# Extract from opinion of counsel: letting agents' fees in Scotland

Fees or charges required by letting agents or landlords from tenants as a condition of the granting, renewal or continue of an assured or short assured tenancy are 'premiums' and unlawful in Scotland.[1] It has been unlawful to require fees in respect of assured and short assured tenancies since the tenancy regime was first introduced in the late 1980s. Due to uncertainty over the legislation which covers upfront charges in the lettings industry and pressure from private tenants, the Scottish Government decided to clarify the definition of 'premium' contained in the Rent (Scotland) Act 1984.[2] This clarification came into force on the 30th of November 2012 and made it plain that the definition of premium includes administration fees or charges.

Due to continuing uncertainty surrounding the law which covers premiums, particularly in relation to fees charged before the Scottish Government's clarification of the law, Shelter Scotland have sought the opinion of counsel. This is published below. The issues considered in the opinion are the legislation and caselaw which covers premiums, both before and after the Scottish Government's clarification of the law in November 2012. Counsel's opinion was also sought on a specific case which called at the small claims court, and accompanying legal opinion, which has been circulated around the lettings industry as 'precedent'.

We hope this will give private tenants and the lettings industry in Scotland clarity over the issue of tenant fees. Particularly in relation to those which were charged before the Scottish Government's clarification of the law in November 2012.

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[1] ss.82 and 90 Rent (Scotland) Act 1984 (as amended by s.32 Private Rented Housing (Scotland) Act 2011) and s.27 Housing (Scotland) Act 1987
[2] s.32 Private Rented Housing (Scotland) Act 2011

# The law relating to premiums

*Legislation*

The statutory provisions in relation to premiums are to be found in part VIII of the Rent (Scotland) Act 1984. These have recently been amended by section 32(1) of the Private Rented Housing (Scotland) Act 2011. For present purposes, the significant amendments came into force on 30 November 2012. The 1984 Act was itself a consolidating Act. Some form of statutory prohibition on premiums has existed since the very first statutory schemes were introduced for the purposes of controlling rents and conferring security of tenure, in 1915. Over the years, the relevant provisions have been subject to various changes. Up to and including the Rent Act 1965, the legislation applied throughout the United Kingdom. However, in the late 1960s and early 1970s separate consolidating Acts were enacted for Scotland (the Rent (Scotland) Act 1971) and for England and Wales (the Rent Act 1968). The relevant provisions applicable South of the border are now to be found in part IX of the Rent Act 1977, beginning at section 119.

Part VIII of the 1984 Act begins with section 82, the terms of which are fundamental to this discussion.

> **82.— Prohibition of premiums and loans on grant of protected tenancies.**
> (1) Any person who, as a condition of the grant, renewal or continuance of a protected tenancy, requires [in addition to the rent] the payment of any premium or the making of any loan (whether secured or unsecured) shall be guilty of an offence under this section.
> (2) Any person who, in connection with the grant, renewal or continuance of a protected tenancy, receives any premium [in addition to the rent] shall be guilty of an offence under this section.
> …

The words in square brackets "in addition to the rent" were deleted by section 32(1) of the 2011 Act. Prior that amendment, the title and subsections (1) and (2) of section 82 were in identical terms to section 119 of the Rent Act 1977,[3] and the section that it replaced, being section 85 of the Rent Act 1968.

What is the relationship between the offences described in subsections (1) and (2)? The answer to this question can be found in the annotations to the 1984 Act in Current Law

[3] With the exception that the words "under this section" at the end of each provision do not appear in section 119. However, that does make any difference to this discussion.

Statutes, authored by AGM Duncan and JAD Hope QC.[4] In relation to these subsections the authors stated:

> *Subs. (1)*
> It is an essential element of the offence constituted by this section that the premium should have been required "as a condition of" the grant, etc. of the protected tenancy: *Woods v Wise* [1955] 2 QB 29. It has been held that a landlord does not "require" a premium unless he is "saying, either expressly or by implication, that there will be no deal unless he gets his premium": see *Myer Properties and Fullard* (1961) 179 EG 693.
> *Subs. (2)*
> This provision was introduced by the 1965 Act, and was designed to close the loophole arising from the strict interpretation which had been placed on the words "as a condition of" in an earlier subsection dealing with this activity in *Wood v Wise*, *supra*. The offence constituted by this subsection has a broader application than that dealt with in subs. (1), since it is no longer necessary to establish that the receipt of the premium was a condition of the grant, renewal or continuance. It is an offence under this subsection to take a bribe in connection with the grant, etc. or a protected tenancy.

