

Case Study - Property Management - failure to ensure bond was received

Relevant Facts

The Complainant owned a commercial property (the Property). The Property was managed by the Real Estate Agency on the Complainant's behalf and the Property Agent against whom the complaint was made was responsible for the day to day management of the Property.

The Property Agent located a tenant, who signed a three year commercial lease agreement (the Agreement). Pursuant to the Agreement the tenant was required to pay a security bond (the Bond) before access would be allowed to the Property.

The Property Agent advised the Complainant by email that the tenant had paid the Bond and had been given the keys to the Property.

The tenant defaulted on the Agreement by failing to pay the rent. The tenant also damaged the Property, misappropriated equipment and had abandoned the Property within the first year of the lease.

The Complainant requested the return of the Bond as partial compensation for the financial loss. The Complainant was advised by the Property Agent that the Bond had not been received by the Real Estate Agency due to 'an electronic funds transfer issue'.

Ground of complaint

The ground of complaint was that the Property Agent failed to exercise due care, skill or diligence by –

- Failing to ensure that the Bond was received, pursuant to the Agreement; and
- Incorrectly advising the Complainant that the Bond had been received.

Discussion

The payment of bond clause in the Agreement read:

"On signing, the Tenant must pay to the Property Owner the sum described in Item 13 of the Schedule to secure the performance of the Tenant's obligations under this lease."

The Property Agent's advice to the Complainant that the Bond had been paid was based on a screenshot of the EFT payment from the tenant's mobile telephone and that formal transfer would occur 2 days later.

A message on the bottom of the screen shot read:

"If funds aren't available on the due date we'll try again over a period of 4 days. If funds are still unavailable a dishonor fee will apply."

The transfer of funds did not occur 2 days later (or at all) presumably because the tenant either cancelled the transaction after leaving the Real Estate Agency's office or because there were insufficient funds in the account to complete the transaction.

The Property Agent submitted to the Board that with the signing of the lease and commencing the EFT transfer process the tenant had for all intents and purposes met all of his obligations under that lease. He further stated that the wording of the lease did not definitively state there must be cleared funds or similar.

The Board fundamentally disagreed with these submissions of the Property Agent.

The Property Agent did not follow up to ensure that the funds were received into the Real Estate Agency's trust account on the date the transaction was scheduled to occur and it was not until seven months later when the Complainant requested the Bond in lieu of unpaid rent and damages that the Property Agent discovered the Bond had not been paid.

The Board considered that the Property Agent did not have any processes in place to check that the bond was paid into the Real Estate Agency's trust account at the time the lease was signed or at another time or alternatively any mechanism to alert the Property Agent that a lease condition, which was in the Property Agent's control to verify, had been met.

Finding by the Board and actions taken

The Board determined that the complaint was substantiated as the Property Agent's conduct was not to a standard of competence and diligence that the public is entitled to expect from a reasonably competent property agent.

The Board reprimanded the Property Agent pursuant to section 101(6) of the *Property Agents and Land Transactions Act 2016*. The Board also required the Property Agent to provide evidence of his processes relating to bond payment and receipting.