

B E T W E E N :

TARIQ KHUJA

Claimant

and

FARZANA KIBRIA CHOWDHURY

Defendant

JUDGMENT

1. The Defendant is the tenant of Flat 1, Thomas Mews, Oxford OX4 1NU, and the Claimant is her landlord. She has an assured shorthold tenancy, entered into on 7th July 2011.
2. On 16th December 2014 the Claimant served a section 21 notice seeking possession of the property.
3. The claim for possession was issued on 25th March 2015.
4. In her Defence, dated 9th April 2015 the Defendant says that the Claimant had not complied with the requirements of section 213 of the Housing Act 2004 because the deposit had not been protected within the prescribed time, and the prescribed information relating to the deposit was served late. In the circumstances, the Defendant says that the landlord cannot validly serve a section 21 notice.
5. She brings a counterclaim pursuant to section 214 Housing Act 2004 for the return of the deposit together with a penalty of between one and three times the amount of the deposit. She says the Claimant, who is a major landlord in Oxford, failed to tell her anything about deposit protection until he got her to sign the deposit protection certificate in his office in 2014 shortly before issuing a claim for possession, which was heard in 2014.
6. That claim was dismissed by Deputy District Judge Drayson on 17th October 2014, she held that the section 21 notice was invalid pursuant to section 215 of the Housing Act 2004. Paragraph 2 of the order states,

'The Claimant has now complied with its obligations within s213 Housing Act 2004 by supplying a copy of the TDP certificate and prescribed information as annexed to the witness statement of Tariq Khuja dated 12 September 2014.'

7. After the Defence in this second claim for possession was filed, District Judge Payne listed the possession hearing with a time estimate of one hour.
8. At the hearing before me Mr Khuja represented himself. The Defendant was assisted at Court by her McKenzie friend, Ms Crawford, who works for Shelter. I have been greatly assisted by her detailed knowledge of the law and her clear explanation of it to me, both in her written skeleton argument and orally. I have also read a short further email from her following the hearing, having given permission to her to respond to any additional submissions that Mr Khuja may wish to have made.
9. The Claimant raised two preliminary issues. Firstly he said that the Defendant could not raise the Defence she had because matters had already been dealt with by Deputy District Judge Drayson. I rejected this argument, because the issue in that case concerned the giving of prescribed information, which it was accepted had not been given. But in this case, the Court is concerned with whether or not the section 21 procedure can be used where the deposit was not protected within the relevant time period.
10. Secondly the Claimant said that I could not hear the counterclaim, because the Defendant ought to have made a separate application to the Court. I considered the relevant rules, and noted that District Judge Payne had the Defence before him when he directed the matter to be listed for hearing. It was open to the Claimant when he received that order to apply to the Court to strike out the Defence, or otherwise vary the order so that the Counterclaim be heard separately, but he did not do so. He had been invited by District Judge Payne's order to file evidence, which could have responded to the Counterclaim, but he did not do so. He was not taken surprise by its contents. The arguments in respect of the Counterclaim are very closely connected to the arguments in respect of the Claim. For all those reasons I concluded that it was appropriate and proportionate to hear the Counterclaim at the same time as the claim for possession.
11. I did give Mr Khuja an opportunity to put in further written submissions confined only to the issue of the Counterclaim if so advised. He did not.
12. I have considered the contents of the witness statements provided by each party, together with documents attached.