While section 82 creates a criminal offence, section 88 allows a civil remedy to any person who has paid a premium. This section was not amended by the 2011 Act.

> **88.— Recovery of premiums and loans unlawfully required or received.**
> (1) Where under any agreement (whether made before or after 12th August 1971) any premium is paid after 12th August 1971 and the whole or any part of that premium could not lawfully be required or received under the preceding provisions of this Part of this Act, the amount of the premium or, as the case may be, so much of it as could not lawfully be required or received, shall be recoverable by the person by whom it was paid.
> …

The term "premium" is defined in section 90:

> **90.— Interpretation of Part VIII.**
> (1) In this Part of this Act, unless the context otherwise requires—
> …

[4] Later Lord Hope.

> "premium" includes any fine or other like sum and any other pecuniary consideration in addition to rent [means any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge];
> …
> (3) For the avoidance of doubt, it is hereby declared that a deposit returnable at the termination of a tenancy…is not a premium for the purposes of this Part of this Act provided that it does not exceed the amount of two months' rent payable under the tenancy...

The words in square brackets comprise the new definition of "premium", following the amendment made by section 32 of the 2011 Act.

In their annotations to the original section 90, AGM Duncan and JAD Hope QC stated (of the old definition of premium):

> *Subs (1)*
> *Premium*: The expression "and any other pecuniary consideration" is apt to cover "any other consideration that sounds in money to the tenant, either in the way of involving him in a payment of money or of forgoing a receipt of money": *Elmdene Estates Limited v White* [1960] AC 528 *per* Lord Keith of Avonholme at p543.

Before departing from the statutory provisions, it is necessary to make two further points. Firstly, section 32 of the 2011 Act amends in a new section 89A, which allows the Scottish Ministers, by regulations, to provide that certain sums are not to be treated as a premium. In other words, the Ministers may provide for further exceptions, apart from the one already made in the primary legislation by section 90(3). However, in terms of the Rent (Scotland) Act 1984 (Premiums) Regulations 2012 (SSI 2012/329), only one such exception is made, for payments towards energy efficiency improvements under a green deal plan within the meaning of chapter 1 of the Energy Act 2011.

Secondly, in terms of section 27 of the 1988 Act, the above provisions of the 1984 Act apply in relation to assured tenancies as they apply in relation to protected tenancies.

*Authorities*

It has been said of the Rent Acts that they had "not been framed with any scientific accuracy of language",[5] and that it is essential "that, wherever possible, [they] should be construed in a broad, practical, common-sense manner so as to give effect to the intention

[5] Sargant LJ in *Roe v Russell* [1928] 2 KB 117 at 138.

of the legislature".[6] This purposive approach to the Rent Acts has been emphasised by the House of Lords.[7] As regards the statutory prohibition on premiums, the leading case is the decision of the House of Lords in *Farrell v Alexander*.[8] For reasons that will become apparent, that case is of considerable importance for the present discussion; it requires detailed consideration.

*Farrell v Alexander*

The defendant was the protected tenant of an unfurnished flat. She made an agreement with the plaintiffs, with her landlord's consent, to surrender her lease to the landlords who would simultaneously grant a new lease to the plaintiffs. On completion of the new lease the plaintiffs were to pay the outgoing tenant (the defendant) £4,000 "for the carpets curtains and chattels fixtures and fittings" in the premises. After the transaction had been completed, the plaintiffs had the contents valued, the valuation being £1,002. They raised proceedings against the defendant claiming that the balance of £2,998 was an unlawful premium under section 85 of the Rent Act 1968 and recoverable under section 90. The plaintiffs lost at first instance, and in the Court of Appeal. That was because it had previously been decided by that court, in *Zimmerman v Grossman*,[9] that section 85 only applied to the landlord of the tenancy; persons other than the landlord (such as the outgoing tenant) could not be guilty of an offence under section 85. That decision was overruled by the House of Lords,[10] and the plaintiffs were successful.

