FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UL/HTC/2021/0001
Property	**:**	5 The Courtyard, Moor Park House Way, Moor Park Lane, Farnham GU10 1FE
Applicant	**:**	Iain Buswell
Representative	**:**	
Respondent	**:**	Hamptons
Representative	**:**	
Type of Application	**:**	Recovery of a holding deposit S15(3) and (5) Tenant Fees Act 2019
Tribunal Member(s)	**:**	Judge J Dobson
Date and venue of hearing	**:**	24th September 2021. On the papers.
Date of Decision	**:**	27th September 2021

DECISION

SUMMARY OF DECISION

1. **The Applicant is entitled to the return of the holding deposit of £691.15, which the Respondent shall pay to the Applicant by 5pm on 8th October 2021.**

APPLICATION AND DIRECTIONS

2. The Applicant applied for an order for the return of what is asserted to be a holding deposit of £691.15 being one weeks rent, contending that, despite requests, the Respondent has not repaid that amount.

3. The Tribunal identified in Directions dated 7th July 2021 that if the payment was a holding deposit within the meaning of the Tenant Fees Act 2019 ("The Act"), the Tribunal was empowered under section 15 of the Act to order recovery of all or part of that amount from the Respondent.

4. The Directions set out the steps to be taken by the parties to prepare the case for a determination and provided that the application would be determined on the papers unless a party objected in writing to the Tribunal within 28 days of the date of receipt of the Directions and that the Tribunal would not inspect the Property.

5. The Directions were subsequently varied by further Directions dated 19th July 2021 on application of the Respondent, which sought additional time for its statement of case and related on the basis of a delay in receipt of supporting documents from the Applicant.

6. No objection has been received has been received to a determination on the papers. This is accordingly the Decision reached on the papers and considering such information as those contain.

THE LAW

7. The Act is one of a number of pieces of legislation enacted to enhance tenant's rights. The Act places a prohibition on landlords and letting agents from charging most payments associated with a tenancy other than rent and authorised tenancy deposits (up to five or six weeks' rent, dependent on the level of rent annually).

8. Much of the structure of the Act is built on the concepts of "prohibited payments" and "permitted payments". Section 3 of the Act defines a payment as a prohibited one:

   "unless it is a permitted payment by virtue of Schedule 1

9. Therefore, payments associated with a tenancy are prohibited unless an exception specifically permitted. Schedule 1 contains a list of permitted

payments that is both long and detailed and must be considered in the context of the given case.

10. Section 15 provide that a relevant person can apply to the Tribunal for an order that the amount or part of the amount of a prohibited payment should be repaid to them. There are two conditions for making an application, namely that:

    A) A landlord or letting agent is in breach of (section 1 or 2 or) Schedule 2 and as a result has received a prohibited payment which has not been repaid or repaid in full, or
    B) [in relation to contracts with third parties]

11. Such an order must specify the time by which the repayment myst be made, at least seven days but not more than fourteen days beginning with the day after that on which the order is made. The order is enforceable as if it were an order of the County Court.

12. By paragraph 3 of Schedule 1, payment of a holding deposit may be a permitted payment but there are stringent conditions. A holding deposit is defined as 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 Act. Such a holding deposit is a prohibited payment to the extent that the amount exceeds one week's rent.

13. Schedule 2 provides for when a holding deposit must be repaid and when it can be retained. In summary, a holding deposit must be repaid where:

    a) The landlord and tenant enter into a tenancy agreement, unless the holding deposit is applied towards the first payment of rent due:

    b) The landlord decides before the deadline for agreement not to enter into a tenancy agreement, in which event it must be repaid on that date. That deadline is the fifteenth day following the date the holding deposit is paid or such other period as it agreed in writing by the tenant.

    c) The landlord and tenant fail to enter into a tenancy agreement before the deadline for agreement, in which event repayment must be on the deadline for agreement date.

14. The deposit does not, in general, have to be repaid where an exemption applies, being amongst other provisions:

    i) The tenant notifies the landlord or letting agent before the deadline for agreement that they have decided not to enter into the tenancy agreement;

ii) The landlord and/ or letting agent has taken all reasonable steps to enter into the tenancy agreement before the deadline for agreement but the tenant has failed to take all reasonable steps.

