Neutral Citation Number: [2014] EWCA Civ 1604

Case No: B5/2014/0981

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CLERKENWELL & SHOREDITCH COUNTY COURT
District Judge Manners
3EC00794

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2014

Before :

LADY JUSTICE BLACK
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

- -

Between :

(1) MICHALIS CHARALAMBOUS **(2) KATERINA KARALI**	**Appellants**
- and -	
(1) MAUREEN ROSAIRIE NG **(2) KOK HO NG**	**Respondents**

- -
- -

Mr Mark Tempest for the **1st Appellant**
Ms Brie Stevens-Hoare QC & Ms Morayo Fagborun Bennett (instructed by The Law Department) for the **Respondent**

Hearing date : 2 December 2014

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Judgment

Lord Justice Lewison:

1. The facts of this case are simple to state. The answer to the legal problem is less so.

2. Mr Charalambous and Ms Karali took a tenancy of 14 Sapphire Court in Spitalfields on 20 August 2002. The term was for one year less a day expiring on 18 August 2003. Under the terms of their tenancy they paid a deposit of £1,560. The tenancy was renewed on 19 August 2003 and again on 18 August 2004, in each case for a further period of one year. Under each tenancy agreement the same deposit was required to be paid. No further money actually changed hands. Instead the original deposit was carried over and credited against the renewed tenancy. When the last of the tenancies came to an end on 17 August 2005, a statutory periodic tenancy arose under the Housing Act 1988. On 17 October 2012 Mrs Ng served notice under section 21 of that Act requiring possession of the property to be given after 17 December 2012.

3. The deposit paid by Mr Charalambous and Ms Karali has never been held under a statutory scheme. Was the section 21 notice valid? This is a question that was raised but left unanswered in *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, [2013] 1 WLR 3848. In our case DJ Manners was confronted with the question and held that the notice was valid. The tenants now appeal. For the reasons that follow, I would allow their appeal.

4. Statutory regulation of tenancy deposits was introduced with effect from 6 April 2007 by sections 212 to 215 of the Housing Act 2004. The provisions were:

> "… designed to put an end to complaints by residential tenants that their deposits had been unreasonably withheld by their landlords at the termination of the lease or, in some cases, had even been misappropriated." *Gladehurst Properties Ltd v Hashemi* [2011] EWCA Civ 604, [2011] 4 All ER 556 at [3]

5. The provisions have since been amended by the Localism Act 2011, and I will need to look at the amendments in due course. The important point to stress at this stage is that by the time when these provisions became effective, the tenancy had already become a statutory periodic tenancy; Mrs Ng already held the deposit; and no further deposit was paid either actually or notionally.

6. Section 212 (1) of the Housing Act 2004 imposed on the appropriate national authority a duty to make arrangements for securing that one or more tenancy deposit schemes were available for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies. Such schemes are of two kinds: custodial schemes and insurance schemes. Under a custodial scheme the landlord pays the deposit to a scheme administrator who keeps it in a separate account. Under an insurance scheme the landlord retains the deposit, but undertakes with the scheme administrator to comply with any direction the administrator may give about payment of the deposit. The scheme administrator maintains insurance against the risk of the landlord's failure to comply.

7. A tenancy deposit is defined by section 212 (8) as meaning "any money intended to be held … as security" for the performance of the tenant's obligations or the discharge of any liability of his arising under the tenancy.

8. The legislation imposes a number of requirements upon landlords. The most important of them (as originally enacted) are as follows:

> "213 (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 14 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.
>
> (5) A landlord who has received such a tenancy deposit must give the tenant and any relevant person such information relating to–
>
> (a) the authorised scheme applying to the deposit,
>
> (b) compliance by the landlord with the initial requirements of the scheme in relation to the deposit, and
>
> (c) the operation of provisions of this Chapter in relation to the deposit,
>
> as may be prescribed.
>
> (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.
>
> (7) No person may, in connection with a shorthold tenancy, require a deposit which consists of property other than money."

9. The period of 14 days referred to in sections 213 (3) and (6) has since been increased to 30 days by section 184 of the Localism Act 2011.

10. In order to compel landlords to comply with their obligations Parliament imposed sanctions on defaulting landlords. These were contained in sections 214 and 215 respectively. As originally enacted the relevant parts of sections 214 and 215 read:

> "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 the initial requirements of an authorised scheme (see section 213(4)) have not, or section 213(6)(a) 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.
>
> (2) Subsections (3) and (4) apply if on such an application the court–
>
> (a) is satisfied that those requirements have not, or section 213(6)(a) 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.
>
> (4) The court must also order the landlord to pay to the applicant a sum of money equal to three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.
>
> …
>
> 215 **Sanctions for non-compliance**

> (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.
>
> (2) 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."

