Case No: H01CL234

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand, London
WC2A 2LL

28 October 2022

BEFORE:

HIS HONOUR JUDGE LUBA KC

BETWEEN:

MERRYCK LOWE

Claimant

-and-

THE GOVERNORS OF SUTTON'S HOSPITAL

IN CHARTERHOUSE

Defendant

Hearing dates: *22 and 28 September 2022*

Mr Robert Brown appeared on behalf of the Claimant

Mr Shomik Datta appeared on behalf of the Defendant

JUDGMENT

I direct that no recording shall be taken of this Judgment and that copies of this version as sealed and handed down may be treated as authentic.

Introduction

1. This claim raises issues relating to the statutory scheme for the protection of tenancy deposits paid by assured shorthold tenants.

2. The parties are respectively tenant and landlord of residential premises. The claimant, Mr Lowe is an assured shorthold tenant who paid a tenancy deposit. The defendant, which I shall simply call 'Charterhouse', is his private landlord.

3. Mr Lowe brings a claim for £120,888 to be paid to him by Charterhouse. He arrives at that sum as follows:

    a. he asserts that he paid a deposit of £4029.60 in total (comprising a base sum of £3300 and an 'additional payment' of £729.60);

    b. he claims to have had a sequence of ten tenancies (over the course of 12 years) in respect of each of which that deposit was taken and held;

    c. he contends that he has never received the statutorily prescribed information relating to the protection of his deposit; and thus

    d. he seeks the imposition of a statutory penalty of the maximum of three times the deposit (3 x £4029.60 = £12,088.80) arising from each of the ten breaches of the requirements (10 x £12,088.80 = £120,888).

4. Charterhouse resists the claim on the following basis:

    a. the deposit paid was £3300 only;

    b. there were fewer than ten assured shorthold tenancies entered into between the parties;

    c. the deposit was protected and there was no material want of compliance in relation to the provision of the statutorily prescribed information concerning the protection of the deposit;

    d. even if there was some non-compliance, the claim is statute-barred in respect of any non-compliance earlier than six years prior to the date of issue of the claim; and accordingly

    e. the claim should either be dismissed or (if there was some non-compliance) only the most modest statutory 'penalty' should be applied.

5. The trial was conducted over two days. I heard and read the evidence of three witnesses – Mr Lowe (the claimant), Mr Simon Barrs (current Head of Property at Charterhouse) and Mr Stephen Birtwistle (currently Senior Associate Partner at Daniel Watney LLP, letting agent for Charterhouse). The Trial Bundle extended to 348 pages (footnote references are to page numbers from the bundle), with a further Bundle of Authorities and Materials containing some 20 items.

6. The evidence was completed on the first day of trial. The second was occupied by legal argument. I heard Mr Robert Brown for the claimant, and Mr Shomik Datta for the defendant. Each provided a full and helpful skeleton argument and Mr Datta submitted a largely agreed and detailed chronology. I am grateful to counsel for their assistance, which included the agreement of a list of some ten issues for determination by the Court.

The essential facts

7. Charterhouse is a registered charity responsible for several of the historic buildings gathered around Charterhouse Square in central London. While many of the residents are beneficiaries of the charity, some of the other Charterhouse-owned properties on site are privately let on open market terms for residential or business use. One of the latter properties is the residential flat known as 2 Preachers Court, 15 Charterhouse Square (hereafter, 'the flat').

8. In 2009, Daniel Watney LLP were the appointed letting agents responsible for finding a tenant for the flat. Mr Lowe was identified as a prospective tenant. In December 2009, he paid a month's rent in advance and a tenancy deposit of £3300. He and Charterhouse countersigned, on 24 January 2010, a written tenancy agreement[1] for a one-year fixed term, running from 4 January 2010 but "rolling over on a monthly basis at the end of the fixed term."[2] The rent payable was £2384pcm, due on the fourth day of each month.[3] That rent could be increased or decreased on a month's written notice given by the landlord but only after the expiry of the initial term.[4] This can be described as the ***"first tenancy"***.

9. Mr Lowe moved-in during January 2010 and has since occupied the flat as his home.

10. The fixed term expired on 3 January 2011. Mr Lowe remained in occupation on the same terms. It is common ground that, by operation of law,[5] a statutory periodic tenancy arose on 4 January 2011. This may be described as the ***"second tenancy".***

[1] P35
[2] P36 at clause 5
[3] P36 at clause 6
[4] P39 at clause 3.2.1
[5] Housing Act 1988 section 5

11. By a document dated 17 June 2011,[6] described as a "Memorandum" and signed by Mr Lowe, the parties agreed to 'extend' the tenancy to 30 June 2012 at an increased monthly rental of £2600pcm. This may be described as the ***"third tenancy".***

12. That fixed term expired on 30 June 2012. Mr Lowe again remained in occupation on the same terms. Again, it is common ground that, by operation of law, a further statutory periodic tenancy arose on 1 July 2012. This may be described as the ***"fourth tenancy"***.

13. By a further document dated 24 January 2013,[7] again described as a "Memorandum" and signed by Mr Lowe, the parties agreed to 'extend' the tenancy again, this time to 30 November 2013 at an increased monthly rental of £2687pcm. This may be described as the ***"fifth tenancy".***

14. That fixed term expired on 30 November 2013. Mr Lowe again remained in occupation on the same terms. Again, it is common ground that, by operation of law, a further statutory periodic tenancy arose on 1 December 2013. This may be described as the ***"sixth tenancy***".

15. By a yet further document dated 31 July 2014,[8] again described as a "Memorandum" and signed by Mr Lowe, the parties agreed to 'extend' the tenancy again, this time to 31 July 2015 at a continuing monthly rental of £2687pcm. This may be described as the ***"seventh tenancy".***

16. When that fixed term expired on 31 July 2015, Mr Lowe again remained in occupation on the same terms. Again, it is common ground that, by operation of law, a further statutory periodic tenancy arose on 1 August 2015. This may be described as the ***"eighth tenancy".***

17. Although Mr Lowe has remained in occupation up to and including today's date, the parties disagree as to the basis on which he does so.

18. Charterhouse contends that there has been no further express agreement and that Mr Lowe occupies under the continuing statutory periodic (eighth) tenancy.

19. Mr Lowe contends that there was, in fact, an express agreement for a further tenancy for a fixed term expiring on 30 September 2017. This may be described as the ***"ninth tenancy"***. His case is that on expiry of that term, he held over under a statutory periodic tenancy commencing on 1 October 2017, which has continued to date. This would be his ***"tenth tenancy".*** I shall hereafter need to resolve whether there have been ten tenancies or only eight.

[6] P55
[7] P56
[8] P57

20. It is not in dispute that a deposit tendered by Mr Lowe in December 2009 was protected by the agents under the approved Tenancy Deposit Scheme (TDS) in 2010 and that it remains so protected.

21. The present claim was issued on 10 June 2021. If the appropriate limitation period for the claim is 12 years, it covers each alleged non-compliance with tenancy deposit requirements for all of the eight or ten instances of the creation of a tenancy. If it is six years, it covers only any non-compliance which occurred on or after 10 June 2015. The earliest tenancy to which that more limited claim can apply would be the eighth tenancy (which arose on 1 August 2015) and any subsequent tenancies.

22. It is right to record that although the pleaded claim asserted that a penalty was payable for non-compliance with the statutory scheme in relation to all ten of Mr Lowe's alleged tenancies, prior to trial Mr Brown accepted (for reasons explained more fully below) that no liability arose in respect of the first tenancy and that, accordingly, the claim was for a maximum of nine penalties. That concession in turn reduced the number of issues that I was invited to determine from ten to nine.

The statutory provisions

(1) Assured shorthold tenancies

23. The arrangements for assured tenancies, and their sub-set 'assured shorthold tenancies', are set out in the Housing Act 1988.

24. Housing Act 1988, section 1(1) provides that:

> (1) A tenancy under which a dwelling-house is let as a separate dwelling is for the purposes of this Act an assured tenancy if and so long as—
>
> (a) the tenant or, as the case may be, each of the joint tenants is an individual; and
>
> (b) the tenant or, as the case may be, at least one of the joint tenants occupies the dwelling-house as his only or principal home; and
>
> (c) the tenancy is not one which, by virtue of subsection (2) or subsection (6) below, cannot be an assured tenancy.

25. Subsection 1(2) provides that:

> (2) …if and so long as a tenancy falls within any paragraph in Part I of Schedule 1 to this Act, it cannot be an assured tenancy.

26. Part I of Schedule 1 thus contains a number of exceptions from assured status. Paragraph 2 excepts tenancies at a high rent.

27. The provisions of Housing Act 1988 section 1 and Part 1 of Schedule 1 are 'ambulatory'[9] in the sense that a continuing tenancy may move into or out of assured status depending upon whether it falls - at any given time - within or without an exception and upon whether the essential conditions, such as those in section 1(1)(a) and 1(1)(b), are met.

