

**IN THE CONSUMER CLAIMS TRIBUNAL MALAYSIA
AT KUCHING, SARAWAK**

CLAIM NO : TTPM-Q-(P)-264-2011

JEREMY TED INGLE - CLAIMANT

TERESA TING LANG - RESPONDENT

GROUND OF JUDGEMENT

THE CLAIMS

The Claimant's claim is for the sum of RM8,750.00 paid in respect of a tenancy of a premise. The said sum is made up as follows:

- (i) Rental deposit of RM5,000.00;
- (ii) Utility deposit of RM1,250.00;
- (iii) 1st rental of RM2,500.00.

The said sum was paid to the lawyers for the Respondent on 13 May 2011 before the purported scheduled commencement date of the tenancy which is on 15 May 2011.

The basis or reasons are set out in Form 1 filed by the Claimant. The pertinent ones are as follows:

- (i) The access card and keys were not handed to the Claimant;
- (ii) The Claimant never stayed at the Apartment;
- (iii) Furnishing were not complete when he inspected the apartment;
- (iv) The final Tenancy Agreement signed on 25 May 2011 was not finalized as the terms were not acceptable;
- (v) No tenancy existed as parties were still in negotiation.

RESPONDENT'S DEFENCE

In short the Respondent's defence in Form 2 is that there is an executed tenancy agreement as shown by exhibits "TT-1" and "TT-2" in Form 2.

FACTS

The claimant intended to take tenancy on an apartment from the Respondent during his employment in Sarawak. From the documents filed before the Tribunal and in the course of the proceedings, the following facts are pertinent:

- i. The draft tenancy agreement was emailed on 28 April 2011 by the Respondent's lawyer to the Claimant in the United States for approval. This draft tenancy agreement was approved by the Claimant;
- ii. The deposits and rental was paid on 13 May 2011 before arrival of the Claimant in Kuching;
- iii. There are in existence two (2) signed Tenancy Agreements (exhibits TT-1 and TT-2);
- iv. From the exchange of emails and from the Tenancy Agreements produced by the Respondent the term of tenancy should be effective from the 15 May 2011;
- v. The fridge and TV should be in the Apartment as at 15 May 2011;
- vi. The Claimant arrived in Kuching on 23 May 2011 and expected to be given possession of the apartment;
- vii. The Claimant's understanding or perception is that the Apartment should come with the use of the facilities;
- viii. Possession was never officially handed over to the Claimant and the Claimant never stayed in the apartment;
- ix. The Claimant is an expatriate and did not have any independent legal advice. Further from the exchange of emails he is expected to pay half of the legal fees of the Respondent's lawyer.

It would appear in totally the relevant matters of the tenancy was never finalized or performed on or before the 16 May 2011 or at all material time thereafter despite the fact that the Claimant had paid the 1st rental and deposits.

The Respondent called one witness namely one Urusula Ting, the lawyer preparing the Tenancy Agreement.

ISSUE / FAIRNESS

The issue here as I see it is whether there is a concluded or finalized Tenancy Agreement which has been specifically performed at the material time.

TT-1 though signed by the Claimant is merely a confirmation of the draft agreement sent by the Respondent's lawyer. This is evident from the email dated 28 April 2011 from the Respondent's lawyers. A formal Tenancy Agreement would have to be executed by the parties on the Claimant taking possession. This is again evident from the Respondent's email of 19 May 2011 (exhibit TT-3).

The Claimant, who arrived in Kuching on 22 May 2011 was scheduled to take and given possession on the 23 May 2011 and to sign the formal Tenancy Agreement at the same time. According to the Claimant he tried to contact Mr. Henry Lim at the Kesuma Resort but in vain. He was able to get a key from one Datin Rose, the Respondent's sister in law to inspect the Apartment. Thus, I have no reason to doubt that the Claimant did make an effort to get hold of Mr. Henry Lim to take possession. Whose duty is it to give possession? It must be the Respondent's responsibility as landlord. Possession cannot be presumed. One must understand the position of the Claimant who just arrived and is unfamiliar with the local environment.

On 25 May 2011 the Claimant was at the Respondent's lawyer's office to sign and finalize the Tenancy Agreement. Why were the keys and access cards not given or arrangement made to do so when the opportunity arose if in fact all matters relating to the tenancy had been finalized. See also exhibit TT-4.

According to the Claimant, though he signed the Tenancy agreement it was not finalized as there were a couple of things he was not agreeable with viz, the fridge and TV were not in the Apartment at the time he inspected, club facilities not included and there was no possession. I

cannot help but note that the invoice (exhibit TT-8) for the fridge was dated 20 May 2011 after the scheduled date of commencement and it bears a fax date of 30 November 2011. Acknowledgement of delivery is not evident from the invoice.

Though it was agreed that the tenancy would take effect on 16 May 2011, in actual fact it has not been specifically performed or effective. As such, time is at large. Until all those matters are sorted out and finalized there is no concluded or performed tenancy. An email on 25 May 2011 from the Respondent's lawyers and another email on 27 May 2011 from the Claimant is relevant (exhibit TT-3).

One has to be fair to the Claimant who has paid the deposits and rental. In the circumstances, unless and until all matters are settled and possession given to the Claimant, there cannot be any repudiation of contract.

In a consumer claim, fairness and reasonableness must be one of the considerations. This is clearly spelt out in Section 24C of the Consumer Protection Act 1999.

Further, it appears that the parties are not at ad idem. It is the Claimant's perception that he would be given possession on 23 May 2011 on his arrival, club facilities come with the apartment and the TV and fridge should be in the apartment on the scheduled date of commencement. The Respondent seems to think otherwise, namely, it is the Claimant's obligation to use all reasonable effort to obtain possession and club facilities does not come free. There is no evidence that the fridge and TV were in the apartment at the scheduled date of commencement. Rather the invoice showed otherwise.

The Respondent not only purports to forfeit the rental deposit but also the utility deposit when in fact the Claimant has not used the utilities in the apartment. There are no outstanding bills for utilities due to the Claimant.

The Tenancy Agreement though signed were not finalized and have not been specifically performed.

CONCLUSION

By reasons of the foregoing I would allow the Claimant's claim.

In view of this I dismiss the Counter-claim, I make no order as to costs.

I make an order that the Respondent do refund the sum of RM8,750.00 to the Claimant within 14 days of service of the Order.

STANLEY EDDY

PRESIDENT

CONSUMER CLAIMS TRIBUNAL

MALAYSIA

Dated: 20 January 2012

