FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/22UH/HTC/2022/0002**
HMCTS code (audio, video, paper)	**:**	**A: BTMMREMOTE**
Property	**:**	**14 Colson Path, Loughton Essex IG10 3QZ**
Applicant	**:**	**Daniel Playfair**
Respondent	**:**	**Case Consultant Solutions Ltd**
Type of application	**:**	**For recovery of a holding deposit**
Tribunal member	**:**	**Judge David Wyatt**
Date of decision	**:**	**6 June 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents I was referred to are those described in paragraph two below. I have noted the contents.

Decision of the Tribunal

The Tribunal orders the Respondent to by **17 June 2022** pay £358 to the Applicant, to refund the holding deposit paid by the Applicant to the Respondent.

Reasons

Procedural history

1. The Applicant applied to the tribunal under section 15 of the Tenant Fees Act 2019 (the "**Act**") for recovery from the Respondent letting agent of a holding deposit.

2. On 28 February 2022, a procedural judge gave case management directions. The application form with enclosures would stand as the Applicant's case. The Respondent was directed to send their statement in reply and any documents they relied upon. They did so, sending an unpaginated hard copy bundle. The Applicant was permitted to produce a reply and did so in electronic format, accompanied by further PDF copy documents.

3. The directions proposed a decision on paper unless either party requested a hearing or the tribunal decided on review of the papers that a hearing was necessary, but a hearing was requested by the Respondent and arranged. At the hearing by telephone on 12 May 2022, the Applicant represented himself, assisted by his Wife, Tasmia Playfair. The Respondent was represented by Sophie Hunter and Marlon Poyser.

The law

4. Section 3 of the Act defines a "*holding deposit*" as money paid by or on behalf of a tenant to a landlord or letting agent before the grant of a tenancy with the intention that it should be dealt with by the landlord or letting agent in accordance with Schedule 2 to the Act. Subject to the conditions set out in section 3 and to the extent it does not exceed one week's rent, such a holding deposit is a permitted payment (so is not prohibited entirely by section 1 or 2 of the Act).

5. Schedule 2 applies where a holding deposit is paid to a landlord or letting agent in respect of a proposed tenancy of housing in England. It defines the "*deadline for agreement*" as: "*the fifteenth day of the period beginning with the day on which the landlord or letting agent receives the holding deposit*" or the day "*agreed with the tenant in writing*" as the deadline for agreement for the purposes of Schedule 2.

6. By paragraph 3(c) of Schedule 2, subject to following provisions of Schedule 2, the person who received the holding deposit must repay it if (amongst other things) the landlord and the tenant fail to enter into a tenancy agreement relating to the housing before the deadline for agreement. This repayment obligation does not apply:

    a. under paragraph 9, if the tenant provides false or misleading information to the landlord or letting agent and one of the conditions set out in 9(a) or (b) applies;

b. under paragraph 10, subject to paragraph 13, 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; or

c. under paragraph 12, subject to paragraph 13, if: (a) the agent takes all reasonable steps to assist the landlord to enter into a tenancy agreement before the deadline for agreement; and (b) the landlord takes all reasonable steps 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.

7. Further, by paragraph 5, the person who received the holding deposit must repay it if: (a) they believe that any of paragraphs 8 to 12 applies in relation to the deposit, but (b) they do not give the person who paid the deposit notice in writing within the relevant period explaining why the person who received it intends not to pay it. Here, the "*relevant period*" means the period of seven days beginning with the deadline for agreement.

8. By section 15(2) of the Act, where a landlord or letting agent breaches Schedule 2 to the Act in relation to a holding deposit paid by a relevant person and all or part of the holding deposit has not been repaid to the relevant person, subsection (3) applies. By subsection (3), the relevant person may apply to the tribunal for recovery from the landlord or letting agent of the amount of the holding deposit (or, if this has been partially repaid, the remaining part of the holding deposit). By subsection (9), on such an application, the tribunal "*may*" order the landlord or letting agent to pay to the relevant person "*…all or any part…*" of the amount referred to in subsection (3) within the period (of at least seven days but not more than 14 days) specified in the order.