28. The most common form of assured tenancy is the assured shorthold tenancy. Indeed, since 1997, it has been the 'default' form of assured tenancy.

29. Housing Act 1988 section 19A provides that:

> An assured tenancy which—
>
> > (a) is entered into on or after the day on which section 96 of the Housing Act 1996 comes into force (otherwise than pursuant to a contract made before that day), or
> >
> > (b) comes into being by virtue of section 5 above on the coming to an end of an assured tenancy within paragraph (a) above,
>
> is an assured shorthold tenancy unless it falls within any paragraph in Schedule 2A to this Act.

(2) Tenancy Deposit Protection

30. The statutory scheme addressing the protection of tenancy deposits is set out in Housing Act 2004 Part 6. It contains detailed provisions requiring not only the protection of deposits paid by assured shorthold tenants but also the supply to such tenants of prescribed information as to how their deposits have been protected. This judgment will later need to refer to specific parts of the statutory scheme in more detail.

31. For present purposes, it will suffice to set out the terms of Housing Act 2004 section 214 which are relied upon as the basis for a remedy in the present claim (with emphasis added, so as to identify the most presently relevant parts):

> (1) **Where a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, the tenant … 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.

[9] Based on the use in section 1 of the phrase "…if and so long as…"

(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.

32. In the instant case, Mr Lowe contends that there has been a failure to comply with section 213(6) and that his claim is made under section 214(1)(a). As his tenancy is continuing, section 214(2)(a) applies. He contends that this triggers the obligations of the Court as to remedies - as set out in both section 214(3) and, most importantly for the purposes of his claim, section 214(4).

(3) Limitation

33. The Limitation Act 1980 sets limitation periods in relation to a wide range of causes of action. In the context of the instant case, there are two relevant alternatives set out respectively in sections 8 and 9 of the Act:

8.— Time limit for actions on a specialty.

(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

9.— Time limit for actions for sums recoverable by statute.

(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action to which section 10 or 10A of this Act applies.

The Agreed Issues

34. As indicated above, the parties identified some ten agreed issues of fact, or law, or mixed law and fact, requiring determination by the Court. I shall address each of them but in a modified sequence to that in which they were put forward. Agreed Issue 2 no longer requires consideration (see paragraph 22 above).

Are any parts of the Claimant's claim statute-barred under Limitation Act 1980? (Issue 7)

35. This issue raises a pure question of law. The first step, in determining it, is to identify the nature of the claim.

36. The claim is not one brought in contract or tort. As described in the Claim Form, it is a claim for "statutory penalties pursuant to section 214(4) of the Housing Act 2004".[10] The terminology used in the Particulars of Claim is that the Claimant has an entitlement to "the statutory penalties provided for by section 214(4)".[11] In the words used by Mr Lowe in his own witness statement, it is a "claim for damages as set out in the claim form and particulars of claim." [12]

37. It is common ground therefore that this is a statutory claim. It is also common ground that: (a) such a claim is, for the purposes of the Limitation Act 1980, an "action upon a specialty"; [13] and (b) that an "action" includes court proceedings.[14] It follows that, by operation of section 8 (set out above), the limitation period is 12 years unless section 9 applies, in which case it is six years.

38. Section 9 applies to "an action to recover any sum recoverable by virtue of any enactment". At first blush, that wording would appear to cover the instant case. That is because - by his claim - Mr Lowe seeks to "recover" the sums payable under section 214(4). But there is no appellate authority in the higher courts as to whether a claim under that subsection is caught by section 9.[15]

39. Mr Brown submits that section 8 applies, and the limitation period is 12 years. His case is that the claim here does not fall within the wording of section 9. He contends that, in order to be able to "recover" a sum of money within section 9, a claimant must first have paid it out. To put that another way, a claim to "recover" money is a claim for repayment of monies paid. If, as in the instant case, what is sought is money that has never been paid, there can be no recovery. Although the Claimant seeks to establish, by reliance on statute, an entitlement to a sum to be paid to him, it is an

[10] P5
[11] P11
[12] P24 at para [1]
[13] *Collins v Duke of Westminster* [1985] 1 QB 581
[14] Limitation Act 1980 section 38(1)
[15] I note that on an appeal in *Howard v Dalton* [2019] July/August Legal Action 44, HHJ Simpkiss held that section 9 did apply and created a six-year limitation period for the purposes of claims under section 214(4). There does not appear to have been a further or second appeal in that case.

entitlement to money he has never previously had. He will not be recovering anything. He will be being awarded something for the first time. The *Collins English Dictionary* has as a meaning for the verb 'recover': "If you recover money that you have spent, invested, or lent to someone, you get the same amount back." The *Cambridge Dictionary* has: "To recover something is to find or get back the use of something lost or taken away."

40. Mr Brown took me to the consumer credit cases of *Rahman v Sterling Credit;*[16] *Nolan v Wright;*[17] and *Bhattacharya v Oaksix Holdings Ltd*.[18] They, he submitted, were proper instances of recovery. The borrowers were relying, or could rely, on statutory provisions to recover, inter alia, repayments they had made to their lenders. They were true instances of actions to "recover" sums recoverable by virtue of an enactment and the judgments in those cases used the language of "repayment".[19]

41. Mr Brown recognised that the statutory remedies in Housing Act 2004 section 214 included provision for recovery of an earlier paid deposit i.e., a circumstance of true "repayment" (see section 214(3)(a)). That would carry a limitation period of only six years. Mr Brown therefore accepted that, on his construction of the provisions, there would unhappily be different limitation periods in respect of (i) the recovery of a sum paid and (ii) the obtaining of a penalty, even in respect of the same deposit. But that, he submitted, would not be the only instance of different limitation periods within section 214. He drew attention to section 214(5) – which makes provision for recovery of any property *other than money* given as a deposit. That was an instance of a claim under section 214 which would have a 12-year limitation period under section 8 because it would not be a claim for a "sum".

42. For all these reasons, Mr Brown sought a finding that this was not a section 9 case, but a section 8 case and the limitation period was 12 years.

43. As attractively as these submissions were advanced, I am unable to accept them.

44. First, they appear to me to run contrary to the wide meaning given to "recover" and "recoverable" by the terms of the Limitation Act itself. That Act clearly treats recovery as including the obtaining of money not previously paid out by a claimant to a defendant.

45. For instance, section 10 addresses recovery of a contribution by A from B towards what A may *in future* (at least in some cases) be required to pay C or may in the past have paid to C. By way of further example, the interpretation section in the 1980 Act, section 38, speaks of actions to "recover" arrears of interest (or damages in respect of arrears of interest) which plainly are not sums which have already been paid.[20] Section 38(11)

[16] [2001] 1 WLR 496
[17] [2009] EWHC 305 (Ch)
[18] [2021] EWHC 1326 (Ch).
[19] For example, Mummery LJ in *Rahman* at p502D-E, HHJ Hodge QC in *Nolan* at [14] and Deputy Master Linwood quoted in *Oaksix* at sub-para 14 of [6].
[20] Section 38(10)(b)

also refers to three specific statutes relating to benefits, credits, and contributions where "recovery" and "recoverable" would embrace obtaining monies the claimant has not previously had.

46. Second, Mr Brown's arguments are inconsistent with established authority and learned commentary. Mr Datta took me to the decisions in *Re: Farmizer*[21] and *Rowan Companies v Lambert Eggink* [22]and to the commentary in *McGee on Limitation Periods*.[23] In *Farmizer,* the claim was against company directors for recovery of statutory compensation for wrongful trading. By definition, that was not an action for recovery of sums that the claimant had earlier paid-out, but nevertheless section 9 of the Limitation Act was applied. Similarly, in *Rowan,* David Steel J set out his first impression of the reach of sections 8 and 9 as being that "the relevant distinction would seem to be between claims under an enactment for non-monetary relief and those claims under an enactment for monetary relief whether in the form of debt, damages, compensation or otherwise". (Emphasis added). That impression was, as the authorities examined by that judge demonstrated, the correct one. 'Recovery' and 'recoverable' are thus words that can as easily apply to obtaining a statutory remedy of damages (whether liquidated or unliquidated) as to securing repayment of a sum already paid. The discussion in *McGee on Limitation Periods* at 11.003 to 11.006 certainly supports this broader approach to the reach of section 9.

47. I consider this to be the right analysis of the provisions of the 1980 Act. Indeed, I take judicial notice of the fact that there are many examples of legislation providing for payment of penalties, awards, contributions, and compensation, even in circumstances where the claimant for those sums has made no relevant prior payment at all. Even within the field of residential property law, there are the examples of statutory compensation for compulsory acquisition and of statutory home loss payments. Unless claims to recover those sums are subject to their own statutory limitation provisions, I would expect them to be subject to the section 9 limitation period.

