Neutral Citation Number: [2020] EWCA Civ 175

Case No: B5/2019/2470

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MIDDLESBROUGH
HHJ Gargan

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE FLOYD
and
LORD JUSTICE ARNOLD

- -

Between :

CAPTAIN NIGEL CRIGHTON PEASE	**Appellant**
- and -	
(1) JEFFREY WILLIAM CARTER	**Respondents**
(2) LOUISE MARY CARTER	

- -
- -

Alice Richardson (instructed by **Tilley Bailey & Irvine LLP**) for the **Appellant**
Christopher Maynard (instructed through **Advocate**) for the **Respondents**

Hearing date: 5 February 2020

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Approved Judgment

Lord Justice Arnold:

Introduction

1. In this case the Appellant ("the Landlord") served notices of proceedings for possession under section 8 of the Housing Act 1988 ("the Notices") on the Respondents ("the Tenants") on 7 November 2018. The Notices stated that the court proceedings would not begin until after "26 November 2017". His Honour Judge Gargan sitting in the County Court at Middlesbrough held that this was an obvious typographical error, and that the reasonable recipient of the Notices would have realised that the intended date was 26 November 2018. He nevertheless held that the error in the date meant that the Notices were invalid. The Landlord contends that he was wrong so to hold. Patten LJ granted permission for what is technically, although not in substance, a second appeal because the appeal raises an important point of principle concerning notices under section 8 of the 1988 Act. As will appear, the position is complicated by two previous decisions of this Court concerning section 21 of the 1988 Act. In those circumstances I should express the Court's gratitude for the assistance we received from counsel for the Tenants (who did not appear below) acting pro bono and at short notice through Advocate.

Background

2. The Landlord granted the Tenants an assured shorthold tenancy of Ivy House, Streatlam, Barnard Castle DL12 8TZ on 1 August 2007 for a period of six months. After the expiry of the six-month term, the tenancy continued as a statutory periodic assured shorthold tenancy. The rent was £800 per month, subsequently reduced to £500 per month on 23 March 2017. The Landlord contends that the Tenants have failed to pay the rent since April 2018, save for one payment in February 2019. As stated above, the Landlord served the Notices on 7 November 2018. The Landlord contends that the rent arrears at that stage were £3,538.44. On 27 December 2018 the Landlord issued possession proceedings in the County Court. At a first hearing on 30 January 2019 District Judge Adams raised of his own motion the error in the date stated in the Notices. Having heard argument, he made an order giving the Landlord permission to amend the date on the Notices and dispensing with re-service. The Tenants appealed on the ground that the District Judge had had no power to permit the Landlord to amend the Notices. The Landlord accepted this, but contended that the Notices were valid despite the error in the date. These proceedings form part of a wider dispute between the parties, but it is unnecessary to go into that for present purposes.

The Notices

3. The Notices were identical save that one was addressed to one Tenant and the other to the other Tenant. The Notices were based on a standard form prescribed by the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015, SI 2015/620, namely Form No. 3.

4. Section 3 of the Notices stated (so far as relevant for present purposes):

> "Your landlord intends to seek possession on grounds 8, 10 and 11 in Schedule 2 to the Housing Act 1988 (as amended), which read(s):
>
> 8. Both at the date of the service of the notice under section 8 of this Act relating to the proceedings for possession and at the date of the hearing –
>
> …
>
> (b) if rent is payable monthly, at least two months rent is unpaid;
>
> …
>
> 10. Some rent lawfully due from the tenant –
>
> (a) is unpaid on the date on which the proceedings for possession are begun; and
>
> (b) except where subsection (1)(b) of section 8 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings.
>
> …"

5. Section 4 set out details of the rent arrears relied on by the Landlord.

6. Section 5 stated: "The court proceedings will not begin until after: 26 November 2017". Section 5 also included notes which stated (so far as relevant):

> "NOTES ON THE EARLIEST DATE ON WHICH THE COURT PROCEEDINGS CAN BE BROUGHT
>
> …
>
> Where the landlord is seeking possession on grounds … 8, 10 to 13 … court proceedings cannot begin earlier than 2 weeks from the date this notice is served. ….
>
> …
>
> After the date shown in section 5, court proceedings may be begun at once but not later than 12 months from the date on which this notice is served. After this time the notice will lapse and a new notice must be served before possession can be sought."

7. Section 6 set out the name and address of the Landlord. Each Notice was signed by the Landlord's solicitors (acting as his agent) and dated "7/11/18".

