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Heads and quantum of damages under the tenancy deposit scheme

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Abstract: This article considers three aspects of the damages regime under the tenancy deposit scheme: the number of tenancies in respect of which damages might be payable; whether breaches of Housing Act 2004 s.213(3) and (6) found separate causes of action; and how judges might exercise their discretion in deciding upon which damages multiplier to apply

Introduction

The usefulness of the tenancy deposit scheme (hereafter ‘tds’) to assured shorthold tenants facing a possession claim under the Housing Act 1988 s.21 is now widely known and relatively straightforward to apply. A landlord who has taken a deposit and failed to comply with the various requirements of the Housing Act 2004 s.213 is precluded by s.215 from giving a s.21 notice until such time as she/he has paid the deposit back.

The scope of the tds as a defence to a s.21 claim was narrowed a little by an amendment to the 2004 Act by the Deregulation Act 2015. That amendment was directed at the Court of Appeal’s judgment in *Superstrike v Rodrigues*.¹ *Superstrike* is discussed in more detail below, but in short terms the Court of Appeal held that the consequence of Housing Act 1998 s.5 was that when a fixed term assured shorthold tenancy (hereafter ‘AST’) expired and became a periodic tenancy on the same terms, a ‘new’ tenancy had been created, and even if the landlord had complied with the tds requirements at the outset of the fixed term AST, those requirements were imposed anew in respect of the periodic AST.

The Conservative/Liberal coalition government took the view that this worked a significant injustice on landlords who had in good faith taken the proper steps to comply with the scheme, and so promoted an amendment to Housing Act 2004 s.215 which introduced a form of ‘deemed compliance’ with the tds. In essence, in circumstances where there are several ASTs between the same landlord and tenant in respect of the same premises (whether through the operation of Housing Act 1988 s.5 or by the grant of new fixed term ASTs), compliance by the landlord with the tds in respect of a past tenancy is deemed to carry over to any subsequent tenancy.

This article is concerned with the use that can be made of the tds as an effective means of defence by way of counterclaim to a possession claim based on rent arrears, and as a

¹ [2013] EWCA Civ 669; [2013] 1 W.L.R. 3848. For a variety of perspectives on the case and its immediate impact see inter alia B. Chataway, “Tenancy deposits: impact of Superstrike” (2013) *Legal Action* (October, 37); K. Lees, “Superstrike Ltd v Rodrigues: more questions than answers” (2014) *Conveyancer and Property Lawyer* 60; E. Humphries, “Another blow for AST landlords” (2013) *Estates Gazette* (1432) 53.

freestanding cause of action on the tenant's part. The damages element of the scheme lies in s.214. In its present form, s.214 provides that:

214 Proceedings relating to tenancy deposits

(1) Where a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, the tenant or any relevant person (as defined by [section 213\(10\)](#)) may make an application to the county court on the grounds—

(a) that [section 213\(3\)](#) or [\(6\)](#) has not been complied with in relation to the deposit, or

(b) that he has been notified by the landlord that a particular authorised scheme applies to the deposit but has been unable to obtain confirmation from the scheme administrator that the deposit is being held in accordance with the scheme.

(1A) Subsection (1) also applies in a case where the tenancy has ended, and in such a case the reference in subsection (1) to the tenant is to a person who was a tenant under the tenancy.

(2) Subsections (3) and (4) apply in the case of an application under subsection (1) if the tenancy has not ended and the court—

(a) is satisfied that [section 213\(3\)](#) or [\(6\)](#) has not been complied with in relation to the deposit, or

(b) is not satisfied that the deposit is being held in accordance with an authorised scheme,

as the case may be.

(2A) Subsections (3A) and (4) apply in the case of an application under subsection (1) if the tenancy has ended (whether before or after the making of the application) and the court—

(a) is satisfied that [section 213\(3\)](#) or [\(6\)](#) has not been complied with in relation to the deposit, or

(b) is not satisfied that the deposit is being held in accordance with an authorised scheme,

as the case may be.

(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...

This aspect of the tds is a little more complicated than the scheme's role as a defence in s.21 proceedings. Three distinct issues arise in respect of s.214. The first is the question of 'how many tenancies' can s.214 be applied to? The second is whether breaches of s.213(3) and s.213(6) raise separate or combined causes of action? The third is what factors control the court's discretion per s.214(4) in assessing where on the range between 1 and 3 times the deposit the appropriate quantum of damages should lie?