48. Mr Brown tentatively advanced a wholly alternative argument; that breach of the tenancy deposit protection provisions was an 'ongoing' or 'continuing' breach so that any limitation period was not triggered until compliance. The argument had been foreshadowed in pre-action correspondence.[24]

49. Here the alleged breaches relate to what might be described as the requirements as to provision of documents: Housing Act 2004 section 213(6). That section itself contains a window of opportunity for compliance. In my judgment, once the time window expires, there is a breach of the provisions. It is from that moment that the limitation period begins to tick away.

[21] [1997] BCC 655 (CA)
[22] [1999] CLC 1461 (HC)
[23] (9th Edition) at 11.003 to 11.006
[24] P337

50. In fairness to Mr Brown, that was the approach adopted in his own skeleton argument. In offering an example of how and when breach should be treated as occurring on the facts of the present case, he wrote:[25]

> For Tenancy 8, the tenancy commenced on 1 August 2015, which is the deemed date of payment for the deposit. D would have had 30 days at that time to comply with the deposit requirements, so there could be no cause of action prior to 31 August 2015.

51. Accordingly, I hold that a claim for the award of a sum by way of statutory penalty under Housing Act 2004 section 214(4) is "an action to recover any sum recoverable by virtue of any enactment", despite the fact that a claimant seeks to recover by it a sum of monies not previously in their hands.

52. Charterhouse pleads limitation by way of its Defence.[26] It has successfully established that the Limitation Act 1980 section 9 creates a limitation period of six years in this case. It follows that nothing is recoverable in this claim in respect of any default capable of triggering liability to a penalty which arose earlier than 10 June 2015.

53. The first such alleged default would be the one alleged to have occurred on 31 August 2015 in relation to the eighth tenancy. If the eighth tenancy is the most recent and (it contends) the current one, there can only have been a single breach. In those circumstances, at its highest, Mr Lowe has a claim for a penalty of 3 x £4026.60 =£12,079.80. If there were in fact two further tenancies, the ninth and tenth, Mr Lowe has a claim for a penalty of 9 x £4026.60 = £36,239.40.

54. Accordingly, success for Charterhouse on the limitation point has reduced the value of the claim, taken at its highest, by more than two thirds. But it remains for me to determine: (a) the dispute as to the amount of the deposit; (b) the dispute as to whether there were eight or ten tenancies; and (c) whether there was non-compliance with the statutory provisions. It is to the agreed issues relating to those matters that this judgment now turns.

Was the alleged Additional Payment of £729.60 a 'tenancy deposit' within the meaning of Housing Act 2004, s.212(8)? (Issue 1)

55. This is largely a question of fact.

56. Housing Act 2004 section 212(8) contains the statutory definition of what constitutes a 'tenancy deposit' for the purposes of the Act. It provides:

> 'tenancy deposit', in relation to a shorthold tenancy, means any money intended to be held (by the landlord or otherwise) as security for–
>
> (a) the performance of any obligations of the tenant, or
>
> (b) the discharge of any liability of his,
>
> arising under or in connection with the tenancy."

[25] At para [83]

[26] P20 para [11(a)]

57. In the present case, it is common ground that: (1) a deposit was initially envisaged to be paid on, or prior to, the commencement of the term of the first tenancy; and (2) the sum of £3,300 was expressed in the first tenancy agreement as being the amount of the deposit required by that agreement.[27]

58. It is the sum of £3,300 that was subsequently protected. On Charterhouse's case, it is the only deposit taken or paid. It seems that payment was made on or about 22 December 2009. As the first tenancy agreement records,[28] a sum by way of a month's rent in advance was also paid on that day.

59. The assertion that a further sum of £729.60 also came to be held by way of additional tenancy deposit is pleaded in the particulars of claim[29] and supported by the witness statement of Mr Lowe.

60. His case is that such a situation arose in this way. Despite the term commencing on 4 January 2010, and despite him having paid, in advance, the whole of the rent due for the month of January, he was not in fact let into possession until 24 January 2010, some three weeks after the start of the term. He had therefore paid for what he had not received i.e., he had overpaid.

61. Charterhouse accepts that the rent was paid in advance for the whole of January 2010 but, as the tenancy agreement of 24 January 2010 records,[30] Mr Lowe was not granted possession until 11 January 2010 and did not take up physical occupation until 17 January 2010. It further accepts that, in principle, he was entitled to some discount or rebate of rent as a result of this delay. That is accordingly described in the Defence as an instance of '*de facto* overpayment'.[31] Indeed, the Particulars of Claim themselves describe Charterhouse as having 'accepted that an overpayment of rent had been made'.[32]

62. The dispute is as to how the overpaid money was thereafter treated by the parties. This was an overpayment that, on the face of it, Charterhouse was due to reimburse. But Mr Lowe was not immediately reimbursed.[33] Instead, Charterhouse (or its agent) retained the monies for several years.

63. Mr Lowe's case is that this money was held by Charterhouse as "further security" for compliance with his obligations as tenant. The sum so 'held' was £729.60. By dint thereof, it became a further or additional deposit bringing the total deposit paid up to £4,029.60. The Defence expressly denied that assertion.[34]

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[27] P36, clause 7
[28] P36, clause 6
[29] P9 paragraphs [3] and [4]
[30] P40 clause 4.1
[31] P13 para 3
[32] P9 para 3
[33] Many years later, a credit note was issued for the £729.60. The sum was initially applied to the rent account. But later a debit in that same sum was applied to the rent account and instead the amount was transferred directly into Mr Lowe's bank account on 10 May 2019.
[34] P14 para 4

64. Mr Lowe's pleaded case contained no reference to any *agreement* between the parties that the overpaid rent should be treated in the way alleged; whether, in 2010 or later. But in his witness statement (made in July 2022), Mr Lowe - having first stated that the sum was 'simply retained' by Charterhouse - went on to allege an oral agreement made between himself and the agents (Daniel Watney) that the sum would be used "for the discharge of any liability arising under or in connection with my tenancy by way of additional deposit."[35]

65. The statement did not identify the individual at Daniel Watney with whom this agreement had been reached, how (whether at a meeting, by phone or in correspondence), or when (beyond "at the time"). When asked, in the course of his oral evidence to recount what had been said, Mr Lowe recalled speaking to one "Adam" about the reimbursement of a sum as a result of the delayed tenancy commencement and his being promised payment at the end of the month. When that was not received, he chased the following month and was not repaid. But then the sum was "agreed to be held by way of deposit."

66. There is, accordingly, no dispute that when it was paid over to Charterhouse (or their agents) this was not a sum '*intended to be held'* (using the language of the statute) as security. It was simply part of a payment of rent in advance. Thus, when paid, it could not have been any form of tenancy deposit. That point is settled by authority.[36]

67. To the extent that Mr Datta contended that this was determinative of the issue, I disagree. There is no reason why A, having paid monies to B for purpose X, cannot later agree with B that part or all of the monies paid to B for purpose X shall be retained by B for purpose Y. That sum would thereafter fall within the definition of a tenancy deposit if retained for the purpose described in section 212(8).

68. So, the question is simply whether, on the balance of probabilities, Mr Lowe has satisfied me that it was agreed by Charterhouse or its agent that £729.60 was to be retained as security for his obligations.

69. Mr Brown invited me to accept Mr Lowe's oral and written evidence in the absence of any live evidence from Charterhouse or its agents in contradiction of it.

70. This provides my opportunity to give my assessment of Mr Lowe's evidence. I regret that I found him a most unsatisfactory witness. He was dogmatic and inappropriately verbose. He was combative and argumentative in answering questions, being inclined to try and make a point or advance his case at every turn. That did not improve, despite encouragement from the Court that he restrain himself. He was wholly inflexible. In my assessment he has become so absorbed or obsessed by his disputes with his landlord (in this and other tribunals), that he had lost all ability to exercise judgment, insight, objectivity, or flexibility. While I accept that he genuinely believed in the correctness of what he was saying and what he had written (to the extent that he plainly treated his account as the only possible truthful account), and that he was not seeking deliberately

[35] P25 at 5

[36] *Johnson v Old* [2013] HLR 26 (CA) in which the Court of Appeal upheld the order of HHJ Simpkiss, who was later to make a finding to like effect in *Howard v Dalton* [2019] July/August Legal Action 44

to mislead the Court, I considered that I should approach his evidence with a good deal of caution and circumspection.

71. I record that when, towards the end of his cross examination, he was asked why he had not banked a cheque[37] (tendered in the sum of £3,300 and intended to re-imburse his deposit) he told me in answer that he banked with an on-line bank and did not know how to *conveniently* deposit cheques with them. This was consistent with his witness statement which explained that his bank did not have a counter service so that "processing of cheques is then tedious".[38] His evidence was at best disingenuous. Mr Lowe is an experienced professional man working in the financial arena and who has significant IT skills (as shown by his ability, as early as 2016, to track-change documents and work on PDFs). I simply did not accept his account that using a banking app[39] or finding out from the bank how to deposit a cheque, was beyond his ability to do without inconvenience. He did not bank the cheque because it served him not to do so. But he did not have the candour to admit that fact.

