



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

Case reference : **LON/00AL/HTC/2022/0022**

Property : **26 Hastings Street, London SE18 6SY**

Applicant : **Mr Alan Sinclair**

Representative : **In person**

Respondent : **Mr Charlie Wang**

Representative : **In person**

Type of application : **Tenant's Fees Act 2019-Section 15**

Tribunal members : **Judge Daley
Ms Sarah Phillips- MRICS**

Date and venue of hearing : **9 June 2023 by CVP at 10 Alfred Place,
London WC1E 7LR**

Date of decision : **7 August 2023**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the Tenant's Fee application fails and that the application is dismissed.
- (2) That the applicant's application for costs under regulation 13 of the Tribunal Procedure Rules 2013 is refused.
- (3) That the respondent's application for costs under regulation 13 of the Tribunal Procedure Rules 2013 is refused.
- (4) No order is made for the applicant's recovery for reimbursement of the application and hearing fees.

The application

1. On 19 October 2022, the applicant made an application pursuant to Section 15 of the Tenant's Fee Act 2019.
2. The application was for an order for the recovery of a holding deposit paid in respect of a prospective tenancy of 26 Hastings Street, London SE18 6SY, pursuant to section 15 of the Tenant Fees Act 2019.
3. The applicant claims that on 6 May 2022 the respondent received payment of £795.00 from the applicant as a holding deposit and that when the applicant made the decision not to sign a tenancy agreement, despite requests, the respondent has not repaid that amount. The applicant sought an order for recovery of all or part of that amount from the respondent.
4. Directions were given on 3 February 2023, and the application was set down for a paper determination. On 4 May 2023, the Tribunal made the following direction. "This application has been listed for an oral hearing because there are disputes of fact between the parties which will be best determined by hearing oral evidence." The matter was set down for a hearing on 9 June 2023.

The Issues

- whether the payment was a holding deposit subject to paragraph 10 Schedule 2 of the Tenants Fees Act 2019 or
- Whether the payment was permitted under section 2, a tenancy deposit.

The Hearing

5. The hearing was held by CVP as there was no objection from any of the parties, and all of the issues could be dealt with by video hearing.
6. The hearing was attended by Mr Sinclair and Mr Wang. The Applicant informed the Tribunal that he saw an advert on a website -Space Rooms for a large double En Suite room in Royal Arsenal Riverside, the rent was £795 PCM, including bills. On 28 April 2022, he sent a message to the respondent Mr Wang asking if the room was still available and whether he could confirm that the property had access to the on-site gym.
7. He informed the Tribunal that he had been particularly interested in the room because of its location near the Gym. He stated that he worked from home and had put on a bit of weight during lockdown and was very keen to be able to use the Gym at lunchtime. On 30 April Mr Wang responded by saying that the room was still available and that access to the Gym would be granted on showing his tenancy agreement.
8. Mr Sinclair told the Tribunal that he made arrangement to view the room on 6 May 2022, however he indicated that he was keen to take the room subject to viewing. In order to ensure that if Mr Sinclair liked the room, he could move quickly to become a tenant. Mr Wang, asked for Mr Sinclair's passport so that could undertake the necessary tenancy checks. Mr Wang asked for references and on the same day sent a draft tenancy agreement and informed Mr Sinclair that he was satisfied with the results from the tenancy checks. Mr Wang sent him a draft tenancy agreement.
9. Mr Sinclair viewed the room on 6 May 2022. He told the Tribunal that the respondent had not been present when he had viewed the room, he had been shown around by a cleaner. He told the Tribunal that there had been no discussion about the Gym during the viewing. In the application he stated that:- "The property wasn't in an ideal state; the backyard had uneven paving stones with weeds growing through the cracks and was generally in a poor state of repair and there was a lot of detritus piled on and around the sofa in the living room. However, the room itself was acceptable and I believed it came with access to The Waterside Club..."
10. Mr Sinclair informed the Tribunal that whilst he was viewing the property another person had come to see the property. Mr Sinclair was keen to secure the property regardless of his concerns about the condition as it had access to the Gym which he wanted to use. He therefore rang Mr Wang, he stated that he had telephoned him and in the conversation which lasted approximately 4 minutes he had told him that he wanted to take the room. He told the Tribunal that in his conversation he had specifically referred to the Gym and the fact that

he would be able to walk to it at lunch time to use the Gym and the swimming pool. The Tribunal accepted Mr Sinclair's evidence that the Gym had been the main factor in his keenness to enter into a tenancy agreement for the property.