Circumstances

9. On 21 January 2022, the Applicant paid a holding deposit of £358 to the Respondent in respect of a prospective tenancy of the Property at an anticipated rent of £1,550 per month. They said a deadline of 26 January 2022 had been agreed.

10. There were then delays in obtaining satisfactory reference checks and alleged failures to communicate. We are satisfied that the Applicant had explained (in effect) that he and/or his Wife were in receipt of universal credit and/or would need a guarantor. On 24 and 26 January respectively the Applicant and Mrs Playfair both passed basic reference checks "*subject to suitable guarantor*"; a (satisfied) CCJ was registered against the Applicant and Mrs Playfair's income/employment reference did not meet the criteria of the reference agency used (FCC Paragon). On 25 January, the Applicant's first guarantor was proposed and on 26 January did not pass because a CCJ was registered against him. On 26 January, the guarantor sent to Paragon details showing that a Tomlin order had been agreed and made on 19 March 2021 to set aside the CCJ and remove the registration. It appears this was not enough to change

the reference report (whether because the registration had not been removed, or the Tomlin order allowed judgment to be entered if agreed monthly instalments were not paid, or for any other reasons, is unclear).

11. On 26 January, documents were provided for an alternative proposed guarantor. On 27 January, Paragon were instructed to carry out the same 24-hour search as for the other individuals. They did not conclude this until 8 February, when they reported their view that the alternative individual would be a suitable guarantor. The alternative guarantor worked for a large organisation, who initially indicated they were not aware of him. Some payslips had then been provided, but more were requested. More were provided, but some were still missing. After several calls, the individual apparently indicated they no longer wanted to be a guarantor. They later provided further payslips but could not find all those needed. Following further correspondence and details passed between the employer and the reference agent up to 1 and 2 February, a reference was provided by the employer and Paragon concluded their report based on the payslips provided and that reference.

12. On 28 January, Mrs Playfair had written to express concerns about the delay to the original deadline "*given to yourselves*" because their son needed to take up his place at the local primary school. She explained the school's deadline had been extended to 31 January, so they would need to know by Sunday 30 January. The Respondent replied saying they were doing all they could but could not guarantee a definitive answer by Sunday, saying Monday was more likely. On 31 January, the Applicant wrote saying the 1pm deadline "*agreed on the phone and previous e-mail*" had passed, so that would be taken as confirmation the Respondent did not wish to proceed, so the holding deposit should be refunded.

13. On 1 February, the Respondent replied, describing the background, the "*moving date which was specified by yourselves as the 26th of January*" and saying that unless the Applicant wanted to reconsider "*pulling out from application midway through guarantors referencing*" the holding deposit would be non-refundable. The Applicant replied immediately to say they were not pulling out. On 4 February, they chased in writing and the Respondent replied that the referencing company were still waiting for the employer to confirm the new guarantor's salary and permanent position, suggesting the employer be chased by the guarantor. On Saturday, 5 February, the Applicant wrote saying it had: "*…been 15 days since we paid our holding deposit and we have received a [sic] decision. Please could you now refund our holding deposit…*". On Monday, 7 February, the Applicant made a written complaint, saying no valid reason had been given to retain the holding deposit. On 8 February, the Respondent said they were abroad but had just been informed the second guarantor had passed referencing, asking the Applicant to confirm if they were still interested in the Property. The Applicant replied that the deadline had passed and the holding deposit must be refunded.

14. On 10 February, the Respondent wrote explaining why they were not returning the holding deposit. They suggested information had been withheld and they "*were misled*" in that the Applicant had a CCJ. They said the first guarantor did not pass their reference check, again in relation to a CCJ. They said the second guarantor was slow to provide information and had doubts about proceeding as guarantor, which led to "*delays on his part to obtain and confirm his employment*". They said they had kept the Applicant up to date. They also referred to costs said to have been incurred by the landlord as a result of requests made by the Applicant. The Applicant responded immediately disputing all this, with his comments under each point they had made.