72. Likewise, his inability to give a straight answer to why he had not provided his banking details to the agents so that the deposit could be returned by direct transfer. To put it bluntly, Mr Lowe was not being candid with the court. He will lack the insight to even accept that proposition. In the result, I felt confident in accepting his evidence only when it was corroborated by others or consistent with the contemporaneous documentation. These assessments of his credibility are, of course, of material importance in resolving other disputed points of fact in this case.

73. Returning to the issue of the 'additional payment' and having considered all the evidence placed before the Court, I am not satisfied that Mr Lowe has made out the alleged agreement relied upon by him, even on the balance of probabilities.

74. First, the contemporaneous document, the agreement for the first tenancy, identifies only one sum by way of deposit (£3,300) and it is agreed that that sum was paid. There is nothing by way of variation recorded in any document to acknowledge a further deposit. No opportunity was taken to vary the agreement or record its modification as to deposits on any of the three occasions upon which the tenancy was expressly 'extended' by written memoranda. That is telling because those memoranda did reflect variation in a monetary payment – the rent.

75. Second, the making of such an agreement (for retention of an additional deposit) is inherently unlikely. Charterhouse and its agents already had security in the significant sum – in 2010 - of £3,300 (well over a month's rent). What purpose would be served by agreeing either (1) a modest but then then unquantified sum equivalent to a few days rent or (2) later, the specific sum of £729.60, by way of additional deposit?

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[37] P279

[38] P33 at [39]

[39] I record that, on seeing the draft of this judgment, Mr Brown informed me that - after the evidence had been given - solicitors for the Claimant had written to the solicitors for the Defendant that a cheque of greater than £500 could not be deposited through the app. Given that Mr Lowe's oral evidence was that he "had no idea" he could deposit cheques by use of the app, I consider this correspondence (which I have not seen) immaterial.

76. Third, Mr Lowe's evidence as to the agreement itself was vague and unconvincing. The agreement had not been pleaded. The witness statement was, to say the least, light on specifics and Mr Lowe's oral evidence was no better. The language his statement used as to what had been agreed was a straight lift from the words of the statute. I do not accept that any such rubric was used in discussion between the parties.

77. Fourth, the figure of £729.60 is an entirely *ex post facto* and incorrectly calculated sum. It was calculated by Mr Lowe himself[40] as the product of reducing a monthly rent of £2774 into a daily rate and multiplying it by eight to represent eight days delay in providing possession at the outset. One might presume that to cover the eight days of 4 to 11 January 2010 inclusive, as stated in the first tenancy agreement itself.[41]

78. But this calculation bristles with difficulty. For example, Mr Lowe was dogmatic in his oral evidence that, despite what the tenancy agreement said and despite him using a multiplier of eight days in 2016, he had in fact been kept out of possession for many more than eight days. Further, he stated that what was originally agreed for him to receive as recompense for that delay was the cost of alternative accommodation that he needed as a result of it. If either of these assertions were right, the amount "agreed" for retention by way of deposit would have been significantly higher. But more importantly, if there were eight days lost in January 2010, that should have produced a sum of eight days' worth of the initial monthly rent in 2010 (i.e., £2384pcm). That would, by my calculation, have been £627.04 not £729.60. It is thus inconceivable that in 2010 anyone at Charterhouse's agents agreed to that latter sum being retained as security.

79. Fifth, when the issue (of abatement for delayed initial entry into possession in January 2010) was raised in exchanges about a new tenancy agreement, many years later in early 2016, Mr Lowe made no reference in his correspondence to any 'additional deposit' existing as at that date. Indeed, he spoke in February 2016 to the Bursar of Charterhouse about the 'overpaid rent'[42] and a month later agreed that the sum (that I am satisfied *he* had referred to in that conversation) should be settled in cash and paid directly into his bank account.[43] If, as is now his case, there was a prior agreement that this sum was to be retained as a security for his obligations as a tenant, he was reneging on that agreement.

80. I do not believe that that is what he was doing because I am not satisfied that there was any such prior agreement as alleged. In oral evidence, Mr Lowe suggested that he had not mentioned overpaid rent to the Bursar but only the 'additional deposit'. It was the Bursar who had raised the prospect of early repayment of that, and they had reached agreement to that effect. That account is inconsistent with the Bursar's reference to "the rent issue" in his email following-up the discussion[44] and with his agreement to "accept" Mr Lowe's proposals. There is no pleading as to any such agreement as that now suggested (agreement with the Bursar of the refund of the earlier agreed 'additional

[40] Email of 21 March 2016 at 17.36 at P144
[41] P40 clause 4.1
[42] The Bursar's email of 15 February 2016 at P145 refers.
[43] P144
[44] P47

payment' by repayment or credit to the rent account) and no reference to such agreement in Mr Lowe's statement.

81. Sixth, when Mr Lowe came to make detailed commentary in 2016 on the draft agreement sent to him by the agents, he made no reference to any "additional deposit". The sum he himself inserted in the draft for the 'deposit' was £3,300. Despite being otherwise meticulous in his comments, he did not add words to the effect "the parties have now agreed that the earlier-agreed additional deposit of £729.60 will no longer be held as a deposit but will be refunded by credit to the rent account or by cash payment".

82. In summary, the Claimant has fallen well short of establishing any agreement that any sum of advance rent already paid should be treated by the parties, going forward, as additional security. I find as a fact that the only sum ever paid that could constitute a tenancy deposit in this case (i.e., for the purposes of section 212(8)) was £3,300.

83. I can now move to the remaining issues.

84. The first attempt to comply with the tenancy deposit provisions in respect of the sum of £3,300 was made in September 2010. The next two issues require me to determine whether it was successful.

Was a letter dated 28 September 2010, with enclosures, given to the Claimant? (Issue 3)

85. It is now common ground that the tenancy for a term commencing on 4 January 2010, entered into by the present parties, was <u>not</u> an assured tenancy when it was granted.

86. That is because the rent was £2,384pcm equivalent to £28,608pa. As at January 2010, Housing Act 1988 Schedule 1 paragraph 2 provided that a tenancy could not be assured if the rent exceeded £25,000 per annum. As the rent did exceed that threshold, the tenancy was not assured. In consequence, it was not an assured shorthold tenancy either. Accordingly, the tenancy deposit protection provisions in Housing Act 2004 did not apply at all.

87. However, with effect from 1 October 2010, the rent limit in the Schedule was raised to £100,000 per annum by the Assured Tenancies (Amendment) (England) Order 2010 (SI No 908). The tenancy between these parties which had commenced on 4 January 2010 automatically became an assured tenancy on that date. No action was required on the part of either party to achieve that effect or acknowledge that change. It just happened as a result of the 'ambulatory' effect of the statutory provisions (as described at paragraph 27 above).

88. The first tenancy of the flat therefore became an assured shorthold with effect from 1 October 2010. Despite increases in the rent subsequently, the £100,000pa threshold has not been exceeded so that each subsequent tenancy has also been an assured shorthold tenancy.

89. The evidence of Mr Birtwistle was that he had been employed by the letting agents, Daniel Watney, for over 20 years and was in their employ in the autumn of 2010 when

this uplift in the rent-related threshold took effect. It meant that certain deposits previously taken and held by his agency would potentially require protection. Down to this change occurring, the £3,300 deposit paid in this case had simply been held by the agents in their client account.

90. Mr Birtwistle was, for the purposes of this case, being required to recall and recount events which occurred in the autumn of 2010 (12 years ago). My assessment of his written and oral evidence is that I can confidently place reliance on it. His oral and written evidence was both measured and non-partisan. He was an experienced property professional who conducted himself in a considered and sensible way. Where it was appropriate to make concessions or agree points put to him, he did so. He dealt with questions with candour and openness.

91. His written evidence was that although UK Government guidance had been to the effect that landlords did not immediately need to protect the deposits to be brought into scope by the statutory change coming into effect from 1 October 2010, his agency had decided to 'err on the side of caution' and protect such deposits anyway.[45] Accordingly, on 7 September 2010, the £3,300 deposit held by the agents in the instant case was registered with the Tenancy Deposit Scheme.[46] The deposit remained with the agents but was protected by registration with TDS.

92. Steps were then taken to draw the change to the attention of newly assured shorthold tenants such as Mr Lowe and to comply with the prospective obligations attaching to statutory protection of deposits, including the provision of prescribed information.

93. Mr Birtwistle told me that he had been the person undertaking this task for his agency. He had to deal with a modest number of tenants whose tenancies had become assured shortholds. He had prepared a standard letter (each then separately personalised) which he typed himself on a word processor and which he used to notify the relevant tenants. He could not recall exactly how many letters he had sent to different tenants based on the same template.

94. His evidence was that one of those letters that he prepared was written to, and addressed to, Mr Lowe and was dated 28 September 2010.[47] He explained that a paper copy of it had been kept in a file relating to the particular property. He exhibited a copy of that to his witness statement and I annex it to this judgment to enable its terms to be seen in full.

