Case No: B5/2012/0804

Neutral Citation Number: [2012] EWCA Civ 1789
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WOOLWICH COUNTY COURT
(DEPUTY DISTRICT JUDGE WALDER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 6th November 2012

Before:

LORD JUSTICE ETHERTON
and
LORD JUSTICE LEWISON

- -

Between:

AYANNUGA

Appellant

- and -

SWINDELLS

Respondent

- -

(DAR Transcript of
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Mr David Watkinson (instructed by Hereward and Foster LLP) appeared on behalf of the **Appellant**.

Mr D Gibson-Lee (instructed by Abbey and Nat Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Etherton:

1. This is an appeal from an order made by Deputy District Judge Walder in the Woolwich County Court on 15 March 2012. The appeal is in relation to that part of the Deputy District Judge's order which dismissed the appellant's counterclaim for relief from breach of the provisions of section 213 of the Housing Act 2004 ("the 2004 Act") relating to deposits.

2. Section 212(1) of the 2004 Act provides that:

> "The appropriate national authority must make arrangements for securing that one or more tenancy deposit schemes are available for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies."

3. Section 212(2) provides that:

> "...a 'tenancy deposit scheme' is a scheme which—
>
> (a)is made for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies and facilitating the resolution of disputes arising in connection with such deposits
>
> … "

4. Section 213(1) and (5)(a) of the 2004 Act provide that a landlord who has received a tenancy deposit from a person in connection with a shorthold tenancy must deal with it in accordance with an authorised scheme and must give to the tenant such information relating to the authorised scheme as may be prescribed.
5. Section 213(6) provides that such information must be given to the tenant in the prescribed form within the period of 14 days beginning with the date on which the deposit is received by the landlord.

6. Section 213(10) provides that "prescribed" means prescribed by the appropriate national authority.

7. I should say that those provisions, together with the provisions in section 214 of the 2004 Act, to which I will refer in a moment, have been amended as from 6 April 2012 by the Localism Act 2011 section 184: see the Localism Act 2004 (Commencement Number 4 and Transitional, Transitory and Saving Provisions) Order 2012 SI 2012/628, paragraph 8. It is common ground that those amendments do not apply in the present case.

8. The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI 2007/797 ("the Housing Order") prescribes information for the purposes of section 213(5) of the 2004 Act. The order does not prescribe a form as such, but, as was recognised in Vision Enterprises Ltd v Tiensia [2010] EWCA Civ

1224, [2012] 1 WLR 94 at paragraph [7] (Rimer LJ), the effect of the order is to prescribe what information has to be given in compliance with section 213 of the 2004 Act.

9. The question on this appeal is whether the Deputy District Judge was correct to conclude that the respondent complied with the obligation under section 213(5) and (6) to provide the information substantially as prescribed by the Housing Order.

10. The factual background to this appeal may be summarised briefly as follows. By a tenancy agreement dated 6 September 2010 ("the Tenancy Agreement") the respondent let the property at 55 Myrtledene Road, Abbeywood, London SE2 0EU ("the Property") to the appellant on an assured shorthold tenancy for 12 months from 6 September 2010 at a monthly rent of £950. The Tenancy Agreement provided for the respondent to pay a deposit of £950 on the signing of the agreement. The Tenancy Agreement contained a number of provisions concerning the deposit. The deposit was duly paid.

11. As appears both from the Tenancy Agreement itself and correspondence in evidence, the deposit was paid to the administrator of an authorised scheme, which was a custodial scheme as opposed to an insurance scheme. The scheme was the Deposit Protection Service based in Bristol. The scheme was not in evidence at the hearing before the Deputy District Judge, but it should have been.

12. The respondent commenced these proceedings by a claim form issued on 20 May 2011. The proceedings began as a straightforward claim for possession of the Property on the ground of arrears of rent. There were amended Particulars of Claim in which Grounds 10 and 11 as well as Ground 8 in Schedule 2 to the Housing Act 1988 ("the 1988 Act") were relied upon, and it was also said that the tenancy had been terminated by a notice under section 21 of the 1988 Act. There is no copy of the amended Particulars of Claim in the court bundle before this court, but nothing turns on that document for the purposes of this appeal.

13. There was a re-Amended Defence and Counterclaim, which denied on various grounds any right to possession, including not admitting the arrears of rent, denying that two months' rent was in arrears for the purpose of Ground 8, denying that the notice under section 21 of the 1988 Act was effective and denying that it would be reasonable to make an order for possession. There was a counterclaim for: 1) damages and an injunction or an order for specific performance for disrepair; 2) damages for breach of the covenant of quiet enjoyment; and 3) an order pursuant to section 214(3) and (4) of the 2004 Act for repayment of the deposit to the respondent and for the payment to the respondent of a sum equal to three times the amount of deposit, namely £2,850 within the period of 14 days of the making of the order. So far as concerns the deposit, there were various alleged breaches of the requirements of section 213 of the 2004 Act, including a failure to provide the information specified in section 213(5) and (6).