11. A "section 21 notice" is a notice seeking possession given under section 21 of the Housing Act 1988. A "relevant person" does not include the landlord.

12. The following features of these subsections should be noted. First, the prohibition on serving a section 21 notice in section 215 (1) applies "at a time when" one or other of the two conditions applies. The use of that phrase suggests that even if one or both of the conditions is or are satisfied at some point, there may come a time later when one or neither is satisfied. Second, the cross-reference in section 215 (1) (b) to section 213 (4) was a cross reference to the definition of "initial requirements" and not a cross-reference to the time limit within which those requirements had to be satisfied. Third, although section 215 (2) referred to section 213 (6) as a whole (which laid down both a requirement for the provision of information and a time limit for providing it) the sanction was capable of being removed by late provision of the information. It was these features that led this court in *Vision Enterprises Ltd v Tiensa* [2010] EWCA Civ 1224, [2012] 1 WLR 94 to conclude, by a majority, that a failure to protect a deposit could be cured by late protection. Since the same wording was used in section 214 (1) (a) as was used in section 215 (1) (b) and section 215 (2), it would have been open to a landlord to cure any default in timely compliance either by paying a deposit into an authorised scheme, or by giving the required information, or both, and thus avoid liability under section 214 (4) to pay three times the deposit. The sanctions applied if on the application the court "is satisfied" that the requirements have not been met or that the deposit "is not" being held in accordance with an authorised scheme. Thus the position was to be judged as at the date of the court hearing. Ms Stevens-Hoare QC on behalf of the landlord submitted that it could not have been Parliament's intention, on the passing of the original section 214, to expose landlords already holding deposits to a risk of proceedings at all. Even if any default could have been cured by late compliance there was a risk as to costs. I did not find this a persuasive argument, since the tenant would inevitably have given notice to the landlord of an intention to apply to the court, otherwise it would be the tenant who was at risk as to costs. But I need not reach a firm conclusion, because we are dealing with the sections as amended.

13. Part of the purpose of the amendments was to reverse the decision in *Vision Enterprises Ltd v Tiensa*. As they now stand (after amendment by section 184 of the Localism Act 2011) the relevant parts of sections 214 and 215 now read as follows:

“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 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.

215 **Sanctions for non-compliance**

(1) Subject to subsection (2A), 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) section 213 (3) has not been complied with in relation to the deposit.

(2) Subject to subsection (2A), 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.

(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 the county court has been made under section 214 (1) and has been determined by the court, withdrawn or settled by agreement between the parties."

14. Article 8 of the Localism Act 2011 (Commencement No. 4 and Transitional, Transitory and Saving Provisions) Order 2012 ("the Order") brought the amendments made by section 184 into force on 6 April 2012. It did so subject to article 16 which provides:

> "(1) Subject to paragraph (2), the amendments made by section 184 of the Act apply in respect of any tenancy deposit received by a landlord in connection with a shorthold tenancy where the tenancy was in effect on or after 6th April 2012.

> (2) Those amendments do not apply in respect of a tenancy deposit received by a landlord in connection with a shorthold tenancy where—
>
> (a) the tenancy was in effect on or after 6th April 2012, and
>
> (b) the landlord has, before the end of the period of 30 days beginning with that date—
>
> (i) complied with the initial requirements of an authorised scheme in relation to the deposit, and
>
> (ii) given to the tenant and any relevant person the information prescribed for the purposes of section 213 (5) of the Housing Act 2004."

15. This was a statutory instrument made in accordance with the negative resolution procedure. In other words the instrument is laid before Parliament after being made, and each House has 40 sitting days to resolve to annul it. If they do (and it does occasionally happen) the result is that the instrument ceases to have effect; but anything done in reliance on it before annulment is preserved.

16. The sanctions imposed by section 214 require the tenant to make an application to the court. Thus they require the tenant to be pro-active and probably to spend money as well. If the application is made during the currency of the tenancy it is quite likely to sour relations between landlord and tenant and, if the tenancy is then a statutory periodic tenancy, may well provoke the landlord into serving a section 21 notice as soon as the application has been resolved: a course sanctioned by section 215 (2A). If, on the other hand, the application is made after the tenancy has ended the tenant bears the burden of enforcing the judgment against the landlord assuming that his application succeeds. It seems to me therefore that the really effective sanction is that the landlord cannot serve a section 21 notice and thus recover possession.