95. The letter referenced three enclosures: (1) the certificate of registration with TDS; (2) a leaflet entitled *What is the Tenancy Deposit Scheme*; and (3) a document headed "*A. Prescribed Information*". The latter was in pro-forma template style and had been populated in typescript with entries which included Mr Lowe's name, address, Email address, and mobile phone number. It concluded with spaces for signature by both the tenant and the landlord (or its agent). The covering letter invited signature of that enclosure and its return. Mr Birtwistle accepted that it was not returned signed by Mr

[45] P189 para 7
[46] P207
[47] P206

Lowe. Nor had it been signed by him (Mr Birtwistle) nor by or on behalf of his agency nor the landlord, as he also accepted.

96. Mr Birtwistle did not suggest that he had personally put the letters or their enclosures in envelopes, stamped or franked them, or put them in the post. He had passed them to admin staff in the agency to deal with those aspects. To the best of his understanding, the letters, including that addressed to Mr Lowe, had been posted-out as first-class franked mail and nothing in the agency's records suggested it had been returned as undeliverable or undelivered.

97. Of course, a landlord or its agent cannot make good compliance with the statutory requirements in relation to deposits by simply showing that something was 'sent' or even that it was 'posted'. The words used by the statute are that the relevant material must be "given to the tenant".[48] The person asserting compliance with that requirement must make it good on the balance of probabilities. It is for Charterhouse or its agent to satisfy me that it 'gave' the material to Mr Lowe.

98. To protect themselves against difficulties over disputed receipt of materials by tenants, some landlords include express terms in their tenancy agreements whereby documents sent by the landlord by particular means will be deemed to have been "given". Such a provision was included in the first tenancy agreement[49] in this case but that required use of registered post or recorded delivery post and it is no part of the defence case here that such a method was used. So, there is no deeming. I must be satisfied - on the evidence - that Mr Lowe was "given" the letter and its enclosures in order to get to the starting point of the landlord's satisfaction of the statutory requirements.

99. Mr Lowe's evidence was to the effect that he had not received the September 2010 letter at all and that he had first seen a copy of it in disclosure of documents in other earlier proceedings between these parties. Indeed, he disclaimed any knowledge on his part, until 2015 or 2016, that his tenancy was of a type that required protection of the deposit. In his oral evidence, he said that he had been told about this by Charlotte Holdsworth at Daniel Watney, in the course of the discussions about the terms of a new tenancy in 2015/16, and it was the first he had known of it. His witness statement indicated that he had no 'recall'[50] of receiving the TDS certificate and the other tenancy deposit information. When put to him that he had received it but simply forgotten, Mr Lowe was adamant that he had only found out about the alleged September 2010 letter (and its enclosures) much later. He said: "I didn't get it".

100. Mr Datta invited me to accept Mr Birtwistle's evidence and find that the letter and enclosures were posted. Mr Brown submitted that I could not be confident of Mr Birtwistle's recall of events more than a decade ago, that the relevant part of his witness statement contained a good deal less detail than what he said in oral evidence, and that what he described in his evidence as the agent's standard practice in relation to handling and postage of documents was – as he accepted - a description of standard practice now, not of standard practice in 2010.

[48] Housing Act 2004 s213(5),
[49] P38 clause 3.1.1
[50] P26 para 10.

101. I have carefully considered the evidence of Mr Birtwistle and the criticisms of it advanced by Mr Brown. The witness's account is consistent with the existence of the unsigned copy letter retrieved from the agent's file. I am satisfied that the original was created by Mr Birtwistle in 2010. What was the purpose of preparing it and ensuring a copy was retained if it was not then to be despatched? There is nothing to suggest it was not despatched. It would have been unusual, or out of the norm, if it had not been. I remind myself that the agency was at this point deliberately choosing to 'go the extra mile' and generate material for tenants that even the government did not consider was then required. That context, and all the other factors, satisfy me that it was despatched.

102. But that cannot get the landlord home. As explained above, the requirement is that the notice was "given" i.e., received, or deemed to have been received.

103. To make good that potential shortfall, Mr Datta relied on the provisions of the Interpretation Act 1978 section 7. It states:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

104. In my judgment, that provision cannot avail Charterhouse here. Not because, as Mr Brown submits, it cannot be shown that the documentation was properly addressed, pre-paid and posted (because I am satisfied, on the balance of probabilities, that it was). Rather, the difficultly for Mr Datta with section 7 is that it is only triggered where a statute "authorises or requires" a document to be served by post (which includes an authorisation or requirement to "give" a document by post).

105. Mr Brown was correct to submit that nothing in the relevant provisions of Housing Act 2004 makes any reference to posting or authorises or requires service (or 'giving') by post. Accordingly, section 7 simply cannot operate here. Mr Brown was also correct to submit that because the September 2010 material was being tendered in advance of any (at that time) current application of the statutory provisions in the 2004 Act, nothing in that Act could have authorised or required its giving. As indicated above, the agents were going beyond what any statutory scheme then required.

106. In short, any benefit Mr Datta may have obtained from section 7 in a different case is not open to him in this case. He can only succeed on this agreed issue in this case if the Court is satisfied that the letter and enclosures were given to Mr Lowe in the sense that they came into his possession.

107. It is a strong thing, in a case in which A asserts something was posted to B and B contends that he did not receive it, to find that a Court is satisfied that in fact the documentation was received. But in the instant case I <u>am</u> so satisfied.

108. As I have indicated above, I did not feel able to treat Mr Lowe (for these purposes, the recipient) as a reliable witness. He moved position from not being able to 'recall' whether he received the documentation to giving oral evidence to the effect that he was 'sure' he did not.

109. I take judicial notice of the fact that most post delivered to the postal service is subsequently delivered to the addressee.

110. In his oral evidence, Mr Lowe invited me to accept that he had known nothing about tenancy deposit protection matters, or the protection of his own deposit, until 2015/16. I regret to state that I did not believe him. I am prepared to accept that he and Charlotte (of the agents) did say something to one another about tenancy deposits in 2015/16 but I am also satisfied that if he had not by that date had what purported to be the required information relating to tenancy deposit protection he would have insisted on its provision.

111. It is clear from his own comments marked on the draft tenancy agreement circulating in 2015/2016 that he knew that his tenancy deposit had been registered and he had accessed on-line material about such deposits (see his Comment ML30).[51] Given his reference to other documentation having not been supplied (as in Comment ML21),[52] I am amply satisfied that, unless he believed he already had the requisite material, he would have demanded it. But more than this, his own account of obtaining this knowledge in 2015/16 is flat contrary to his witness statement in which he states that he first knew of the protection of his deposit in 2019.[53]

112. Accordingly, my finding on this issue is that the letter dated 28 September 2010, with enclosures, was given to the Claimant.

If so, did that letter and enclosures give the Claimant the necessary prescribed information in accordance with the Housing (Tenancy Deposits) (Prescribed Information) Order 2007, or in a form substantially to the same effect in accordance with Housing Act 2004, s.213(6)? (Issue 4)

113. There is first a sub-issue as to what precisely were the 'enclosures' delivered with the letter of 28 September 2010. Mr Brown submits that even if the Court is satisfied that the letter and some enclosures were received, it cannot be satisfied that the booklet describing the TDS scheme (and containing much of the material a landlord is statutorily obliged to give to the tenant) was actually enclosed. That is because, as Mr Birtwistle accepted in evidence, no copy was retained in the agent's paper file relating to the flat.

114. Mr Birtwistle explained that where standard leaflets or other similar non-tenant-specific documents were sent out as enclosures, physical hard copies were not kept on file. That was to avoid the filing arrangements becoming overloaded by the retention of the same document in multiples files. Instead, when copies of such documents were later needed, they were downloaded from the internet. That was particularly so in relation to TDS documents because its website maintained an accessible archive of earlier versions of its current documents.

[51] P168
[52] P165
[53] P30 para 25

115. To my mind, this amply explained why the 'copy booklet' had not been disclosed from the agent's hard copy files and why no copy had been provided from those files to Mr Lowe in response to a GDPR request. The version provided in the Trial Bundle[54] had been sourced by Mr Birtwistle by the means already described.

116. There is nothing in the proposition that the booklet was not enclosed with the 2010 letter. It was a specifically referenced enclosure in the letter. What possible reason could there have been for not, in fact, enclosing it? Mr Birtwistle was clear that his letter had gone for despatch with the enclosures he had intended. I have already accepted his relevant evidence.

117. The issue then becomes whether the enclosures that I am satisfied were enclosed, individually or taken together, satisfied the obligations on a landlord as to the giving of the requisite information to the tenant. Mr Lowe's pleaded case relies on four alleged wants of compliance.[55]

118. First, it is asserted that there was no compliance with the statutory obligations in relation to the additional deposit of £729.60. For the reasons given above, I am not satisfied that there was any such additional deposit.

119. Second, it is said that Mr Lowe was not provided with any of the material information at all in relation to the deposit of £3,300. For the reasons given above, I am satisfied that he was given the letter of 20 September 2010 and its enclosures.