The statutory provisions

8. Section 8 of the 1988 Act, which forms part of Chapter I of Part I of the Act, concerns proceedings by landlords for possession of properties let on assured tenancies on one of the grounds specified in Schedule 2 to the Act. Those grounds include ground 8 (a mandatory ground) and grounds 10 and 11 (two discretionary grounds) relating to the non-payment of rent. Section 8 provides (as amended and so far as relevant):

> "**Notice of proceedings for possession.**
>
> (1) The court shall not entertain proceedings for possession of a dwelling-house let on an assured tenancy unless—
>
> (a) the landlord or, in the case of joint landlords, at least one of them has served on the tenant a notice in accordance with this section and the proceedings are begun within the time limits stated in the notice in accordance with subsections (3) to (4B) below; or
>
> (b) the court considers it just and equitable to dispense with the requirement of such a notice.
>
> (2) The court shall not make an order for possession on any of the grounds in Schedule 2 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the court.
>
> (3) A notice under this section is one in the prescribed form informing the tenant that—
>
> (a) the landlord intends to begin proceedings for possession of the dwelling-house on one or more of the grounds specified in the notice; and
>
> (b) those proceedings will not begin earlier than a date specified in the notice in accordance with subsections (3A) to (4B) below; and
>
> (c) those proceedings will not begin later than twelve months from the date of service of the notice.
>
> …
>
> (4B) In any other case, the date specified in the notice as mentioned in subsection (3)(b) above shall not be earlier than the expiry of the period of two weeks from the date of the service of the notice.
>
> …

> (5) The court may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground … 8 in Schedule 2 to this Act.
>
> …"

9. Section 20 of the 1988 Act, which forms part of Chapter II of Part I of the Act, provides that an assured tenancy which is not one to which section 19A applies (i.e. it is an assured tenancy created before the Housing Act 1996 came into force) is an assured shorthold tenancy (and thus a tenancy which affords the tenant lesser security of tenure) if certain conditions are satisfied. Section 20(1)(c) requires service of a notice which complies with section 20(2). Section 20(2) provides:

> "The notice referred to in subsection (1)(c) above is one which—
>
> (a) is in such form as may be prescribed;
>
> (b) is served before the assured tenancy is entered into;
>
> (c) is served by the person who is to be the landlord under the assured tenancy on the person who is to be the tenant under that tenancy; and
>
> (d) states that the assured tenancy to which it relates is to be a shorthold tenancy."

10. Section 21 of the 1988 Act, which is also in Chapter II of Part I, enables a landlord to obtain possession of property at the end of an assured shorthold tenancy without establishing any of the grounds specified in Schedule 2 to the Act. It provides (as amended and so far as relevant):

> "**Recovery of possession on expiry or termination of assured shorthold tenancy.**
>
> (1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling-house let on the tenancy in accordance with Chapter I above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied—
>
> (a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than an assured shorthold periodic tenancy (whether statutory or not); and
>
> (b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house.

…

(4) Without prejudice to any such right as is referred to in subsection (1) above, a court shall make an order for possession of a dwelling-house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied—

(a) that the landlord or, in the case of joint landlords, at least one of them has given to the tenant a notice in writing stating that, after a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling-house is required by virtue of this section; and

(b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above.

.."

11. Regulation 3(c) of the 2015 Regulations provides that the form prescribed for a notice under section 8 of the 1988 Act is Form No. 3. Regulation 2 provides that "any reference to a numbered form is a reference to the form bearing that number in the Schedule to these Regulations, or to a form substantially to the same effect". Prior to 2015 there was no prescribed form for a notice under section 21, although there has been since then.

The Judge's judgment

12. The Judge held in summary as follows:

i) Applying the test laid down by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 747 with respect to notices under break clauses in commercial leases, "2017" was an obvious typographical error, and the reasonable recipient of the Notices would have realised that the intended date was 26 November 2018. The Judge rejected a contention that the reasonable recipient might think that the date could be 26 November 2019 and therefore be uncertain as to the intended date.

ii) The reasonable recipient test did not apply to notices served under section 8 of the 1988 Act because, applying the reasoning of Hale LJ in *Fernandez v McDonald* [2003] EWCA Civ 1219, [2004] 1 WLR 1027 at [23], section 8(3)(b) and 8(4B) were clear and precise, were not difficult for landlords to comply with and did not have particularly serious consequences for landlords if not complied with since a defect in a notice could easily be cured by service of a further valid notice. The statute required notices to specify a date which was not earlier than the expiry of two weeks from the date of service of the notice. The Notices did not do so. They were therefore invalid.

iii) The Notices were not "substantially to the same effect" as the prescribed form. The wording of the Notices followed the prescribed form precisely. The problem was that the date inserted in section 5 of the Notices contained a typographical error.

iv) It was just and equitable for service of the section 8 notices to be dispensed with in respect of grounds 10 and 11 in Schedule 2 to the 1988 Act pursuant to section 8(1)(b), but the court had no power to do this with respect to ground 8 by virtue of section 8(5). There is no challenge to these conclusions by either side.