The number of tenancies

This question comes into play in part because of s.5 of the Housing Act 1988, in part because of common practice among landlords and tenants in the AST sector, and in part because of what is likely to have been a legislative oversight in the amendment to the tenancy deposit scheme enacted following the Court of Appeal's judgment in *Superstrike*.

The s.5 point arises because s.5 provides that on the expiry of the initial time span of a fixed term AST, a new periodic tenancy comes into being on the same terms as those that applied to the fixed term AST, with the period of the new tenancy being determined by the original fixed term AST's provisions concerning rent payment; (ie a 6 month fixed term AST with rent payable monthly becomes a monthly periodic AST). S.5 does not provide that the original tenancy acquires a new character; its effect much more bluntly is that the fixed term AST has ended and been replaced with a new periodic AST. This situation occurs with great regularity in the private rented sector, when the landlord and tenant who have been satisfied with the way the original fixed term has worked simply drift by default – and without really understanding what has happened in formal legal terms – into a new periodic relationship.

Relatedly, although here the scope for ignorance on the landlord and tenant's part is less readily understandable, the grant of a new fixed term AST immediately on the expiry of the original fixed term AST also creates a wholly new tenancy; it does not in some fashion extend the terms of the original AST.

Consider then this scenario, which is hardly uncommon. L grants T a 12 month fixed term AST commencing on 01.03.2013 with the rent payable monthly; this is 'tenancy 1'. Both parties are happy with the relationship and it continues beyond the 12 months without any new agreement being signed; thus from 01.03.2014 the parties have created 'tenancy 2'. A few months later the parties agree that the rent be increased, and sign a new 12 month fixed term AST with effect from 01.07.2014; this is tenancy 3. When that expires on 30.06.2015, the parties are again content to let the arrangement continue; they thereby create 'tenancy 4' as a periodic monthly tenancy starting on 01.07.2015. From a Housing Act s.214 perspective, the (for the landlord) unhappy consequence of the landlord having failed properly to deal with per s.213 any deposit she/he might have taken at the commencement of tenancy 1 and having failed both to do so at any later point and to have returned the deposit, is that four tenancies are in play for the purpose of any damages claim.

As noted above, the effect of Housing Act 1988 s.5 within the tenancy deposit scheme was initially addressed in respect of a defence to s.21 proceedings in *Superstrike*. For present purposes, the essential elements of the reasoning in *Superstrike* are at paras 36-39:

36 The 2004 Act has to be construed in the light of the provisions of the 1988 Act as regards assured shorthold tenancies, including [section 5](#). Once the new statutory periodic tenancy had come into being after the commencement date, a tenant's deposit being already held, it would be necessary to consider whether and if so how the 2004 Act applied. As I have said already, it must have been the claimant's position, by then, that it held the sum of £606.66 as a deposit as security for the performance of the defendant's obligations, or for the discharge of any liability of the defendant, arising under or in connection with the new tenancy. That could only be the correct legal position if that sum of money was to be treated as having been paid pursuant to the

defendant's obligation under the periodic tenancy to provide a deposit. That obligation only arose on the expiry of the fixed term tenancy, so the payment at the beginning of that fixed term cannot have given rise to the position which obtained once the fixed term had expired. Something must have happened in January 2008 which led to the result that the deposit was held in relation to the new tenancy. That something could have been either an actual... payment (but none took place in this instance) or something which amounted to payment. If there was an actual payment or something treated as a payment there must also have been a corresponding receipt.

37 If the parties had been aware of the true nature of the legal consequences in January 2008 of the expiry of the express fixed term tenancy without the defendant either giving up possession or entering into a new express tenancy agreement, they might have had a conversation or other exchange about the deposit, in which they agreed that the claimant should continue to hold the deposit, and that it should for the future be treated as the deposit under the new tenancy, instead of under the former fixed term tenancy...

