



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference CAM/00ME/HTC/2021/0005

HMCTS Code P: PAPERREMOTE

Property : 12 Smiths lane, Windsor, SL4 5PD

Applicant : Rachael Whitcroft

Respondent : Proper Genies Ltd

Type of application : For recovery of all or part of a prohibited payment or holding deposit: Tenant Fees Act 2019

Tribunal : Judge Wayte

Date : 11 January 2022

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P: PAPERREMOTE. A face-to-face hearing was not held because all issues could be determined on paper. In accordance with the directions, I have considered the application and supporting documents and the respondent's reply and supporting documents.

The tribunal's decision is that Proper Genies Ltd are ordered to pay the applicant £500 by 24 January 2022.

The application and determination

1. On 10 November 2021 the applicant applied to the tribunal for the return of a holding deposit of £500 paid to Proper Genies Ltd on 23 September 2021.
2. The tribunal gave directions on 23 November 2021 providing for the matter to be determined on the papers unless either party made a request for a hearing by 24 December 2021 or the tribunal, having reviewed the papers, considered that a hearing was required. No request was made, and I did not consider a hearing was necessary to determine the issue fairly and justly.

The law

3. Paragraph 3 of Schedule 1 to the Tenants Fees Act 2019 (“the 2019 Act”) states that a payment of a holding deposit is a permitted payment, provided that it is for a maximum of one week’s rent and the agent has not already been paid a holding deposit for the same property.
4. The detailed provisions in respect of the treatment of holding deposits are set out in Schedule 2. The starting point is that the holding deposit must be repaid if: *“the landlord and the tenant fail to enter into a tenancy agreement relating to the housing before the deadline for agreement”* (paragraph 3(c)).
5. This starting point is subject to a number of exceptions, including paragraph 10 which states: *“Subject to paragraph 13, paragraph 3(c) does not apply if the tenant notifies the landlord or letting agent before the deadline for the agreement that the tenant has decided not to enter into a tenancy agreement”*. The relevant part of paragraph 13(b) states that paragraph 10 will not apply *“if, before the deadline for the agreement, the landlord or letting agent instructed by the landlord in relation to the proposed tenancy behaves towards the tenant, or a person who is a relevant person in relation to the tenant, in such a way that it would be unreasonable to expect the tenant to enter into a tenancy agreement with the landlord.”*
6. Under paragraph 5, if the person who received the holding deposit believes that any of the exceptions apply, they must give notice in writing to the person who paid the deposit within 7 days beginning with the deadline for agreement. The deadline for agreement is the fifteenth day beginning with the date the holding deposit was received by the letting agent, unless an alternative date is agreed in writing.
7. Where a holding deposit has not been repaid, the relevant person may make an application to the First-tier Tribunal for recovery of the money. Section 15(9) states that on an application the Tribunal may order the landlord or letting agent to pay all or any part of the amount to the relevant person within the period specified in the order.

8. Guidance has been published by the Government for the enforcement authorities, landlords and letting agents and tenants. It is available on the internet and sets out the basis on which holding deposits can be taken and must be returned.

The applicant's case

9. The applicant was planning to relocate from Newcastle to live with her partner, Peter. Her partner viewed the property and they decided to rent it together for 6 months at a rent of £2,300, inclusive of bills. 4 months' rent was to be paid up front. Ruchika Pandhi, Sales and Lettings Manager for the respondent, confirmed the details in an email dated 23 September 2021 setting out "an expected move in date of 15 October 2021" and requested a holding deposit of £500 be paid into their client account so that they could start the referencing process. The email stated that the holding deposit "is only refundable if your references are not accepted by the landlord". At 12.36 that same day the applicant emailed Ruchika to confirm that she had sent the money.
10. Unfortunately, the applicant's offer of employment was withdrawn and therefore she felt unable to rent the property. Her application form states that before she advised the agents of that decision, they changed the tenancy start date to 30 October 2021 and asked for 6 months' rent up front.
11. The applicant included text messages with her application form, showing a text from her to Ruchika on 3 October to confirm that her employment offer had been withdrawn, although the text stated that Peter would complete the referencing process on his own. Ruchika's response asked whether all 6 months could be paid in advance and whether it was possible to change the start date to 30 October 2021.
12. The applicant then sent a detailed email to the respondent on 5 October 2021 stating that she and her partner were unable to accept the change of terms and requesting the return of the holding deposit. That email also confirmed that due to the change in her situation she would be looking for alternative solutions to her relocation which did not require rental accommodation.
13. The applicant chased for a response on 13 October 2021 and received an email from Ruchika the following day stating that "her admin" would look at the request for return of the deposit. The applicant chased again on 25 October 2021 stating that her partner had bumped into the landlord who had confirmed she would ask the respondent to return the money. Waseem responded that day to say that a detailed response would be made within 7 to 10 working days. On 10 November 2021 the applicant wrote to say that she was making an application to the tribunal.
14. That email prompted a response from Waseem the same day setting out the respondent's reasons for refusing to return the deposit, detailed in

the respondent's section below. On 12 November 2021 he sent a further email, mainly to query how the applicant had made contact with the landlord.

