FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AD/HTC/2021/0013-P**
Property	**:**	**75 Frobisher Road, Erith, Kent DA8 2PU**
Applicant	**:**	**Moses Awomolo**
Respondent	**:**	**Ann Worssam, Hunters Letting Agency**
Type of application	**:**	**For recovery of all or part of a prohibited payment or holding deposit: Tenant Fees Act 2019**
Tribunal members	**:**	**Judge P Korn**
Date of decision	**:**	**25th January 2022**

DECISION

Description of hearing

This has been a remote hearing on the papers. The form of remote hearing was **P**. An oral hearing was not held because the Applicant confirmed that he would be content with a paper determination, the Respondent did not object and the tribunal agrees that it is appropriate to determine the issues on the papers alone. The documents to which I have been referred are in electronic bundles, the contents of which I have noted. The decision made is described immediately below under the heading "Decision of the tribunal".

Decision of the tribunal

The tribunal declines to order the Respondent to repay the whole or any part of the holding deposit to the Applicant.

The application

1. Pursuant to section 15 of the Tenant Fees Act 2019 ("**the 2019 Act**"), the Applicant seeks the return of the whole of a holding fee paid to the Respondent in connection with a prospective tenancy of the Property. The amount of the holding deposit was £230.76. The tenancy was not entered into and the holding deposit was not returned.

Applicant's case

2. The Applicant states that he paid the holding deposit to the Respondent on 29th June 2021 in anticipation of being granted a tenancy of the Property. He was told by the Respondent that FCC Paragon would carry out employment checks, as well as checks with his existing landlord, and that he would need to show an annual income in excess of £21,500. The employer duly confirmed his employment and income level and his landlord gave him a good reference. He was also asked to produce three bank statements and three payslips, which he did.

3. He was then asked to consent to Open Banking so that the reference agency could access his full banking history. He refused consent on the basis that the Respondent had made no mention of the need for the reference agency to access his full banking history when he asked her what the reference process would entail, and he submits that it is a wholly unreasonable requirement.

4. The Applicant was then told that he had failed the referencing stage because he had not consented to Open Banking, which he maintains was not mentioned to him before he committed himself to the Property. The Respondent said that because the Applicant had failed the credit check it would not be proceeding with the tenancy and would not be returning his holding deposit.

5. The Applicant adds that he has reason to believe that £230.76 was taken from multiple people for the same property.

Respondent's case

6. The Respondent states that the holding deposit was taken to reserve the Property whilst referencing was carried out. In her email of 25th June 2021, she stated that if the Applicant did not pass referencing (or if he withdrew the application once referencing had started) the deposit would be non-refundable.

7. FCC Paragon, the reference agency, found detrimental information which required them to carry out further checks, and in order for them to do this the Applicant was requested to complete the Open Banking request. The Applicant refused to do so, and therefore the report from FCC Paragon was returned as "Fail – Guarantor Required". The Applicant then declined the option of proceeding with a guarantor. The holding deposit was not refunded due to the Applicant's failure to complete the referencing process by failing to allow FCC Paragon to conduct additional checks after discovering detrimental information.

Tribunal's analysis

8. Section 15 of the 2019 Act provides 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.

9. Under paragraph 3(3) of Schedule 1 to the 2019 Act, if the amount of a holding deposit exceeds one week's rent the amount of the excess is a "prohibited payment". However, in the present case the Applicant is not arguing that the holding deposit exceeded one week's rent and the evidence indicates that it equalled one week's rent. Therefore, the holding deposit was not a "prohibited payment" under paragraph 3(3) of Schedule 1.

10. Section 15(2) of the 2019 Act states: *"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"*. The relevant part of section 15(3) then states: *"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 … holding deposit has been repaid to the relevant person, the amount of the … holding deposit …"*.

11. Therefore, in addition to "prohibited payments" section 15 also applies to the status of holding deposits where there has been a breach of the provisions of Schedule 2 to the 2019 Act. It is therefore necessary to consider the relevant parts of Schedule 2 to the 2019 Act in order to determine whether the Respondent is in breach of any of its provisions. The relevant parts of Schedule 2 are as follows:-

2(1) In this Schedule "the deadline for agreement" means the fifteenth day of the period beginning with the day on which the … letting agent receives the 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.

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.

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 … 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.

12. Subject to the exceptions set out later on in Schedule 2, under paragraph 3 of Schedule 2 the holding deposit must be repaid if the landlord decides not to enter into a tenancy agreement or if the landlord and tenant fail to enter into a tenancy agreement before the "deadline for agreement" (in each case). It is clear, and is not disputed by the Respondent, that the holding deposit was not repaid before the "deadline for agreement" as defined in paragraph 2(1) of Schedule 2.

