Neutral Citation Number: [2024] EWCA Civ 1457

Case No: CA-2024-000851

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CLERKENWELL AND SHOREDITCH COUNTY COURT
DISTRICT JUDGE REDPATH-STEVENS
CASE NO: K05EC725

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2024

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE ZACAROLI

- -

Between :

MARTYNA SWITAJ	**Appellant**
- and –	
ADRIAN McCLENAGHAN	**Respondent**

- -
- -

Martin Westgate KC and Miranda Grell (instructed by **Hackney Community Law Centre**) for the **Appellant**
Luke Decker (instructed by **Regency Solicitors**) for the **Respondent**

Hearing date: 21/11/2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28/11/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The Tenant Fees Act 2019 ("the TFA") came into force on 1 June 2019. In very broad terms it prohibits the making of requirements in relation to a variety of payments by tenants or prospective tenants which had hitherto been lawful. In relation to landlords the prohibitions are in section 1 of the TFA. It also precludes a landlord from serving notice under section 21 of the Housing Act 1988 where the landlord is in breach of section 1 (1) of the TFA. The issue raised on this appeal is whether payments required by the landlord and paid before the TFA came into force preclude the service of a section 21 notice.

The facts

2. Ms Switaj entered into an assured shorthold tenancy ("AST") of a flat in Holloway on 12 April 2018 ("the original AST"). The property was let and managed by Drivers & Norris.

3. The original AST was for a fixed term of 12 months at a rent of £1,400 per month. Clause 4.2 of the tenancy required the tenant to pay the landlord or the landlord's agent a security deposit of £1,615. That deposit was to be held under an approved tenancy deposit scheme. Clause 5.18.4 required the tenant to "pay the sum of £120.00 Plus VAT for the preparation of any documents in relation to all renewals or extensions of this Tenancy." This has been referred to as the administration fee. Clause 5.21.1 required the tenant to "pay the cost of a check out of the inventory and Schedule of Condition listing all the Fixtures and Fittings in the Premises and the condition thereof at the expiry or sooner determination of the tenancy." This has been referred to as "the check-out fee".

4. The statement of account produced by Drivers & Norris showed that Ms Switaj made payments by debit card on 9 March and 14 April 2018; and that debits against those payments were made, resulting in a nil balance. The debits related to the deposit, the administration fee, the check-out fee and two instalments of rent. These debits were all made before 13 July 2018.

5. What happened at the expiry of the original AST is unclear. Although there was some discussion about entering into a new written agreement, no such agreement was in evidence; and it is possible that a new statutory periodic tenancy arose. Either way, that tenancy ("the 2019 tenancy") would have been on the same terms as the original AST. Ms Switaj apparently paid a further £120 pursuant to clause 5.18.4 of the written tenancy agreement.

6. What is, however, clear, is that on 28 April 2020 Ms Switaj entered into another AST of the flat, this time for 12 months and thereafter from rental period to rental period. The rent remained at £1,400 per month. By this time, the TFA had come into force. The terms of the AST had been substantially changed. Although there was a requirement to pay a security deposit, there was no longer any provision for an administration fee nor any provision for a check-out fee. Indeed, there was no obligation to conduct a check-out at all; although there was an obligation to conduct a

check-in. There is no evidence of any actual payment by Ms Switaj in respect of either an administration fee or a check-out fee.

7. On 9 April 2021 Ms Switaj entered into another AST for 12 months from 13 April 2021 to include 12 April 2022 and thereafter from rental period to rental period ("the current AST"). The rent remained at £1,400 per month. It was on the same terms as the 2020 tenancy. It is the current tenancy which Mr McClenaghan wished to terminate. Again, although there was a requirement to pay a security deposit, there was no provision for an administration fee nor any provision for a check-out or payment of a check-out fee. There is no evidence of any actual payment by Ms Switaj in respect of either.

8. On 22 June 2023 McClenaghan served Ms Switaj with a section 21 notice. The issue is whether he was entitled to do so. Ms Switaj says that he was not, because of the payments made in 2018. DJ Redpath-Stevens rejected that defence and made an order for possession.