The authorities

13. The arguments in this case require consideration of a number of authorities concerning unilateral notices.

14. The starting point is *Mannai v Eagle*. In that case two leases for a term of 10 years commencing on 13 January 1992 provided that the tenant could determine the leases by serving not less than six months' notice in writing on the landlord or its solicitors to expire "on the third anniversary of the term commencement date" i.e. 13 January 1995. On 24 June 1994 the tenant served notices determining both leases on "12 January 1995". The majority of the House of Lords (Lord Steyn, Lord Hoffmann and Lord Clyde) held that the notices were effective for reasons which are accurately summarised in the headnote to the report as follows:

> "the construction of the notices had to be approached objectively, and the question was how a reasonable recipient would have understood them, bearing in mind their context; that the purpose of the notices was to inform the landlord of the tenant's decision to determine the leases in accordance with the break clauses; that a reasonable recipient with knowledge of the terms of the leases and of the third anniversary date would have been left in no doubt that the tenant wished to determine the leases on 13 January 1995 but had wrongly described it as 12 January".

15. In so holding, the majority expressly approved the approach which had been adopted by Goulding J in *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442 when deciding that (as Lord Clyde pithily summarised it at page 781E) "an expressed intention to determine the lease at a date in 1973 was obviously incorrect in a notice served in 1974".

16. *Mannai v Eagle* was a case concerning break clauses in leases for a term. Lord Steyn was clear, however, that the same approach should be adopted to any unilateral notice served for the purpose of exercising a contractual right: see page 768F-H. Lord Hoffmann explicitly contemplated that the same approach should be applied to notices to terminate periodic tenancies: see page 778H-779A. Moreover, Lord Hoffmann referred with approval to the decision of the Court of Appeal in *Germax Securities Ltd v Spiegal* (1978) 37 P & CR 204, which was a case concerning a statutory notice: see page 780E.

17. Lord Hoffmann distinguished commercial contracts and notices served under commercial contracts from certain other kinds of document at page 779D-E:

> "There are documents in which the need for certainty is paramount and which admissible background is restricted to avoid the possibility that the same document may have different meanings for different people according to their knowledge of the background. Documents required by bankers' commercial credits fall within this category. Article 13(a) of the Uniform Customs and Practice for Commercial Credits (1993 revision) says (echoing Lord Greene M.R.'s phrase in *Hankey v. Clavering*) that the documents must 'upon their face' appear to be in accordance with the terms and conditions of the credit. But the reasons of policy which require the restriction of background in this case do not apply to notices given pursuant to clauses in leases."

18. In *York v Casey* (1999) 31 HLR 209 the landlords brought proceedings for possession of a property after serving notice under section 21 of the 1988 Act. The validity of that notice depended on whether the landlords had successfully granted the tenants an assured shorthold tenancy under section 20. That in turn depended on whether they had served a notice under section 20(1)(c) that complied with section 20(2). That in turn depended in part on whether the notice was in the prescribed form, which required the start and end dates of the tenancy to be specified.

19. Peter Gibson LJ, with whom Bennett J agreed, held at 213-215 that the correct approach was to interpret the notice in the manner laid down in *Mannai*. He considered that two earlier decisions of the Court of Appeal concerning notices under section 20(1)(c) were consistent with that approach. The first was *Panayi v Roberts* (1993) 25 HLR 421, in which it was held that a notice which stated that the tenancy would run from 7 November 1990 to 6 May 1991, whereas the tenancy agreement was for one year from 7 November 1990, was not "substantially to the same effect" as a notice with the correct end date because the mistake was not obvious. Mann LJ, with whom Ralph Gibson LJ agreed, had distinguished that mistake from "slips of the pen" such as "'1793' for '1993'". The second decision was *Andrews v Brewer* (1997) 30 HLR 203, in which it was held that a notice which stated that the tenancy would run from 29 May 2003 to 28 May 2003 was valid because it was obvious that the latter date was wrong and the intended date was 28 May 2004.

20. Peter Gibson LJ went on to hold on the facts of the instant case that the end date of the lease specified in the notice (6 September 1996) was obviously incorrect since that was the date of the notice and before the specified start date (28 September 1996), and that the reasonable recipient would understand from the context, which included the covering letter, that the intended end date was six months from 28 September 1996.

21. In *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] HLR 43 three appeals concerning disputes as to the compliance of notices with section 8 and Schedule 3 paragraph 6(1) of the Leasehold Reform Act 1967 were heard together. In all three cases the Court of Appeal concluded that the notices were invalid because they failed to provide certain information which was required. The judge had held that *Mannai v Eagle* was not applicable to statutory notices. Rimer J, with whom Pill and

May LJJ agreed, said at [20] that he could not see why, in principle, different rules of interpretation should apply. Having noted that *Mannai v Eagle* had been applied in *York v Casey* and to notices served under the Leasehold Reform, Housing and Urban Development Act 1993 in *Keepers and Governors of John Lyon Grammar School v Secchi* [2000] LTR 308, he went on at [22]:

> "Having expressed my own view and referred to those authorities, I would nevertheless regard it as incautious to attempt to express any general conclusion as to the application of the *Mannai* case to the interpretation of notices served under a statutory regime. This is because, as Peter Gibson L.J. pointed out in the *York* case at page 27, 'one should bear in mind that in a statutory context there may be requirements which have to be observed and without which a notice will be invalid. But the same may be true in the case of a contractual context.' Taking due note of the first part of that, I consider that the better approach is to look at the particular statutory provisions pursuant to which the notice is given and identify what its requirements are. Having done so, it should then be possible to arrive at a conclusion as to whether or not the notice served under it adequately complies with those requirements. If anything in the notice contains what appears to be an error on its face, then it may be that there will be scope for the application of the *Mannai* approach, although this may depend on the particular statutory provisions in question. The key question will always be: is the notice a valid one for the purpose of satisfying the relevant statutory provisions?"

22. Pausing there, *York v Casey* and *Speedwell v Dalziel* establish that the *Mannai v Eagle* approach to interpretation is applicable to statutory notices, but with the qualification that it remains necessary to consider whether the notice satisfies the relevant statutory requirements. That involves consideration of the purpose of those requirements.

23. In *Ravenseft Properties Ltd v Hall* [2001] EWCA Civ 2034, [2002] HLR 624 three appeals concerning disputes as to the compliance of notices with section 20 of the 1988 Act were heard together. In all three cases the Court of Appeal concluded that the notices were valid despite assorted errors. Mummery LJ, who gave the lead judgment, began at [12] by citing what Nourse LJ had said in *Manel v Memon* (2001) 33 HLR 24 at [21] concerning the purpose of a notice under section 20(1)(c):

> "Its essential purpose is to tell the proposed tenant that the tenancy is to be an assured shorthold tenancy, with consequences specified in paragraphs 2 and 3 of Form 7, in particular that 'the landlord may have the right to possession if he wants.'"

24. Mummery LJ continued at [13]:

> "In applying the *Mannai* approach, it is … important to have well in mind the context of the evident purpose of the

> requirement of a notice in the prescribed form. If, notwithstanding errors or omissions, the substance of the notice is sufficiently clear to the reasonable person reading it, the notice is likely to serve the purpose identified by Nourse L.J."

25. He went on to say in relation to the first appeal at [27]:

> "I agree with [counsel for tenant] that the facts of this case are close to those in *Panayi v. Roberts* and that Mann L.J. resolved in the tenant's favour the narrow issue that a notice which gave the wrong date (in that case the termination date) was not 'substantially to the same effect' as one which gave the correct date, at least in a case where the mistake was not obvious. In the light of the later case of *Manel v. Memon*, in which Nourse L.J. identified the purpose of serving a notice, and of the approach to the construction of notices laid down by the House of Lords in *Mannai*, this court is, in my judgment, bound to take the broader approach to the issue of validity. I do not read the authorities as laying down a two stage test which can only be operated when the error is 'obvious.' The question is simply whether, notwithstanding any errors and omissions, the notice is 'substantially to the same effect' in accomplishing the statutory purpose of telling the proposed tenant of the special nature of an assured shorthold tenancy. Despite the error as to the start date, this notice did that. I would accept the contention of [counsel for the landlord] that this notice was in a form 'substantially to the same effect' as the prescribed form and is valid."

26. Lord Phillips MR agreed with Mummery LJ as to the disposition of all three appeals. In one case, however, he did so for slightly different reasons. Tuckey LJ stated that, to the extent that they differed, he preferred Mummery LJ's approach.

27. In my judgment Mummery LJ's reasoning does not exclude the possibility of concluding in an appropriate case that, having regard to the way in which a notice would be interpreted by the reasonable recipient applying *Mannai v Eagle*, it satisfies the relevant statutory requirements. Rather, what he was saying was that, even if the notice contains a mistake which is not obvious, it may still be possible to conclude that it is "substantially to the same effect" as the prescribed form having regard to the purpose of the statutory requirements. Of course, this will only save the notice if it is one to which a "substantially to the same effect" provision applies.

28. In *B Osborn & Co Ltd v Dior* [2003] EWCA Civ 281, [2003] HLR 45 two appeals concerning disputes as to the compliance of notices with section 20(2) of the 1988 Act were heard together. The Court of Appeal held that both notices were valid despite certain errors and omissions. Having considered *Ravenseft v Hall* at some length, Arden LJ, with whom Simon Brown LJ agreed, stated at [37]:

> "As regards the form and content of the notice, s.20 simply requires that the notice given to the tenant should be in a particular form, and in addition that the notice should contain

> the statement set out in s.20(2)(c). There is full compliance with those two express requirements in the present appeals and therefore those requirements are not in issue. Section 20 is silent about the completion of the prescribed form. The requirement to complete the prescribed form with information is implicit rather than explicit in s.20. However, the test established by the *Ravenseft* case applies whether the defect in the s.20 notice is an error in, or the omission of, information required to be inserted into the prescribed form or is an error in, or the omission of, one of the prescribed parts of the form. In either case, the *Ravenseft* case establishes that the test which the court must apply is whether, notwithstanding any errors or omissions that have been demonstrated, the notice is 'substantially to the same effect' as a notice in the proper form which has been duly completed. In reaching its conclusion, the court must bear in mind the statutory purpose of the notice, namely that of telling the proposed tenant of the special nature of an assured shorthold tenancy."