Claim for possession

13. I am satisfied, on a balance of probabilities, that a deposit was received on behalf of the Claimant in June 2011, before the commencement of the tenancy. The Defendant has exhibited a copy of the receipt dated 27th June 2011 which confirms that £800 has been received as a deposit, £280 as an agency fee.
14. Some confusion arose thereafter, as it seems that the Claimant allocated the deposit money towards the July rent, and the Defendant did not realise that the rent for July had not been paid. Her evidence, which I accept, and which is supported by documentary evidence in the form of deposit slips, is that she paid a further £800 over two instalments in 2011 in order to resolve this.
15. There was subsequently some further confusion about the rent and it seems that some payments made by the Defendant were not assigned a reference number to help the Claimant allocate them. However, in June 2013, the Defendant had a meeting with Kayleigh Belcher, who works for the Claimant, and, as Ms Belcher says in her witness statement, *'on that day and with the help of Mrs Chowdhury's payment receipts I managed to ascertain that she had made enough payments to bring the account up to date and enough for a deposit. I then protected the deposit and Mrs Chowdhury signed the protection certificate.'*
16. I prefer the evidence of the Defendant to that of Ms Belcher in respect of the deposit. Ms Belcher says that Mrs Chowdhury was *'allowed to let the property without paying the deposit as there had been some confusion with where the funds for her deposit were to come from, I do not recall the precise facts but it is not uncommon for Mr Khuja to be flexible and lenient.'* Whether or not Mr Khuja is flexible and lenient in general, I have not found any evidence to support Ms Belcher's assertion that the Defendant did not pay a deposit on this occasion. I have seen the receipt for it, and I have read the evidence of the Defendant. There is nothing within Ms Belcher's account or Mr Khuja's evidence to suggest that the deposit was not paid, and no letters or other documents to support that assertion. To the contrary, the first tenancy deposit certificate itself, from mydeposits.co.uk records the date the deposit was collected as being 27th June 2011 and the period of protection starting on 27th June 2013. The Defendant was not entitled to use the deposit towards the rent account.
17. The deposit was protected in a scheme from June 2013 to 28th January 2014. Ms Belcher says it was then re-protected with Tenancy Deposit Scheme and exhibited the certificate which records the deposit as being registered on 17th February 2014.

18. The first claim for possession failed because the section 21 notice was served at a time when the prescribed information in respect of the tenancy deposit scheme had not been provided to the Defendant as required by section 213(6) of the Act. Section 215(2) provides that if section 213(6) is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as section 213(6)(a) is complied with.
19. The notice served was therefore not valid, but by the time of the hearing before Deputy District Judge Drayson, the prescribed information had been provided, annexed to Mr Khuja's witness statement.
20. So at the time the section 21 notice was served in this case, the prescribed information had been given and the deposit had been protected, but not within the 30 days prescribed by section 213 of the Housing Act 2004 (as amended by the Localism Act 2011). Section 215(1) provides that a section 21 notice may not be delivered in those circumstances.
21. This does not mean that a landlord who has not protected a deposit within the appropriate time limit is never able to serve a section 21 notice. The Localism Act 2011 inserted section 215(2A) into the Housing Act 2004 which sets out the circumstances in which a section 21 notice may be delivered, notwithstanding that the deposit was not protected in time:
 - (2A) *Subsections (1) and (2) do not apply in a case where –*
 - (a) *the deposit has been returned to the tenant in full or with such deductions as are agreed between the landlord and tenant, or*
 - (b) *an application to a county court has been made under section 214(1) and has been determined by the Court, withdrawn or settled by agreement between the parties.'*
22. So if the deposit has been repaid either voluntarily or pursuant to an application to the Court, then the way is clear to issue the section 21 notice, notwithstanding that the deposit may not have been protected within the prescribed period at the outset.
23. Mr Khuja said that he had offered to pay £800 at the last hearing (which is not disputed) and the tenant had refused to accept it (also not disputed). However, I do not accept this is equivalent to the money having been paid within the meaning of the statute. On behalf of the Defendant it was said that she did not have the opportunity to take legal advice and the basis upon which the money was being offered at that time was not clear. Had the money been offered to her subsequently, she says that she would have accepted, but it has not. Between then and the hearing before me, the

Claimant did not make any further offer to pay the deposit back, or send a cheque to the Defendant. He did reiterate the offer in Court.

24. There is no evidence that the Defendant unreasonably refused the money at the hearing, or that that she has since deliberately refused to accept the return of her deposit in order to avoid possession proceedings.
25. I have to determine the case on the facts, and it remains the case that the deposit has not yet been repaid.
26. I have considered carefully the statute, the case law to which I was referred, Superstrike Ltd v Rodrigues [2013] EWCA Civ 669 and Charalambous v Ng [2014] EWCA Civ 1604 and the arguments put by both sides. In my judgment, the claim for possession must be dismissed; because the section 21 notice could not have been validly delivered in circumstances where the deposit had not been protected within the prescribed time, and the Defendant had not received it back again, nor had the Court determined any application for a remedy in respect of it.

Counterclaim

27. The counterclaim is brought pursuant to section 214 of the 2004 Act, which has been amended by section 184 of the Localism Act 2011.