38 [A]lthough there is no evidence that the parties said or did anything of that kind...nevertheless the position as between them should be treated in the same way as if they had had such a discussion. The defendant should be treated as having paid the amount of the deposit to the claimant in respect of the new tenancy, by way of set-off against the claimant's obligation to account to the defendant for the deposit in respect of the previous tenancy, given that the claimant did not seek payment out of the prior deposit for the consequences of any prior breach of the tenancy agreement.

39 It follows that, on my analysis, the defendant did pay, and the claimant did receive, the sum of £606.66 by way of a deposit in respect of the new periodic tenancy in January 2008, and so the obligations under [section 213](#) of the 2004 Act applied to the deposit so received.....

The correctness of the *Superstrike*-derived argument for multiple tenancy liability is reinforced – if such were needed – by the amendment to the Act introduced in (s.214(2A)) which allows recovery even if ‘the tenancy’ has ended. It is entirely possible (one might think it quite likely) that the ‘intention’ behind the amendment was only to enable tenants who no longer had any landlord/tenant relationship *at all* with their former landlord to bring a claim, but the text of the amended Act does not lend itself to so limited a reading. Prima facie, s.214(2A) bites firmly on the landlord and tenant who are (perhaps quite happily and quite unknowingly) on their third, fourth or fifth or more tenancy for tds purposes.

From the landlord's perspective, there is a ‘better late than never’ dimension to this potentially very expensive problem. If our L in the scenario above had complied with s.213(3) and s.213(6) at the outset of tenancy 4, his/her s.214 liability would arise only in respect of tenancies 1-3 and would not be rekindled should there subsequently be a tenancy 5 or 6 or 7 between the parties.

The reasoning in *Superstrike* and the text of s.214(2A) would not seem to permit any doubt about the correctness of this proposition. It has yet to be endorsed by a judgment in the higher courts, although there are now a few noted county court decisions where it has been applied; for example in *Chaudry v Cooley*² and *Kazardi v Martin Brooks Lettings*.³ The next issue however is rather more complicated.

Do breaches of s.213(3) and 213(6) found separate causes of action ?

A less compelling but not wholly implausible argument can be made that if, as is likely in many cases the landlord has breached both s.213(3) and s.213(6) then each breach may raise

² Brentford CC 09.06.2016 reported in *Legal Action* (2016; November p 40).

³ Edmonton CC 14.05.2015 reported in *Legal Action* (2015; September p51).

a separate cause of action. S.214(2)(a) clearly identifies these two types of breach as actionable for the purposes of damages.

S.213(3) requires the landlord to comply with all of the requirements of whichever authorised scheme he/she has chosen to use:

s.213(3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 14 days beginning with the date on which it is received.

Landlords currently have three schemes to choose from: the *Deposit Protection Service* (DPS); *My Deposits*; and the *Tenancy Deposit Scheme* (DPS).⁴ What most tenants and landlords might regard as the most important requirements of each scheme are that the deposit paid be protected and that the tenant be provided with a certificate confirming that fact. There is some overlap here with s.213(2)(b), which expressly refers to a deposit having to be held in accordance with the requirements of a scheme, and which presumably recognises that the requirements of a scheme per s.213(3) can encompass more than simply protecting the deposit.

S.213(6) requires the landlord to give the tenant certain prescribed information, which is detailed (and detailed in great detail) in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI No. 797:

- (6) The information required by subsection (5) must be given to the tenant and any relevant person—
(a) in the prescribed form or in a form substantially to the same effect, and
(b) within the period of 14 days beginning with the date on which the deposit is received by the landlord.

The relationship between s.213(3) and (6) is a little odd, since a failure to comply with s.213(6) will almost invariably mean that the landlord has breached s.213(3) as well, since providing (at least some of the prescribed information) is a requirement of the various schemes. It is possible, though rather unlikely, that a landlord will comply with s.213(6) but not s.213(3).

The ambiguity raised by s.214(2)(a) is whether these distinct failures of compliance may be raised by the tenant in addition to each other rather than as alternatives. If this were not the case, very peculiar consequences would arise. That s.214(a) uses the word ‘or’ rather than ‘and’ might suggest that a tenant can only plead one breach even if the landlord has breached both provisos. But that conclusion leads to a very odd result.

