Property Litigation column: Tenancy deposits in flat shares: Sturgiss & Gupta v Boddy & Ors [2021] 7 WLUK 298

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Articles | Published on 11-Aug-2021

Samuel Hodge, a barrister at Enterprise Chambers, discusses the recent case of *Sturgiss & Gupta v Boddy & Ors [2021] 7 WLUK 298* and the implications which arise in relation to protecting the tenancy deposit when, following the initial grant of an assured shorthold tenancy, there are multiple periodic changes of tenants which take place without involving the landlord.

It is common, in towns and cities, for single individuals to live in house or flat shares. At the start, a landowner lets a property to a group of people on a joint tenancy. The original tenants will often have paid a tenancy deposit, each contributing a certain proportion. Over time, one or more of them might move elsewhere, and so they or the remaining tenants advertise for a replacement, usually online, and undertake their own "vetting" process. Normally, the incoming tenant will reimburse the outgoing tenant their notional "share" of the deposit they previously contributed, at a level to be agreed.

The landowner might or might not be told of the occupant change. There may be multiple changes. These kinds of arrangements may be convenient for landlords. The rent they receive is usually collected by a lead tenant and paid periodically. The landlord need not, each time an occupant moves on, spend money engaging agents to advertise the room or vet new residents.

When disputes break out, informal arrangements such as these can throw up many difficult legal issues, including the real nature of the parties' relationship on the facts of each case; and the question: "for whom is the original deposit, which was first paid by the original tenants, held after many years of changed occupation?"

On 19 July 2021, HHJ Luba QC handed down judgment in the case of *Sturgiss & Gupta v Boddy & Ors [2021] 7 WLUK 298*. He dealt with an appeal from an Order dismissing a claim brought under the Housing Act 2004 by recently-departed flat sharers against a landowner for failure to protect their deposits. This note looks at that decision and comments upon its implications.

The facts of Sturgiss & Gupta v Boddy & Ors

Mr Boddy was the owner of a flat. He let it out in June 2004 under an assured shorthold tenancy (AST) to four tenants, with weekly rent of £349. A deposit of £1,754 was paid. As at June 2004, there was no obligation on landlords to protect deposits. Mr Boddy, after making some deductions for breakages, now held a balance from the originally-paid deposit of £1,205.

This was a flexible flat share situation, where occupants came and went, and decided amongst themselves who would move in and who would contribute what sums. Mr Boddy had little or no visibility of the occupants' arrangements inter se. No managing agents were involved. None of the original tenants now remain in the flat. By April and May 2020, the rent had increased, via some unspecified means, to £2,295 per month.

Miss Sturgiss moved in on 17 October 2018 and paid £1,050 to the outgoing occupiers in respect of their deposit "share", and thereafter £702pcm towards the rent (Churn A). Miss Gupta moved in in April 2019, paid the outgoing occupier £800 in respect of their deposit "share", and thereafter £660pcm towards the rent (Churn B).

On 8 January 2020, the occupiers emailed Mr Boddy raising issues about the flat. They also asked whether they were under an assured shorthold tenancy, and Mr Boddy replied in the affirmative.

Miss Gupta wanted to move out in early 2020, and enquired of Mr Boddy whether the existing deposit was protected or would be. Mr Boddy said the initial deposit was taken in 2004 and was not protected as it did not need to be.

A replacement was eventually found for Miss Gupta, who paid her £800 for her deposit "share" when she left in around February 2020 (Churn C).

In March 2020, Miss Sturgiss decided to leave the country. She gave Mr Boddy notice that she would be moving out of the flat and that she would pay rent to 15 May 2020.

In August 2020, Miss Sturgiss and Miss Gupta issued proceedings against Mr Boddy alleging the non-protection of their deposits, per sections 213 to 214 of the Housing Act 2004. They sought statutory penalties of a multiplier of no less than 1x their deposits and a maximum of 3x the deposits for each "Churn", claiming that each time a new occupant entered, the existing AST was surrendered, and a new tenancy arose in respect of which a deposit was to be treated as having been paid but which had not been protected. The other occupants were made defendants for procedural reasons.

Mr Boddy denied that the occupiers were lessees with ASTs, and argued that they were licensees, and that no tenancy deposit was paid by the Claimants to him in connection with any AST and therefore no statutory requirement to protect the deposit was engaged.