15. The applicant sent a detailed email on 10 November 2021 setting out her response to Waseem's first letter. In particular, she raised the failure of the respondent to set out their reasons for holding on to the deposit within 7 days of the deadline for the agreement, which she suggested would be 15 October 2021.

The respondent's case

16. The respondent's case was set out in a letter to the tribunal dated 7 December 2021. Their main point was that under the 2019 Act they were entitled to retain the holding deposit if the applicant and her partner withdrew from the proposed agreement. They stated that they had kept the £500 to cover their time spent on sourcing the tenant, showing the tenant the property and spending time on the reference check, preparing the tenancy agreement and negotiating the offer with the landlord. They said that if the applicant had said on 3 October 2021 that she wanted to withdraw they would have refunded the full holding deposit. They denied that they changed the terms of the agreement and pointed to the draft document sent on 4 October 2021 which referred to 4 months' rent up front as opposed to 6. They said they had lost business from the landlord as a result of the applicant withdrawing from the tenancy.
17. This letter contrasts with the reasons given by Waseem in his email dated 10 November 2021 which were that their email dated 23 September 2021 made it clear that the holding deposit was only refundable if the references were not accepted by the landlord. He stated that the references had been agreed or processed before the applicant and her partner pulled out and they had wasted the respondent's time.
18. The respondent provided further detail of their "vouch" credit check which actually indicated that the applicant had not completed the tenancy application on 4 October 2021, neither had Peter's employer provided his reference. That said, the respondent also claimed that as the landlord had met Peter and the rent was mainly to be paid in advance, there was no need to proceed with the references.

The tribunal's decision

19. The evidence indicates that the holding deposit of £500 was paid by the applicant on 23 September 2021. The monthly rent was £2,300 and therefore the amount is within the upper limit of one week's rent, although it is a relatively large amount for a holding deposit. As the applicant stated in her application, a copy of the tenancy agreement should have been provided by the respondent before the holding deposit was taken together with clear information as to the

circumstances where all or part of the deposit may be lost, in accordance with the 2019 Act. The respondent did not comply with either of these responsibilities, the only information provided in respect of the potential loss of the deposit is as set out in paragraph 9 above, which does not comply with the 2019 Act. The tenancy agreement was not provided until 4 October 2021.

20. Given that the holding deposit was paid on 23 September 2021, the deadline for the agreement under the 2019 Act was 7 October 2021. The tenancy was not completed by that or any date and therefore the starting point is that the applicant is entitled to the return of her holding deposit.
21. However, in this case the tenants withdrew from the agreement, following the loss of the applicant's offer of employment. That potentially raises the exception in paragraph 10 of Schedule 2 as the respondent was advised of this decision on 5 October 2021, before the deadline for the agreement.
22. The applicant claims that as the respondent varied the terms of the agreement, she was entitled to withdraw without risking her deposit. As stated above, the 2019 Act provides that paragraph 10 does not apply if the letting agent behaves in such a way that it would be unreasonable to expect the tenant to enter into the tenancy agreement (paragraph 13(b) of Schedule 2). In the absence of any evidence that the expected moving in date was of critical importance to the applicant, I do not consider that the change from 15 October 2021 to 1 November 2021 amounts to unreasonable behaviour so as to engage paragraph 13(b). The draft agreement reflected payment of 4 months' rent in advance and in the circumstances the suggestion of an additional 2 months' rent up front had not crystallised at that point.
23. That said, paragraph 5 of Schedule 2 obliges the respondent to repay the holding deposit if it fails to give a notice in writing within 7 days beginning with the deadline for the agreement explaining why the respondent intends to keep the deposit. That deadline expired on 13 October 2021, when the applicant first chased for a response. The first email from the respondent providing any reasons was sent on 10 November 2021 and that referred to the previous email of 23 September 2021 rather than the appropriate exception in the 2019 Act. The first mention by the respondent of that Act was made in their response to these proceedings on 7 December 2021.
24. As stated above, the evidence provided by the respondent in relation to whether the referencing process had been completed or was irrelevant as the rent was mainly being paid in advance was confused. In any event, the information provided in their email of 23 September 2021 did not comply with the 2019 Act.
25. Although paragraph 5 of Schedule 2 states that the respondent must repay the deposit when they fail to provide their reasons in time, as

here, section 15 of the 2019 Act appears to give the tribunal a discretion as to whether to order payment of all or any part of the amount.

26. I see no reason in this case to order less than the full amount paid. As letting agents it was the responsibility of the respondent to properly advise the tenant of the circumstances in which her holding deposit could be retained both at the time of payment and after the expiry of the deadline for agreement but before 13 October 2021. This they failed to do, in fact none of their correspondence makes any mention of the 2019 Act at all. If they had complied with the Act they would have been entitled to retain the deposit, given the withdrawal by the tenants, although the guidance encourages agents to decide whether to do so on a case-by-case basis and to limit the amount retained to cover their costs. £500 is a significant sum and is likely to be higher than the actual costs incurred in this case of which no evidence was provided. I also note that the respondent said that they would have returned the deposit if the applicant had withdrawn on 3 October 2021. She withdrew just two days later and it is far from clear that the respondent undertook any further work between those dates other than a chasing call or text.

27. In the circumstances I order the respondent to repay the applicant £500 by 24 January 2022.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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 reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).