For present purposes, I find the following passages from the judgments to be of particular significance. It may be of assistance if I remind the reader that in these passages, sections 85, 90 and 92 of the Rent Act 1968 are the equivalents of sections 82, 88 and 90 in the 1984 Act.
The following passage comes from Lord Wilberforce's judgment:[11]

> My Lords, I must say that, in relation to the facts which I have stated, [section 85, 90 and 92] are to me, if not transparently clear, at least unambiguous in the legal sense. They refer to "any person," words wide enough to include landlords, tenants, agents or middlemen. They apply to what was done here because the respondent required the premium as a condition of the grant of a protected tenancy (see the words "subject to... the simultaneous grant" mentioned above). The words

[6] McCardie J in *Read v Goater* [1921] 1 KB 611 at 615.
[7] In *Cadogan Estates v McMahon* [2001] 1 AC 378; see in particular the opinions of Lord Hoffmann and Lord Hutton.
[8] [1977] AC 59.
[9] [1972] 1 QB 167, following *Remmington v Larchin* [1921] 3 KB 404.
[10] On a 4 to 1 majority, Lord Russell of Killowen dissenting.
[11] At p71.

> "any person" which are common to subsections (1) and (2) [of section 85]…are words of wide generality and fit, without any strain whatever, the present facts. I am unable to follow the argument that the words "in addition to the rent" or "in addition to rent" which appear in section 85 and in the interpretation section 92 and which on any view are used with some surplusage, have the effect of limiting "any persons" to "persons in receipt of rent." The words are descriptive of the character of the payment and not of the recipient.

This passage comes from the judgment of Viscount Dilhorne:[12]

> The respondent…contends that this case is governed by section 85. While not disputing that "Any person" means what it says, it is contended that only a landlord or potential landlord can commit the offences defined in the section. It was argued clearly and persuasively by Mr. Barnes, for the respondent, that section 85(1) properly interpreted could only apply to a person who, as a condition of the grant etc. of a protected tenancy, required the payment of rent and also required the payment of a premium; and section 85(2) only to a person who receives the premium and also receives the rent. The opposing argument is that the words "in addition to the rent" are there merely to indicate that the premium must be a sum over and above the rent. For the respondent, it was suggested that in section 85 (1) the fact that the words "in addition to the rent" followed immediately after the word "requires" supported the contention advanced on her behalf. I am unable to attach any significance to this or to the punctuation. The words "in addition to the rent" must have the same meaning in section 85(2) as in section 85(1), and in section 85(2) they do not appear after "receives" but after "any premium."
>
> Mr. Barnes conceded, and in my view rightly, that in section 92(1), the interpretation clause, "in addition to rent" meant over and above the rent and, that being so, I cannot regard it as right to read section 85(1) as if it read "any person who requires the rent and also requires a premium" or section 85 (2) as saying "receives any premium and also receives the rent." The context does not require the words "in addition to the rent" to be interpreted differently in the same part of the Act.
>
> …
>
> Looking at the Rent Act 1968 alone, I would have no hesitation in saying that, in my view, the amount paid by the appellants in excess of a reasonable price for the fixtures and fittings constituted a premium; that it was an offence under section 85(1) to require the payment of it as a condition of the grant of the protected tenancy, an offence under section 85(2) to receive it in connection with the grant of

[12] From the foot of p76 onwards.

such a tenancy; and also that it was a premium which could not under sections 89 and 88 be lawfully required and so a premium recoverable under section 90(1).

I do not regard section 85(1) and (2) as ambiguous. Though they might have been better phrased I think their meaning and effect is clear. The object of these provisions was to protect protected tenants by making it impossible to extract from them as the condition of the grant, renewal, continuance or assignment of a tenancy or in connection with such a grant etc., any sum over and above the rent. That seems to me to be clear and that being so I can see no valid reason why, as a matter of policy, Parliament should have intended the section only to apply to landlords though it may have been thought that they were the most likely offenders.