First instance

DDJ Brafield held that the occupiers were not tenants, but were mere licensees without exclusive occupation. He said the position was one of a "casual rolling licence without a fixed definable term or notice period". He also held that, each time a new occupant came in, there had not been a surrender by operation of law of any AST, nor any re-grant, as Mr Boddy played no part in the process at all. He also said that, even if he was wrong on the previous points, the statutory scheme only enabled a tenant who had actually paid a deposit to the landlord or agent to sue for the statutory penalty, and only the four original tenants had done that – the Claimants had not. He dismissed the claim. The Claimants appealed.

HHJ Luba QC’s decision on appeal

Tenancy / Licence

HHJ Luba QC allowed the appeal on this point, as all the hallmarks of a tenancy: exclusive occupation, for a term, at a rent, were all present.

- Rent was sought and accepted in respect of the occupiers of the flat from time to time, was described as rent by all parties, and was paid monthly on behalf of all occupiers.

- No evidence was led of any fixed term tenancy; the term (if any) must have been periodic on a monthly basis, i.e. when rent was paid.
- The occupiers clearly enjoyed exclusive possession of the flat. They would not have been required to admit Mr Boddy to live with them if Mr Boddy just turned up, for instance. That Mr Boddy may not have known the names of the occupiers at any point in time did not matter; the arrangement envisaged that possibility. Notice was not a normal feature of the arrangements because no notice was usually given in circumstances where the outgoing occupant simply found a replacement. Miss Sturgiss, however, did not find a replacement and thus was required to give notice, which she did in March 2020.

Surrender / Re-grant

The Claimants submitted that DDJ Brafield was wrong to find that, when each new occupier came in, there was not a surrender and re-grant. HHJ Luba QC allowed the appeal on this point as well.

- He noted the case of *London Borough of Tower Hamlets v Ayinde [1994] 26 HLR 631*, where the CA held a landlord's acceptance by conduct of a new set up (where a tenant left and installed another) amounted to surrender and re-grant, even where the landlord did not know of the change when it happened.
- Mr Boddy's evidence made clear that there was a prior arrangement that, when one or more occupant left, the property would be treated as effectively re-let to the remaining and new arrivals. It did not require Mr Boddy's involvement.
- He said at paragraph 69: "It would be absurd to think that the landlord could insist that an individual who was a joint tenant before a "churn", and had left after it, was still a tenant even though he [the landlord] was accepting rent he knew (or can be taken to have known) was being tendered on behalf of a new group."

Deposit / Penalties

The Claimants still needed to demonstrate, in order to obtain relief, that they either paid or were to be treated as having paid a deposit to the landlord in relation to each relevant Churn.

It had been rightly found below that the Claimants had not paid any money for a deposit directly to Mr Boddy. They paid money to outgoing tenants to reimburse them for their personal and notional "carried forward" share of the original deposit.

The Claimants contended, however, that DDJ Brafield was wrong to not follow *Superstrike Ltd v Rodrigues [2013] 1 WLR 3848*, and wrong not to hold that a deposit payment should be deemed as having been made to the landlord at each Churn, despite the Claimants not paying him directly.

HHJ Luba QC allowed the appeal. He said at paragraph 80:

"Where the landlord has entered into a construct by which, at his own design, there is a single initial payment of a deposit and thereafter a churning in the identities of the tenants, he must be treated as having been "paid" by each new cohort, the amount held in respect of the original coherent and each subsequent cohort. The alternative is the very artificial notion that Mr Boddy is fixed with an indefinite liability to account to his original (and long gone)

2004 tenants for such sum as is left after proper deduction in respect of acts for which they are not responsible and have assumed no responsibility."
As to the statutory penalty payable by Mr Boddy: £1,205 (the amount of the original deposit remaining held by Mr Boddy at the time of each relevant Churn) was the sum to be treated as being paid and received as a deposit for the tenancy of the whole flat at each Churn. It was to that sum which the multipliers fell to be applied. The relevant sum was not the sum which any Claimant personally paid to the person(s) they replaced.

HHJ Luba QC decided that this case was at the bottom end of the spectrum of "landlord culpability", and said to impose a multiplier of more than 1x would be unjust. The following factors were noted at paragraph 87: that (a) the deposit was first taken when they did not require protection; (b) the deposit had been retained; (c) Mr Boddy did not protect it because he believed the informal nature of the arrangement did not require it; (d) Mr Boddy's views had been supported by his legal advisers and at least one judge; (e) the informal arrangement was meant to ensure each outgoing tenant received reimbursement of their share; (f) Mr Boddy's gave evidence, and undertaking, that, if the Court ruled against him, he would protect the deposit he has retained for over 15 years.