Deadline for agreement – 5 February 2022

15. At the hearing, the parties agreed that, unless another date had been agreed in writing for this, the deadline for agreement was 5 February 2022. I am satisfied that no other date was agreed in writing with the Applicant as the deadline for agreement for the purposes of Schedule 2 to the Act. The Applicant referred to various dates as "deadlines" in his correspondence and the other documents, but that appeared to be part of his general approach of attempting to press for everything to happen as quickly as possible. The Respondent generally had not disputed the "deadlines" the Applicant had sought to impose at the relevant times, but in my view they were looking at the earliest potential commencement dates for the tenancy, not agreeing deadlines for agreement for the purposes of Schedule 2.

16. I am satisfied that the Respondent's communication of 10 February 2022 complied with paragraph 5 of Schedule 2 to the Act, having been sent within seven days of 5 February 2022, the deadline for agreement. Accordingly, the remaining issues are whether any of the potentially relevant exceptions (in paras. 9, 10 or 12) to the obligation to repay the deposit (in para. 3(c)) apply and, if not, whether I should make an order under s.15 and, if so, what order I should make.

Paragraph 9 of Schedule 2

17. On the evidence produced, paragraph 9 does not apply. I am not satisfied that the tenants provided any false or misleading information. Ms Hunter described the circumstances and failure to disclose information. She referred to forms the prospective tenants would have been asked to complete with their basic and personal information, to send to Paragon. However, copies of those forms had not been provided. There was no suggestion that the tenants had been asked to sign (or said) anything declaring they did not have any adverse credit history, or the like. On the contrary, Mr Poyser agreed that the Applicant had explained during an early conversation that they were receiving universal credit and Mr Poyser had advised a guarantor would be needed. The CCJ registered against the Applicant (in May 2018) had been satisfied in March 2019. It seems likely neither the tenants nor the first proposed guarantor knew that first proposed guarantor still had a CCJ registered

against him, since it appears he would reasonably have expected it to be removed from the register in 2021 when Tomlin order was made.

Para 10 of Schedule 2

18. I am not satisfied that paragraph 10 applies. Ms Hunter relied on the e-mail of 31 January, but that said it was taking the delay as confirmation the landlord did not wish to proceed and gave details for repayment of the holding deposit. When on 1 February the Respondent said the tenants were pulling out and suggested they reconsider, the Applicant immediately replied to say (in effect) they had not meant they were pulling out. They then continued to chase the Respondent for the awaited reference for the second guarantor and the Respondent's administrator gave them updates.

19. The Respondent also relied on the e-mail of 5 February. Looking at that e-mail objectively, even if it was sent before the expiry of the deadline for agreement, I am not satisfied that it was enough to be understood as notifying the letting agent that the tenant had decided not to enter into a tenancy agreement. It was saying in effect that, since 15 days had passed and no decision had been made, they wanted their holding deposit back. Particularly in the context of their earlier chasing correspondence/"deadline" and immediate assurance in response to the exchange on 31 January/1 February that they had not meant in their e-mail of 31 January that they were pulling out, I am not satisfied that the e-mail of 5 February was sufficient to satisfy paragraph 10.

Para 12 of Schedule 2

20. I am satisfied that the agent had taken all reasonable steps to assist the landlord to enter into a tenancy agreement before the deadline and the landlord had done the same. However, I am not satisfied that the tenant failed to take all reasonable steps to enter into a tenancy agreement before that date. Ms Hunter referred to all the problems with the reference checks and the guarantors, and then the failure to confirm that the tenants were still interested in the Property once the second guarantor passed referencing on 8 February. However, I consider the tenant took all reasonable steps to provide and chase the guarantors and the Respondent to seek to enter into a tenancy agreement before 5 February. It was only after that date that they stopped taking all reasonable steps to enter into the tenancy agreement, so paragraph 12 does not apply.

