



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

Case reference CAM/00MA/HTC/2022/0001

HMCTS Code P:PAPERREMOTE

Property : 4 Froxfield Down, Forest Park,
Bracknell, RG12 9YB

Applicant : Shirley Ann Bernez
Emma Sheppard

Respondent : Duncan Yeardley Bracknell Estate
Agents

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

Tribunal : Mary Hardman FRICS IRRV(Hons)

Date : 6 July 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 application and determination

1. On 28 June 2021 the tribunal received the application from Ms Bernez on behalf of herself and Ms Emma Sheppard for the return of the holding deposit of £271 paid to Duncan Yeardley Bracknell Estate Agents on 3 June 2021.

2. The tribunal gave directions on 12 April 2022 providing for the matter to be determined on the papers unless either party made a request for a hearing by 10 May 2022 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. Schedule 2 to the Tenant Fees Act 2019 deals with the treatment of holding deposits.
Paragraph 3(b) provides that the holding deposit must be repaid if: *“the landlord decides before the deadline for agreement not to enter into a tenancy agreement relating to the housing”*
and 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”*
4. 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 18 June 2021.
5. 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.
6. For the purpose of this decision the relevant exception is to be found in paragraph 9:-
9. Paragraph 3(b) or (c) does not apply if the tenant provides false or misleading information to the landlord or letting agent and—
(a) the landlord is reasonably entitled to take into account the difference between the information provided by the tenant and the correct information in deciding whether to grant a tenancy to the tenant, or
(b) the landlord is reasonably entitled to take the tenant’s action in providing false or misleading information into account in deciding whether to grant such a tenancy.
7. 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

8. The Applicants stated in the application that they had paid a one week holding deposit of £271 on 3 June 2021 in respect of a tenancy at 4 Froxfield Down, Forest Park, Bracknell RG12 9YB. They provided email communications with the respondent and a bank statement as evidence.
9. The agents for the landlord, Duncan Yeardley Bracknell Estate Agents, wrote to the Applicants on 22 June 2021 to say that they were not able to proceed with the proposed tenancy.
10. The Applicants wrote to the Respondent on 24 June 2021 to say that they had emailed the Respondent on 22 March 2021 to say that Ms Bernez was retired and was unable to work during 2020 and enclosed a copy of the e mail. When asked to provide proof of income to cover the shortfall in income they had provided a payslip for £1,500 dated 25 March 2021. They believed that the TFA clearly stated that all legal fees were capped at £50 so that withholding £115 would have been excessive but they believed no fees were payable.
11. The respondent replied (undated) to say that the application form they had submitted confirmed that they were both employed with a combined income of £42,000 per annum which would have passed the referencing criteria. However, on completing the referencing information on Goodlord only one employment was declared with the other applicant advised as retired and receiving a pension. The Respondent wrote that they had spoken to the Applicants and was advised that two additional forms of income had been available on a contract basis previously. However, since COVID- 19 and lockdown began in March 2020, the employment had not been available and therefore no income had been earned during this period which therefore came under the category of false or misleading information being provided.
12. Therefore, under the legislation, as referencing costs had been incurred during this process due to the above points the agents said that they were permitted to deduct this cost from the holding deposit
13. On 25 June 2021 the Respondent sent an e mail to say that the tenancy had been cancelled for 'subject to Contract and References'.
14. In response to a direction from the tribunal on 25 April 2022 the Applicant wrote to the tribunal setting out the basis for the £41,000 income referred to in the email of 22 March 2021.
15. This was made up of income for Shirley Bernez of state pension and teachers pension, benefit paid by Bracknell Forest Borough Council , income from part time employment as college invigilator and a small amount of income from the Chartered Institute of Marketing as an examiner which came to £21,416.47 . For Emma Sheppard it was an annual income of £18,882.06 and the total came to £40,299.43.

The Respondent's case

16. The Respondent's evidence mirrors much of that provided by the Applicants.
17. They provide a copy of the email referred to in paragraph 11, which is dated 23 June 2021 in respect of the discrepancy between the income on the application form and that completed on the Goodlord referencing platform.
18. They had written further on 28 June 2021 to say that the referencing report completed on 19 June 2021 confirmed a joint income of £32952.04. On this basis they were seeking to return a portion of the deposit but had not been provided with bank account details in order to do so.
19. An email from the landlord of 18 June 2021 asks the agents to put the property back on the market as they wouldn't be able to get insurance and that the Applicants had been deceitful in their application.
20. On 26 October 2021 they received an email from the Property Ombudsman asking for evidence of the misleading information that had led to retention of the deposit.
21. On 27 October 2021 the Respondent sent the required documentation to the Ombudsman, explaining that the landlord had decided not to proceed given the income shortfall and that they had attempted to refund part of the deposit on a number of occasions.
22. They provided a copy of an email to the Applicants of 12 January 2022 to say that further to the Property Ombudsman's final decision received that day they would be withholding £120 for the cost of referencing from the holding deposit and that the balance of £151 would be returned within 7 days.
23. A further email of 21 January 2022 to the Applicants says that they had 'made every attempt to refund £151 of the holding deposit'.
24. An email of 9 May 2022 said that they had contacted the Applicants on several occasions to refund the remainder of the holding deposit (assumed to be £151) and had not had any response to the phone calls or emails,

Discussion

25. The tenancy was not completed, and the starting point is that the applicants are entitled to the return of the holding deposit.

26. However, the respondent is relying on the exception in paragraph 9 of the act in that they assert that the tenants provided false or misleading information to the landlord or letting agent and it was reasonable for the landlord to take into account how the information provided differed from the 'correct' information. Alternatively, that the landlord is reasonably entitled to take into account the fact that the tenant had provided false or misleading information in deciding whether to accept him as a tenant.
27. The requirement is therefore firstly for the tribunal to decide whether the tenants did indeed provide false or misleading information.
28. Paragraph 9 incorporates a reasonableness test. If it is engaged the exceptions in paragraphs 3 (b) and (c) are disapplied and the respondent does not need to return the holding deposit.
29. The tenants confirmed that they gave their estimated income to the agents as 'about £42k per year'. However, the total from the completed application forms is shown as just under £32,000 and the referencing showed a 'conditional pass' on the part of Ms. Bernez. The Applicants provided a payslip for £1,500 for Ms Bernez but the agents were not prepared to accept it as it was 4 months old and there was no surety of future income provided.
30. The question for the Tribunal is whether the information provided was 'false or misleading'. The Tribunal has the benefit of a schedule of income provided by the Applicant which amounts to just short of £40,300 which the tribunal assumes in the light of the shortfall declared would have met the income requirements.
31. Whilst the income declaration on the referencing check may not have covered their full income and it was not unreasonable for the agents to have relied on this to make their decision and recommendation to the landlord, this is not the test. The tribunal is not satisfied that the information supplied was false or misleading, albeit the information on the application form was seemingly incomplete.
32. It determines that the full amount of the holding deposit of £271 should be returned within 28 days.

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).