120. Third, it is contended that the tenant was not provided with the booklet *What is the Tenancy Deposit Scheme?* which was required in order to supply much of the prescribed information. For the reasons given above, I am satisfied that that booklet was provided.

121. Fourthly and finally, it is said that Charterhouse and its agent failed to give a *signed* certification in respect of the prescribed particulars. As I have already indicated, it is accepted that there is no signed certificate although there is an unsigned certificate that I am satisfied was enclosed with the letter of 20 September 2010.

122. This is made relevant by the terms of the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI No 797). That Order sets out what is prescribed information for the purposes of section 213(5) of the 2004 Act. At Article 2(1)(g)(vii) it describes the following as being required:

> (vii) confirmation (in the form of a certificate **signed by the landlord**) that—
>
> > (aa) the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and
> >
> > (bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.

[54] P211

[55] P10 para 7

123. For the reasons already given, I am satisfied that sub-sub-article (bb) was met by the provision to Mr Lowe in September 2010 of the enclosure "*A. Prescribed Information*" with the invitation by covering letter that he signs and return it.

124. The real difficulty is with the alleged want of compliance with the opening words of sub-article (g) and sub-sub-article (aa). There is no suggestion that Charterhouse, the landlord, signed the certificate. There is no suggestion that the agent for Charterhouse signed it, even if Article 2(3) enabled valid signature by the agent on behalf of the landlord.

125. Faced with that difficulty, Mr Datta invites me to take a constructive approach. He draws attention to Housing Act 2004 section 213(5)(a) which provides that the prescribed information must be given "in the prescribed form *or in a form to substantially the same effect*". He invites me to find that, in a case in which all the requisite prescribed information has been provided as an attachment under cover of a letter which gives the name of the individual staff member of the landlord's agent sending it, and contains space for their signature, one can: (1) assume that the covering letter itself was signed; and (2) treat that signature as extending, in effect, into the space requiring a signature on the enclosure. In that sense, what Mr Lowe had, he submits, was substantially to the same effect as that which the prescribed form requires.

126. In contrast, Mr Brown invites my attention to the precise terms of the statutory scheme. They require a signature. This is not, he submits, a case like *Northwood Solihull Ltd v Fearn*.[56] There the issue was about the adequacy of a particular signature. Here, there is no signature on the document at all. The landlord has failed to meet the statutory requirements. A certificate without a signature cannot be substantially to the same effect as one that has been signed. And a signature is required. Accordingly, he invites me to find against the landlord on this issue

127. The submissions of both parties were well argued - and are well arguable - but I prefer those of Mr Datta on this point.

128. First, on the certificate in the instant case, the first of the signatures intended to appear is that of the tenant. I have found that the unsigned certificate was supplied to the tenant to sign under cover of a letter inviting signature and return. As a matter of logic, one would expect that the next signature, that of the landlord, would then be entered, on return, after receipt from the tenant of the form signed by him. Here the form was received by the tenant (as I have held) but not returned. So, it is by the tenant's failure, not the landlord's, that there is no version which bears the landlord's signature.

129. Second, and more importantly, here the recipient knew who had sent him the document, who had signed the covering letter, and that the covering letter asserted that what was enclosed was *"The 'Prescribed Information' as required under the legislation".* The statutory objective had been achieved. The prescribed information had been given by the landlord's agent as a specified enclosure to a document signed

[56] [2022] EWCA Civ 40; [2022] 1 WLR 1661

by an identified individual member of staff of the agent. The certificate and booklet gave the tenant all the information the statute required. It fulfilled the statutory purpose.

130. In my judgment, this is either satisfaction of the statutory requirements by the route of the form of certificate being "substantially to the same effect" as that required or it is saved by the application of a sensible, purposive, and constructive approach to the interpretation of these prescriptive statutory requirements, such as exemplified by this passage from *Fearn* at [66] to [68] with emphasis added:

> [66] In so far as there is a requirement of signature by the landlord, it is not to be found in the primary legislation. It is introduced into the 2007 Order as a parenthesis and without any explicit mandatory language.
>
> [67] That Parliament did not consider that authentication by an agent was fatal to the validity of a certificate is, to my mind, clearly shown both by section 212 (9) of the Housing Act 2004 and also by the intention behind the amendments introduced by the Deregulation Act 2015. The certificate in fact gave the tenants all the information that was required to be given to them. Thus, the requirement to give the tenant "the prescribed information" was fully and precisely complied with. It is not suggested that any of the information was inaccurate. That information was authenticated on behalf of the landlord by someone authorised to do so. If an authorised and authenticated certificate, containing all the right information, is given to the tenant, I cannot see that any harm has been done. I would hold that even if the certificate did not strictly comply with the requirements about authentication by the landlord, it was still valid.
>
> [68] Any other outcome would, in the words of Males LJ, be "contrary to … common sense", whether commercial or otherwise.

131. It is right to record that Mr Brown took an additional point that there had been a different and distinct want of compliance. This further point was no part of Mr Lowe's pleaded case. However, the point was argued fully, Mr Datta was able to deal with it, and I shall entertain it.

132. Want of compliance with article 2(1)(g)(vi) of the 2017 Order is the new allegation. By that provision, the prescribed information must include "…the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy".

133. In the instant case, the enclosure "*A. Prescribed information*" is said to be defective in this respect. It refers at its internal paragraphs A15 and A16 to release of the deposit - or retention of it or of deductions from it - by reference to "Clause 6 of the Tenancy Agreement attached".[57] But no tenancy agreement was attached. More importantly, there is no "clause 6" in the tenancy agreement that the parties were bound by in September 2010 when the enclosure was delivered.

134. Mr Birtwistle acknowledged this error. No tenancy agreement had been attached as an enclosure. The one enjoyed by Mr Lowe had been entered into only some eight or nine months earlier. Mr Birtwistle explained that the erroneous reference to Clause 6 was the result of giving this Prescribed Information for the first time to tenants who were becoming assured shorthold tenants because of the change in the law. Clause

[57] P209

6 referred to a clause in relation to deposits used in the then current pro forma tenancy agreement held by assured *shorthold* tenants in respect of whom the agency Daniel Watney was the landlord's agent. There was no clause 6 in the style of agreement that Mr Lowe had been given as a *non*-shorthold tenant.

135. Mr Datta submitted that this error made no material difference. Mr Lowe or any other tenant mystified by a reference to a "Clause 6" as dealing with tenancy deposits would, in the absence of a clause 6 in their own agreement, simply skim their own copy of their tenancy agreement to see what provision it made, albeit under a differently numbered clause, about the circumstances in which a deposit might be retained.

136. In my judgment, this once again is either satisfaction of the statutory requirements by the route of providing material "substantially to the same effect" or it is again saved by the application of the approach to the interpretation of prescriptive statutory requirements shown by the above quoted passage from *Fearn.*

137. In short, on this issue, I am satisfied that the September 2010 letter and its enclosures gave the claimant the necessary prescribed information in accordance with the Housing (Tenancy Deposits) (Prescribed Information) Order 2007, or that they were in a form substantially to the same effect, in accordance with Housing Act 2004 section 213(6).

138. But the landlord needs to go yet further. It must be able to rely on *this same material* (given in 2010) in order to satisfy its statutory obligations relating to tenancy deposits that were applicable to the eighth tenancy, the statutory periodic tenancy which began on 1 August 2015. That is the earliest tenancy in respect of which a breach of the obligations might be relevant (given my holding as to the limitation period).

139. No 'new' deposit was required or paid in 2015, but the issue arises here by the following tortuous route.

140. In *Superstrike Ltd v Rodrigues*,[58] the Court of Appeal held that where a deposit is paid in respect of a tenancy and that tenancy deposit is then simply rolled-over into a new tenancy between the same parties, the tenant is treated as having paid the amount of the deposit to the landlord in respect of the new tenancy by way of set-off against the landlord's obligation to account to the tenant for the deposit in respect of the earlier tenancy. In such circumstances, the tenant has 'paid' and the landlord has received a deposit in connection with the new tenancy and the requirements of the 2004 Act would apply to that deposit afresh. Unfettered, this analysis would require landlords to give essentially the same information afresh to their tenants each time a new tenancy between them was agreed, or when a statutory tenancy arose, in respect of the same premises.

141. In the instant case, that would have required Charterhouse or its agents to give to Mr Lowe again, in respect of the statutory tenancy which arose on 1 August 2015 precisely the same information he had earlier received in 2010.

[58] [2013] EWCA Civ 669; [2013] 1 WLR 3848

142. However, following *Superstrike*, Parliament utilised the Deregulation Act 2015 to amend Housing Act 2004 to avoid the wasteful exercise of repeatedly requiring landlords to provide that material which had already been provided to continuing tenants of the same accommodation. That was achieved by inserting a new section into the 2004 Act (i.e., section 215B).

