



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

Case Reference : **LON/00AZ/HTC/2021/0001**

**HMCTS code
(paper, video,
audio)** : **P: PAPER REMOTE**

Property : **7A Gaynesford Road, London
SE23 2Q**

Applicant : **Ms Anna Dorota Dynska-Gezer**

Respondent : **Mr Raj Birring**

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

Tribunal Members : **Tribunal Judge Prof R Percival
Mrs A Flynn MA, MRICS**

**Date and venue of
Hearing** : **Remote paper determination**

Date of Decision : **27 April 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote determination on the papers which has been consented to by the parties. The form of remote hearing was P:PAPER REMOTE. A face-to-face hearing was not held because the parties agreed on a paper determination. We were referred to a number of documents by both the Applicant and the Respondent, the contents of which have been noted.

The application

1. The Applicant applies for the recovery of all or part of a prohibited payment from the landlord. The application is dated 21 December 2020.
2. The application relates to the withholding of £100 from the £1,000 tenancy deposit taken from the Applicant on the commencement of the tenancy. We were not supplied with a copy of the tenancy, but the parties state that it – or, we assume, its predecessor – commenced in 2009, and that was when the deposit was taken.

Jurisdiction

3. It is only appropriate for the Tribunal to consider the merits of the points raised by the parties if the Tribunal is satisfied that the application falls within our jurisdiction under the Tenant Fees Act 2019, section 15. We have concluded that this dispute is not one to which the 2019 Act applies, and so we cannot make a determination in relation to it.
4. The purpose of the Tenant Fees Act is to ban letting fees and other fees that make renting more expensive, and to make the costs of renting clearer to tenants and prospective tenants.
5. The current system for the regulation of tenancy deposits in assured shorthold tenancies is that provided for in the Housing Act 2004, Part 6, chapter 4. This, broadly, makes it compulsory for tenancy deposits taken by landlords to be dealt with in accordance with an authorised scheme. The schemes include dispute resolution procedures.
6. There is some cross-over between the two schemes, in that the Tenancy Fees Act makes the payment of a tenancy deposit to a landlord a permitted payment, provided that (for most deposits) it is limited to the same amount as five weeks' rent (schedule 1, paragraph 2). However, the operation of a tenancy deposit, including in particular what may or

may not be withheld from a tenant, is covered by the system of authorised schemes put in place by the Housing Act 2004.

7. It is clear to us that the policy of the Tenant Fees Act is that the regulation of tenancy deposits, once paid, should continue to be determined by the 2004 Act system of authorised schemes. There is nothing to suggest that the Tenant Fees Act intends that the Tribunal should also independently have jurisdiction over disputes relating to the withholding of a tenancy deposit, in addition to the dispute resolution schemes authorised under the 2004 Act. Had that been the intention, we would have expected it to have been made clear on the fact of the Act.
8. The Explanatory Notes to the Tenant Fees Act refer to the 2004 system as applying to tenancy deposits. Explanatory Notes are provided by the Government department responsible for an Act. They are not part of the Act, so do not have the force of law, but can be of assistance in understanding the policy of an Act.
9. The statutory guidance to which enforcement authorities are required to have regard (Tenant Fees Act 2019, section 6(4)) states that

“The Act does not affect the landlord’s entitlement to recover damages for breach of the tenancy agreement by way of a deduction from the tenancy deposit or through the courts”

The Guidance is not authoritative as to the proper interpretation of the Act, but again it is indicative of the policy of the Act.
10. There are also other provisions in the Act which rely on the 2004 Act (for instance, a provision allowing a holding deposit to be applied to an obligation to pay a tenancy deposit, and the provisions on client money).
11. We do not consider that the withholding of a tenancy deposit, or part of it, is the sort of transaction covered by the Tenant Fees Act. The Act makes it unlawful for a landlord to require a tenant to make a payment, enter into a contract or make a loan for various listed purposes, such as in connection with the grant, renewal or termination of a tenancy, and makes provisions in tenancy agreements to pay such fees not binding. It applies to such payments or provisions in tenancies whenever they were made, although there are some differences between the treatment of payments and tenancy conditions made before the Tenant Fees Act came into effect.
12. It is obvious that withholding a tenancy deposit cannot be the entering into a contract or a loan.
13. Neither do we think it can count as a payment. In making provision for the payment of tenancy deposits (provided they are under the cap), the

Tenant Fees Act anticipates that it is possible for landlords to withhold some or all of the tenancy deposit at the end of the tenancy. The Act does not, however, make such withholding a “permitted payment” under the Act. If the intention was that withholding repayment of a tenancy deposit were to count as “payments” under the Act, it would have been necessary to make them “permitted payments”, or there would be no point in having tenancy deposits (the payment of which is expressly permitted). So the absence of a provision making withholdings “permitted payments” must mean that they are not payments at all.

14. This conclusion is in keeping with the policy of the Tenant Fees Act, accords with the ordinary meaning of the word “payment”, and is in line with common sense.
15. We understand that the stated reason for withholding part of the deposit in this case – for “professional cleaning” – might have had the effect of misleading the Applicant into thinking that it was covered by the Tenant Fees Act. One example of a *free-standing fee* which would be caught by the Act is a requirement to pay for professional cleaning at the end of a tenancy. We note from the papers that, although the initial heading given to the withholding of the sum in this case was “professional cleaning”, the Respondent conceded that this was misleading and what was really meant was damage going beyond wear and tear. However, in any event, this was not a free-standing requirement to make a payment, but a withholding from a tenancy deposit. As we have explained, it is therefore not caught by the Tenant Fees Act.
16. Had the challenge in this case been in relation to the original payment of the deposit, on the basis that it was higher than the cap, then that payment would be within the jurisdiction of the Tribunal. But it is clear that it is the withholding, not the initial payment, that the Applicant is seeking to challenge.
17. We have not quoted the legislation at length in this determination. Both statutes can be found on the official legislation website. The Tenant Fees Act is here: <https://www.legislation.gov.uk/ukpga/2019/4/contents/enacted> and the Housing Act 2004 here: <https://www.legislation.gov.uk/ukpga/2004/34/contents>.