The final passage comes from the judgment of Lord Edmund-Davies:[13]

Let me first consider [section 85(1)]. The basic submission for the respondent is that this operates only if the "person" requiring the payment of a premium is in a position to make such payment a condition of the grant of a protected tenancy; and it is said that the only person who can impose such a condition is the landlord, for he alone can grant the new tenancy. Again, despite the width of the opening words of the subsection ("Any person"), such "person" must be he who is to become entitled to the rent under the contemplated tenancy, since, in order to be a "premium," the payment required must be "in addition to the rent"; therefore, since the only person entitled to the rent is the landlord, section 85 (1) makes it a penal offence for him (and for no one else) to make such a requirement. With respect, I do not think this reasoning is right. Take the present case: the respondent, though merely a tenant, was certainly in a position to make the grant of a protected tenancy of the Little Venice flat to the appellants conditional upon the payment of a capital sum to her, and the events amply demonstrate that she would never have vacated the premises and the Church Commissioners could not and would not have been in a position to grant the new tenancy to the appellants unless and until they paid her the £4,000 she required of them.

But to revert to the words, "in addition to the rent." Do they not point to the landlord as the only person contemplated as being in a position to "require"? The answer to the question, I think, is to be found in the description of "premium" in section 92 (1) of the Act as a word which "includes any fine or other like sum and any other pecuniary consideration in addition to rent." It is beyond doubt that others besides landlords may in certain situations "require" payment of a "premium." Thus, section 86, already referred to, prohibits the imposition of the condition of payment of a "premium" on the assignment of a protected tenancy, and it is common ground that

[13] From p95.

> it would operate here had the transaction been in fact in law an assignment, and would therefore render the respondent liable to repay to the appellant that part of the £4,000 paid which constituted a "premium." The repeating of the words "in addition to the rent" in section 85 (1) which is already involved in its use of the word "premium," cannot, in my judgment, mean that the landlord is the only "person" intended to be caught by the subsection. I respectfully adopt the observation of my noble and learned friend, Lord Wilberforce, that the words are descriptive of the character of the payment, and not of the recipient. Mr. Blum rightly submitted, and Mr. Barnes conceded, that they mean no more than a sum which is "over and above the rent."
>
> If that conclusion is right, the excess part of the £4,000 paid by the appellants is recoverable by them and it is not strictly necessary to consider whether the respondent also comes within subsection (2) of section 85. It is a separate provision and its construction is not interlocked with that attributed to subsection (1); that is to say, although a landlord may well be caught by both subsections, a person may be within subsection (2) who is outside subsection (1). In my judgment, this subsection is, if anything, even clearer that subsection (1) and there is no room for doubt that the respondent did receive a "premium" of £4,000 "in connection with the grant... of a protected tenancy" of the Little Venice flat to the appellants. The wording of the subsection could scarcely be more widely or clearly expressed, and it fits the facts of this case like a well-made glove.
>
> When one looks at premiums in the way suggested by these passages, it becomes clear that control of premiums was intended to be an aspect of rent control, or in a wider sense, a means of holding down the amount of money that a prospective tenant has to pay, in order to access housing.

Before turning to the arguments made on behalf of Letting Solutions Ltd I should also mention *Saleh v Robinson*,[14] which was decided under section 119 of the Rent Act 1977. This was also a case which involved payment of a premium to an outgoing tenant. The plaintiff had agreed with an estate agent, whom she understood to be acting for the defendant, that she would pay the sum of £12,000 to the estate agent, ostensibly for fixtures and fittings in the defendant's flat. The estate agent told the defendant that the plaintiff would pay a maximum of £10,000 plus his fees. Thereafter the defendant gave the estate agent a letter to his landlords surrendering his tenancy. The plaintiff paid the estate agent £12,000 of which the defendant received £10.000. Subsequently the plaintiff instituted proceedings against the defendant, seeking payment of the entire £12,000 premium. At the trial, the judge found that the estate agent was the defendant's agent for

[14] (1988) 20 HLR 424.

the purposes of marketing the flat. The judge gave judgment for the plaintiff in the sum of £10,000 less £200 being the value of certain carpets and curtains which the plaintiff took over in the flat. The defendant appealed to the Court of Appeal, and the plaintiff cross-appealed. Dismissing the appeal and allowing the cross appeal, the Court held that (1) (following *Farrell v Alexander*) that the provisions of section 119 of the Rent Act 1977 included not only landlords and potential landlords but also their tenants, agents and middlemen; in the instant case they clearly included the estate agent. (2) Since the estate agent was acting within the scope of his ostensible authority when he required and obtained £12,000 from the plaintiff, that sum (less the value of the items transferred), was recoverable from the defendant.