13. One of the exceptions to which paragraph 3 is subject is contained in paragraph 9, which essentially provides that the holding deposit need not be repaid if the tenant provides false or misleading information and if it is reasonable to take into account (a) the difference between the false/misleading information and the true position or (b) the tenant's action in providing false/misleading information, in deciding whether to grant the tenancy. On the facts of this case, I do not consider that there is evidence that the Applicant has provided false or misleading information. What seems to have happened is that the Applicant provided some initial information which the Respondent accepted was correct but then the reference agency "found detrimental information which required them to carry out further checks". Therefore, the facts indicate that the exception in paragraph 9 does not apply.

14. There is another exception contained in paragraph 12, which itself is then limited in scope by paragraph 13. Under paragraph 12 (to the extent that it is not disapplied by paragraph 13), if – as is the case here – the parties fail to enter into a tenancy agreement before the deadline for agreement, there is no obligation on the letting agent to refund the holding deposit if the letting agent takes all reasonable steps to assist the landlord to enter into the tenancy agreement and the tenant fails to take all reasonable steps to enter into the agreement before the deadline.

15. Paragraph 13(a) disapplies the exception in paragraph 12 where the letting agent or landlord is in breach of sections 1 or 2 of the 2019 Act. First of all, there is no suggestion that the landlord (as distinct from the letting agent) has breached section 1 (or section 2) of the 2019 Act. Regarding the Respondent herself, the holding deposit is not a prohibited payment for the reason set out in paragraph 9 above and

there is no suggestion – and nor do I consider – that she has breached section 2 (or section 1) of the 2019 Act in any other way.

16. Paragraph 13(b) disapplies the exception in paragraph 12 where the letting agent or landlord has behaved towards the tenant in such a way that it would be unreasonable to expect the tenant to enter into a tenancy agreement, and this point needs in my view to be considered together with the applicability or otherwise of paragraph 12 itself.

17. I am conscious that this case is being determined on the papers alone. There is therefore no opportunity for the parties to present and explain their respective cases in detail, and nor is there an opportunity to cross-examine the parties or indeed to cross-examine someone from the reference agency. In addition, the parties' respective written submissions are very thin. These observations are not meant as a criticism; given the sums involved it is understandable for the parties to consider it disproportionate to have an oral hearing and/or to provide more detailed evidence. Nevertheless, the factual information available to me is not detailed.

18. On the basis of the evidence before me, I consider on balance that the Respondent acted reasonably in seeking further information from the Applicant. There is no suggestion, let alone evidence, that the reference agency was anything other than a competent professional organisation trying to do its job. The evidence suggests that it discovered detrimental information in relation to the Applicant and judged as a result that it needed to carry out further checks. The Applicant refused to agree to those further checks and, as a result, he failed the credit check. He was given the option of proceeding with a guarantor but declined this option.

19. Applying this to paragraphs 12 and 13 of Schedule 2, the parties fail to enter into a tenancy agreement before the deadline for agreement and in my view the Respondent took all reasonable steps to assist the landlord to enter into the tenancy agreement before the deadline for agreement and the tenant fails to take all reasonable steps to enter into the agreement before the deadline for agreement. In the absence of any evidence that the Respondent simply invented the need for these further checks, the presumption has to be that she was relying on advice from the reference agency. Having then been told by them that further checks were needed as a result of detrimental information coming to light, it is hard to see on what basis it was reasonable for the Applicant to expect her simply to ignore the advice from the reference agency. Having seen the limited correspondence between the parties, I do not see any compelling evidence that the Respondent misled the Applicant – she was simply reacting to what the reference agency was telling her in the light of new information.

20. As noted above, the exception in paragraph 12 is not disapplied by paragraph 13(a). As regards paragraph 13(b), I see nothing in the written submissions to indicate that the Respondent or the landlord behaved in such a way that it would be unreasonable to expect the Applicant to have entered into the tenancy agreement.

21. For the sake of completeness, the Applicant cannot rely on paragraph 5 of Schedule 2 to the 2019 Act (not set out in this determination) as he is not even arguing that the Respondent failed to write to him within the "relevant period" explaining why she did not intend to repay the holding deposit.

22. As regards the Applicant's claim that he has reason to believe that £230.76 was taken from multiple people for the same property, this is just an assertion and the Applicant has provided no supporting evidence.

23. Accordingly, I do not consider that the Respondent is required to repay either the whole or any part of the holding deposit.

Name: Judge P Korn **Date:** 25th January 2022

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.