15. However, and notwithstanding the above paragraph, the holding deposit must still be repaid where

    1) The person holding the deposit considers that one of the exemptions applies but fails to give the tenant notice in writing within the relevant period (essentially seven days) explaining why it is not to be repaid, or

    2) the landlord and tenant fail to enter into a tenancy agreement and the landlord or letting agent:

    "behaves towards the tenant, or a person who is a relevant person 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" (or there is another breach of a manner not relevant here).

16. Statutory guidance has been issued by the Minister of Housing, Communities and Local Government. The guidance includes that a landlord or letting agent should stop advertising a house once a holding deposit has been paid.

THE PARTIES' CASES

17. The Applicant's case is found in the application itself together with 12 additional pages of evidence. To that was added a short response to the Respondent's case dated 3rd August 2021 and comprising two pages.

18. The Respondent's case is found in the witness statement of Daniel McMinn, signed but not dated and comprising 41 paragraphs, together with a 52- page bundle of supporting documents.

19. There is no single paginated bundle for this determination. Accordingly, references will be made to given paragraphs of the parties' cases or to specific exhibits, to the extent that it is appropriate to do so.

20. Much of the circumstances are not in dispute. The fundamental dispute between the parties is as to whether Ms McMinn stated to the Applicant at the time of him viewing the Property that the Applicant's children could use the communal garden area for playing.

AGREED FACTS

21. I understand from the parties' cases from the documents provided to me that the following matters are not in dispute:

    i) The Respondent was the letting agent for the landlord, one Ms Ervine. ;

ii) The Applicant enquired about the Property on 15th February 2021, a video of the Property was sent by Ms McMinn that day, a conversation took place between the Applicant and Ms McMinn about viewing the Property and an email confirming the viewing was sent by Ms McMinn.

iii) The Applicant viewed the Property on 16th February 2021, accompanied by Ms McMinn, together with his partner and two children. The children were aged 3 years old and 5 years old.

iv) The communal garden grassed lawns and garden areas were discussed. The details of the discussion are not agreed- see below.

v) On 25th February 2021, the Applicant made an offer to rent the Property and that was accepted on 26th February 2021. The tenancy application form and other documents, including a sample tenancy agreement and a letter explaining about a holding deposit, were sent to the Applicant by Ms McMinn.

vi) The sample tenancy agreement included reference to a requirement that the tenant perform and observe the covenants in a superior lease and that a copy of such lease can be viewed on request.

vii) The tenancy application form was signed by the Applicant and his partner and sent to the Respondent on 27th February 2021 and the holding deposit of £691.15 was paid. That was one week's worth of rent. The payment was made to the Respondent as agent of the landlord.

viii) The move- in date was changed from 22nd March 2021 to 31st March 2021 by request on 3rd March 2021 and agreement on 4th March 2021. Ms McMinn submitted the Applicant and his partner for referencing on 4th March 2021.

ix) The agreed terms of offer were sent by the Respondent to the Applicant on 9th March 2021.

x) The landlord emailed the Respondent on 15th March 1991 to check whether the Applicant knew about the provisions of the lease.

xi) The original referencing report was sent to the landlord on 16th March 2021 and was queried by her on 18th March 2021, following which additional information was sought by the referencer (who had not checked against the correct rent level).

xii) Referencing of the Applicant was completed on 24th March 2021 and the Respondent informed the Applicant on 25th March 2021 by email.

xiii) The superior lease was requested by the Applicant on 25th March 2021.

xiv) That lease was supplied on 26th March 2021, with a request that the Applicant sign the paperwork. The Applicant rang the Respondent. Ms McMinn agreed to contact the landlord to check whether the lease terms were enforced.

xv) The Applicant withdrew from the intended tenancy on 30th March 2021, by email at 12.21 pm and asserting that he had been misled.

xvi) The Respondent emailed the Applicant on 30th March 2021 at 1.02pm referring to a separate grassed area behind the stream.

xvii) The Applicant immediately responded confirming that he would not take the tenancy. The Applicant requested the return of the deposit.

xviii) The Respondent emailed the Applicant on 31st March 2021 and refused to return the deposit referring to the sample tenancy agreement and a document signed in relation to the holding deposit.