For reasons that are not discussed in the report, the claim was made under section 119(1), rather than under than subsection (2). The appellant's attempt to take advantage of that fact was unsuccessful, for the reasons outlined in the following passage from the judgment of Lord Justice May:

> The submission which Mr. Adlard [counsel for the appellant] makes is that on the facts in the instant case the plaintiffs have made their claim under the wrong subsection of section 119. He submits that having regard in particular to the presence of the word "of" as the seventh word in subsection (1) of section 119, the relevant condition which must not be imposed must be one, as he puts it, belonging to or attached to the grant. The condition of the payment of £10,000 or £12,000 in the instant case may have been, he would be prepared to accept, a condition precedent to the grant of the new tenancy by the Church Commissioners to the plaintiff but that, he submitted with respect, was not enough. One could and should distinguish the facts of the instant case in this way. On the facts of *Farrell v. Alexander* it was clear that there was, as he put it, simultaneity between the payment of the money and the receipt of the new lease. That was not so in the instant case. Accordingly, one could not say that payment of the £10,000 or £12,000 was condition of—I emphasise the word "of"—the grant of a protected tenancy.
>
> With respect to that argument, it seems to me to be really only another way of putting the argument which was before their Lordships' House in *Farrell v. Alexander*. It is only another way of submitting that one has to construe section 119(1) so that the words "any person who, as a condition of the grant …requires the payment of any premium" as a landlord or a potential landlord who can make the grant. That was clearly negatived by the decision of their Lordships' House in Farrell's case and I think the necessary consequence is that Mr. Adlard's argument based upon the proper construction of section 119(1) is just not sustainable. It was a valiant attempt, if I may say so, to distinguish a case which I think was clearly

> against him, but for the reasons which I have given it was an attempt which in my judgment must fail.

## Response to the points raised by the letting agent's counsel

There are three points. The first two deal with the case under section 82(1). The third point deals with the case under section 82(2). I find it convenient to discuss the last point first.

*Point 3 in the email*

That is:

> The foregoing points deal with section 82(1). Section 82(2) of course deals with receipt of such a payment. Although there is no doubt that Mr and Mrs Callaghan received the administration fees payment they did not do so "in addition to the rent" since the rent was received by the landlord. In my view the amendment so as to delete the words "*in addition to the rent*" can only be intended to bring letting agents rendering administration fees within the ambit of the legislation, with the necessary implication that they were not within the ambit of the legislation as originally enacted.

It is apparent from the passages that I have quoted from *Farrell v Alexander* that this argument must be wrong. It follows from *Farrell* that the words "Any person" at the beginning of section 82(1) and (2) mean just "any person". That includes, as Lord Wilberforce said, "landlords, tenants, agents or middlemen". The argument that the words "in addition to the rent" limited the application of these provisions to landlords was exactly the argument that was rejected in *Farrell.*[15] Accordingly, the deletion of those words by the recent amendment to section 82(1) and (2) does not have the effect of bringing letting agents within the ambit of the legislation; they were already within its ambit, if they had received a payment that was a premium. I would point out that both Lord Wilberforce and Viscount Dilhorne viewed the words "in addition to rent" in the equivalent subsections under the 1968 Act as "surplusage". Therefore, the removal of these words may be regarded as an acceptance (or codification) of the decision in *Farrell*. Given that decision, it is appropriate that those words are removed.

[15] Hence, in the annotations to section 82 in Current Law Statutes, the authors note that "any person" include "agents and middlemen", under reference to *Farrell.*

*Did the payment to Letting Solutions Ltd fall foul of section 82(2)?*

Having disposed of point 3, I think it is appropriate to return to the elements of section 82(2), and ask whether they seem apt to cover the payment received by Letting Solutions Ltd in this case.