143. The rubric of the new section 215B only applies, however, where the tenancy deposit first received by the landlord was received "in connection with a shorthold tenancy", described by section 215B(1)(a) as "the original tenancy".

144. In those circumstances, Mr Brown submits that Charterhouse can place no reliance on the saving mechanism introduced by section 215B because the original (or first) tenancy granted to Mr Lowe was not a "shorthold tenancy". It was, at the time of its grant, simply a contractual tenancy. Because Charterhouse cannot get within the scheme through the portal offered by section 215B, it follows, he submits, that it failed to comply with its obligations in respect of the eighth tenancy in 2015.

145. That is a singularly unattractive submission, but if it is right, the Court must give effect to it. If Parliamentary counsel simply overlooked the need to expressly include within the term "original tenancy" a contractual tenancy which within its term became an assured shorthold tenancy, a Court cannot fill that gap.

146. But Parliament, when enacting the Deregulation Act 2015 must be taken to have known that the 'ambulatory' features of the regime of assured tenancies in Housing Act 1988 had been in place for more than two decades. Tenancies could move in and out of assured status and into shorthold status. Its words cannot be used to ossify the treatment of the statutory scheme in its application to a particular tenancy. I am satisfied that section 215B can operate constructively and that the 'original tenancy' concept within it can apply to an original tenancy that was at first non-assured and became an assured shorthold and/or to the first statutory periodic assured shorthold tenancy that springs from it.

147. Such a construction gives effect to Parliamentary intent to address the perceived 'mischief' that the decision in *Superstrike* had given rise to. Namely, the notion of a tenancy deposit been deemed 'paid' where no new payment was actually made with the consequence of repeated resurrection of the tenancy deposit obligations under Housing Act 2004. Parliament met that with a suitable deeming of compliance with the tenancy deposit information requirements. Its efforts should not be treated as falling short of the target in cases such as the present.

148. Accordingly, I conclude on this issue that the September 2010 letter and enclosures gave the Claimant the necessary prescribed information in accordance with the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 or were in a form substantially to the same effect.

Did the parties agree a fixed term tenancy commencing on 1 October 2015? (Issue 5)

149. If I have correctly determined the previous issues, and the landlord here did provide the prescribed information in September 2010 and such provision satisfies its obligations in respect of all follow-on tenancies of the same premises enjoyed by the same tenant, this issue does not arise. But the point has been fully argued and I shall address it, albeit relatively briefly.

150. It will be recalled that it is this alleged new 'fixed' term tenancy commencing on 1 October 2015 comprises the *ninth tenancy* described above and which, on its expiry, would give rise to the *tenth tenancy*. If I am wrong in respect of compliance with tenancy deposit requirements in respect of the eighth tenancy, Mr Lowe will – if there were two more tenancies – establish three breaches of the provisions, not simply one.

151. The seventh tenancy expired by effluxion of time on 31 July 2015 and the eighth tenancy (a statutory periodic tenancy) then arose on 1 August 2015. So much is common ground.

152. The parties are also in agreement that in 2015 there were discussions and negotiations about a new fixed term tenancy involving the agents Daniel Watney, Mr Lowe, and Charterhouse. Mr Lowe's case (and it is one he has to establish on the balance of probabilities) is that there came a time in 2015 when agreement was reached[59] and a new fixed term tenancy came into being. He contends that this new tenancy took effect on 1 October 2015 for a fixed term of two years.

153. Determining this issue has required a detailed treatment and consideration of the sequence of communications between the parties over many months in 2015 and beyond. That is because Mr Lowe can rely on no single document as encapsulating the terms of what was agreed.

154. First, however, 'context' is all important and the starting point is clear. In all their previous dealings to establish new replacement fixed-term tenancies, the present parties used the technique of either a countersigned written agreement or a signed, written memoranda. To accept Mr Lowe's case would involve an acceptance of agreement between the parties being fashioned not by a single document recording its terms in the habitual way adopted by them but instead through chains of Email communications between a variety of players informed (at least in some part) by the content of telephone conversations. As a starting point, I consider it inherently unlikely that the parties crystalised an agreement on a fresh tenancy in the absence of a single document containing or summarising its terms. Certainly, it is unlikely that professional letting agents or property-portfolio landlords such as Charterhouse would do so.

155. Second, that is doubly so given that one of the interests of the agents in the negotiations that took place was precisely to achieve a situation in which Mr Lowe moved away from terms and conditions initially held by him as non-assured tenant and onto a set of terms and conditions that the agents wished to use for all its assured *shorthold* tenants.

[59] Expressed in Mr Brown's Skeleton Argument at [66] as a meeting of minds.

156. Third, the law is somewhat cautious about treating a tenant who holds-over in occupation after the expiry of one tenancy as having entered into a further fresh tenancy. Mr Datta took me to the learning on the point as summarised in *Woodfall*[60] and to the cases of *Marcroft*,[61] *Longrigg*[62] and *Burrows.*[63]

157. It is guided by those three indicia that I carefully reviewed the dealings between the parties in 2015/2016. Of the three witnesses tendering evidence before me, only Mr Lowe had been actively involved. Mr Birtwistle and Mr Barrs were, with respect, merely after-the-event commentators on the material that it fell to me to review. I have already emphasised the caution I feel it necessary to apply to Mr Lowe's written and oral evidence. In those circumstances, the key material on which I must rely is the contemporaneous documentation.

158. The process begins on 24 June 2015[64] (a month or so before the then current fixed term was to expire). By Email of that date endorsed "Without prejudice and subject to contract" (my emphasis) Daniel Watney open with an intimation that Charterhouse would be happy to offer a further fixed term at a higher rent. Mr Lowe responds[65] that he too would be happy to continue at the property but then makes counter-suggestions about the level of the new rent.

159. A series of exchanges follow in which the parties become side-tracked into discussions about works to be undertaken, works to be completed, deferral of commencement of liability to higher rent, issues about a parking space, the length of the term, the use of an office space and more besides. I have read and re-read the material, guided by the helpful and almost entirely agreed chronology prepared by Mr Datta.

160. I say immediately that I found it impossible to distil out of it any concluded agreement as to a *term* (duration of the new agreement), a *date for commencement* of the term, and as to liability for an agreed rent from the commencement of the term. Mr Lowe came a long way short, evidentially, in establishing the concluded agreement for which he contends.

161. Any objective analysis, or fair reading of the material, illuminates a process of to-ing and fro-ing in respect of which agreement was never reached. In late October 2015, at the request of Charterhouse, Daniel Watney sent Mr Lowe formal new terms and conditions of tenancy for agreement and signature. Even by early 2016, long after Mr Lowe contends an agreed new term was underway, the parties had not agreed those terms. As late as 30 March 2016, Mr Lowe was ending a lengthy Email of that date with a promise to suggest "ways to resolve the outstanding matters."[66] That reflected the reality that final agreement had not been reached and that matters were still outstanding.

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[60] At para 1.021.4

[61] *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, CA.

[62] *Longrigg, Burrough & Trounson v Smith* [1979] 2 EGLR 42, CA

[63] *Burrows v Brent LBC* [1996] 1 WLR 1448, HL

[64] P64

[65] P65

[66] P185.

162. Mr Brown's best points in support of Mr Lowe's case for a new tenancy seem compelling at first blush. First, at some stage in the process, Mr Lowe began to pay, and his landlord accepted, a higher rent than that payable under what had by then become a statutory periodic tenancy. Second, again at some stage in the process, Daniel Watney had re-registered Mr Lowe's deposit with TDS and TDS had generated a certificate indicating that the end date of the tenancy was 31 July 2017. These, Mr Brown submits, are compelling indicia of a concluded new tenancy.

163. In my judgment, Mr Datta had a correct rejoinder to both points. First, as *Woodfall*[67] again teaches, an increase in rent does not necessarily have the effect of deeming a surrender of an old tenancy and its replacement with a new one. Here, the context was of payment at a higher rate in respect of a running statutory periodic tenancy which contained a rent increase clause, and that higher payment being made pending agreement of a single replacement new contractual tenancy. That was the reality of the situation. It was not any indicia of a concluded agreement for a new lease.

164. Second, as to the TDS certificate, however it came about and however it be understood, it cannot sustain Mr Lowe's pleaded case that what the parties agreed was a fixed term from 1 October 2015 to 30 September 2017.[68] It contains an end date of 31 July 2017. As Mr Datta correctly submits, there is nothing in the materials that the Court has been invited, at length, to review which comes anywhere near a settled agreement between the parties as to the precise *term* of a new lease.

165. For all those reasons, Mr Lowe's case for a *ninth tenancy* (contractual) and *tenth tenancy* (statutory periodic) fails. It follows that if Charterhouse has failed in respect of its statutory obligations in relation to tenancy deposit information, it failed only once and that was in respect of the eighth (and presently current) statutory periodic tenancy that arose on 1 August 2015.