11. On the same day as he agreed to take the room, he told the Tribunal sent what he now believed to be a holding deposit at approximately 10.45 am. There was correspondence between Mr Wang and Mr Sinclair including WhatsApp messages on the same date. Mr Wang sent a signed tenancy agreement together with an amended agreement at Mr Wang's request. Mr Wang sent a copy of the unsigned tenancy deposit protection,
12. Mr Sinclair told the Tribunal that he did not sign the agreements as he considered that he had time to formalise his decision. "I have never at any point signed or otherwise signalled agreement to formally enter into a tenancy...".
13. However, Mr Sinclair accepted that the second tenancy agreement which also remained unsigned was sent as he had requested via WhatsApp which was sent on the 6 May that the agreement be amended from 4 months to 6 months.
14. Mr Sinclair explained that he, had checked with Waterside Gym and it had been explained that membership to the Gym was limited to those who lived in the Berkley Homes Group. On the 10 May 2022 he sent a message via WhatsApp, to Mr Wang. He explained the situation and wrote "If you remember that was one of the first questions, I asked you and it's an absolute deal breaker for me I'm afraid. That gym and its proximity to the house, meaning I could go on my lunch break whilst working from home is a large part of why I wanted to move to Royal Arsenal. On that basis I will not be moving in sadly please may I have my deposit back?" Mr Sinclair in his message also stated that one of his housemates might be interested in the room however this did not materialise.
15. The Tribunal asked Mr Sinclair about the Gym, as it was clear from the documentation, that there were two gyms on the development. The Tribunal were told that there was a gym near the Duke of Wellington and that this was approximately 150 metres from the property. The Waterside Gym was about 400 metres away from the property.
16. The Tribunal also asked whether Mr Sinclair had subsequently rented a property within the development and he informed the Tribunal that he had at a rent of £900.00 per calendar month.
17. The panel was told of the subsequent dispute concerning the deposit. It was Mr Sinclair's position that the deposit was returnable, however Mr

Wang considered that Mr Sinclair had entered into a tenancy agreement, and had subsequently breached the terms. Although he had indicated a willingness to return the deposit, if Mr Sinclair's house mate agreed to enter into a tenancy this had not occurred.

18. The Tribunal heard from Mr Wang, there was no dispute concerning the sequence of events that led up to Mr Sinclair viewing the property and his WhatsApp in which he stated " Hi Charlie, I've had a look and would like to take the room. I have just made the deposit payment of £795."
19. The Tribunal hearing from Mr Wang, that following this he sent Mr Sinclair a copy of the tenancy agreement and made the amendment requested from 4 months as the rental period to 6 months.
20. Mr Wang denied that the deposit which was paid was a holding deposit, he set out his case that the deposit had been paid as part of the agreement to enter into a tenancy pursuant to the tenancy agreement. He also denied any misrepresentation on his part in relation to the gym.
21. Mr Wang's case was set out in his email 10 May 2022, in which he stated " Please remember the sequence of events; you were emailed a draft tenancy agreement on 4th May of 2022 at your request prior to viewing. You viewed the property, you agreed with everything, you paid the tenancy deposit on 6th May 2022. I issued you with the protection certificate. We talked about the gym close to a concierge..." Mr Wang then stated that Mr Sinclair had requested a six-month tenancy and that this agreement was binding on both of them. In reference to the Waterside Gym he noted "... you mentioned a brand-new facility which was further away which I was not aware of..." He reiterated that his view was that it was not a "holding deposit" and was in fact a "tenancy deposit" in which the proper mechanism for a dispute concerning the deposit, lay with the government approved scheme.
22. In addition Mr Wang told us that he had not requested a holding deposit and that Mr Sinclair's payment of the deposit had been a voluntary act. That he had relied upon the agreement by amending the tenancy as requested and depositing the deposit under the government approved scheme. He explained that he had turned prospective tenants down. He also explained that there had been a 9-week delay in finding a tenant and that he had acted quickly to mitigate his losses.
23. In his evidence he stated that he had found Mr Sinclair's correspondence intimidating. In that he had stated that he, Mr Sinclair was a solicitor and had referred to his misrepresenting the gym which was connected to the property to be the Riverside Gym when this was not the case. He was seeking a costs award against Mr Sinclair.

24. The Tribunal heard brief closing submissions from the parties, which largely reiterated their oral and written submissions.

The Decision of the Tribunal

25. The Tribunal considered all of the evidence which included the hearing bundle, the application and the oral submissions of the parties. The Tribunal considered the issues which are set out above in reaching its decision. Although it has not set out the evidence verbatim where the Tribunal has relied upon specific evidence in reaching its decision the panel has included this evidence.
26. The Tribunal has firstly considered the evidence concerning the gym. It was clear that Mr Sinclair in looking for a room to rent had considered the need for a modern and accessible gym as being one of his requirements. He told the panel that he has now rented a room in a property which provides access to Waterside Gym and that this was at a higher rent than the subject property which was £795.00.
27. The Tribunal noted that first written communication on the WhatsApp messages is in reply to the request from Mr Sinclair about whether the room is available. Although the Tribunal did not have sight of the first message which was sent on Spacerooms.com. In answer to his question Mr Wang says that “you will be able to join the gym by showing your tenancy agreement.” From what the Tribunal has noted from the conversation the name of the gym was not mentioned until the 10 May 2022 when Mr Sinclair confirmed that he had been referring to the Waterside Gym.
28. The Tribunal heard and accepted evidence from Mr Wang which was not disputed that there is a gym near the concierge which is approximately 150 metres from the property. He said he had no knowledge of the Waterside Gym and that this was the gym to which he was referring. It is also not disputed that access could be obtained to use this gym by showing your tenancy agreement. Given this the Tribunal has found that there was no attempt on Mr Wang’s part to misrepresent that access to the Waterside Gym was a perk of the tenancy agreement.
29. The Tribunal has noted that this was a requirement for Mr Sinclair, and as such it was for Mr Sinclair to carry out the relevant enquires and to satisfy himself that the property included access to his required gym. There is a well-known legal expression with which the parties will be familiar with the Caveat Emptor, which is that it is for the buyer to check on the suitability before any purchase.