17. Let me begin by looking at what section 215 (1) actually says. The first condition that must be satisfied is that "a tenancy deposit has been paid in connection with a shorthold tenancy." It is looking at a past event, not a prospective one. That condition is satisfied in our case, because Mr Charalambous and Ms Karali paid a deposit in connection with the shorthold tenancy granted to them in 2002. It was a deposit as statutorily defined because it was money intended to be held as security for the performance of the tenant's obligations. I do not accept that it means only a deposit paid after 6 April 2007, because (quite simply) it does not say so. The second condition that must be satisfied is expressed in the alternative. Either "the deposit is not being held in accordance with an authorised scheme" or "section 213 (3) has not been complied with". The first of these alternatives is expressed in the present tense. It is looking at a current state of affairs. In *Vision Enterprises Ltd v Tiensa* [2010] EWCA Civ 1224, [2012] 1 WLR 94 both the majority and the minority in this court attached importance to the present tense: see Rimer LJ at [39] and [42] (with whom Thorpe LJ agreed); Sedley LJ at [52]. Although the amendments introduced by the Localism Act 2011 have reversed the actual decision in that case, they have not reversed the reasoning in so far as it was based on the use of the present tense. In our case that state of affairs exists because the deposit paid by Mr Charalambous and Ms

Karali is not (and never has been) held in accordance with an authorised scheme. The second alternative is looking at a past event, namely compliance with the initial requirements of an authorised scheme within the statutory time limit (originally 14 days, now 30 days).

18. Ms Stevens-Hoare submits that the sanctions in sections 214 and 215 correlate precisely with the duties imposed on landlords under section 213.Thus the sanction under section 214 (2) (b) and section 214 (2A) (b) apply to the duty under section 213 (1) to deal with the deposit in accordance with an authorised scheme from the time when it is received. The sanction under section 214 (2) (a) and section 214 (2A) (a) apply to the duty under section 213 (3) to give notice within the statutory time limits; and to the duty to give prescribed information, again within the statutory time limits.

19. Ms Stevens-Hoare also relies strongly on the presumption against retrospective legislation. The presumption is said to arise when legislation removes or impairs a vested right. As Lord Hoffmann and Lord Brown pointed out in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 at [5] and [31] respectively arguments of this kind are often circular, because they simply transfer attention to the question whether a person has a vested right which legislation will remove or impair. In that case the House of Lords held that changes in the Immigration Rules applied to Dr Odelola's pending application for leave to remain as a post-graduate doctor. It would have succeeded under the rules in force when she made her application, but subsequent changes meant that it was bound to fail. In the course of their speeches their Lordships approved the speech of Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486. In that case the House held that section 13A of the Arbitration Act 1950 (which empowers an arbitrator to dismiss a claim made in an arbitration on the ground of delay) applied to arbitrations begun before the section was enacted; and that in deciding whether to exercise that power an arbitrator could take into account delay that occurred before the section was brought into force. Having said that the question was at bottom one of impression Lord Mustill said at 525:

> "… the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after the event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself. …
>
> Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the

> statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

20. Lord Mustill went on to list a number of factors that he took into account in reaching his conclusion. These included (a) the nature of the rights affected; (b) the value of the rights (c) the purpose of the legislation and (d) the hardship of the result. Lord Mustill also noticed a long line of cases distinguishing between substantive and procedural rights. But "whilst keeping the distinction well in view" he preferred to look at the "the practical value and nature of the rights presently involved".

21. Ms Stevens-Hoare argues that Mrs Ng could not (and did not need to) have complied with section 213 (3) because she received the deposit long before any duty to comply with section 213 (3) came into existence. Even if the deposit is treated as having been notionally paid again when the statutory periodic tenancy came into being (as in *Superstrike Ltd v Rodrigues*) that notional payment in August 2005 would also have long pre-dated the coming into force of the legislation in April 2007. It cannot have been the intention of Parliament to impose sanctions for failure to comply with an obligation that was impossible to comply with. This second alternative condition in section 215 (1) (b) is part of the same section as the first of the two alternatives in section 215 (1) (a). The same intention must be imputed to Parliament. Before the legislation came into effect Mrs Ng had a vested right to keep the deposit, and the right to serve a section 21 notice whether or not the deposit was being held in accordance with an authorised scheme. If section 215 (1) (a) is interpreted in the manner proposed then Mrs Ng's vested right will have been retrospectively removed.