Under section 82(2) the elements required to constitute the offence are:

a) any person who
b) in connection with the grant, renewal or continuance
c) of a protected tenancy
d) receives any premium
e) in addition to the rent

In my view, only b) presents any difficulty here, because the words "in connection with" are open to interpretation. As we have seen, a) is fulfilled because "agents and middlemen" come under the description "any person". As regards c), "protected tenancy" should be read as "assured tenancy" (which includes short assured tenancy) given section 27 of the 1988 Act. As regards d), Letting Solutions Ltd received the payment. Again, following the decision in *Farrell*, the payment was one which was "over and above the rent", and was apt to be described as "any other consideration that sounds in money to the tenant, either in the way of involving him in a payment of money or of forgoing a receipt of money".[16] It was therefore a premium. Finally, e) adds nothing to d), for the reasons set out in *Farrell.*

*Section 82(2): "…in connection with…"*

This case featured the grant of a tenancy rather than renewal or continuance. Was the payment to Letting Solutions Ltd made "in connection with" that grant?

The words "connected with" or "in connection with" appear in numerous statutory provisions.[17] They have no legal technical meaning. As in any point of statutory interpretation, the starting point is that they should be given their ordinary meaning. The OED offers the following definition:

[16] The words used in *Elmdene Estates Limited v White*, to which reference is made at page 6 above.
[17] See the entry for "connected with" in Stroud's Judicial Dictionary of Words and Phrases, 8th Ed.

> The condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with or involved in, another.

The breadth of that definition appears to accord with the observation made by Lord Edmund-Davies, towards the end of the passage quoted above: "The wording of the subsection could scarcely be more widely or clearly expressed". It is also necessary to bear in mind the point made by the authors of the annotations to the 1984 Act in Current Law Statutes: that the offence set out in subsection (2) was introduced in the mid 1960s, as a response to decisions that appeared to limit the application of the offence which is now subsection (1). Thus the offence constituted by (2) is intended to have a broader application since it is no longer necessary to establish that the receipt of the premium was a condition of the grant, renewal or continuance.[18]

Finally, one also has to consider the breadth of the statements made by the judges in *Farrell* as to the legislative purpose:[19] "The object of these provisions was to protect…tenants by making it impossible to extract from them as the condition of the grant, renewal, continuance or assignment of a tenancy or in connection with such a grant etc., any sum over and above the rent"; "control of premiums was intended to be an aspect of rent control, or in a wider sense, a means of holding down the amount of money that a prospective tenant has to pay, in order to access housing".

If these points are borne in mind, I think that one is necessarily drawn to the conclusion that the payment made to Letting Solutions Ltd in this case was made "in connection with" the grant of a tenancy. In my view, that is clear from the material produced by the company itself, described at page 2 to 3. To recap, this states:

> The administration fee is payable when the paperwork for the tenancy such as the lease is being set up…
> A date for signing the lease and finalising the other paperwork will be set once the administration fee is paid….
> The referencing application process is activated once the administration fee is paid.
> The charge which is the subject of this claim is to cover the costs of referencing, set up checks and other admin costs of setting up the tenancy related to the tenant.

It could hardly be clearer that the payment is being made "in connection with" the grant of a tenancy.

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[18] This point is also made in *Farrell*, at p80, per Viscount Dilhorne.

[19] In particular the final paragraphs from the quoted passages from the judgments of Viscount Dilhorne and Lord Edmund-Davies.

*Section 82(2) conclusion*

It is my view, for the reasons stated, that the various elements for the commission of an offence under section 82(2) were clearly fulfilled here. It follows that the pursuers had a sound case under section 88. It is unfortunate that the action had to be abandoned, though I can understand that, in the position in which the pursuers and agents were placed, that seemed like the best option at the time.

*Point 2 and section 82(1) of the Act*

As section 82(2) is established, consideration of 82(1) is academic. However, I will nevertheless comment on the points raised by Levy & McCrae, for the sake of completeness.