The Tenant Fees Act 2019

9. The broad policy objectives of the TFA were set out in paragraph 1 of the Explanatory Notes:

> "Through this Act, the Government aims to make renting fairer and more affordable for tenants by reducing the costs at the outset of a tenancy. This Act also aims to improve transparency and competition in the private rental market. The Act implements the commitment to ban letting fees paid by tenants in England and includes other measures to improve fairness, competition and affordability in the lettings sector."

10. It sought to achieve that objective by banning landlords and their agents from requiring tenants of privately rented housing in England and persons acting on their behalf or guaranteeing their rent to make payments except those which were expressly permitted by the TFA.

11. Section 1 of the TFA relevantly provides:

> "(1) A landlord must not require a relevant person to make a prohibited payment to the landlord in connection with a tenancy of housing in England.
>
> (2) A landlord must not require a relevant person to make a prohibited payment to a third party in connection with a tenancy of housing in England.
>
> (3) A landlord must not require a relevant person to enter into a contract with a third party in connection with a tenancy of housing in England if that contract is—
>
> (a) a contract for the provision of a service, or
>
> (b) a contract of insurance.

(4) Subsection (3) does not apply if the contract is for—

(a) the provision of a utility to the tenant, or

(b) the provision of a communication service to the tenant.

(5) A landlord must not require a relevant person to make a loan to any person in connection with a tenancy of housing in England.

(6) For the purposes of this section, a landlord requires a relevant person to make a payment, enter into a contract or make a loan in connection with a tenancy of housing in England if and only if the landlord—

(a) requires the person to do any of those things in consideration of the grant, renewal, continuance, variation, assignment, novation or termination of such a tenancy,

(b) requires the person to do any of those things pursuant to a provision of a tenancy agreement relating to such a tenancy which requires or purports to require the person to do any of those things in the event of an act or default of a relevant person,

(c) requires the person to do any of those things pursuant to a provision of a tenancy agreement relating to such a tenancy which requires or purports to require the person to do any of those things if the tenancy is varied, assigned, novated or terminated,

(d) enters into a tenancy agreement relating to such a tenancy which requires or purports to require the person to do any of those things other than in the circumstances mentioned in paragraph (b) or (c),

(e) requires the person to do any of those things—

(i) as a result of an act or default of a relevant person relating to such a tenancy or housing let under it, and

(ii) otherwise, than pursuant to, or for the breach of, a provision of a tenancy agreement, or

(f) requires the person to do any of those things in consideration of providing a reference in relation to that person in connection with the person's occupation of housing in England.

(7) For the purposes of this section, a landlord does not require a relevant person to make a payment, enter into a contract or make a loan if the landlord gives the person the option of doing

> any of those things as an alternative to complying with another requirement imposed by the landlord or a letting agent.
>
> (8) Subsection (7) does not apply if—
>
> (a) the other requirement is prohibited by this section or section 2 (ignoring subsection (7) or section 2(6)), or
>
> (b) it would be unreasonable to expect a relevant person to comply with the other requirement.
>
> (9) In this Act "relevant person" means—
>
> (a) a tenant…"

12. A payment is a prohibited payment unless it is a permitted payment by virtue of Schedule 1: TFA section 3 (1). A security deposit is, in principle, a permitted payment up to a limited amount; but neither an administration fee nor a check-out fee is a permitted payment.

13. Section 4 (1) provides that a term of a tenancy agreement which breaches section 1 is not binding on a relevant person.

14. It will be seen that section 1 contains several different prohibitions. Section 1 (1) concerns payments to the landlord; section 1 (2) concerns payments to third parties; section 1 (3) concerns contracts with third parties, and section 1 (5) concerns the making of loans. But each prohibition bites only where the landlord "requires" the payment; and does so either "in consideration of" the grant etc of a tenancy or "pursuant to a provision of a tenancy agreement". It is not, however, necessary for the requirement to result in an actual payment in order to amount to a breach of section 1.

15. Section 2 creates parallel prohibitions applicable to letting agents.

16. Section 17 relevantly provides:

> "(1) This section applies if—
>
> (a) a landlord breaches section 1(1) by requiring a relevant person to make a prohibited payment in connection with an assured shorthold tenancy, and
>
> (b) the relevant person makes a prohibited payment to the landlord as a result of the requirement being made.
>
> (2) This section also applies if—
>
> (a) a landlord breaches Schedule 2 in relation to a holding deposit paid by a relevant person, and
>
> (b) the deposit relates to an assured shorthold tenancy.