29. Pausing again, *Ravenseft v Hall* and *Obsorn v Dior* confirm the applicability of *Mannai v Eagle* to statutory notices, but they also establish that notices which contain errors or omissions that are not obvious may be "substantially to the same effect" as a prescribed form if the notices nevertheless fulfil the relevant statutory purpose.

30. In *Fernandez v McDonald* the tenants were granted an assured shorthold tenancy from 4 September 1999 to 3 March 2000. They remained in the property thereafter as statutory periodic tenants from the fourth of each month to the third of the following month. On 24 October 2002 the landlords gave them notice expressed to be under section 21(4)(a) stating that the landlords required possession "on 4 January 2003". The tenants contended that the notice was invalid because the last day of a period of the tenancy was 3 January 2003.

31. Counsel for the landlord advanced two arguments in answer to this contention, the first of which is not relevant for present purposes. Hale LJ, with whom Potter LJ agreed, summarised the second argument at [16] as being that "the notice in this case was sufficiently clear to comply with its statutory purpose". In support of this argument, counsel for the landlord relied upon *Mannai v Eagle*. Hale LJ then outlined the argument at [17] as follows:

> "These tenants, it is argued, knew that their tenancy ran from the fourth to the third. They can have been in no doubt that the landlord was giving them notice that after the expiry of the December 2002 to January 2003 period, he would be going to court to seek possession if they did not voluntarily vacate the property. Saying 'I want possession on 4 January' is no different from saying 'I want possession on the day after 3 January'."

32. In considering this argument, Hale LJ cited at [18] the first passage from Mummery LJ's judgment in *Ravenseft* quoted above and referred at [19] to *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] Ch 256, in which Chadwick LJ had

cited the passage from Rimer J's judgment in *Speedwell* quoted above as encapsulating the correct approach. She went on (emphases added):

> "20. …. [Counsel for the landlord] argued that the reasonable recipient test applied *whether or not the error is obvious*…. In my view, the obviousness or otherwise of an error is simply a factor in deciding what the reasonable recipient would understand by the notice. The more obvious it is that a slip has been made, the less likely is the reasonable recipient to be in any doubt as to what was meant.
>
> 21. In this case, however, a good deal hangs upon the precise question which is to be asked. *If the question is simply, what would a reasonable tenant understand by this notice, then a reasonable tenant would understand that the landlord wanted to regain possession on or after 4 January 2003*. If the question is what is the purpose of requiring such notice, I would accept that one purpose is to give the tenant at least two month's notice that the landlord will be starting the process of regaining possession once the relevant period of the tenancy has expired, so that the tenant can begin to make plans accordingly.
>
> 22. But if the question is, what does the statute require, the answer is that the statute requires the notice to specify a date which is the last day of the period. The statute does not require the landlord to specify a date on which he requires possession. This is not a notice to quit. The landlord will not get possession without the tenant's consent unless he goes to court. That is why the statute requires the landlord to state that possession is required 'after a date specified in the notice, being the last day of a period of the tenancy'.
>
> 23. This is not a case where the legislation permits a form to be 'substantially to the same effect'. The subsection is clear and precise. Nor is it difficult for landlords to comply. They know when the period ends. Furthermore, this is not a case where the consequences of failure to comply are particularly serious for landlords: a defective notice can be cured the next day. Even if the defect is not noticed until the point is taken in court, a valid notice can then be given. The landlord is not unwillingly and unwittingly saddled with a tenant who has security of tenure, as would be the case with an invalid notice under section 20 of the 1988 Act. One purpose of the subsection may be to alert tenants to the need to look for alternative accommodation, but another is to give the courts a clear and simple set of criteria which trigger their mandatory duty to order possession. The notice in this case was only one day out, but …. [counsel for the landlord's] alternative submission would leave room for all sorts of arguments, uncertainty and inconsistency up and down

> the country on a matter about which there should be no doubt at all."