Point 2 is:

> The issue here is whether the proper Defender is the Landlord. It is only the Landlord who has the power to grant or not to grant the tenancy. It necessarily follows that only the landlord may impose conditions on such a grant. It may be that the proper analysis here is that the Landlord did impose a condition on the grant of the tenancy – that the tenant should be fully vetted and credit checked by a reputable letting agent. The fact that the letting agent may issue a fee for such work, reflecting in particular the fact that it has to pay the credit reference agencies is immaterial. The letting agent has not required payment as a condition of granting the tenancy. If anyone has done so, which is denied, it is the landlord.

Again, I return to a passage from the judgments in *Farrell*, this time from the judgment of Lord Edmund-Davies:

> Let me first consider [section 85(1)]. The basic submission for the respondent is that this operates only if the "person" requiring the payment of a premium is in a position to make such payment a condition of the grant of a protected tenancy; and it is said that the only person who can impose such a condition is the landlord, for he alone can grant the new tenancy. Again, despite the width of the opening words of the subsection (" Any person"), such "person" must be he who is to become entitled to the rent under the contemplated tenancy, since, in order to be a "premium," the payment required must be "in addition to the rent"; therefore, since the only person entitled to the rent is the landlord, section 85 (1) makes it a penal offence for him (and for no one else) to make such a requirement. With respect, I do not think this reasoning is right. Take the present case: the respondent, though merely a tenant, was certainly in a position to make the grant of a protected

> tenancy of the Little Venice flat to the appellants conditional upon the payment of a capital sum to her, and the events amply demonstrate that she would never have vacated the premises and the Church Commissioners could not and would not have been in a position to grant the new tenancy to the appellants unless and until they paid her the £4,000 she required of them.

In essence, the difference here is between treating the question as a matter of law or a matter of fact. In the first paragraph, taken from Levy & McRae's email, the writer insists that because it is only the landlord who has, *as a matter of law*, the right to grant the tenancy, it must only be the landlord who has the power to impose conditions on the grant. However, in the second paragraph Lord Edmund-Davies recognises that in the facts of a particular case, there may be persons other than the landlord who are in a position to demand money from the tenant, without payment of which the grant of the tenancy by the landlord will not take place. Of course, this all comes back to the court's emphasis on the words "Any persons" at the beginning of the provision. That tends to negate any interpretation of the subsection which restricts its application to the landlord.

In the case under discussion, who is it that "requires" payment of the administration fee to the letting agents? Is it the landlord or the letting agent? I suspect that the answer is: both. On the authority of *Saleh v Robinson*, the tenant could seek to recover the fee from the landlord: in charging the fee, the agent was acting within the scope of his ostensible authority. However, it does not follow from that case that the tenant could not also have sought payment from the estate agent, of the amount which he was paid. It follows from the legislation, as interpreted in the cases, that the only "pecuiniary consideration" that can be sought from the tenant, as a requirement of the grant of the lease, is the rent. As Lord Wilberforce said: "The words are descriptive of the character of the payment and not of the recipient." Any payment, other than the rent, which the tenant is required to pay, otherwise the tenancy will not be granted, is struck at by the legislative scheme. Here it is the letting agents who set the amount of the administration fee, and insist upon it being paid to them, otherwise the transaction will not go ahead. Therefore, it is reasonable to say that they require payment as a condition of the grant.

I should say that of the three points made in Levy & McCrae's email, it is only point 2 which, in my view, causes any difficulty. I think there is room for argument as to whether it is really the landlord or the letting agent who requires payment of the fee. However, I would emphasise that this is only an issue in relation to section 82(1). It appears to have been this problem (the necessity of showing that the payment was required as a condition of the grant) that led to the introduction of the provision which is now section 82(2). For the reasons set out above, I think that the latter offence took place in this case.

*Point 1 and section 82(1) of the Act*

Point 1 runs in two paragraphs, the first of which is:

> Was the payment truly a premium within the meaning of the legislation as it then stood? There is no indication from the words used within the legislation that the legislative intent was to prevent the making of *bona fides* charges to cover the work actually and necessarily done and the costs actually and necessarily incurred by the letting agent. It is therefore my conclusion that a charge such as that presently in issue is not a premium within the meaning of section 82 as originally enacted. It is not a "pecuniary consideration in addition to rent" – in other words an additional charge needing consideration of the landlord giving occupancy to the tenant.