Did the Defendant give the Claimant the necessary prescribed information in October 2015 or March 2016? (Issue 6)

166. This issue pre-supposes that Mr Lowe has established the existence of the two tenancies for which he contends, and which are identified as the ninth and tenth tenancies. If they were made out, Charterhouse may have needed a determination in its favour on this Issue in order to establish compliance with the tenancy deposit obligations in respect of them. Alternatively, the Issue might theoretically have fallen for consideration as an alternative route to sustaining compliance in respect of the eighth tenancy, if I had not already found satisfactory compliance in respect of that tenancy.

167. I consider that Mr Lowe has fallen so far short of establishing the existence of those last two tenancies on the facts of this case, that it would not be right to burden this already lengthy judgment with the findings I would have made on this issue. Nor

[67] Para 17.026 and fn 5 to it.
[68] PoC para 8(vii)

does any doubt in my mind as to compliance with the obligation in respect of the eighth tenancy justify a treatment of this Issue.

Has the Initial Deposit (as defined in the pleadings) been returned to the Claimant? (Issue 8)

Is the Claimant entitled to an order requiring the Initial Deposit to be returned to him, pursuant to Housing Act 2004, s.214(3)? (Issue 9)

168. I shall deal with these two issues together, and only briefly. They relate to what is pleaded as "the Initial Deposit" which I have already held was the deposit paid and protected of £3,300. By operation of a combination of Housing Act 2004 sections 214(2)(a) and (3)(a), the possibility arises of the Court making an order for the person 'holding the deposit' to 'repay' it. Hence, the possible need to determine who is presently 'holding' the deposit and whether to order its repayment.

169. Because I have also held that Charterhouse has met its statutory obligations in relation to both the protection of that deposit and in relation to the provision of prescribed information relating to it, these questions do not in fact fall for determination. The claim under section 214 has failed.

170. However, the points were again well and fully argued, and it may assist the parties if I shortly state my conclusions on them.

171. I would have refused Mr Lowe the remedy of an order for repayment under Housing Act 2004 section 214(3)(a) even if the pre-conditions had been satisfied. That is because:

a. There is no claim made for any such repayment order. Mr Lowe advanced, as described in the opening paragraphs of this judgment, a carefully calibrated and very precisely calculated money claim for a specified sum. No application was made, before or even at trial, to seek anything more by way of amendment. The Defence expressly pleaded that the deposit had been returned to the Claimant in May 2021.[69] There was no Reply.

b. I reject Mr Brown's submission that the language of the statute compels a Court to grant something a Claimant has not sought. The logic of Mr Brown's submissions would be that even if Charterhouse had paid Mr Lowe every penny claimed in the Claim Form and Particulars of Claim (direct to him or into Court) the claim would still have had to have gone for trial on the issue of whether to make a 'repayment order'. That would be a nonsense. Likewise, if the Claimant expressly disclaimed any wish to have an order for the return of his deposit, Mr Brown's submission would mean that nevertheless the Court was forced to order it. That cannot be the law.

c. The words of section 214(3) provide for the Court to make one of two alternative orders (if the preconditions are met). Mr Brown submits that the

[69] P20 para 11(b)(i)

Court has, on a true construction of the subsection, no choice but to make one or other. I do not accept that construction. It would be achieved by the simple use of the words "The court must either…". Instead, the words are: "The court must, *as it thinks fit,* …". That sensibly admits of a degree of judicial judgment or discretion.

d. The present case was a paradigm for such a discretion. The present parties were subject to a continuing tenancy containing in its terms a deposit requirement to be held to meet contingencies stipulated in an express agreement. Requiring repayment would cut across that mutual set of obligations. But, in any event, the deposit had already been tendered to the tenant by cheque in form of repayment. It was only still being 'held' by the agents because Mr Lowe had not, for reasons I have found specious, banked the cheque. Alternatively, the deposit would already have been paid directly into his bank account, but for his own failure to give the agents his bank transfer details. These seem to me precisely the sorts of facts that should lead a court to decline to make a repayment order, even if it had the power to do so.

172. There may, had this stage been reached, have arisen a need for me to determine factually whether the deposit was still 'held' or had been repaid, However, I anticipate that whatever practical difficulties there might have been at the date of trial, in transferring the £3300 into Mr Lowe's bank account, if that is what the agents still wanted to do, will have been overcome in the time that has passed before this reserved judgment can be handed down.[70]

What, if any, order should be made under Housing Act 2004, s.214(4)? (Issue 10)

173. This issue again does not strictly arise. However, I will deal with it in order to meet the possibility that I am wrong to hold that there has been compliance with the prescribed information requirements in respect of the eighth tenancy.

174. I am here concerned with the imposition of a statutory penalty for non-compliance. The language of the sub-section is both mandatory and absolute ("The court must…"). There is no discretion as to whether to order a penalty. The only question is what *amount* to order. The Court must make an order for a sum of not less than the amount of the deposit (£3,300) and no greater than three times that amount (£9,900).

175. There is, as yet no authoritative guidance as to how a Court should approach the task of selecting the 'right' or 'apt' sum in particular cases. One can assume that Parliament intended the highest award to be imposed in the most egregious cases, of flagrant failure to comply with the statutory requirements by landlords or agents who

[70] In the event, Mr Brown informed me, on the eve of the hand-down of this judgment, that he had no instructions as to any attempt by the agents to make a bank transfer or other form of payment since the trial. I declined his invitation to go on to determine this issue (Issue 8). For the reasons already given, the issue does not in fact fall for determination in light of my previous findings and anything I say about how I might have decided it would have no binding effect.

knew what was required but positively elected not to comply. In other cases, awards will be framed by the particular factual matrix. The decision of Mr Justice Males (as he then was) in *Okadigbo v Chan*[71]is oft cited for the proposition that a judge would not be wrong to treat 'culpability' as 'the most relevant factor'. My own decision in *Sturgiss v Boddy*[72] applied that approach in circumstances rather similar to the instant case (where there had been no initial obligation to protect the deposit).

176. Mr Brown reminded me that the landlord here was an established, professional landlord (in the sense that it let a portfolio of property). It could not, he submitted, escape liability by reliance on the failings of its agent. Moreover, he might have added, if those agents had taken better care when assembling the documents in 2010 and in ensuring they were delivered by recorded delivery, or the like, several of the issues in this case may not have arisen at all. *A fortiori*, if they had troubled to simply undertake a checking and re-sending exercise in 2015 when the last tenancy expired.

177. However, to my mind the relevant features in this case also include the facts that:

a. The deposit has been protected since it first required protection;

b. The tenant has known that it was protected;

c. It is (at the date of trial) still held and available;

d. It had (pre-trial) been tendered to the tenant in case he wanted to have it back;

e. Charterhouse is a charity;

f. It employed professional agents to deal with these tenancy matters;

g. Those agents sought to comply with newly applicable legal provisions in 2010 even before they took effect (see my reference above to 'going the extra mile'); and

h. If they failed to comply with the statutory provisions in relation to prescribed information, it was not in the absence of a genuine attempt to comply.

178. Those features, taken together with all the other facts and circumstances of this case, are such that – had I been required to fix a sum by way of penalty – it would have been the least amount open to me to order i.e., £3,300.

Conclusion

179. For the reasons given above, this claim is dismissed.

[71] [2014] EWHC 4729 (QB)
[72] [2021] EW Misc 10 (CC) (19 July 2021)

180. The parties are invited to agree a minute of order reflecting that outcome and the consequences of it. I will deal with any consequential matters that cannot be agreed at the formal handing-down of the judgment.

HHJ Luba KC

28 October 2022

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28 September 2010

Mr M Lowe
Flat 2, Preachers Court
Charterhouse
London EC1M 6AU

Dear Merryk,

FLAT 2, PREACHERS COURT, CHARTERHOUSE, LONDON EC1M 6AU

I am writing to you concerning recent legislative changes and how this legislation confers rights upon you as tenants at the above.

At this point in time, legislation associated with the Housing Act 1988 states that a tenancy formed with an annual aggregate rent greater than £25,000 cannot be an assured shorthold tenancy. These tenancies are sometimes referred to as non-Housing Act tenancies.

The Assured Tenancies (Amendment)(England) Order 2010 will come into force on 1 October 2010 and as a result any tenancy with an annual rent greater than £25,000 but less than £100,000 will become an assured shorthold tenancy overnight. All rights and responsibilities associated with the Housing Act 1988 will be extended to higher rent properties for the first time.

The most obvious and immediate consequence of the increase is that all tenancy deposits will be protected under the tenancy deposit scheme. As is the current arrangement your deposit will be retained by Daniel Watney throughout the period of your tenancy, but will be registered with The Dispute Service.

Please find enclosed your certificate of registration with The Dispute Service confirming your deposit has been protected. I also enclose an explanation leaflet 'What is the Tenancy Deposit Scheme?' and additionally the 'Prescribed Information' as required under the legislation.

We require you to sign the 'Prescribed Information' and to return one copy to us and retain one copy for your records.

Yours sincerely

STEPHEN BIRTWISTLE