FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference HMCTS Code	**:**	**CAM/38UC/HTC/2020/0004 P:PAPERREMOTE**
Property	**:**	**168 Divinity Road, Oxford, OX4 1LR**
Applicant	**:**	**Moritz Reithmayr**
Respondent	**:**	**College and County**
Type of application	**:**	**For recovery of all or part of a prohibited payment or holding deposit: Tenant Fees Act 2019**
Tribunal	**:**	**Judge Wayte**
Date	**:**	**16 November 2020**

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, the respondent's reply and subsequent emails from both parties.

The tribunal's decision is that the respondent must pay the applicant £150 within 14 days.

The application and determination

1. This is an application for an order for the recovery of a prohibited payment paid in respect of a tenancy of 168 Divinity Road, Oxford OX4 1LR, pursuant to section 15 of the Tenant Fees Act 2019 ("the 2019 Act").

2. The application form and supporting documents confirm that on 21 October 2019 the respondent received payment of £250 from or on behalf of the applicant in respect of the variation of the tenancy to sublet his room while he was conducting research in the USA. Under paragraph 6 of Schedule 1 to the 2019 Act, a payment to a letting agent in consideration of arranging a variation of a tenancy at the tenant's request is a permitted payment provided that the payment does not exceed the reasonable costs of the agent.

3. The applicant argues that £50 (as indicated in paragraph 6(2)(a) of Schedule 1) is sufficient and therefore the amount of the excess is a prohibited payment within the meaning of the Tenant Fees Act 2019. If so, the tribunal would be empowered to order recovery of all or part of that amount from the respondent.

4. The tribunal gave directions on 24 August 2020 providing for the matter to be determined on the papers unless either party made a request for a hearing 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, particularly in view of the amount in issue.

The law

5. As stated above, Schedule 1 to the Tenants Fees Act 2019 ("the 2019 Act") contains a list of permitted payments, paragraph 6 deals with payment on variation, assignment or novation of a tenancy and states:

> *6 (1) A payment is a permitted payment if it is a payment-*
> *(a) to a landlord in consideration of the variation, assignment or novation of a tenancy at the tenant's request, or*
> *(b) to a letting agent is consideration of arranging the variation, assignment or novation of a tenancy at the tenant's request.*
>
> *(2) But if the amount of the payment exceeds the greater of-*
> *(a) £50, or*
> *(b) the reasonable costs of the person to whom the payment is to be made in respect of the variation, assignment or novation of the tenancy,*
>
> *the amount of the excess is a prohibited payment.*

6. Section 15 of the 2019 Act states that the relevant person may make an application to the First-tier Tribunal for the recovery from the landlord or letting agent of any prohibited payment. 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.

The applicant's case

7. The applicant stated in his application that he wished to sublet his room between October 2019 and January 2020 while he was out of the country for research. He exhibited his email communications with the respondent as evidence.

8. The first email was dated 28 September 2019. It contained the request to sublet from 23 October to 18 January and quoted clause 13.1 of his tenancy agreement which he said "*states that we as tenants are not to assign, sublet, part with, or share the possession of all or part of the Premises with any other person without the Landlord's or the Agent's prior written consent, which will not be unreasonably withheld*."

9. The reply from the respondent was dated 30 September 2019, setting out the process and requesting payment of a £250 release fee. The applicant responded that evening querying that fee by reference to the 2019 Act and the guidance for tenants in relation to fees charged for a change to a tenancy which stated that "*The general expectation is that this charge will not exceed £50*." He requested an exhaustive list of the administrative costs and invoices/receipts as evidence of expenditure.

10. The respondent replied on 2 October 2019 that as the agreement was for a fixed term, permission to sublet is at the landlord's discretion. They also said that the process took on average 4-5 hours of staff time at £60 per hour. A long list of the work required for a change of tenant was supplied, although the email ended by stating that "*if we go down a licence route rather than assigning the agreement and provided we do not have to chase anyone through the process, we may be able to speed things up and this would cost less*".

11. The next email supplied is dated 21 October 2019. It confirms that the landlord has agreed to a change and requests payment of the release fee of £250. There were in fact two such payments as two tenants were seeking a change and reference to a new tenancy agreement for the other change and the licence to occupy process for the applicant.

12. The applicant replied the same day with evidence that he had paid the £250 and stated that he was still unconvinced that the payment was in compliance with the 2019 Act. The respondent had previously outlined 7 steps to be taken to complete the process, he confirmed he had complied with the first four and therefore all that was left was any reference check required and to issue the licence to occupy.

The respondent's case

13. The respondent confirmed that they drafted a licence to occupy and sought references for the incoming tenant. They stated that "*from the moment of request to completion of the sublet we sent 22 emails and spoke to both the incoming tenant and the applicant multiple times on the telephone to co-ordinate this work as well as needing the rest of the group to be party to the licence and sign the licence agreement. Addtionally we obtained credit checks and landlord reference for the incoming sublet tenant all of which take time and expense (credit check alone cost £17).*" In the circumstances they submitted that £250 was a fair fee. Copies of the emails dated 28 September 2019, 30 September 2019 and 21 October 2019 were attached.

14. In response to this evidence the applicant denied that the email chain was unusually long, or that he spoke to the respondent on the telephone. He stated that a significant part of the written correspondence was in relation to the fee. He maintained that the respondent's initial email was clearly in a standard form which suggests that they are charging all their tenants a £250 sublet fee in clear violation of the 2019 Act and that there were no circumstances particular to his case which warranted such a drastic departure from the general expectation that the charge will be £50.

The tribunal's decision

15. As stated above, if the respondent can show that their reasonable costs of arranging the sublet were £250, it would be a permitted payment under the 2019 Act. However, the evidence provided in support of their case was really assertion, with a conflict between the parties as to how much work was actually carried out to permit the subletting for a period of just over 2 months.

16. I am inclined to agree with the applicant that £250 is described by the respondent throughout their contemporaneous emails as a release fee, rather than payment for a change to the tenancy and it is also clearly a standard fee requested in every case. As described above, in this case the respondent was processing two changes at the same time and therefore received £500 to cover the cost of their work in respect of the property over the same period. Their email dated 2 October 2019 confirmed that a licence to occupy should be cheaper than an assignment of the agreement and their response to these proceedings confirm that was the route taken in this case, together with a credit check of £17.

17. In the directions, the respondent was asked to provide copies of all the documents they relied on, including all relevant tenancy documents. After prompting by the tribunal, only a few emails were produced in addition to the emailed statement and no tenancy documents or proof

of expenditure. The Guidance on the 2019 Act for landlords and agents is clear that if a tenant has found a suitable replacement tenant, it is unlikely that a fee above £50 can be justified and that any costs above that amount should be evidenced. The respondent has failed to evidence the 22 emails claimed. However, the contemporaneous emails estimate the cost of the agent's time at £60 per hour and I consider that the process described for the licence and credit check would take about that time. Giving a reasonable allowance for the process this increases the permitted payment in this case to £100, meaning that the respondent must return £150 to the applicant.

Judge Ruth Wayte **16 November 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).