14. In his Reply and Defence to Counterclaim the respondent denied that there had been any breach of section 213(6) of the 2004 Act. He relied in that connection on information about the deposit in the Tenancy Agreement and a letter to the appellant dated 8 September 2010.

15. The proceedings having been allocated to the multi-track, they came before District Judge Walder on 13 March 2012 for a trial that, in the event, lasted some 3 days. The respondent appeared in person. The appellant was represented by Mr David Watkinson, counsel. It appears that on 15 March 2012, immediately after the lunch adjournment and just before the Deputy District Judge gave his judgment, the respondent provided to the appellant a handwritten document giving additional information about the deposit ("the Additional Information Document").

16. It is not necessary to consider any part of the Deputy District Judge's careful and full judgment or his formal order insofar as they address matters other than the counterclaim in respect of the deposit. He addressed the allegations about the deposit in paragraph 40 of his judgment, dismissing them as follows:

> "40. Finally, there is the issue of the tenancy deposit. I have been handed [the Additional Information Document]. To be fair to the defendant it is right to acknowledge that I made it abundantly clear to the claimant that if he were to satisfy this requirement before I gave my judgment I would find, as the law compels me to, that he was not in breach of those sections. It seems to me and indeed I find that the requirements are satisfied by looking at (a) the lease and (b) [the Additional Information Document] that I have before me, on the basis that it does not have to actually satisfy all of the requirements but to substantially satisfy [them]. I will just refer specifically to the legislation. What is required is that the information required by subsection (5) must be given to the tenant in the prescribed form or in a form substantially to the same effect. In my judgment the lease coupled with this additional document gives the information substantially to the same effect and on that basis in my judgment the claimant has complied with his obligations."

17. The Deputy District Judge gave the appellant permission to appeal his decision on the deposit.
18. Mr Watkinson has appeared for the appellant today, as he did before the Deputy District Judge. The respondent is represented today by Mr David Gibson-Lee, counsel.

19. Mr Gibson-Lee, both in his admirably concise skeleton argument and in his equally contained oral submissions, supports the judgment of the

Deputy District Judge. He emphasised in his oral submissions the circumstances in which the Judge came to address the issue in his court. He emphasised that at that hearing the respondent was unrepresented; that the appellant was represented; that it was perfectly clear from the documentation that she was well aware, if only from the terms of the Tenancy Agreement itself, who was the custodian trustee; that it was also clear that the administrator of the custodian scheme had written to her and that there would have been provided one way or the other the means by which she could find out such further information about the scheme as was necessary in the event of a dispute about the return of the deposit or indeed if there was any other reason to consider the circumstances in which the deposit should be returned.

20. Mr Gibson-Lee accepted that there was a failure to comply with section 213 and the Housing Order. In his written skeleton argument he accepted that the requirements in paragraph 2(1)(e) and (f) of the Housing Order were not complied with, but he disputed that the requirements in 2(1)(c) and (d) were not complied with. Those provisions are as follows:

> "2(1) The following is prescribed information for the purpose of Section 213(5) of the Housing Act 2004 …
> (c)the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy ('the tenancy');
>
> (d)the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy;
>
> (e)the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;
>
> (f)the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation … "

21. In his skeleton argument Mr Gibson-Lee submitted that the Tenancy Agreement sufficiently set out the details of what should happen about the return of the deposit at the end of the tenancy and in the event of any outstanding claims for disrepair or rent arrears or such like. He pointed out that there was also a reference in the Additional Information Document to the right or ability of the appellant to contact the respondent for the release of the deposit after the expiry of the tenancy or to contact the estate agent for the same purpose.

22. In his oral submissions Mr Gibson-Lee did not press that point but what he did press, as he had in his skeleton argument, was that the matters in respect of which there was a deficiency in complying with section 213(5) and the Housing Order essentially concerned procedural points which left the

appellant in no serious or disadvantaged position. He emphasised that the overriding purpose of the legislation is to provide protection for the tenant's deposit and that the matters with which these proceedings are concerned in respect of the deposit are about procedure, which the appellant could have ascertained with ease by simply contacting the administrator of the custodian scheme by correspondence or by telephone or by obtaining contact details through the internet. He emphasised that, at the hearing before the Deputy District Judge, the scheme was known to the lawyers who were then representing the appellant.

