FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/HTC/2020/0006**
HMCTS Code	**:**	P: Paper remote
Property	**:**	11 Rosendale Way, Elm Village, London NW1 0XB ("the flat")
Applicant	**:**	Mr Harrison Hodgkins
Representative	**:**	In person
Respondent:	**:**	Mr Geoffrey Fulford
Representative	**:**	In person
Type of application	**:**	For recovery of a holding deposit under the Tenant Fees Act 2019
Tribunal members	**:**	Judge Angus Andrew
Hearing venue	**:**	10 Alfred Place, London WC1E 7LR
Date of decision	**:**	29 May 2020

DECISION

Decision

1. I decline to order the return of the £300 holding deposit.

The application and determination

2. On 17 March 2020 the tribunal received Mr Hodgkins' application for the return of a holding deposit of £300 paid to Mr Fulford on 24 February 2020. In the application form Mr Hodgkins consented to the application being determined on the papers alone and without an oral hearing.

3. The tribunal gave directions 20 March 2020. The directions provided for a paper determination unless a request for an oral hearing was made by 24 April 2020. It is apparent that no such request was received by the tribunal. As a result of the Covid-19 Pandemic subsequent directions required the parties to submit digital papers by email. Prior to allocation of the case the papers were reviewed by a salaried judge who considered that the case was suitable for a paper determination.

4. I was given remote access to those papers, which did not include either the application form or the tribunal directions. At my request copies were kindly supplied by the case officer. As the parties will have seen those documents before submitting their papers I did not consider it necessary to invite further observations on them. It is on the basis of the digital papers supplied by the parties and the additional documents supplied by the case officer that I find the facts set out below.

The facts

5. On 24 February 2020 Mr Hodgkins and Ms Victoria Moynes met Mr Fulford and agreed to rent the flat from 14 March 2020 at a monthly rent of £1,560. At the meeting they paid a holding deposit of £300. The meeting is confirmed in Mr Fulford's letter of 24 February 2020. I cannot tell from the papers whether Mr Hodgkins and Ms Moynes inspected the flat at or before the meeting. Mr Fulford's letter continues by confirming that he will no longer show the flat and that he will close down *"the advertising presence"*.

6. It is apparent that there was a further meeting on 3 March 2020, at the flat. During that meeting Mr Hodgkins and Ms Moynes enquired about the internet provider. They explained that they both worked from home and required a high broadband speed. They suggested that it might be necessary to change internet provider if the existing speed was not high enough. I find that this was the first occasion on which they raised the issue of the broadband speed. I come to that conclusion because not only is the finding consistent with the information provided by Mr Hodgkins in the application form but also because it is consistent with Mr Fulford's subsequent email at 9.47 on 8 March 2020 referred to in the next paragraph.

7. In that email Mr Fulford informs Mr Hodgkins that he has made some enquiries of the previous tenants and discovered that the internet provider is NowTV. Having checked the broadband speed Mr Hodgkin replies at 10.12 on the same day. He informs Mr Fulford that the speed is too slow and that only Virgin could provide the high broadband speed that he requires. Consequently he sought permission for Virgin to fit a separate line to the flat *"in order to activate the connection"*.

8. Although I have difficulty in following the subsequent email chains that are not in chronological order it is clear that this request dented the relationship between the parties. Mr Fulford's first reaction was to say that he would not agree to a new connection and that Mr Hodgkins and Ms Moynes should either take the flat *"as seen"* or he would return the deposit. In response Mr Hodgkins said that he would accept the return of the deposit.

9. However despite this apparent agreement it is clear that the parties decided to make a final attempt to resolve the issue. Mr Fulford and Mr Hodgkins met at the flat during the evening of 10 March 2020. Ultimately the meeting was unsuccessful.

10. At 7.35 on the following day Mr Fulford sent an email to Mr Hodgkins and Ms Moynes. He consents to the provision of broadband by their chosen provider but on the understanding that no excavations are required.

11. Mr Hodgkins and Ms Moynes reply at 9.35. They reject the proposal for two reasons. Firstly because the extent of any engineering work is unknown. Secondly because of Mr Fulford's *"aggressive behaviour last night"*. In the final paragraph they say that *"the prospective tenancy has been terminated due to mutual impasse"* and conclude by requesting the return of the deposit failing which they will apply to the tribunal for its return.

12. Mr Fulford responds at 10.42. He describes the meeting as *"sometimes heated but not aggressive"*. He again consents to the provision of broadband by their chosen provider whilst at the same time saying that the *"digging up and making good of hardlandscape surface"* is not reasonable. He concludes by offering *"to work together to get an installation that meets your needs"*.

13. In the email Mr Fulford makes it clear that he will not refund the holding deposit if Mr Hodgkins and Ms Moynes do not complete the tenancy agreement by the following Saturday, 14 March 2020. He relies largely on their purported failure to inform him of their broadband speed requirements *"before at either of our previous two meetings"*. As an aside it will be recalled that I found that he was first informed of their requirements *"at"* the second meeting but not before.

14. In a final email at 12.23 Mr Hodgkins and Ms Moynes confirm that they will apply to the tribunal for the return of the deposit.

15. On 16 March 2020 Mr Fulford gave Mr Hodgkins and Ms Moynes a notice under paragraph 5(1) of Schedule 2 to the Tenant Fees Act 2019 explaining why he did not intend to repay the holding deposit.