22. I do not accept this argument. I am prepared to accept that Mrs Ng was not required to comply with section 213 (3) at the time when she received the deposit or at the time when the statutory periodic tenancy arose. As Ms Stevens-Hoare submitted there were no authorised schemes at either of those dates, so there was nothing on which section 213 could bite; and anyway the section was not in force. Whether section 215 (1) (b) in its current form precludes her from serving a section 21 notice depends on the interpretation of that sub-section in combination with the Order. But even assuming that it does not, that is only one of the two alternative reasons why a landlord may be debarred from serving a section 21 notice. We are concerned in the first instance with the alternative in section 215 (1) (a). Section 215 (1) (a) applies where a deposit "is not being *held* in accordance with an authorised scheme." This language differs from that used in section 213 (1) which requires deposits to "be *dealt with*" in accordance with an authorised scheme. So the correlation between section 215 (1) (a) and section 213 (1) is not as precise as Ms Stevens-Hoare submits. Second, if section 213 (3) had been complied with it would almost inevitably follow in any realistic scenario that a

deposit *was* being held in accordance with an authorised scheme. Accordingly, as Mr Tempest submits on behalf of the tenant, the target of section 215 (1)(a) must have been something else. The natural target is those cases where the deposit was not in fact being held in accordance with an authorised scheme, whether or not the landlord had a preceding obligation to deal with the deposit in any particular way. It is that which give the tenants real protection.

23. In my judgment in so far as section 215 (1) (a) precludes the service of a section 21 notice it is prospective in operation rather than retrospective. It is only concerned with section 21 notices served after it came into force. Had it invalidated section 21 notices served before it came into force, it would have been retrospective in its operation. But it does not. In a rather different context in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 Lord Reed said at [120] and [121]:

> "[120] … Changes in the law, even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred. Changes in family law, for example, are not applicable only to families which subsequently come into existence, but affect existing families, even although the changes may not have been foreseeable at the time when individuals married or had children. Similarly, a person who buys a house, or a company that employs staff, cannot expect the law governing the rights and responsibilities of homeowners or employers to remain unchanged throughout the period of ownership or employment. The same point could be made in respect of other types of right and obligation of a civil character. As Lon L Fuller observed in The Morality of Law (revised ed 1969), p 60: "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."
>
> [121] A distinction might, however, be drawn between laws which alter prospectively the rights and obligations arising from pre-existing legal relationships, and laws which alter such rights and obligations retrospectively. To the extent that laws of the latter kind may undermine legal certainty more severely, they may be more difficult to justify, but there can be no doubt that justification for such laws sometimes exists. It may exist, in particular, when the legislation has a remedial purpose. As Fuller remarked, at p 53:
>
> "It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.""

24. I respectfully agree. It is also to be noted that in both *Odelola* and *L'Office Cherifien des Phosphates* the legislation in question did have the effect of changing the legal consequences that attached to things that happened before the entry into force of the

legislation. In our case the nature of the right involved is the right to serve a section 21 notice at a time when the deposit is unprotected. To the extent that one can differentiate between substantive and procedural rights, that right is to my mind procedural. There is no particular value in the right. The purpose of the legislation was to protect tenants' deposits and to impose sanctions on landlords who failed to protect them. There is no real hardship caused to landlords in the interpretation of section 215 (1) (a) for which the tenants contend. Mrs Ng could have cleared the path to the service of such a notice in one of two ways. First, she could have paid the deposit into an authorised custodial scheme (as happened in *Vision Enterprises Ltd v Tiensa*). Second, if for any reason that was impossible or inconvenient, she could have repaid the deposit to Mr Charalambous and Ms Karali. In the former case the fetter imposed by section 215 (1) (a) would have been removed because the state of affairs no longer fell within its terms; and in the latter case section 215 (2A) would have disapplied section 215 (1). Once she has complied with the requirements, she will be free to serve a section 21 notice. In addition I consider that the language of section 215 (1) (a) is clear. I agree with Sedley LJ in *Vision Enterprises Ltd v Tiensa* at [55] that legislation like this "is or ought to be written for lay people" who are unlikely to delve into the niceties about when legislation is or may be retrospective in operation. The facts with which we are concerned fall squarely within its terms, straightforwardly read.