23. Accordingly, he submitted, there was no real prejudice suffered by the appellant in the present case of a kind that was intended to be prevented by the statutory scheme. He submitted that, in carrying out the evaluative exercise as to whether there had been substantial compliance with the statutory requirement for the provision of information, the Deputy District Judge was entitled to take into account the unusual circumstances of the present case in which the respondent was not represented, the deposit was indeed protected by being placed with a custodial scheme, the appellant was represented by lawyers, and the appellant and lawyers, between them, knew perfectly well the identity of the scheme and knew or could have found out quite easily how to contact the scheme's administrator in relation to procedures. He submitted that it is a mixed question of fact and law whether there was substantial compliance with the statutory requirements for the provision of information and that this court can only interfere with the conclusion of the Deputy District Judge if it concludes that no tribunal or judge, acting properly having regard to all the circumstances, could reasonably have come to the conclusion to which the Deputy District Judge came, and even if other judges or we ourselves left to our own devices might have reached a different conclusion.

24. He submitted that the conclusion of the Deputy District Judge was plainly one to which the Deputy District Judge was entitled to arrive at, being fair and seeking to achieve a fair result as between the parties.

25. I acknowledge immediately the eloquence and the force of those submissions by Mr Gibson-Lee and I do so particularly against the background, which is identified by the Deputy District Judge in his judgment, that this is not a case of a wealthy landlord seeking to exploit an impecunious tenant. The Deputy District Judge was careful to point out that it was the respondent landlord's own difficult and impecunious circumstances that had obliged him to let out the Property, which had formerly been his family home. I do not for a moment suppose that it would be at all an easy thing for the respondent in the present case not only to return the deposit but, more particularly, to pay an amount equal to three times the deposit pursuant to section 214 of the 2004 Act. Nevertheless, I am quite clear that the Deputy District Judge reached a conclusion in relation to the deposit which was outside a proper exercise of judicial judgment and evaluation.

26. I am quite satisfied, in the light of the very helpful and skilful submissions of Mr Watkinson, that there was a failure to comply with each of paragraphs (c),

(d), (e) and (f) of the Housing Order. It is true that the Tenancy Agreement and the Additional Information Document addressed the procedure that was to apply if and when the tenancy came to an end and the deposit had to be returned, taking into account any outstanding liabilities to the respondent. It is clear from those provisions in the Tenancy Agreement, however, that they do not address, as is required under paragraphs 2(1)(c) and (d) of the Housing Order, the procedural provisions in the scheme itself. The provisions in the Tenancy Agreement, and indeed those in the Additional Information Document, dealing with the return of the deposit at the end of the tenancy proceed on the hypothesis that the deposit has been retained by the respondent's agent as stakeholder and that the agent and the respondent himself can decide how and what to do with the deposit. This being a custodial scheme, however, the deposit was not held by either the respondent's agent or the respondent himself but was properly paid to the administrator of the scheme. What is required, therefore, to be provided under the Housing Order, but has not been provided in this case, is information relating to the scheme's procedures for the return of the deposit in the circumstances specified in paragraphs 2(1)(c) and (d) of the Housing Order.

27. It is no answer for the respondent to assert that the information could have been obtained by the appellant making her own enquiries by means of the internet or telephoning the respondent's agent or the scheme's administrator or in some other way. Section 213(5) of the 2004 Act requires the information to be provided by the landlord.

28. As I have said, it is conceded by Mr Gibson-Lee that there has been a failure to comply with paragraphs 2(1)(e) and (f) of the order. I do not accept Mr Gibson-Lee's core submission that the matters in those paragraphs of the Housing Order are to be regarded as mere matters of procedure, and in some way of subsidiary importance to other matters including the payment of the deposit to an authorised scheme. All the matters specified in (c), (d), (e) and (f) are of real importance to a tenant. They define the circumstances in which the tenant can recover the deposit and also the means by which disputes in relation to the deposit and its repayment can be resolved, including resolution without recourse to litigation. The importance of the latter is highlighted in section 212(2)(a) of the 2004 Act, which specifically refers to the purpose of the legislation and an authorised scheme of "facilitating the resolution of disputes arising in connection with such deposits".

29. It is common ground that the appropriate test to apply in deciding whether or not there has been substantial compliance with the requirement to provide information, as specified in section 213(6)(a), is one of fact and degree: see Ravenseft Properties Limited v Hall [2001] EWCA Civ 2034; [2001] HLR 33. That was a case about whether a notice under section 20 of the Housing Act 1988 giving notice that the tenancy about to be entered into was an assured tenancy was "substantially to the same effect" as that prescribed by the Assured Tenancy and Agricultural Occupancies (Forms) Regulations 1988 SI 1988 No 2203. Mummery LJ said :

> "11... In my judgment, however, a detailed analysis of each decision is not a profitable exercise: the question whether a notice under section 20 is in the prescribed form or is in a form "substantially to the same effect" is a question of fact and degree in each case, turning on a comparison between the prescribed form in Annex 1 and the particular form of notice given…"
>
> "27… The question is simply whether, notwithstanding any errors and omissions, the notice is 'substantially to the same effect' in accomplishing the statutory purpose of telling the proposed tenant of the special nature of an assured shorthold tenancy."