> (3) No section 21 notice may be given in relation to the tenancy so long as all or part of the prohibited payment or holding deposit has not been repaid to the relevant person."

17. It is common ground that section 17 (3) means that the prohibited payment must relate to the tenancy that the landlord wishes to terminate by the section 21 notice. But it is only a breach of section 1 (1) which attracts the sanction. Breaches of section 1 (2), 1 (3) and 1 (5) do not. Neither party could explain why section 1 (1) alone was singled out for special treatment. The Explanatory Notes shed no light on the topic.

18. The TFA also contained transitional provisions in section 30. Section 30 (1) provides:

> "(1) Subject as follows, section 1 (prohibitions applying to landlords) does not apply to—
>
> (a) a requirement imposed before the coming into force of that section, or
>
> (b) a requirement imposed by or pursuant to a tenancy agreement entered into before the coming into force of that section."

Do payments made before 1 June 2019 carry over into a new tenancy?

19. The essence of the argument for Ms Switaj is that the lawful payments that she made under the terms of the original AST in 2018 are to be treated as having been required and made under the current AST made in 2021. This argument starts with the decision of this court in *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, [2013] 1 WLR 3848. Although that case concerned different legislation relating to security deposits, it is relied on by analogy. The facts are adequately summarised in the headnote. In January 2007 the claimant granted the defendant an AST of a residential property for a term of one year less one day. The defendant paid the claimant a deposit equal to a month's rent as security for the performance of his obligations under the tenancy agreement. In April 2007 the provisions in Part 6 of the Housing Act 2004 governing the treatment of tenancy deposits came into force. In January 2008 the fixed term tenancy came to an end and was replaced by a statutory periodic tenancy arising by virtue of section 5 of the Housing Act 1988. The terms of the statutory tenancy were the same as those of the original AST. Nothing was said or done by either party in relation to the deposit at that time or any other time prior to June 2011, when the claimant served on the defendant a section 21 notice. The issue for the court was whether the section 21 notice was valid.

20. The appeal turned on section 215 of the Housing Act 2004. That provided:

> "(1) If a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when— (a) the deposit is not being held in accordance with an authorised scheme, or (b) the initial requirements of such a scheme (see section 213(4)) have not been complied with in relation to the deposit."

21. As this sub-section indicates the "initial requirements" were those in section 213. That relevantly provided (as amended by the Localism Act 2011):

> "(1) Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme.
>
> (2) No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).
>
> (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 30 days beginning with the date on which it is received.
>
> (4) For the purposes of this section 'the initial requirements' of an authorised scheme are such requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit."

22. Lloyd LJ gave the leading judgment, with which Gloster LJ and I agreed. At [27] Lloyd LJ pointed out that the statutory periodic tenancy that arose at the expiry of the AST was a new and distinct tenancy. At [28] he said that that new and distinct tenancy contained an equivalent provision for the payment of a deposit as had been part of the original fixed term AST. The question was how to fit the retention of the deposit into that legal framework. At [28] Lloyd LJ went on to say:

> "But the legal position after 8 January 2008 must have been that the deposit was held by the claimant as security for the performance of the defendant's obligations, or for the discharge of any liability of his, arising under or in connection with the new statutory periodic tenancy, not (or not only) in respect of such obligations or liabilities arising under the original fixed term tenancy. How had that come about? It must have been on the basis that the defendant's right to be credited with the deposit at the end of the fixed period tenancy, as well as his obligation to pay, and the claimant's right to receive, an equivalent deposit under the new statutory periodic tenancy, were treated as satisfied by the claimant continuing to hold the same sum of money as before on the same basis as before but by reference to the new tenancy."

23. The core reasoning is at [36]:

> "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 (or, as Mr Bhose put it, physical) 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."

24. Accordingly, section 213 applied, and because the landlord had not complied with that section, the section 21 notice was invalid.