Order - discretion

21. Since none of the exceptions in Schedule 2 apply, paragraph 3(c) expects the Respondent to repay the holding deposit to the Applicant. I put it to the parties and they did not dispute that section 15 gives the tribunal a discretion as to whether to make an order ("*may order the … letting agent to pay*") and, if so, whether to order full or partial repayment ("*all or any part of*" the holding deposit). The Applicant contended that the entire holding deposit was refundable. He felt the tenants and the

guarantors had done all they could. He said by 8 February he no longer trusted the Respondent, who should simply have refunded the deposit after 5 February, so he focussed on getting that back. He felt the Respondent had not done enough to communicate and would not have been ready to enter into a tenancy agreement on 8 February. Mrs Playfair said their child remained on the waiting list for the school near the Property (but as a result of the delays was further down that list) and they were still living at the same property where they had been at the time all of this happened.

22. The Respondent felt they had done everything they could and had always wanted the Applicant to take the Property. Their administrator had been in the office while they were abroad and they said the tenancy agreement could have been entered into electronically within 24 hours of referencing being passed, subject to payment of the deposit and first month's rent and agreement of the move-in date. Ms Hunter pointed out they had tried to help despite the difficulties securing adequate references, given the difficulties of holding places for the Applicant's child at the local school and so on, keeping the Property off the market while they had the holding deposit. She said referencing fees had been incurred, £420 had been incurred cleaning and moving out furniture at the Applicant's request and it had cost £149 to re-list the Property through a marketing site for six weeks, having removed it at the Applicant's request when the holding deposit was paid. Mr Posyer had spent a lot of time working on this matter, with daily calls from the Applicant and calling the referencing agencies but being in their hands while they sought the evidence they needed from the second guarantor and his employer.

Conclusion

23. I sympathise with the Respondent and accept they made reasonable efforts in difficult circumstances. The Applicant's focus on trying to make their move happen while their child had their place at the local school may have made them unrealistic about the circumstances and weekends. That may explain the sometimes rather difficult correspondence from the Applicant and the decision not to proceed when their second proposed passed referencing shortly after the deadline for agreement. They do not seem to have understood that ordinarily the referencing agency might reasonably have been expected to have concluded matters much sooner, but had to deal with several set-backs and difficulties dealing with a very large employer who required more information to trace and release information and a guarantor who understandably took time to provide what was requested and ultimately had to wait for a reference from the employer because the guarantor could not find all their payslips for the requested period.

24. However, I need to exercise my discretion keeping in mind the scheme of the Act. Schedule 2 expects the agent to refund the entire holding deposit in the factual circumstances I have determined above. That may seem harsh, but the Act prohibits holding deposits entirely unless they

are intended to be dealt with in accordance with Schedule 2. Such holding deposits can only be retained in the circumstances specified in Schedule 2. They are not unrestricted security for costs incurred in seeking to let a property to prospective tenants. This puts the onus on any agent wanting to take holding deposits to be careful about how they do so.

25. In some cases, it may be appropriate to make an order to refund less than the full holding deposit, but I am not satisfied this is one of those cases. There was no evidence of the referencing costs said to have been incurred, or even the amount of the referencing costs. There was no invoice to confirm the costs of £420 for cleaning and moving out furniture. The Respondent accepted at the hearing that cleaning may have been necessary in any event and the Property had been let to new tenants without the furniture. There was no invoice or the like in relation to the re-marketing costs of £149 and it is not clear what period had been covered by any earlier marketing fee. I am not satisfied that I should deduct any of these costs from the holding deposit to be refunded.

26. These were professional letting agents dealing with private individuals who had (at least) explained they were receiving universal credit. They knew the tenants would not pass referencing alone, so would need a suitable guarantor. However, they did not require (or could not show they had required) the tenants to complete the type of application form which might usually be expected, requiring them to declare basic information about their financial circumstances and those of their guarantor. Nor had they insisted on an extended deadline for agreement, given the additional work and time which might be involved in seeking to obtain satisfactory references for guarantors who had not even been identified when the deposit was paid. Because they did not take any such steps to give them grounds to retain the holding deposit, they ran the risk that the matter might not be ready in time. Ultimately, and sadly for all concerned, it was not. I make no criticism of either party, but the Respondent does need to refund the entire holding deposit for the reasons I have given.

Name: Judge David Wyatt **Date:** 6 June 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).