30. As I have said, I consider that that the categories of information in paragraphs 2(1) (c) to (f) of the Housing Order are important and of real significance to the tenant. I endorse the view expressed by Cox J in Suurpere v Nice [2011] EWHC 2003, [2011] 39 EG 110 when she said as follows at paragraph [41]:

> "Although the primary focus in the cases involving these statutory provisions has so far been on the deposit, it is clear that a landlord's obligations under this part of the 2004 Act are twofold. Parliament regards the landlord's obligation to provide the prescribed information as being of equal importance to his duty to safeguard the tenant's deposit. Judges who have to determine the extent of a landlord's compliance with these provisions will always need to consider whether the prescribed information has been supplied to the tenant, in addition to the question of protection of the deposit. The list of particulars to be provided is detailed and specific. The requirement for landlords to provide such detailed information, together with the sanction for non-compliance, demonstrate the importance attached to the giving of particulars, certified as accurate by the landlord, which will enable tenants to understand how the scheme works and how they may seek the return of their deposit."

31. In any event, as Lewison LJ pointed out in the course of oral submissions, it is doubtful whether the distinction between what Mr Gibson-Lee described as mere procedural provisions and other provisions is justified in a case where the legislation has prescribed all the different categories of information which are required to be provided in order to comply with the statutory obligation in section 213(5) and (6) of the 2004 Act.

32. I am quite satisfied that the only proper conclusion which could be reached in this case is that there was a failure by the respondent substantially to comply with the statutory requirements in view of the entire omission of the information specified in each of paragraphs 2(1)(c) to (f) of the Housing Order.

33. For those short reasons, I would allow this appeal.

34. In view of the fact that section 184 of the Localism Act 2011, amending sections 213 to 215 of the 2004 Act, have no application, I would vary the Deputy District Judge's order by the deletion of paragraph 7 and inserting in its place an order that the respondent do repay the deposit of £950 to the appellant within 14 days pursuant to section 214(3) of the Housing Act 2004 and also do pay within 14 days £2,850, being three times the amount of deposit, pursuant to section 214(4) of the Housing Act 2004.

Lord Justice Lewison:

35. I agree. The approach that we must take is clearly laid down by this court in Ravenseft Properties Limited v Hall to which Etherton LJ has referred. We must compare the form or information prescribed on the one hand and the information in fact supplied on the other. We must then ask, in the light of the purpose of the notice or the provision of information, whether the substance of the information has been supplied bearing in mind that that is a matter of fact and degree.

36. The purpose of a tenancy deposit scheme is given in section 212(2) of the Housing Act 2004. It is the purpose of "safeguarding tenancy deposits paid in connection with shorthold tenancies and facilitating the resolution of disputes arising in connection with such deposits". There is therefore a twofold purpose, which is not merely the purpose of safeguarding tenancy deposits. There is also the purpose of facilitating the resolution of disputes.

37. Article 2(1) of the Housing Order prescribes the information to be supplied to the tenant. Paragraphs (e) and (f) to which Etherton LJ has referred apply specifically to the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid and the facilities to resolve disputes without recourse to litigation. It is quite plain that the provision of that information is part of the statutory purpose of setting up tenancy deposit schemes in the first place.

38. That information is therefore, in my judgment, part of the substance of the requirement. It is true, as Mr Gibson-Lee pointed out, that the information is procedural, but an explanation of the procedure is of itself substantive in the sense that that is specifically required by the order and is one of the purposes of setting up the tenancy deposit schemes.

39. Mr Gibson-Lee submitted that the tenant had the means of obtaining the information even if it was not actually provided to her by the landlord. But the statutory requirement is that the landlord must provide the information. Even

if the tenant knows the information the failure to provide it will still not validate an invalid notice. This point arose in the decision of this court in Kahlon v Isherwood [2011] EWCA Civ 602, [2011] HLR 38 in which Patten LJ said at paragraph 21:

> "Relevance or materiality has to be assessed by reference to the purpose of the notice. But where the provision in the prescribed form is clearly part of the substance of the notice as found in *Manel v Memon* it is no answer to its omission to say that the information it conveys was well known to the tenant at the relevant time."

40. Like Etherton LJ, I am satisfied that the complete failure to engage with paragraphs (e) and (f) and indeed paragraphs (c) and (d) mean that the substance of the requirement to provide information was not complied with.

41. It follows therefore that, in agreement with Etherton LJ and for the reasons he gives, supplemented by these short reasons, I too would allow the appeal.

Order: Appeal allowed