25. The District Judge in our case distinguished *Superstrike* "on the simple basis" that although clause 5.21.1 of the original AST required the payment of a check-out fee, the current tenancy did not. It could not, therefore, be said that the landlord was requiring the tenant to pay such a fee in relation to the current tenancy. The court reached its conclusion in *Superstrike* because the periodic AST that arose on the expiry of the original fixed term itself contained a requirement that the tenant pay a deposit. I might add that although it is true that section 213 (2) prohibited the requirement of a deposit to be held otherwise than in accordance with the terms of an authorised deposit scheme, the reasoning of the court was concerned only with section 213 (1) which dealt with payments (whether or not required).

26. Mr Westgate KC correctly points out that the prohibitions in section 1 of the TFA can apply even where the prohibited payments are not paid pursuant to a provision of the tenancy agreement: section 1 (6) (a). But the landlord must still "require" the payment and, if the requirement is not contained in a provision of the tenancy agreement, must do so "in consideration of" the grant etc of a tenancy. The ordinary meaning of "require" is to ask or request a person to do something. I consider that this entails some overt act or utterance. I do not consider that mere silence can amount to a requirement. The force of the word "require" is reinforced by section 30 which disapplies section 1 in relation to "a requirement *imposed*" before the section came into force; and by section 1 (7) which also speaks of a requirement "imposed" by the landlord. I agree with Mr Decker that this means that the word "required", taken in context, imports a compulsory quality to the requirement. Moreover, if the requirement is not one contained in a provision of the tenancy it must be made in consideration of the grant of a tenancy. The check-out fee was, as Mr Westgate acknowledges, part of the consideration of the grant of the original tenancy. It formed no part of the consideration of the grant of the current tenancy which was the subject of the section 21 notice.

27. I consider, therefore, that the District Judge was correct to have distinguished *Superstrike*.

Was the check-out fee repayable to Ms Switaj?

28. Mr Westgate's elaborate argument in support of the appeal proceeded in the following steps:

    i) The check-out fee was in fact paid in March or April 2018 and was not caught by the TFA. It was part of the consideration for the grant of the original tenancy.

    ii) But when that tenancy came to an end, no check-out took place. Ms Switaj could have required the check-out fee to be repaid to her either (a) because it was a conditional payment or (b) because the basis of the payment had wholly failed, giving rise to a claim in unjust enrichment.

    iii) Mr McClenaghan did not repay it. The explanation is that it must have been (notionally) paid under the terms of the 2019 tenancy which contained the same terms as the original tenancy.

    iv) Although the 2021 tenancy did not contain any terms requiring payment of the check-out fee (or, indeed, any obligation to conduct a check-out), a check-out was clearly contemplated. The same is true of the current tenancy.

    v) Accordingly, when the current tenancy was granted, Mr McClenaghan was holding money that had been earmarked to pay for a check-out fee; there was no longer any basis to retain it and it should have been repaid to Ms Switaj.

    vi) The retention of those monies can properly be described as a payment pursuant to a requirement. Although there was no obligation on Ms Switaj in the current tenancy to pay the costs of a check-out, the parties' unstated objective can be taken to be that the monies were retained for that purpose. Alternatively, the fact that Mr McClenaghan unilaterally paid himself from money to which Ms Switaj was entitled amounted to the making of a payment by Ms Switaj pursuant to a requirement.

    vii) Although it is necessary for the payment to be required "in consideration of" the grant of a tenancy, that does not necessarily refer to a bargain between the parties that the payment is given in exchange for the tenancy. The statutory phrase "in consideration of" is merely to identify the kind of connection between the grant and the payment which makes the payment prohibited.

29. This elaborate argument depends on the drawing of inferences. Mr Westgate accepts that these are not inevitable inferences. They are one set of inferences out of other possible inferences. The argument would require the court to draw an inference that Mr McClenaghan required an unlawful payment when what was on offer was a tenancy on the terms of a tenancy agreement that had been carefully remodelled so as not to fall foul of the TFA. Moreover, the inferences for which he argues, fall to be drawn in circumstances in which Ms Switaj never asked for the money back.

30. There are no rules of law applicable to the drawing of inferences. As Lord Leggatt explained in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863 at [41]:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

31. One further major difficulty that this argument faces is that the District Judge was not asked to draw the factual inferences that Mr Westgate now relies on. Because the case was not articulated below in the way it is now advanced, there was no real need for Mr McClenaghan to give evidence to rebut it. It cannot be said that the District Judge was wrong not to draw inferences that were never articulated.

