neither occasion did the Letting Agent offer to act on his behalf but rather told him to contact the Landlord directly.

[68] Furthermore, he gave evidence that when at one stage he approached the Letting Agent requesting a further copy of the 2014 Agreement he was not told that he was entitled to this without charge but rather he should be charged £5 for each copy sought. However, the Tenant does accept that on this particular occasion the employee of the Letting Agent agreed to waive this charge.

[69] Mr Campbell gave evidence on behalf of the Letting Agent that in 2014 they did reach an agreement with the Tenant to provide services to him.

[70] His evidence was that on at least two occasions, once when viewing the property and once when attending at the Letting Agent's office to sign the Tenancy Agreement, the Tenant would have been told what services the Letting Agent provide for the Tenants in return for the payment of the Administration Fee. The Letting Agent was not able to produce any documentation to support this assertion. Mr Campbell conceded under cross-examination that he could not recall whether he had actually been present at either the viewing or the Tenant's subsequent visit to his office when he claimed the Tenant was told of the services on offer to him in return for payment of the Administration Fee. He accepted that he could not give direct evidence as to what exchange, if any, took place

with the Tenant other than to say it was standard practice he would have expected it did.

[71] After considering the evidence given I have come to the conclusion that the Tenant did not at any time commission the Letting Agent to provide services to him. He did not do so in connection with the initial letting of the property and he did not do so in connection with any issues arising thereafter.

[72] Having determined that at no time in the instance case did the Tenant instruct the Letting Agent to provide any services to him, it is not therefore necessary for me to consider whether the list of services the Letting Agent claims to have provided to him would in fact have been services the Letting Agent could have provided without breaching his duty to avoid a conflict of interest.

[73] In the particular factual matrix of this case, the Letting Agent was commissioned solely by the Landlord to provide services for him. The Letting Agent was not commissioned by the Tenant to provide services for him.

[74] However, the Tenant paid the Administration Fee to the Letting Agent. If he is entitled to it back under the provisions of the Order, the court must be satisfied that the Administration Fee covered services the Letting Agent had provided to the Landlord in letting the property.

[75] The Letting Agent has listed what the Administration Fee was to cover. They do so in an email from Richard Campbell dated 27 July 2016 and in the affidavit of Hastings Campbell sworn on 14 June 2017.

[76] While there is some overlap between the two lists there is also some discrepancy. However, combining the lists together, it would appear that the Letting Agent is suggesting that the services they provided to the Tenant in return for the Administration Fee were:

- reviewing an application form provided by a tenant
- checking references provided by a tenant
- drafting a Tenancy Agreement
- ensuring Standing Order forms were set up by the tenant
- ensuring guarantors were in place
- negotiating about the terms of the tenancy agreement prior to its execution
- providing additional copies of the tenancy agreement to the tenant after its commencement
- providing proof of the address of the tenant if they seek a Hardship Loan

- providing future estate agents/landlords with references if requested
- providing spare key services to any tenants who have lost theirs.

[77] The Tenant argues that these services were provided by the Letting Agent for the Landlord in letting the property. He suggests that the way the court can determine whether the particular services were provided for the Landlord is to ask itself if the Letting Agent was not involved and the services were to be performed would it be the Landlord or the Tenant who would perform them.

[78] The Letting Agent disputes this is the appropriate test but offers no alternative test. Instead the Letting Agent asserts that landlords simply do not provide services of this nature and this must mean that when the letting agent does they are not doing so for the landlord but instead for the tenant.

[79] I consider there to be merit in the test the Tenant urges upon the court. On considering the list of services it seems to me that while some are concerned with the letting of the property, some are to do with issues that might arise during its term but that all are services that only the Landlord could have done if the Letting Agent had not been involved.

[80] In respect of those services which arose in connection with the letting of the property, the Tenant could not have reviewed his own application form but the Landlord could. He could not have checked his own references but the Landlord could. In transactional work it is the party disposing of an interest, in this case the Landlord, who would draft the disposal document, in this case the 2014 Agreement. It would not be done by the Tenant. Similarly, it would be the Landlord, not the Tenant, who would ensure that the Tenant has set up his Standing Order forms correctly. The Landlord would ensure suitable guarantors and references from previous landlords were in order. Finally, if the Tenant sought that amendment be made to the draft tenancy agreement before its execution it would be the Landlord not the Tenant who would see to this.

[81] In this case I am satisfied that all of the services noted in the preceding paragraph were carried out for the Landlord in the letting of the property. They were carried out by the Letting Agent who was entitled to be paid for them. In paying the Administration Fee, the Tenant was contributing in part towards the costs of the services the Letting Agent had been commissioned by the Landlord to do. Such a payment is void under the provisions of the Order. The Tenant has sought that these monies be returned to him. In the circumstances of this case I find he is entitled to this.