22. Not every date on which an event occurred is listed above, and none of those mentioned after the refusal to return the holding deposit the subject of this application. The remainder do not materially add to the position.

CONSIDERATION and DISPUTES AS TO FACT

23. The deadline for the agreement as referred to in various provisions of the Act is in this instance, 14th March 2021, the fifteenth day after the holding deposit was paid on 27th February 2021.

24. It quite clearly follows from the facts not in dispute that the parties had not entered into a tenancy agreement by the deadline for agreement, unless such date was extended. Whilst the parties may extent that date by agreement in writing, no evidence has been provided to me that the deadline was extended. Neither has any such assertion been made.

25. As identified in relation to the law above, the Respondent, as the party to which the deposit was paid, had to repay the deposit unless that requirement did not apply.

26. The relevant circumstance in which the requirement may not apply is if the landlord and Respondent has taken all reasonable steps to enter into a tenancy agreement before the deadline for agreement, but the tenant had failed to take all reasonable steps before that date.

27. However, the Respondent can only take advantage of that if it provided notice as to why the deposit was being retained within seven days and if the Respondent did not behave in such a way that it would be unreasonable to expect the Applicant to enter into the tenancy agreement.

28. The Respondent did, I find, give the relevant notice by way of its email 31st March 2021, which explained the reason why the deposit was to be retained. The question of the Respondent's behaviour would need to be answered by resolving factual disputes. I address that, as far as required, below.

29. Of more immediate significance is that the Respondent has not identified any steps any reasonable steps that the Applicant failed to take before the deadline for agreement on 14th March 2021 where the Respondent had taken all such steps. I find that there are no such reasonable steps that the Applicant failed to take during the relevant period.

30. I find that as at 14th March 2021, there were two reasons why the tenancy agreement had not been entered into. The first and most obvious one is that the tenant referencing reports had not been received back- even in their original incorrect form- for the landlord and the Respondent to be satisfied about the Applicant as tenant.

31. It is not apparent that had anything to do with the Applicant. The deadline for agreement is calculated from the date of payment of the holding deposit. The Applicant did not submit the referencing request and neither is there any suggestion that he ought. That was in the control of the Respondent. It is less than clear that it matters but Ms McMinn is said to have submitted the request on the Wednesday following payment of the holding deposit on the Saturday.

32. It is the Respondent who failed to take all reasonable steps ahead of the deadline for agreement date by not having arranged referencing to be completed ahead of the deadline and ensuring that the tenancy could be entered into.

33. The second potential one is that the new agreed terms of offer had not been sent to the Applicant by the deadline for agreement date following the Applicant's request on 12th March 2021. That was sent on 15th March 2021, after the deadline had passed. Given the first aspect, it is not clear that this one had any practical impact.

34. The request by the Applicant to change the payment schedule is not, I find, the failure to take a reasonable step. Neither I should say for completeness, do I consider the earlier change to the moving in date due to difficulties finding a removal company to be the failure to take a reasonable step.

35. The Applicant had not identified the issue with the lease terms at that stage. Given that was relevant, arguably the Applicant had failed to take that reasonable step, irrespective of whether there was a failure to take any others.

36. However, failure by the Applicant to take all reasonable steps is only relevant if the Respondent had itself taken all relevant steps. Given that I have found that the Respondent did not, I need not dwell on failure by the Applicant.

37. It necessarily follows from the findings above that the Respondent had not taken all reasonable steps to enter into the tenancy agreement before the deadline for agreement and the landlord was not ready to enter into the tenancy agreement, that the holding deposit was required to be repaid by the Respondent on the deadline for agreement date.

38. I am mindful that I have dealt with a point that neither party has raised. Some caution is appropriate in such a situation, albeit arguably more so in a situation in which parties are represented and might be assumed to have deliberately not taken a point.