This argument does not present any difficulty in my view. As regards the second sentence: there is no explicit indication in the legislation that it is intended to cover payments to outgoing tenants for the value of their interest as a protected tenant, but that did not prevent the court from coming to conclusion that such payments were unlawful: see *Farrell.* As always, it is a matter of looking at the terms used, and considering whether the circumstances are apt to be described by those terms. Here, the key words are "any persons" and "pecuniary consideration in addition to rent". These are sufficiently wide to cover administration fees to letting agents, on the basis of the authorities.

The second paragraph of point 1 is this:

> The fact that the recent amendment makes specific provision for service and administration charges rather suggests that they were not covered in the previous version of the legislation, that too is a powerful indicator that the previous version is at best ambiguous, in the case of a penal statute such ambiguity falls to be resolved in favour of the person prospectively penalised.

It is ironic that this point should be made, when one considers the discussion that took place in *Farrell*. In that case, it was the respondents' argument that, having regard to the history of *preceding* legislation, one could discern an ambiguity in the statutory provisions which ought to be resolved in the respondent's favour. Now, it is argued that having regard to the amendments that *postdated* the original enactment, one can similarly discern an ambiguity. Of course, the difficulty is that in *Farrell* the judges in the majority came to the conclusion that there was no ambiguity, and therefore any presumption arising from the penal nature of the legislation was not in play. Thus Lord Edmund Davies said:[20]

[20] At p94.

> I…begin by asking: Is section 85 of the Rent Act 1968 ambiguous in the sense that it is a matter of uncertainty whether the tripartite arrangement with which your Lordships are presently concerned falls within its wording? Since it has been argued for the respondent that this House should tend towards a narrow construction of the section on the ground that it attaches a penalty to any contravention, it is well to have in mind the observations of Lord Reid in *R v Ottewell* [1970] AC 642, 649 who said:
>
> > "The Court of Appeal (Criminal Division) refer to the well-established principle that in doubtful cases a penal provision ought to be given that interpretation which is least unfavourable to the accused. I would never seek to diminish in any way the importance of that principle within its proper sphere. But it only applies where after full inquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings. The imprecision of the English language (and, so far as I am aware, of any other language) is such that it is extremely difficult to draft any provision which is not ambiguous in that sense. This section [section 37 (2) of the Criminal Justice Act 1967] is clearly ambiguous in that sense: the Court of Appeal (Criminal Division) attach one meaning to it, and your Lordships are attaching a different meaning to it. But if, after full consideration, your Lordships are satisfied, as I am, that the latter is the meaning which Parliament must have intended the words to convey, then this principle does not prevent us from giving effect to our conclusions."
>
> That the language of section 85 is in that sense ambiguous is demonstrated by, for example, the totally different conclusions as to its applicability to the instant case arrived at by my noble and learned friends, Viscount Dilhorne and Lord Russell of Killowen, the former holding it "clear" that the Little Venice flat arrangement is caught by the section, the latter evincing equal firmness in concluding that it is not. It is against - and despite - the background of that conflict that I must ask myself whether there is room for doubt whether the wording of section 85 covers the facts of that case.
>
> The ultimate conclusion at which I have arrived is that no room for doubt exists that section 85 does apply. That conclusion is not incompatible with my having veered a good deal both during counsel's able submissions and in reflecting upon them since the hearing of the appeal was concluded.

In any discussion as to the interpretation of section 82(1) [or 82(2)], the court will not follow the view that might be attributed to the Scottish Government (or the Scottish Parliament) as to whether section 82 could be regarded as ambiguous. It will be bound by

the decision in *Farrell.* That decision is to the effect that there is no ambiguity which allows the operation of interpretive presumptions, such as that regarding penal provisions.

*Section 82(1): conclusion*

For these reasons, I would say that offence under section 82(1) has also been committed. However, I think the issue is less clear here, than in relation to section 82(2), because of the second point made in Levy & McCrae's email.