33. It can be seen from what Hale LJ said in the italicised passage in [21] that she held that the notice would be interpreted by the reasonable recipient as meaning that "the landlord wanted to gain possession on or after 4 January 2003". In other words, she did *not* hold that the reasonable recipient would realise that "on 4 January 2003" was an obvious mistake and that what the notice was intended to say was "after 3 January 2003". Indeed, it does not appear from what Hale LJ said at [17], and the italicised words in [20], that that was even argued by counsel for the landlord. It is on that very narrow basis that Hale LJ held that the notice did not satisfy the statutory requirement of specifying a date which was the last day of a period of the tenancy. Moreover, as she pointed out, it was not a case in which it was permissible for the notice to be "substantially to the same effect" as a prescribed form. Accordingly, she rejected the argument that the notice was "sufficiently clear to comply with its statutory purpose".

34. In *Spencer v Taylor* [2013] EWCA Civ 1600, [2014] HLR 9 the landlord granted the tenant an assured shorthold tenancy for a term of six months beginning on Monday 6 February 2006 at a weekly rental. At the expiry of the fixed term, a statutory periodic tenancy arose which was also weekly, each week ending on a Sunday. On 18 October 2011 the landlord gave notice requiring possession after 1 January 2012, which was a Saturday, "or at the end of your period of tenancy which will end next after the expiration of two months from the service upon you of this notice". Two months after service of the notice was 18 December 2011, and the next Sunday after that was 23 December 2011. The landlord commenced proceedings for possession on 27 April 2012. Lewison LJ, with whom Sir Brian Leveson PQBD and McFarlane LJ agreed, held that the notice complied with section 21(1)(b), and that the other conditions laid down by section 21(1) were also satisfied.

35. Lewison LJ pointed out at [19]-[21] that, on the facts, *Fernandez v McDonald* was a case falling squarely within section 21(1) of the 1988 Act. Despite that, the case had been argued and decided by reference to section 21(4). It followed that what the Court had said in that case about section 21(1) was obiter. Moreover, given that section 21(1) governed the instant case, arguments about whether the notice complied with section 21(4) were beside the point.

36. Lewison LJ went on, however, to consider obiter whether the notice in the instant case complied with section 21(4). In that context he said:

> "28. … The notice in [*Fernandez v McDonald*] case specified 4 January 2003 and no other date. It should have specified 3 January rather than 4 January. The landlord argued that the tenant would have understood that 4 January was a mistake for 3 January, relying for this argument on the decision of the House of Lords in the *Mannai* case. In that case the House of Lords said that if the reasonable recipient of a notice would have realised what the server of the notice intended to convey, an obvious error could be corrected.
>
> 29. … this court rejected that argument. It held that [what] the statute required was notice specifying the last day of a period

of the tenancy and the notice in that case had not satisfied the statutory requirement.

30. So I approach this part of the case on the basis that in the case of a s.21(4) notice the court cannot correct obvious mistakes even if satisfied that a reasonable recipient would have realised that a mistake had been made and had also realised what information the server of notice had tried to convey. But importantly, the court in *Fernandez v McDonald* did not say that *Mannai* was irrelevant. What Hale L.J. said at [18] was that the question was how the reasonable recipient test, that is the test in *Mannai*, was to be applied to the case of a statutory notice.

31. I accept [counsel for the landlord]'s submission that the statutory requirement is that the notice under s.21(4) must specify a date that has the dual characteristics of being (a) two months after the notice is given and (b) the last day of the period of the tenancy. The notice in *Fernandez v McDonald* did not do but the notice in our case did. It did so by means of the formula. The barrenness of [counsel for the tenant]'s argument is that if the fixed date and the formula date had been contained on two separate pieces of paper served simultaneously, the landlord could have issued a single claim form relying on both notices and would undoubted have succeeded.

32. The decision in *Fernandez v McDonald* was concerned with what the statute required. Hale L.J. was clear about what the notice in that case meant; it meant 4 January not 3 January. But we are also concerned with what the notice in our case means. Answering that question does not in my judgement rule out the approach of *Hussain v Bradford Community Housing Ltd*.

33. In order to see whether the notice complies with the statutory requirement, one must see what it does. In our case the notice refers to two dates, the fixed date and the date calculated by reference to the formula. They are clearly alternatives, as the word 'or' separating them makes clear, so they are at least capable of leading to different results. In the event that they do, which one prevails?

34. In my judgement, the reasonable recipient of this notice would look at the back of the form which contains the notes and they say that the notice must specify the last day of a period of the tenancy. She would know that she paid her rent on the Monday and she would be able to see from the calendar that 1 January 2012 was a Saturday. So it obviously was not the last day of a period of the tenancy. Conformably with *Fernandez v McDonald*, that mistake, if such it was, cannot be corrected. But that leads to the conclusion that that part of the notice does

> not do what the notes on the back say it must do. So that part of the notice cannot be effective. Since that alternative is ruled out as being ineffective, the other alternative must prevail."

37. Thus Lewison LJ concluded that the notice in that case complied with section 21(4) because the formula wording complied with the statutory requirements, and therefore it was immaterial that the alternative fixed date did not. What matters for present purposes, however, is not his conclusion, but his analysis of *Fernandez v McDonald*.

