



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

Case reference : **LON/00AG/HTC/2022/0017**

**HMCTS code
(paper, video,
audio)** : **P: PAPERREMOTE**

Property : **Flat 12, 286 Kilburn High Road, London
NW6 2DB**

Applicant : **Nelson Baltimor**

Representative : **-**

Respondent : **Constantin Boca, Kilburn Property
Investors Limited**

Representative : **-**

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

**Tribunal
member(s)** : **Judge D Brandler**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **17th January 2023**

DECISION

The tribunal's summary decision

(1) The tribunal determines that the respondent must repay the sum of £1,074.00 to the applicant in respect of the holding deposit retained by them. That amount to be repaid to the applicant within 28 days.

Background

1. In around November 2020 Nelson Baltimore (“the applicant”) expressed an interest in taking an assured shorthold tenancy of Flat 12, 286 Kilburn High Road, London NW6 2DB (“the property”) at a rent of £1,395.00 per month. He found the property advertised on the ‘OpenRent’ website entered into email/WhatsApp correspondence with Constantin Boca of Kilburn Property Investors Limited (“the respondent”).
2. On or around 02/11/2020 by a message on OpenRent, the respondent wrote to the applicant *“If you will be able to confirm and pay a holding deposit equivalent to one month rent, I will be happy to hold it for you until mid December”* .
3. On 09/12/2020 the applicant paid £1351 to the respondent.
4. A tenancy agreement was sent to the applicant by email on 28/11/2020 in which required:
 - (i) Rent of £1,395 per month payable in advance on the 19th of every month, commencing on 19/12/2020
 - (ii) Holding deposit of £1,395 to be paid by 28/12/2020 to be “refunded or will be allocated for the last month of the AST”
 - (iii) Security deposit £1,395 to be paid by 19/12/2020
 - (iv) Advance rent of £4,185 to be paid by 19/12/2020 to be “allocated for the last 3 months of the tenancy”
5. On 11/12/2020 the applicant decided not to take the property, having received the tenancy agreement and noted the amounts that were being requested in advance by the respondent, and finding that he could not afford those advance payments.
6. On or around 11/12/2020 the applicant asked for the holding deposit to be returned. The respondent refused.
7. An application dated 8/12/2022 was received by the tribunal and directions were issued on 24/10/2022.

The applicant’s case

8. In his application, the applicant claims the holding deposit of one month’s rent is clearly stated in the tenancy agreement. It is also confirmed in the WhatsApp messages between the parties, and in the respondent’s confirmation of receipt of the holding deposit, although the respondent now seeks to disguise this as one month’s rent in advance.
9. The WhatsApp messages from the respondent confirm that the 3 months rent in advance will be used for the last 3 months of the

tenancy. He asserts that the respondent was permitted only to ask for a holding deposit for the equivalent of one week's rent, that is £321.

The respondent's case

10. By a response dated 04/11/2022, the respondent states that, as they informed the applicant, the amount withheld was not a deposit but was for the first month's rent, citing that they had taken the property off the market for more than one month during which time the applicant was "convinced" that he would rent it, and this resulted in them losing income.
11. The respondent further asserts that the applicant informed them only a few days before the start of the tenancy. During that period, they say they could have found another tenant, but the property was reserved for the applicant and not being marketed.
12. They say also that the applicant agreed and signed the tenancy agreement and made a last-minute decision to change his mind. The respondent's position was that it was correct for them to retain one month's rent, if not more, until they were able to find another tenant.
13. The tenancy agreement provided by the respondent with the response shows the tenant's electronic signature, but no landlord signature and is dated 27/11/2020.

The tribunal's decision and reasons

14. The tribunal finds that a holding deposit was requested by the respondent in the sum of £1,395.00 and was paid by the applicant on 09/12/2020.
15. This is evidenced by both the tenancy agreement which specifically mentions "Holding deposit" of £1,395.00, and the WhatsApp messages between the parties. In particular the WhatsApp message sent in the applications reply dated 15/12/2020 in which the respondent states *"The money you transferred over were the holding deposit. As I said, the agreement was very clear that the advanced payments will be used for the last months of the tenancy agreement. I am repeating myself now and I am happy to keep the holding deposit you have transferred to be used as the last month of your tenancy... If you changed your mind and you are not happy with my proposal, I am sorry but you will not be getting the holding deposit back"* (sic).
16. However, the landlord was permitted to request a holding deposit of only one week's rent only in the sum of £321, and therefore the excess of £1,074.00 is a prohibited payment which must be repaid.

17. By paragraph 3 of schedule 1 to the Tenant Fees Act 2019, payment of a holding deposit may be a permitted payment but there are stringent conditions. For this purpose, a holding deposit means money paid to a landlord or letting agent before the grant of a tenancy with the intention that it is dealt with in accordance with schedule 2 of the 2019 Act.
18. By paragraph 3(3) if the amount of the holding deposit exceeds one week's rent, then the amount of the excess is a prohibited payment.
19. The Tribunal finds that it was the applicant terminated the agreement. The landlord is therefore entitled to retain the permitted amount of holding deposit of £321.
20. The tribunal finds no evidence to support the respondent's assertion of lost revenue from failing to rent the property from the 19/12/2020, which in any event is not a defence to retaining a prohibited payment.
21. The tribunal finds that the applicant is entitled to the return of the prohibited amount of £1,074.00 of the holding deposit.

Name: Judge D Brandler

Date: 17th January 2023

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).