The law

16. Schedule 2 to the Tenant Fees Act 2019 deals with the treatment of holding deposits. Paragraph 3(c) provides 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"*

For reasons that are outside the scope of the dispute between the parties I am satisfied that in this case *"the deadline for agreement*" was 14 March 2020.

17. However there are a number of exceptions to the requirement that the holding deposit must be repaid. Thus if one of the exceptions applies the landlord need not repay the holding deposit.

18. For the purpose of this decision the relevant exceptions are to be found in paragraphs 10 and 11:-

> *"10 Subject to paragraph 13, paragraph 3(c) does not apply if the tenant notifies the landlord or letting agent before the deadline for agreement that the tenant has decided not to enter into a tenancy agreement.*
>
> *11 Subject to paragraph 13, paragraph 3(c) does not apply where the deposit is paid to the landlord if—*
> *(a)the landlord takes all reasonable steps to enter into a tenancy agreement before the deadline for agreement, and*
> *(b)if the landlord has instructed a letting agent in relation to the proposed tenancy, the agent takes all reasonable steps to assist the landlord to enter into a tenancy agreement before that date, but*
> *(c)the tenant fails to take all reasonable steps to enter into a tenancy agreement before that date".*

19. Paragraph 13 disapplies the exceptions in paragraphs 10 and 11 in two situations. Thus if either situation is engaged the holding deposit must be repaid. In this case only the second situation is of potential relevance. Paragraph 13 (b) provides that the exceptions will be disapplied if:-

> *"the landlord or a 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".*

Reasons for my decision

20. The tenancy was not completed and the starting point is that Mr Hodgkins is entitled to the return of the holding deposit. I am however satisfied and find that it was Mr Hodgkins and Ms Moynes and not Mr Fulford who decided not to enter into the tenancy agreement. Although they refer to *"an impasse"* at the meeting on the evening of 10 March 2020 it is apparent from Mr Fulford's emails at 7.35 and 10.42 on 11 March 2020 that he was still willing to proceed with the grant of the tenancy. Ultimately it was their email of 9.35 on 11 March 2020 that closed the door on the completion of the tenancy. The exception in paragraph 10 of the Second Schedule is not in itself subject to a reasonableness test and consequently it is engaged.

21. The exception in paragraph 11 does incorporate a reasonableness test. Given my finding in the previous paragraph it is unnecessary for me to consider it in any detail. That said and largely for the reasons set out in the following paragraphs I would have come to the conclusion that paragraph 11 is also engaged.

22. Finally I must consider paragraph 13 (b), which also incorporates a reasonableness test. If it is engaged the exceptions in paragraphs 10 and 11 are disapplied and Mr Hodgkins again becomes entitled to the return of the holding deposit. In essence I must decide if Mr Fulford's behaviour was such that it would be unreasonable to expect Mr Hodgkins and Ms Moynes to enter into the tenancy.

23. They give two reasons for not entering into the tenancy. The first is that Mr Fulford could not guarantee a Virgin connection because of his condition that no excavations would be allowed by which I understand him to mean that only surface cabling would be permitted. I cannot see that the imposition of that condition is a matter of behaviour. However even if I am wrong about that I am satisfied that for each of two reasons it was perfectly reasonable for Mr Fulford to impose the condition.

24. Firstly, because Mr Hodgkins and Ms Moynes did not explain their broadband requirements until a week after they had paid the holding deposit and agreed to take the tenancy. As a result of their home working a high broadband speed was clearly an essential condition of their taking a tenancy of the flat or indeed any other flat. They should have made their requirements known at the outset: if they had and Mr Fulford had been unable to meet them I would have come to a different decision.

25. Secondly, because as Mr Fulford explains in his statement of case the cabling would in part have to be installed outside the demise of the flat, which is on the first floor. Although I do not have a copy of his lease I have no reason to doubt his assertion that the lessor's consent would have been required to other than surface cabling and that would almost certainly have resulted in an impractical delay.

26. The second reason relied on by Mr Hodgkins and Ms Moynes is Mr Fulford's asserted aggressive behaviour at the meeting during the evening of 10 March

2020. I have not had the benefit of hearing this assertion tested by cross-examination. I am nevertheless satisfied that I am able to come to a conclusion from the papers provided by the parties.

27. Mr Hodgkins does not explain in what way Mr Fulford's behaviour was aggressive: it is a simple assertion. I find that odd given the background to the case. I have also had regard to the email correspondence as a whole. Mr Fulford is blunt but that is not necessarily an unacceptable trait: in some parts of the country it is regarded with approbation. It is equally clear that he was irritated by the late request for a different broadband provider a week after Mr Hodgkins and Ms Moynes had agreed to take the flat and had paid the holding deposit. In my judgment he was entitled to be irritated. However bluntness and irritation fall well short of aggression. Having considered the email correspondence as a whole I accept Mr Fulford's description of the meeting as *"sometimes heated but not aggressive"*.

28. Consequently and for each of the above reasons I find that Mr Fulford behaviour was not unreasonable and that it cannot be said that it was unreasonable to expect Mr Hodgkins and Ms Moynes to enter into the tenancy. It therefore follows that the exceptions in paragraphs 10 and 11 are not disapplied. Having found that each of those exceptions are engaged it follows that Mr Fulford is entitled to retain the holding deposit.

Name: Judge Angus Andrew Date: 29 May 2020

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).