Flat Shares & Tenancy Deposits

"Much of our property law in England & Wales derives from generations-old judge-made common law rules overlaid by legislation built up over many years and often lagging behind commonplace 'real life' arrangements such as flat- or house- sharing." So said HHJ Luba QC in *Sturgiss v. Boddy* in a judgment handed down on 19 July 2021. In the case, HHJ Luba QC squared the phenomenon of flat-sharing with the Housing Act 2004 and its provisions as to tenancy deposits. The Judge found that because a tenancy deposit initially paid in 2004 by tenants who had long-since moved on from the property had not been protected, two more recent tenants were entitled to the statutory penalty. This decision may well come as a shock to many urban landlords.

The facts were that in 2004 Mr Boddy had let his property on an assured shorthold tenancy to four individual joint tenants as a "flat-share". The tenants shared the kitchen and communal area but each had their own bedroom. A deposit was collected (although at this time statute did not require it to be protected) and the landlord received a monthly cumulative rent from the designated 'head tenant'. In time, each of the original tenants wanted to leave and so found replacements (whether being friends or acquaintances or following the placing of an advertisement). The replacements re-imbursed the departing occupier for their share of the deposit and over time, following many churns of occupants, the only record of the original tenants was (as the Judge put it) "the appearance of their names on increasingly dog-eared post in an ever-growing pile in the communal hallway". The informal situation suited Mr Boddy who did not get involved in the re-letting of rooms but consistently received the rent and equally gave the revolving cast of occupiers a semi-permanent home with the flexibility to move on when their personal circumstances changed.

It is a situation that will be familiar to many students, young professionals and ex-pats. How though does it fit into English residential landlord-and-tenant law?

Differing from the Judge at first instance, HHJ Luba QC held that the current occupiers of the property were tenants and not mere licensees. The normal threefold hallmarks of a tenancy of (i) exclusive occupation; (ii) for a term; (iii) at a rent, were present. The occupiers, who Mr Boddy at all times referred to as his tenants, paid rent on a monthly basis and had exclusive occupation of the flat to the exclusion of Mr Boddy and the world. It mattered not that Mr Boddy may not, from time to time, have known the names of all his tenants – they were his tenants and had the security of tenure accorded to tenants.

HHJ Luba QC then held that upon each change of occupant (or "churn") there was a surrender and re-grant of the tenancy. On the basis of Mr Boddy's own evidence, he had accepted an arrangement whereby the departure of one at the departure of one or more individuals the property would be treated as, in effect, re-let to those remaining and the new arrival(s). The landlord could not resile from this treatment and seek to insist that an individual who was a joint tenant before a churn, and had left after it, was still a tenant even though he was accepting rent he knew was being tendered on behalf of a new group.

Finally, HHJ Luba QC had to consider the effect of s.214 of the Housing Act 2004. He held that where there was a single initial payment of a deposit and thereafter a churning of the identities of tenants, the landlord must be treated as having been 'paid' by each new cohort the amount held in respect of the original cohort and each subsequent cohort. Requiring Mr Boddy to account to his original 2004 tenants for the what might be left of the deposit in 2021 after proper deduction in respect of acts for which those original tenants were not responsible and assumed no responsibility was wholly artificial and made no sense in the factual context of a flat-share.

The result of this analysis was that the landlord was liable to pay the statutory penalty for failure to protect the deposit. The Court did not award three times the deposit but accepted a multiplier of 1 was appropriate on the facts of the case.

However, the penalty applied on each churn of tenants subsequent to April 2007 (because on each such occasion there was a grant of a new tenancy) where the tenant was making a claim. Thus Mr Boddy ended up paying the claiming tenants three-times the value of the remaining deposit. This judgment represents a salutary lesson for landlords: if you take a deposit, you must protect it notwithstanding that you may be operating a long-standing informal flat-share arrangement that seems a poor-fit to the statutory scheme.

Andrew Bruce