



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

Case Reference : BIR/00CN/HTC/2021/0001

Property : 34 The Forge, 262 Bradford Street,
Birmingham, B12 0QY

Applicant : Ben Young

Representative : Unrepresented

Respondent : Ascend Estates Limited

Representative : Unrepresented

Type of Application : Application for recovery of a holding deposit:
Tenant Fees Act 2019 (“2019 Act”)

Tribunal member : Judge Anthony Verduyn

Date of Decision : 15 February 2021

Date Decision issued : 9 March 2021

DECISION

The Respondent, Ascend Estates Limited, shall repay to the Applicant, Mr Ben Young, the holding deposit of £160.

REASONS

1. On 11th January 2021 Mr Ben Young (“Mr Young”) applied to the Tribunal for the repayment of a holding deposit which had been retained by Ascend Estates Limited (“Ascend”).
2. The relevant law is appended to this decision. The application is made pursuant to Section 15 of the 2019 Act. Put simply, the 2019 Act permits a landlord or agent to take a holding deposit from a prospective tenant to reserve a property whilst reference checks and preparation for a tenancy agreement are undertaken. It is capped at a maximum of one week’s rent. A landlord will usually have 14 days to enter into a tenancy agreement with the prospective tenant once a holding deposit has been received by the landlord or agent. The “deadline for agreement” is the 15th day after the holding deposit has been received, unless a different day is agreed in writing. A landlord must return the holding deposit (or set it off against rent) once the tenancy agreement is entered into, or the landlord chooses to withdraw from the proposed tenancy agreement, or the deadline for agreement has passed. A holding deposit can only be retained where the tenant provide false or misleading information or fails a right to rent check or decides not to proceed with a tenancy or fails to take all reasonable steps to enter into a tenancy agreement (and the landlord or agent takes all reasonable steps to do so, for example, clearly requesting information required to progress the tenancy). A landlord or agent must also set out in writing why they are retaining the holding deposit within 7 days of deciding not to let if this is before the “deadline for agreement” or within 7 days of the “deadline for agreement” passing, otherwise they forfeit the right to retain the holding deposit and must return it to the tenant. Even then, the retention of the holding deposit is a matter of discretion on the part of the landlord. Where a landlord retains a holding deposit, the prospective tenant has the right to apply to the Tribunal for its return.
3. In this case the only question is whether or not Ascend was entitled to retain the holding deposit after the deadline for agreement on the bases that Mr Young failed to take all reasonable steps to enter into a tenancy agreement when Ascend took all reasonable steps to do so. It follows that the issues are the conduct of Mr Young and of Ascend.
4. Directions were given on 13th January 2021, with the content of the Application standing as Mr Young’s statement of case, a response being directed by Ascend by 28th January 2021 and any reply by Mr Young on 4th February 2021. A paper determination was directed unless Mr Young or Ascend requested a hearing, and neither did so. The directions were complied with.
5. I note the course of events from the Statements of the parties and the documents disclosed.

6. Mr Young was relocating from Scotland to the Midlands and sought to rent 34 The Forge, 262 Bradford Street, Birmingham B12 0QY from or through Ascend. He viewed the Property on 19th and 21st December 2020. I note the following chronology from disclosed documents and statements of case from the parties.
7. 21st December 2020 13:25 email - Ascend informed Mr Young that letting is offered at £700pcm, with a discount for the first month. At 13:44 Ascend stated by email that Mr Young's contract of employment would be acceptable in place of an employer's reference. (Mr Young explains that his employers were closed until 5th January 2021 in explanation for why this was an issue. I note that 4th January was a bank holiday in Scotland.)
8. 22nd December 2020 Mr Young received an email from Ascend stating that if he wanted to move in on 31st December 2020 a holding deposit was required straight away "so [Ascend] can start the credit and reference checks". Mr Young states that he informed Ascend that he would pay the holding deposit the next day.
9. 23rd December 2020 at 13:52 Mr Young paid £160 to the account of Ascend. I find from this that 23rd December 2020 was day one of 14 day period. Ascend states that almost exactly at the time the payment was made it was texted by Mr Young to the effect that the electronic application form had been completed. Just over an hour later, Ascend requested proof of payment of the holding deposit from Mr Young, so they could begin the referencing process, although Ascend does not explain why it could not have checked its own account.
10. 24th December 2020 at 9.24am Mr Young sent a screenshot of the payment record via email. This was acknowledged very quickly, but Mr Young was informed that it was too late to complete the process for moving in on 31st December 2020 and it would have to wait until 4th January 2021. Emails were exchanged on this issue, because Mr Young was unhappy that Ascend was apparently unable to check its own account the day before and the credit check company was unable to initiate the checks before Christmas. I note the email from Ascend at 3pm on 24th December in fact states that the holding deposit would have had to have been paid on Monday 21st December to secure an earlier date than 4th January 2021, not on 23rd December implied by Ascend's statement of case. This was contrary to its own communication of 22nd December 2020. The credit check agency emailed Mr Young for information at 4:05pm and Mr Young completed the form that day, including uploading his employment contract.
11. 29th December 2020 by email disclosed by Mr Young, the credit check agency requested 3 months of bank statements.
12. 30th December 2020 Ascend states it had requested a copy of Mr Young's contract of employment, as this had been omitted from the referencing application. The same day, Mr Young informed Ascend that the reference agency had his contract of employment, and it was the bank statements for 3 months that were the issue. Mr Young informed Ascend that he did not wish to disclose bank statements, but he provided a work email address so