38. It can be seen from what Lewison LJ said at [32] that he read Hale LJ's judgment in the same way that I do, namely as holding that the reasonable recipient of the notice in that case would interpret "on 4 January 2003" as meaning just that. Where I respectfully differ from Lewison LJ, however, is in relation to his statement in [28] that "[t]he landlord argued that the tenant would have understood that 4 January was a mistake for 3 January" and his statement in [30] that *Fernandez v McDonald* decided that "in the case of a s.21(4) notice the court cannot correct obvious mistakes even if satisfied that a reasonable recipient would have realised that a mistake had been made and had also realised what information the server of notice had tried to convey". For the reasons explained above, I do not consider that the first statement accurately characterises the landlord's argument or that the second statement accurately characterises what the Court decided.

39. The conclusions which I draw from this survey of the authorities are as follows:

    i) A statutory notice is to be interpreted in accordance with *Mannai v Eagle*, that is to say, as it would be understood by a reasonable recipient reading it in context.

    ii) If a reasonable recipient would appreciate that the notice contained an error, for example as to date, and would appreciate what meaning the notice was intended to convey, then that is how the notice is to be interpreted.

    iii) It remains necessary to consider whether, so interpreted, the notice complies with the relevant statutory requirements. This involves considering the purpose of those requirements.

    iv) Even if a notice, properly interpreted, does not precisely comply with the statutory requirements, it may be possible to conclude that it is "substantially to the same effect" as a prescribed form if it nevertheless fulfils the statutory purpose. This is so even if the error relates to information inserted into or omitted from the form, and not to wording used instead of the prescribed language.

Respondents' Notice

40. It is convenient before turning to consider the Landlord's grounds of appeal to consider a point which is sought to be raised by counsel for the Tenants by way of Respondents' Notice. The Tenants contend that the Judge was wrong to conclude that the reasonable recipient of the Notices would have understood that the intended date was 28 November 2018 because, once the recipient concluded that the year stated in the Notices must be erroneous, they would have been uncertain as to what day and

month was intended. No Respondents' Notice was served in due time by the Tenants even though they were professionally represented then. The point was first raised by counsel for the Tenants in his skeleton argument dated 3 February 2020. Accordingly, the first question is whether the Tenants should be given permission to raise the point out of time. Furthermore, it is at least arguable that the Tenants require permission to raise it for the first time in this Court because it was not advanced below.

41. Counsel for the Landlord did not object to the Tenants being given permission to raise the point provided that the Landlord was given permission to rely on the covering letters under which the Notices were served ("the Letters"). The Letters had not been before the Judge, because the Tenants' case as to how the reasonable recipient would understand the Notices had only emerged (to the extent that it then did) during the course of oral argument before him.

42. I consider that the Tenants should be given permission to raise this point on terms that the Landlord is given permission to rely on the Letters. Although the precise contention that is now sought to be advanced was not advanced before the Judge, which is why he did not address it in his judgment, the argument that the reasonable recipient of the Notices would not have understood that the intended date was 28 November 2018 was raised. Thus the point is not an entirely new one. Moreover, there is no prejudice to the Landlord if he is permitted to rely on the Letters. I do not consider that it would be fair to the Landlord to allow the point to be raised at this late stage without allowing him to rely on the Letters. Equally, there is no prejudice to the Tenants in admitting the Letters given that they are uncontroversial and limited documentary evidence and given that it is not suggested that the Tenants would wish to try to counter them by any other evidence.

43. I turn then to consider the merits of the Tenants' contention. Counsel for the Tenants did not dispute the Judge's conclusion that "2017" was an obvious typographical error, but it is common ground that that is not sufficient to satisfy the reasonable recipient test: it must also be clear to the reasonable recipient what the intended date was. Counsel for the Tenants argued that the reasonable recipient would be uncertain what the intended date was: if "2017" was an error, then so could "26" and/or "November" be.

44. I do not accept this argument. As the Judge found, the reason why "2017" was an obvious typographical error is that, read in context including the explanatory notes, it would make no sense for a date earlier than that of the Notices to be specified. Thus the reasonable recipient would realise that something must have gone wrong. The reasonable recipient would be aware that a common form of typographical error is typing an adjacent digit to that intended. Counsel for the Tenants submitted that it is commonplace for people to type the date of the preceding year in early January, not in November; but that is actually a slightly different form of mistake, namely a failure to make the necessary mental adjustment. In my judgment the reasonable recipient would conclude that the person who typed the Notices had mistakenly typed "7" rather than "8". Having mentally corrected that error, the reasonable recipient would conclude that 26 November 2018 made sense as being the intended date and would have no reason to think that the day or month were erroneous. Thus I consider that the Judge was not merely fully entitled to make that finding, but correct.

45. If I were in any doubt about this conclusion, it would be dispelled by the Letters. These state:

> "Proceedings will not be issued before 26 November 2018 but will be issued within 12 months of service of the notice."