Whether the payment was a holding deposit subject to paragraph 10 Schedule 2. Of the Tenants Fees Act 2019 or

30. The Tribunal heard from Mr Sinclair that the first occasion that he came across the term ‘ holding deposit’ was when he had undertook research in order to get his money back. Given this it is clear to the Tribunal that at the time when the money was paid over to Mr Wang it was not paid as a holding deposit rather it was paid as a tenancy deposit under the terms of the tenancy agreement.
31. The Tribunal carefully considered the background and the fact that all of the required tenancy checks were carried out, and Mr Sinclair was not asked to provide a holding deposit and did not ask to be allowed time to think about the room. His response provided in his WhatsApp message was that -: “I have just had a look at the room I would like to take it...” At 10.41 am he indicates that he has paid the deposit of £795.00 which was the tenancy deposit under the tenancy agreement. The Tribunal is satisfied that even though the tenancy agreement was not signed this was sufficient to create a contractual agreement. The Tribunal has considered that there was part performance of the contract by Mr Sinclair in sending the deposit, and in Mr Wang amending the agreement.
32. The Tribunal is satisfied that Mr Wang did not treat the deposit as a holding deposit, as on the 9 May 2022 Mr Wang sent a copy of the tenancy deposit certificate to Mr Sinclair.
33. If the Tribunal is wrong about the status of the deposit, the Tribunal went on to consider whether 3 (c) of the Tenant Fees Act, there was a failure to repay the sum as the tenant had asked for the return of the amount due prior to the deadline for the agreement. Although there was no deadline for the agreement, the Tribunal finds that the agreement deadline had to be before the deposit was sent to the government tenancy deposit protection scheme prior to 9 May 2022. Accordingly it was too late for Mr Sinclair to ask for the money to be returned, although for reasons set out above, the Tribunal is satisfied that it was not a holding deposit.

Whether the payment was a permitted payment under Schedule 1 section 2 Tenants Fee Act

34. The Tribunal has considered all of the surrounding circumstances and for the reasons the panel has stated it considers the deposit that was paid by Mr Sinclair to be a tenancy deposit under the Tenant Fees Act 2019. Given this the Tribunal is satisfied that it was a permitted payment.

35. Accordingly the Tribunal has decided that the sum of £795.00 is not repayable in accordance with the Tenant Fees Act.
36. In his response Mr Wang asked that the Tribunal consider an order for costs in accordance with rule 13 of the Tribunal Procedure (First-Tier) (Property) Regulations 2013. If a party has acted unreasonably in bringing, defending or conducting proceedings.
37. The Tribunal has considered the submissions of Mr Wang, however it has considered that even though it has not found for Mr Sinclair, no criticism is made of him for bringing these proceedings, as there was an important issue for him which needed adjudication
38. Accordingly the Tribunal has refused his application.
39. The Tribunal makes no order for reimbursement of the claimant's hearing and application fee.
- 40. Accordingly the application to recover the sum of £795.00 as a holding fee is unsuccessful and is dismissed.**

Name: Judge Daley

Date: 07/08/23

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).

The Law

Requirement to repay holding deposit

Section 3 of the Tenant Fees Act 2019

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.

4 If paragraph 3 applies, the deposit must be repaid within the period of 7 days beginning with—

(a) where paragraph 3(a) applies, the date of the tenancy agreement,

(b) where paragraph 3(b) applies, the date on which the landlord decides not to enter into the tenancy agreement, or

(c) where paragraph 3(c) applies, the deadline for agreement.

5(1) The person who received the holding deposit must repay it if—

(a) that person believes that any of paragraphs 8 to 12 applies in relation to the deposit, but

(b) that person does not give the person who paid the deposit a notice in writing within the relevant period explaining why the person who received it intends not to repay it.

(2) In sub-paragraph (1) “the relevant period” means—

(a) where the landlord decides not to enter into a tenancy agreement before the deadline for agreement, the period of 7 days beginning with the date on which the landlord decides not to do so;

(b) where the landlord and tenant fail to enter into a tenancy agreement before the deadline for agreement, the period of 7 days beginning with 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.