that his employers could be contacted directly. The employers would not be available until 5th January 2021. Ascend stated that it would wait until credit checks were finalised before releasing the key, but wanted to put a date in the diary for this.

13. 4th January 2021 Ascend states that Mr Young was chased for documents, but responded that he was not happy to provide these and matters should wait until his employers were available the next day. Mr Young denies that this exchange took place. (Given it was a bank holiday in Scotland, I consider that progress was unlikely on that day in any event.)
14. 5th January 2021 Ascend states that Mr Young was chased again at 8.23am. Mr Young does not comment.
15. 6th January 2021 Ascend state that the credit check agency called Mr Young's employers, but the phone line rang out. It queried with Mr Young whether he would still be working in Glasgow, whilst renting in Birmingham, but got no response. At 12.43pm Ascend emailed Mr Young seeking the employer's reference and asked about the likely date for key collection. These questions were texted at 1.05pm. Again, Mr Young does not comment.
16. 7th January 2021 the credit check agency sought Mr Young's consent for the release of a reference (as requested by his employer and who must, therefore, have been in contact with the agency that day at the latest), but the phone line rang out and an email went unanswered. Mr Young provides a copy of that email.
17. 8th January 2021 Mr Young advised that he had no printer to print out the form sent the previous day. Ascend state that he was told an e-signature would do, but no copy communication to that effect is provided. A call from Ascend at 10.58am on that day went unanswered, as did an email sent at that time. A copy of the latter has been supplied by Mr Young, it referenced the call and asked if he was still proceeding with the letting. At 11.13am, only 15 minutes later, Ascend informed Mr Young that due to lack of contact and no progress with his employer's reference, the property would be put back on the market. Unmentioned by Ascend, Mr Young responded that evening by email, expressing his surprise and noting that the holding deposit was already required to be returned. He provided his bank details.
18. 11th January 2021 Ascend state that Mr Young told them to close the application. Mr Young has disclosed Ascend's email timed at 9:53am. It states: "Unfortunately, the Tenant Fees Act states that if you pull out, the landlord/agent can claim the holding deposit as forfeit. In this scenario the tenant does not get the deposit back. It goes to the landlord or agent to cover them against any loss of time and money; therefore the deposit will not be refunded to you. We gave ample opportunity for you to respond and you failed to let us know either way", all attempted contact failed.
19. Mr Young responded to state that the deposit was due back on the 15th day. Ascend withdrew from the agreement, not him. The reference was being

progressed in a timely manner and notwithstanding that the supply of the employment contract was acceptable and this was done on 24th December 2020. He stated he would make the application now before the Tribunal.