39. However, the deadline for agreement and the effect of it is a matter of statute law, which cannot be ignored. This Tribunal is also an expert Tribunal and must determine applications applying its knowledge and expertise. The law which the Tribunal is aware of cannot be ignored.

40. I have also considered with some care whether I ought to invite submissions from the parties prior to making this determination but I have concluded that I ought not to do so.

41. The parties have presented the evidence on which they wish to rely in accordance with Directions which made it clear that the Tribunal would then determine the application, the sum involved is modest, additional time and cost would be involved in the preparation of further submissions and the determination of this application would be delayed. Taking all of those matters into appropriate account and considering the over-riding objective of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, I have determined that further submissions should not be sought and rather the application should be determined on the statements, submissions and supporting documents filed and served.

42. That determination renders the factual disputes between the parties irrelevant to the outcome of this application. Accordingly, there is no merit in saying a great deal about them.

43. The most significant to the parties, as indicated by their presented cases was in relation to the discussion about the communal lawn and garden areas. The Applicant states that Ms McMinn informed him that the children could play on them. Ms McMinn states (para 12) that the Applicant did not specifically ask whether the children could play on

the lawn- and implicitly that she made no comment that they could. Ms McMinn also states that she informed the Applicant that although the gardens were communal, they could not be used for barbeques, parties or anything that would disturb other residents or damage the gras. She states that the Applicant asked whether they could go onto the lawn at all and that she replied that the lawn could be walked on and sat on but that ball games, cycling and running around were not permitted.

44. There is a direct conflict of evidence. It is possible to identify how there could have been a misunderstanding if Ms McMinn's evidence had stopped at excluding barbeques and parties. The Applicant may well have perceived that use by two small children playing was somewhat different to such gatherings. However, the statement by Ms McMinn is that she informed the Applicant that ball games and running around were not permitted. Whilst it is not wholly impossible that the Applicant may have had in mind the children playing in other manners, it is hard to see how an absence of any running around could have been likely. In any event, the statement said by the Applicant to have been made by Mc McMinn is quite specific and contrasts strongly with her evidence.

45. It is generally accepted that there ought not to be an attempt to reach a decision which involves preferring one witnesses' evidence as against another on the basis of written statements and without the opportunity for the evidence to be tested by oral questioning. However, I see not merit at all in listing a hearing, oral evidence being given in respect of the dispute and a finding being made one way or the other.

46. To the extent of other disputes as to facts, the same points apply and the same approach is appropriate.

47. Given that the requirement for the Respondent to repay the deposit rests on the fact that no tenancy agreement was entered into by the deadline for agreement date and where I have found no exception to that applies, nothing turns on the factual dispute in this instance. The Applicant was entitled to the return of the holding deposit some days before the Applicant decided not to enter into the tenancy agreement. The outcome of this application does not depend upon the merits or otherwise of the Applicant's position in relation to factual matters in dispute.

48. I am troubled that the Applicant stated that he would not enter into the agreement some weeks after stating that he would so, after changes had been made to accommodate him and only on the date on which he was due to move in. I have no doubt that the letting of the Property was thereby delayed. I also note that the sample tenancy agreement identified that there may be other relevant terms in a lease, enabling the Applicant to request that. He did not do so until towards the end of March 2021. His criticism of the Respondent in not providing him a few days earlier with something he had not requested is not well founded.

49. None of that would have encouraged the exercise of any discretion in favour of the Applicant had there been any to exercise. Given that there is no such discretion to be exercised and that nothing turns on the matters which trouble me, I say no more about them.

DECISION

50. The Applicant is entitled to the return of the holding deposit of £691.15, which ought to have been repaid on 14th March 2021, because no tenancy agreement had been entered into by the deadline for agreement.

51. The Application accordingly succeeds.

52. The Respondent shall pay the sum of £691.15 to the Applicant by 5pm on 30th September 2021.

53. There was no fee payable on the filing of the application by the Applicant and hence there is no such sum required to be refunded by the Respondent.

Rights of Appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.