25. In addition as Mr Tempest points out if there was any lack of clarity in section 215 (1) (a) itself the terms of article 16 of the Order plainly envisage that as from the coming into force of the amendments made by section 184 the code will apply to existing tenancies. Article 16 (1) is clear in its terms. The amendments will apply to tenancies in existence on 6 April 2012. Its concern is not with the date at which the deposit was received, but with the date on which the tenancy was in effect. Since the amendments made by section 184 include amendments to section 215 (1) itself, it must have been envisaged that section 215 in its amended form would apply to all such tenancies.

26. What, then of section 215 (1) (b)? Here the arguments are more finely balanced. It is not at all clear how the phrase "at a time when" in the opening part of section 215 (1) is meant to apply to section 215 (1) (b). Be that as it may, it might well be said that section 215 (1) (b) is potentially retrospective, because it does on the face of it attribute a different legal consequence to a past act (or, more properly, to a past omission). One argument is that the problem of potential retrospectivity is dealt with by the Order. Article 16 (2) confronts head on the problem about timely compliance with section 213 (3). It does so by giving the landlord a prospective window in which to comply. Thus the clarity of the language, which is another factor that Lord Mustill mentioned, also points in the tenants' favour. Ms Stevens-Hoare said that if that had been Parliament's intention it would have been made clear in the primary amending legislation itself. But to my mind it is clear in the secondary legislation; and Ms Stevens-Hoare does not suggest that the 2012 Order was *ultra vires*. I do not, therefore, consider that she has come up with a persuasive reason for reading down article 16. In *Superstrike Ltd v Rodrigues* Lloyd LJ said at [42]:

> "Under the original version of section 215, as construed in *Vision Enterprises v Tiensia*, it was open to the landlord to comply with the requirement to have the deposit held in accordance with an authorised scheme, even though this was

> not done within the 14 days then stipulated. That seems not to be the case now, given the amendment to section 215(1)(b) made in 2012. I note that, as regards failure to provide the necessary information, under section 213(6), the sanction preventing service of a section 21 notice applies until the information is given, even if that is done late: see section 215(2) and its words: "until such time as section 213(6)(a) is complied with". The time stipulation is in section 213(6)(b), so in that case the distinction is clearly deliberate: the landlord can retrieve the position, as regards that failure to comply, by complying late. The same does not appear to be the case in respect of failure to protect the deposit by an authorised scheme at all. Therefore it may be (I do not decide that it is so) that the only way in which the landlord can now escape from the provisions of section 215(1) is by returning the deposit to the tenant."

27. This may well be the case. Thus Mrs Ng may well be precluded from serving a section 21 notice unless she repays the deposit to the tenants. I am prepared to accept, as Ms Stevens-Hoare submitted, that there is a significant difference between having to pay a deposit into an authorised scheme and having to repay it to the tenants. Unfortunately it is not open to a landlord to apply to the court under section 214 for an order requiring the deposit to be paid into an authorised custodial scheme. But the predicament in which Mrs Ng now finds herself follows, not from any retrospectivity in the amendment, but from her failure to take advantage of the period of grace given by article 16 (2) of the Order.

28. The opposing argument is that even in its amended form section 215 (1) (b) only applies where section 213 (3) has not been *complied with*. The notion of compliance presupposes an obligation with which to comply. Mrs Ng never had an obligation to comply with section 213 (3) because she had received the deposit, both in reality and notionally, before section 213 came into force. Thus even if section 215 (1) (a) applies to her, section 215 (1) (b) does not. This reading still gives effect to the Order, because the period of grace would apply to those landlords who *were* required to comply with section 213 when they received the deposit (either in reality or notionally), but who did not do so at a time when late compliance would have removed the bar on serving a section 21 notice. This argument was not fully explored before us and, although I am inclined to think that it is correct, I express no final view one way or the other. That must wait for a case in which it really matters.

29. However, even if this argument were correct it would apply only to the bar on serving a section 21 notice imposed by section 215 (1) (b). It would not, in my judgment, provide justification for reading down section 215 (1) (a).

30. Since it is common ground that the deposit never has been held in accordance with an authorised scheme, that on its own is enough to lead to the conclusion that the section 21 notice was invalid.

31. I might add that as far as I can see the Order was not shown to DJ Manners, and as far as I recall it was not shown to this court in *Superstrike Ltd v Rodrigues*.

32. We were told that clause 31 of the Deregulation Bill now progressing through Parliament will make changes to the law about tenancy deposits. The current proposals do not cover the factual situation with which we are concerned. If Parliament considers that there is a need to make additional changes to the law, the opportunity is there.

33. I would allow the appeal.

Lady Justice Eleanor King:

34. I agree.

Lady Justice Black:

35. I also agree.