20. The relevant law appears in Schedule 2 to the 2019 Act. Under paragraphs 3(c) and 4(c) the holding deposit is repayable on the deadline for the agreement when the landlord and the tenant fail to enter into a tenancy agreement relating to the housing before the deadline for agreement.
21. The holding deposit may only be retained if (pursuant to paragraphs 11 or 12 of Schedule 2) the landlord and/or agent takes all reasonable steps to enter into a tenancy agreement before the deadline for agreement, and the tenant fails to take all reasonable steps to enter into a tenancy agreement before that date. It follows that, if there is default in taking all reasonable steps on the part of the landlord or no default in taking all reasonable steps on the part of the tenant, or both sides take all reasonable steps before the deadline for agreement, then the holding deposit cannot be retained and it must be returned to the tenant.
22. Having reviewed the documentation and statements provided, I find:
23. Firstly, that payment having been made on 23rd December 2020, the 15th day (hence when the holding deposit should have been repaid absent written agreement extending time) was 6th January 2021. Events after that date are irrelevant, save that no repayment was made. I note that the agreement was proceedings regardless until at least the morning of 8th January 2021 (when Ascend made inquiry of it proceeding with Mr Young). It follows that under paragraph 3(c) of the Schedule 2, the landlord and the tenant failed to enter into a tenancy agreement relating to the housing before the deadline for agreement and under paragraph 4(c) the holding deposit was repayable 7 days from that date, hence 13th January 2021. Pursuant to paragraph 5(b) of Schedule 2, notice in writing of why it was not being repaid was required by that date, and the parties have treated (rightly) the email of 11th January 2021 as that notice. Ascend assert Mr Young failed to take all reasonable steps to enter into the Tenancy Agreement before the deadline for agreement (paragraphs 11(c) or 12(c)), but those paragraphs also require that Ascend had also taken all reasonable steps to enter into the tenancy agreement by the deadline for agreement (paragraphs 11(a) and (b) or 12(a) and (b)).
24. Secondly, I find that Ascend did not take all reasonable steps to enter into a tenancy agreement before the deadline for agreement: (a) Ascend misinformed Mr Young insofar as it needed the holding the deposit paid on Monday 21st December 2020 to progress the application notwithstanding public holidays, rather than “straight away” on 22nd December or 23rd December; (b) Ascend failed to identify the payment on 23rd December 2020 because, for reasons that are entirely unclear, it could not examine its own bank account; (c) Although Mr Young provided evidence of payment on the morning of 24th December 2020, Ascend did not immediately instruct the credit check agency and the process of credit checking did not start before 4pm that day. Since Ascend were asserting urgency, they needed to act very promptly; (d) Ascend had a policy of not

allowing moving in to take place between Christmas and New Year in any event, but Ascend did not make that sufficiently clear in a timely manner; and (e) Ascend and its credit check agency did not communicate effectively with each other, such that the agency did not inform Ascend of receipt of the contract of employment, nor had Ascend informed the agency that the contract was to be treated as sufficient without a reference from the employer.

25. Had Ascend considered that public holidays meant that time was too short to enter into a tenancy currency of the holding deposit, it could and should have agreed a written extension of the period, but it did not.
26. Since Ascend cannot be said to have taken all reasonable steps to enter into the tenancy agreement before 6th January 2021, it cannot claim the benefit of the exception in paragraphs 11 or 12 of Schedule 2.
27. Thirdly, in any event, I find that Mr Young did take all reasonable steps to facilitate entering into the tenancy agreement as he sets out in his statement of case. He too was hampered by the unavailability of his employers, and he did all he could to mitigate this. I do not consider that the complaints at the time he took to respond to communications can be criticised and that includes the period from 6th to 8th January 2021. Ascend cannot make out the necessary criticism of Mr Young under subparagraphs (c) of paragraphs 11 or 12 of Schedule 2, and so is not entitled to retain the holding deposit. This is the case, even were I to be wrong in criticising Ascend as set out above.
28. It really does not matter who withdrew from the process of entering into the tenancy agreement, because the deadline for agreement had passed without agreement, and that triggers repayment unless an exception applies. It is instructive nonetheless, and I find, that Ascend withdrew by its email at 11.13am on 8th January 2021. Although Ascend sought to justify this in that email by stating that this was due to non-contact and, by implication, Mr Young's withdrawal from the agreement, this is entirely inconsistent with a request to him asking whether he was proceeding only 15 minutes before. Plainly, the email at 10.58am proceeded on the basis that Mr Young had not withdrawn at that stage (otherwise the question would have been redundant) and equally clearly there was no reasonable time given to him to respond to the question before the next email. Mr Young requested his holding deposit back that evening, but even then, did not state that he was treating the agreement as terminated. The deposit was due back on 6th January, and he was entitled to ask for his money back without impliedly ending the agreement. It was Ascend on 11th January 2021 which renewed its position that the agreement was at an end.
29. On the basis of my findings, the holding deposit is required to be repaid by Ascend to Mr Young.

Tribunal Judge Dr Anthony Verduyn

Dated 9 March 2021

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.

Tenants Fees Act 2019

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

TREATMENT OF HOLDING DEPOSIT

Application

1 This Schedule applies where a holding deposit is paid to a landlord or letting agent in respect of a proposed tenancy of housing in England.

Interpretation

2 (1) In this Schedule “the deadline for agreement” means the fifteenth day of the period beginning with the day on which the landlord or letting agent receives the holding deposit.

(2) But the landlord or the letting agent may agree with the tenant in writing that a different day is to be the deadline for agreement for the purposes of this Schedule.

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.

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.

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.