32. In my judgment the starting point for the analysis is that the money described as the check-out fee was paid by Ms Switaj as part of the consideration for the grant of the original AST. It was debited to her account before that tenancy came to an end. There is nothing in the terms of the original AST to support an inference that it was a conditional payment. It was simply part of the overall consideration for the original grant. It was required and paid long before the TFA came into force.

33. Mr Westgate argued that because there was no check-out at the end of the original AST, Ms Switaj would have been entitled to require Mr McClenaghan to repay her the check-out fee. Likewise at the end of the 2019 tenancy she would have been entitled to require repayment of the check-out fee. I will assume that to be so. But that does not in my judgment mean that retention of the monies amounted to a requirement in consideration of the grant of the current AST, particularly where, as is the case here, Ms Switaj did not ask Mr McClenaghan to repay them. The check-out fee was paid in consideration of the grant of the original AST. The retention of the monies was entirely independent of the grant of the current tenancy. Nor do I consider that the

passive retention of the monies could amount to a requirement. In addition, if Ms Switaj had a claim in unjust enrichment or in debt at the end of the original AST or the 2019 tenancy, she still has it. It seems highly unlikely that she compromised her claim by making an unlawful payment.

34. Moreover, the language of section 1 (6) is deliberately phrased in contractual terms. In most cases, the requirement must be made pursuant to a provision of the tenancy agreement (i.e. a contractual term). But where it need not be, as in section 1 (6) (a), the use of the phrase "in consideration of" must take its meaning from the contractual context in which it is used. In my judgment, therefore, in the context of the grant of a tenancy it has its usual meaning in the law of contract, namely a payment made in exchange for the grant. The grant in exchange for which the payment was actually made was the grant of the original AST. Mr Westgate took some comfort from section 1 (6) (d) which applies where a person enters into a tenancy agreement which requires or purports to require the making of a prohibited payment. It is not entirely clear what section 1 (6) (d) adds to the other paragraphs of section 1 (6). But in any event, in order to fall within the scope of that paragraph, it is still necessary for a tenancy agreement (i.e. a contract) to be made which contains a requirement or purported requirement to make a prohibited payment.

35. Although Mr Westgate argues for an expansive interpretation of section 1 (6), I consider that that argument is ill-founded. All the sub-paragraphs of section 1 (6) are prefaced by the statement that the landlord makes a requirement "if and only if" one or more of those paragraphs is satisfied. The words "only if" are, in my view, a statutory instruction not to expand the natural meaning of the words. And it is still necessary to establish that the landlord *required* the payment to be made in consideration of the grant etc of a tenancy. Even if, as Mr Westgate submitted, it is possible to give consideration without being aware that one is doing so (as in *Pitts v Jones* [2008] QB 706) it seems to me to be impossible to find a requirement in mere silence.

36. Section 17 (1) is also drafted in sequential terms. Stage one is the making of the requirement. Stage two is that the payment is made "as a result of" the requirement being made. In other words, the requirement must cause the payment. Accordingly, even if there was a (notional) payment, it was not responsive to or caused by any requirement.

37. In my judgment, long before the TFA came into force Ms Switaj was required to pay and did pay a sum of money intended for use as a check-out fee. She has never been required to pay that sum again. If and when a check-out comes to take place, the landlord will bear the costs of that exercise. The fact (if it is a fact) that the landlord has funds set aside for that purpose amounts neither to a requirement nor to a payment in consideration of the grant of a tenancy after the coming into force of the TFA.

38. Because the TFA is not retrospective, the payments that Mr McClenaghan required were not prohibited payments; and any requirement made before the Act came into force is not caught by section 1 : see section 30.

39. Finally, the entire argument rests on assertions based on notional facts that the District Judge never found. Although Mr Westgate argues that he ought to have made factual findings by inference, there was no obligation on the District Judge to do so.

> Moreover, this is not a case in which the District Judge was invited to make findings by inference about what actually happened. It is a case in which, starting from the result for which Ms Switaj contended, an elaborate series of non-facts is constructed in order to support the desired conclusion.

40. Ingenious and elegant though Mr Westgate's argument is, I would reject it.

Result

41. I would dismiss the appeal.

Lady Justice Andrews:

42. I agree.

Lord Justice Zacaroli:

43. I also agree.