214 Proceedings relating to tenancy deposits

(1) Where a tenancy deposit has been paid in connection with a shorthold tenancy, the tenant or any relevant person (as defined by section 213(10)) may make an application to a county court on the grounds—

(a) that section 213(3) or (6) has not been complied with in relation to the deposit; ...

28. In the Act as originally drafted, the tenant's right of action lasted only so long as the landlord had failed to comply with his obligations to protect the deposit and to provide the relevant information. So, if a landlord was late in complying with the dual s.213 obligations, but did so before any s.214 proceedings are brought by the tenant, the tenant would have no cause of action under s.214. This position was confirmed in Vision Enterprises Limited (t/a Universal Estates) v Tiensia [2010] EWCA Civ 1224. Following that case, the Localism Act 2011 amended section 214 so that the right of action arose where the deposit was not protected within 30 days or prescribed information given within 30 days, and is not extinguished if the landlord subsequently protects the deposit and provides the tenant with prescribed information. That is the situation in this case.

29. The Claimant did not file any reply to the Counterclaim nor any evidence in response, despite being invited to by District Judge Payne's order, nor did he file any submissions by email, having sought my permission to do so at the hearing.
30. I have considered the case of Tiensia and the case of Okadigbo v Chan [2014] EWHC 4279 and the statute as amended, which continues:
- (2) (conditions for a remedy) ... if the court is satisfied that section 213(30 or (6) has not been complied with in relation to the deposit ...*
- (3) The court must, as it thinks fit, either—*
- (a) order the person who appears to the court to be holding the deposit to repay it to the applicant, or*
- (b) order that person to pay the deposit into the designated account held by the scheme administrator under an authorised custodial scheme, within the period of 14 days beginning with the date of the making of the order.*
- (3A) The court may order the person who appears to the court to be holding the deposit to repay all or part of it to the applicant within the period of 14 days beginning with the date of the making of the order*
- (4) The court must order the landlord to pay to the applicant a sum of money not less than the amount of the deposit and not more than three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.*
- ...
31. Before the changes brought by the Localism Act the Defendant's counterclaim would be bound to fail, because the deposit was protected and the prescribed information given before the Defendant brought the claim. However, the Act is clear. The deposit was not protected nor the prescribed information supplied within 30 days of the deposit being received, the section says that the Court 'must' make an order in respect of the deposit, and an order that the Claimant pays an amount to the Claimant of between one and three times the amount of the deposit.
32. There does not seem to be an option available to the Court to simply leave the deposit within the tenancy deposit scheme, I must make an order that it is repaid or paid into a scheme, which seems to be an order that can only be made if it is not already protected in a scheme. In the circumstances, I order that the deposit should be paid out from the scheme to the Defendant.
33. So far as the payment of a sum between one and three times the amount of the deposit is concerned, there is only one reported case about how the discretion should be exercised; Okadigbo. The conduct of the Claimant is

to be assessed. At one end of the scale will be cases where there has been a failure to protect a deposit through no fault of the landlord, and the time limit has been missed by a very small amount. At the other end of the scale will be cases where there has been a flagrant disregard for the rules, and the deposit has been dissipated in some way.

34. This case in my judgment falls somewhere between the two. The landlord is a professional landlord and the rules about deposit protection have been in force for many years now, including the changes incorporated by the Localism Act. He has no good reason not to be fully aware of his responsibilities. His own company manages the property, so he cannot blame an agent. Although he has sought to suggest that he did not know he had the deposit until June 2013, and is being punished for his own leniency in giving his tenant the benefit of the doubt, I do not find that position to be consistent with the evidence. It is clear that he did receive a deposit before his tenant moved in, and it was his responsibility to have the systems in place to ensure that it was protected within the relevant time. On the other hand, the deposit did become protected eventually, the prescribed information was given, and he is in a position to pay it back. I am satisfied there has been no dishonesty.
35. In the circumstances, in my judgment this case falls in the middle of the range, and I therefore make an award based on twice the amount of the deposit and shall give judgment on the counterclaim for £1600.
36. With the return of the deposit and a determination of the Defendant's claim, the slate is now wiped clean, however, not to the extent that the already served section 21 notice could become valid retrospectively. The Claimant was not entitled to serve it at that time and cannot cure his error after the event.
37. The Claim for possession shall be dismissed, the deposit of £800 is to be repaid to the Defendant and in addition the Claimant is to pay to the Defendant the sum of £1,600.

Joanna Vincent
District Judge
14th May 2015