HHJ Luba QC gave judgment to the Claimants in for a total of £3,615: "(i.e. £1,205 in respect of each of the three relevant churns which produced a tenancy to which they were in turn either or both parties)".

Comment

- This decision provides clarity regarding the legal status of occupiers in flexible house or flat share arrangements. In the majority of cases, the occupiers will have the benefit of a tenancy. Each time a new occupier replaces another, the law may, on the basis of this decision at least, treat the existing periodic tenancy as being surrendered and re-granted. It might be questioned, however, whether a more fitting analysis would be based on assignment (see below).
- The decision provides a clear reminder that landlords must protect any deposits they originally obtained from the original tenants, which should remain protected for as long as the flat share continues. This is so even if the flat share is a long running one, pre-dating the Housing Act 2004 (at least where there have been subsequent churns). That a new tenant does not pay a deposit directly to a landlord, but reimburses the outgoing tenant, is irrelevant, on the basis of *Sturgiss*. The landlord was treated as having received a deposit from the tenants at each churn, each of which requires protection.
- Some leeway was given to Mr Boddy for his mistaken belief that the deposit did not need protecting now because the original arrangement was so informal and because, at the time he took the original deposit, no statutory obligations to protect tenancies existed. Landlords in a similar position would, however, be advised to protect the deposit as soon as possible to protect them moving forward, and because it is unlikely that landlords will now, in light of this judgment's promulgation, be afforded similar leeway in future.
- Mr Boddy was ordered to pay the Claimants a total sum of £3,615. This was in respect of 3 "churns". It is assumed that HHJ Luba QC did not rule that Miss Gupta was entitled to any penalty arising out of Churn C, as, at that time, she was leaving and was reimbursed her "share" by the incoming tenant. She was therefore not a tenant as at Churn C, and was not a "relevant person" as defined by section 213(10) (i.e. "any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant"), so would not have been able to apply under section 214(1) as at Churn C.
- Landlords should be aware that if they decide to adopt such informal arrangements and do not, at an early stage, take steps to protect a deposit, they are at serious risk of facing very large claims for statutory penalties, potentially running to many thousands of pounds, especially if the flat share involves multiple changes of tenant, perhaps in quick succession.

- Tenants should also be aware that, if their landlord holds sums of an original deposit but simply has not formally protected them, the tenants may only be able to obtain a penalty as a multiplier of the sums that remain held by the landlord as at the churn (the total of which may well have been properly reduced, through deductions for breakages etc., since the original deposit was paid). This could accordingly limit the landlord's liability on future churns, unless a new deposit arrangement is struck by the tenants and landlord moving forward, and further sums advanced to the landlord. An assignment analysis (discussed below) might avoid this difficulty.
- It might be questioned whether, as a matter of principle, it is correct or fair to deem that a fresh payment of the entire deposit has been paid to the landlord upon each churn, especially in circumstances where each tenant has only paid one contribution, and the only money changing hands at each churn is as between the incoming and outgoing tenant. The result in *Sturgiss* (that Mr Boddy was required to pay the amount of the deposit three times over) is linked to the surrender and re-grant analysis. On that analysis, a landlord's liability may end up exponentially increased in "multiple churn" cases, as, at each churn, they are deemed to have received the deposit afresh. That may strike many as unfair and fictional. On that basis, tenants might receive penalties in the amount of their deposits many times over, simply by virtue of occupant changes. One response may be to construct an argument that, on the surrender and re-grant analysis, the liability should be severable in some way on each churn. This approach was, however, simply rejected by HHJ Luba QC.
- Alternatively, a more fitting analysis, it is suggested, might be found in the concept of **assignment**. Each churn would amount to an effective assignment of the AST (for which AST there was no implied alienation prohibition, and to which assignment the landlord can, in the circumstances, be taken to have consented). This analysis has the benefit of avoiding any fictional "deeming" that a deposit is received by the landlord on each churn (when in reality no money is actually received). The focus would, quite properly, be on whether the landlord protected the original deposit, the only sum that was actually paid to it, meaning that the landlord's liability could not be multiplied according to the number of churns. It also seems to be a more fitting analysis generally: when one tenant leaves, but the others remain as they are, it is a stretch to say that the entire tenancy is "surrendered". The periodic AST remains, but one of the parties is swapped out. It is hoped that the question of which analysis is apposite will be dealt with in future cases, perhaps even at appellate level.
- Nonetheless, landlords should beware that, in flat share cases, a failure to protect a deposit may end up being an extremely costly failure indeed.

Case: *Sturgiss v Boddy [2021] 7 WLUK 298 (19 July 2021)*

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