Tenant Fees Act 2019

15 Recovery by relevant person of amount paid

(1) Subsection (3) applies where—

(a) a landlord or a letting agent breaches section 1 or 2, as a result of which the landlord or letting agent, or a third party, receives a prohibited payment from a relevant person, and

(b) all or part of the prohibited payment has not been repaid to the relevant person.

(2) Subsection (3) also applies where—

(a) a landlord or letting agent breaches Schedule 2 in relation to a holding deposit paid by a relevant person, and

(b) all or part of the holding deposit has not been repaid to the relevant person.

(3) The relevant person may make an application to the First-tier Tribunal for the recovery from the landlord or letting agent of—

(a) if none of the prohibited payment or holding deposit has been repaid to the relevant person, the amount of the prohibited payment or holding deposit;

(b) if part of the prohibited payment or holding deposit has been repaid to the relevant person, the remaining part of the prohibited payment or holding deposit.

(4) Subsection (5) applies where—

(a) a landlord or letting agent breaches section 1 or 2, as a result of which a relevant person enters into a contract with a third party, and

(b) the relevant person has made a payment or payments under the contract.

(5) The relevant person may make an application to the First-tier Tribunal for the recovery from the landlord or letting agent of the amount of the payment or (as the case may be) the aggregate amount of the payments that the relevant person has made.

(6) Subsection (3) does not apply in relation to a prohibited payment or holding deposit if or to the extent that, with the consent of the relevant person—

(a) the prohibited payment or holding deposit, or the remaining part of it, has been applied towards a payment of rent under the tenancy, or

(b) the prohibited payment or holding deposit, or the remaining part of it, has been applied towards the tenancy deposit in respect of the tenancy.

(7) Subsection (3) or (5) does not apply where an enforcement authority has commenced criminal proceedings against the landlord or the letting agent for the same breach.

(8) Subsection (3) or (5) does not apply where an enforcement authority has required the landlord or letting agent to pay to the relevant person all or part of the amount or (as the case may be) the aggregate amount referred to in that subsection.

(9) On an application under subsection (3) or (5), the First-tier Tribunal may order the landlord or the letting agent to pay all or any part of the amount or (as the case may be) the aggregate amount referred to in that subsection to the relevant person within the period specified in the order.

(10) A period specified under subsection (9) must be a period of at least 7 days but not more than 14 days beginning with the day after that on which the order is made.

(11) An order of the First-tier Tribunal under this section is enforceable by order of the county court as if the amount payable under the order were payable under an order of that court.

Schedule 1

Holding deposit

3(1) Subject to sub-paragraphs (3) to (6), a payment of a holding deposit is a permitted payment.

(2) In this Act “holding deposit” means money which is 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 (treatment of holding deposit).

(3) If the amount of the holding deposit exceeds one week’s rent, the amount of the excess is a prohibited payment.

(4) In sub-paragraph (3) “one week’s rent” means the amount of the annual rent payable in respect of the tenancy immediately after its grant, renewal or continuance divided by 52.

(5) A payment of a holding deposit is not a permitted payment if—

(a) the landlord or letting agent to whom the deposit was paid has previously received a holding deposit (“the earlier deposit”) in relation to the same housing,

(b) the landlord or letting agent has not repaid all or part of the earlier deposit, and

(c) none of paragraphs 6 to 12 of Schedule 2 have applied so as to permit the landlord or letting agent not to repay the earlier deposit or the part that has not been repaid.

(6) The reference in sub-paragraph (5)(a) to a landlord or letting agent receiving a holding deposit does not include the landlord or letting agent doing so before the coming into force of Schedule 2.

Schedule 2

Requirement to repay holding deposit

3 Subject as follows, the person who received the holding deposit must repay it if—

- (a) the landlord and the tenant enter into a tenancy agreement relating to the housing,
- (b) the landlord decides before the deadline for agreement not to enter into a tenancy agreement relating to the housing, or
- (c) the landlord and the tenant fail to enter into a tenancy agreement relating to the housing before the deadline for agreement.

Exceptions

6 Paragraph [3\(a\)](#) does not apply if or to the extent that the amount of the deposit is applied, with the consent of the person by whom it was paid—

- (a) towards the first payment of rent under the tenancy, or
- (b) towards the payment of the tenancy deposit in respect of the tenancy.

7 If all or part of the amount of the deposit is applied in accordance with paragraph [6\(b\)](#), the amount applied is treated for the purposes of section 213 of the Housing Act 2004 (requirements in connection with deposits) as having been received by the landlord on the date of the tenancy agreement.

8 Paragraph [3\(b\)](#) or [\(c\)](#) does not apply if—

- (a) the landlord is prohibited by section 22 of the Immigration Act 2014 (persons disqualified by immigration status) from granting a tenancy of the housing to the tenant,
- (b) the landlord did not know, and could not reasonably have been expected to know, the prohibition applied before the deposit was accepted, and
- (c) if the landlord has instructed a letting agent in relation to the proposed tenancy, the letting agent did not know, and could not reasonably have been expected to know, the prohibition applied before the deposit was accepted.

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.

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.

12 Subject to paragraph [13](#), paragraph [3\(c\)](#) does not apply where the deposit is paid to the letting agent 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.

13 Paragraph [10](#), [11](#) or [12](#) does not apply (so that paragraph [3\(c\)](#) does apply) if, before the deadline for agreement—

(a) the landlord or a letting agent instructed by the landlord in relation to the proposed tenancy breaches section 1 or 2 by imposing a requirement under that section on the tenant or a person who is a relevant person in relation to the tenant, or

(b) 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.