If the s.213(3) and (6) breaches are alternatives, then there can surely be no circumstances in which just one breach is proven that a court can award the maximum 3-x-deposit damages. This is because the nature of the breach must be less serious than if both s.213(3) and s.213(6) were breached, and presumably only the most serious⁵ breaches can trigger 3-x-deposit liability. But s.214(4) imposes no such limitation. Prima facie, 3-x-deposit damages are payable for a claim which proves a breach of either s.213(3) or (6).

So in hypothetical Case A, involving the most serious breach of s.213(3), the court could make an award of 3-x-deposit damages. And in hypothetical case B, the most serious breach of s.213(6) can lead to an award of 3-x-deposit damages. But that would also mean that in case C, which involves the same breach of s.213(3) as in Case A and the same breach of s.213(6) as in Case B, that the court can still only award 3-x-deposit damages.

That would seem to be a nonsensical proposition, and not one to which the court is driven by the clear words of the Act. There is contrast nothing objectionable in principle about a

⁴ See the guidance at <https://www.gov.uk/tenancy-deposit-protection/overview>.

⁵ What this might mean is addressed further below.

landlord being liable in damages for both breaches if he/she/it has committed both breaches. A better way of making sense of the 'or' is that it is confirming that the tenant need not prove both breaches in order to recover, rather than restricting her to one cause of action if both breaches have occurred.

Judicial discretion as to quantum

If the section above concerning whether s.214 creates one or two causes of action is incorrect, then in the case outlined above, the minimum damages the court could award is 5 x a single multiple of the £1000 deposit; ie £5000. The maximum is 5 x a triple multiple; ie £15,000. If the analysis above is correct, those figures can be doubled in appropriate cases. Either way, for both parties, there is much to play for in this area of judicial discretion.

There is little higher court authority on this question. Lawyers acting for either party would likely refer to Males J's short judgment in *Okadigbo v Chan*⁶ [2014] EWHC 4729 (QB), where the deposit was protected 7 months late, in March 2013 rather than August 2102, and the prescribed information was not given until July 2013. That case upheld the lowest possible award of 1 x the deposit on the various bases that the landlords' degree of 'culpability' was a very important factor, and that here the culpability was low because, inter alia,: (a) There was late rather than no compliance: (b) The landlords were not experienced housing professionals; (c) The landlord had employed professional managing agents who had failed to comply with the deposit requirement.

It is unfortunate that *Okadigbo* was not taken to a further appeal, because the High Court's reasoning is manifestly defective, and since it is the only High Court decision on the point it is likely exercising an unwelcome influence on the lower courts.

The first defect relates to the court's readiness to allow the landlord to shelter behind the failure of his managing agent. There are four elements to this.

The first element, quite simply, is that the Act explicitly equates a managing agent with the landlord in s.212(9):

(9) In this Chapter—

(a) references to a landlord or landlords in relation to any shorthold tenancy or tenancies include references to a person or persons acting on his or their behalf in relation to the tenancy or tenancies....

So, bluntly put, the Act provides that agent's failure is the landlord's failure. The judgment in *Okadigbo* therefore ignores the plain words of the Act.

The second element is that there is an obvious route for the landlord to protect himself from the consequences of his agent's shortcomings. If one is moved by the supposed 'unfairness' of the ingenu landlord being screwed over by his mendacious or incompetent agent then the remedy for the landlord is obviously to join the agent as a part 20 defendant and invite the court to impose any liability for damages on the agent.⁷ Any agency agreement will either make it clear the agent was responsible for ensuring compliance with the tds, in which event a part 20 indemnity will be easily achieved; or it will be silent about the tds in which event the landlord has no contractual basis to shift liability at all.⁸

⁶ [2014] EWHC 4729 (QB).

⁷ In principle the tenant could take this step herself, but given the phrasing of s.219 there is not good reason why she should.

The third element runs on from the second. If a landlord in the *Okadigbo* position does post-trial seek to recover the damages from the agent, the agent – who as a supposed ‘expert’ has completely failed to comply with the tds on the basis of what can at best be gross negligence – will be in the frame only for the lowest possible damages award. So it is not just the landlord who benefits from the agent’s failings, it is the agent as well. That seems to be a very peculiar outcome.

The fourth element is that the court’s reasoning completely ignores the perspective of the tenant. From that perspective, the severity of the breach is wholly unaffected by who is – in a moral sense – ‘to blame’ for the breach. The deposit has not been protected and/or the prescribed information not provided. The source of the failing(s) is irrelevant to their impact on the tenant.