It is clear from *York v Casey* that such covering letters may be taken into account in determining how the reasonable recipient would interpret a statutory notice. The Letters would leave the reasonable recipient in no doubt as to what the intended date was.

The appeal

46. The Landlord appeals on two grounds:

i) The Judge was wrong to hold that the reasonable recipient test did not apply to section 8 notices.

ii) In the alternative, the Judge was wrong to hold that the Notices were not "substantially to the same effect" as the prescribed form.

47. So far as the first ground is concerned, I consider that the Judge was in error in holding that the reasonable recipient test did not apply to section 8 notices. For the reasons given above, statutory notices are to be interpreted in accordance with *Mannai v Eagle*. Contrary to what the Judge thought, *Fernandez v McDonald* is not authority for the proposition that this approach is inapplicable where the statutory requirements are clear and precise, are not difficult for the party serving the notice to comply with and do not have particularly serious consequences for that party if not complied with. Contrary to the submission of counsel for the Tenants, I do not consider that the need for practical justice in circumstances where busy district judges have to deal with lengthy possession lists requires a bright-line test. In my view district judges should have no real difficulty in applying *Mannai v Eagle.*

48. It remains necessary, however, to consider whether the Notices complied with the statutory requirements. It is common ground that it is necessary to begin by considering what the purpose of the statutory requirements is.

49. This case is not concerned with section 21(4), as *Fernandez v McDonald* was, but with section 8(1), (3)(b) and (4B). Counsel for the Tenants pointed out that section 8(1) provides that the court "shall not entertain proceedings for possession of a dwelling-house let on an assured tenancy unless …", and argued that this meant that it imposed a jurisdictional threshold. I am content to assume that this is correct, but for reasons that will appear I do not consider that it assists the Tenants.

50. Unlike section 21(4)(a), section 8(3)(b) and 8(4B) do not require the notice to specify a date which has a particular contractual significance. Their combined effect is simply to require the landlord to give the tenant notice that the proceedings will begin not earlier than a date which must not be earlier than the expiry of two weeks from the date of service of the notice (and not later than a year from then: section 8(3)(c)). What is the purpose of that requirement?

51. It is common ground that the answer to that question is the same as that provided by Ralph Gibson LJ, with whom Mann and Nolan LJJ agreed, in *Mountain v Hastings* (1993) 25 HLR 427 at 433 in relation to the requirement that the notice specify the ground(s) in Schedule 2 relied upon:

> "That purpose, in my judgment, is to give to the tenant the information which the provision requires to be given in the notice to enable the tenant to consider what she should do and, with or without advice, to do that which is in her power and which will best protect her against the loss of her home."

52. In other words, the purpose of the requirement for at least two weeks' notice is to give the tenant time to take steps to deal with the threatened proceedings e.g. by trying to pay off arrears of rent, taking advice, obtaining representation and/or seeking alternative accommodation.

53. Did the Notices serve that purpose? Given that the date of 26 November 2017 was an obvious typographical error and that a reasonable recipient would have understood that the intended date was 26 November 2018, I consider that the Notices did serve the statutory purpose of giving the Tenants at least two weeks' warning of the commencement of proceedings. (In the event, proceedings were not commenced until a further month had elapsed, but in my view that is an irrelevant consideration, because the Landlord might have commenced proceedings on 27 November 2018.) Accordingly, the Notices were valid.

54. Having regard to my conclusion on the first ground of appeal, it is unnecessary to consider the second ground of appeal. I should nevertheless record that I consider that the Judge also fell into error here. To be fair to him, however, he did not have the benefit of having either *Ravenseft v Hall* or *Obsorn v Dior* cited to him. As discussed above, those authorities establish that, contrary to the Judge's understandable view, the "substantially to the same effect" test applies to information inserted into the form and not just to the wording used.

Conclusion

55. For the reasons given above, I would allow this appeal.

Floyd LJ:

56. I agree.

Underhill LJ:

57. I agree that this appeal should be allowed for the reasons given by Arnold LJ. The inter-action of *Fernandez v McDonald* and *Spencer v Taylor* has understandably caused some confusion, but Arnold LJ has demonstrated that on a careful reading the essential ratio of both is clear and that there is no inconsistency between them. The tenant succeeded in *Fernandez* because the notice said, unambiguously, 4 January, and the fact that that did not correspond to the end of a period was not in itself a reason why the reasonable recipient would understand it to mean 3 January. The landlord succeeded in *Spencer* because the notice contained two alternative dates and

the Court believed that it was clear from the notes on the form which of the two must have been intended. The correct test is encapsulated in points (i) and (ii) at para. 39 of Arnold LJ's judgment. I would only add, as regards (ii), that there must be no reasonable doubt as to what the notice was intended to say: that is the formula endorsed by Lord Steyn in *Mannai*, at page 768G.