This shades into the second systemic defence in the *Okadigbo* reasoning, namely that it seems to focus solely on what we might term the *mens rea* rather than the *actus reus* of the breach. The scheme of the Act provides that even the most trivial breach of either s.213(3) or s.213(6) (ie a substantively tiny *actus reus*)⁹ must incur damages liability of 1 x the deposit: there is no de minimis exception. So, accepting that it is legitimate to take ‘culpability’ (ie the *mens rea*) into account, then the tiniest breach produced by the least culpable of landlords must still incur 1 x deposit liability. But the landlord’s breach in *Okadigbo* was far from tiny; it was complete non-compliance for a period which lasted far beyond the permissible time limits. If the landlord had complied with almost every requirement in the relevant time period, and then remedied any breach just a day late, he/she would still have been liable to the minimum 1 x deposit damages. Seen in this light, *Okadigbo* makes no sense at all.

One might suggest a more structured approach to quantum could be adopted, in which the quantum moves from the minimum (1) toward the maximum (3) dependent upon the way in which the court classifies – on an equal weighting basis - both the *actus reus* and *mens rea* components of the non-compliance.

The *actus reus* element might have five components: de minimis; trivial; minor; substantial; and total. A de minimis breach leaves the multiple at 1; trivial moves it to 1.25; minor to 1.5; substantial to 1.75; and total to 2. One might then factor in the *mens rea* dimension, drawing distinctions perhaps between accidental, negligent and wilful non-compliance, and ranking those categories as adding respectively 0, 0.5 and 1 to the multiple. This approach offers twelve potential outcomes, each reflecting the cumulative seriousness of the extent of and reason for the landlord’s breach of the scheme, which are laid out in table 1 below. At one extreme, 1 x deposit can only apply to the most trivial of breaches by the least culpable of landlords. At the other, 3 x deposit can apply only to the most egregious of breaches by the most culpable of landlords.

[Insert table 1]

Conclusion

The thus far undeveloped state of the law on the post 2015 tds can have little to do with the infrequency with which disputes arise, because they surely arise on a regular basis. A more

⁸ It is perhaps arguable that in the absence of a contractual obligation the landlord could raise an economic loss claim in tort against the agent on a *Hedley-Byrne* basis. Again however, there is no reason why that should be of concern to the tenant.

⁹ Such as for example complying a day late, or failing to provide one or two of the very detailed bits of information required by the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (S.I. 2007/797).

contextual factor is the likely explanation. A tenants will only qualify for legal aid to press an argument about the tds if she is doing so in response to a possession claim brought by her landlord. The cynical but obviously sensible strategy for any landlord to adopt when a s.21 and/or rent arrears possession claim is met with a well-founded tds defence and counterclaim from a legally-aided tenant is to discontinue the claim. The counterclaim will remain live of course, but the formerly legally-aided tenant will now be a litigant in person or at best be getting pro bono representation to pursue the counterclaim. Many tenants might in such circumstances simply give up the counterclaim entirely or accept a modest settlement. It would seem likely that few of those tenants would be well-placed to argue the multiple tenancy or twin heads of liability points, or to argue the toss in court about whether to depart from the minimalist *Okadigbo* approach to damages. Nor, since it will rarely be the case that potential damages exceed the small claims threshold, could tenants expect to find skilled representation on a conditional fee basis.

What is likely need to bring the matter back before the higher courts is a ground 8 rent arrears claim where the 8 week/2 month threshold will be beaten only if the tenant recovers very substantial tds damages at a higher level than awarded at trial. In those circumstances, the tenant's eligibility for legal aid will continue, both because her home would be at stake and because there would be a wider public interest in clarifying the law. There are presumably some such cases lining up in the lower courts, but it may be some time before one of them reaches a level that attracts a wider audience.

Table 1; Quantifying quantum in the tenancy deposit scheme

Actus reus

De minimis	1.00	1.50	2.0
Trivial	1.25	1.75	2.25
Minor	1.50	2.00	2.50
Substantial	1.75	2.25	2.75
Total	2.00	2.50	3

Accidental

Negligent

Wilful

Mens rea
