Neutral Citation Number: [2025] EWCA Civ 11

Case No: CA-2023-002567

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT WANDSWORTH
Her Honour Judge Baucher
G00WT813

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2025

Before :

LORD JUSTICE NEWEY
LORD JUSTICE NUGEE
and
MR JUSTICE COBB

- -

Between :

(1) KAMEEL KHAN **(2) JULIA RANDELL-KHAN**	**Claimants and Respondents**
- and -	
ELENA D'AUBIGNY	**Defendant and Appellant**
NATIONAL RESIDENTIAL LANDLORDS ASSOCIATION	**Intervener**

- -
- -

Martin Westgate KC, Matthew Lee and Tim Jones (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Justin Bates KC and Richard Clarke (instructed by **Gateley plc**) for the **Respondents**
Tom Morris (instructed by **JMW Solicitors LLP**) for the **Intervener**
(by written submissions only)

Hearing date: 3 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lord Justice Nugee:

Introduction

1. This second appeal from the County Court at Wandsworth raises a point of some general importance on the construction of s. 7 of the Interpretation Act 1978 (**"IA 1978"**). This section, which re-enacts a materially similar provision in s. 26 of the Interpretation Act 1889 (**"IA 1889"**), provides as follows:

> "**7 References to service by post**
>
> 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."

The question is whether the section applies where a statutory provision requires a document to be given or provided to someone but does not expressly refer to that being done by post. Somewhat surprisingly, this question does not appear to have been authoritatively settled in the 135 years that s. 7 IA 1978 and its predecessor s. 26 IA 1889 have been on the statute book.

2. In the present case the question arose in proceedings brought by the Respondents, Dr Kameel Khan and his wife Mrs Julia Randell-Khan (**"the Khans"**), against the Appellant, Mrs Elena D'Aubigny (**"Mrs D'Aubigny"**), for possession of the flat which they had let to her under an assured shorthold tenancy (**"AST"**). The Khans relied on a notice under s. 21 of the Housing Act 1988 (**"HA 1988"**) as entitling them to possession. The s. 21 notice was admittedly sent and received, but landlords may not give a s. 21 notice if they are in breach of various statutory requirements to give other documents to their tenant, namely an Energy Performance Certificate (**"EPC"**), a Gas Safety Record (**"GSR"**), and a document entitled "How to rent: the checklist for renting in England" (**"How to Rent"**). The Khans' evidence was that their solicitor had posted these documents to the Appellant; Mrs D'Aubigny's evidence was that she had not received them.

3. At first instance Deputy District Judge Davis held that the documents had been duly served, relying both on the deeming provision in s. 7 IA 1978 and, in the alternative, on a deeming provision in clause 13.2 of the tenancy agreement. He therefore granted possession. On appeal his decision was upheld by Her Honour Judge Baucher who agreed with him both in relation to s. 7 IA 1978 and in relation to clause 13.2. She also said that she would have held that the documents had been served even without the deeming provisions.

4. Mrs D'Aubigny now appeals to this Court. She was represented by Mr Martin Westgate KC, who appeared with Mr Matthew Lee and Mr Tim Jones; the Khans were represented by Mr Justin Bates KC, who appeared with Mr Richard Clarke. We also had the benefit of written submissions from Mr Tom Morris on behalf of the National Residential Landlords Association which had been permitted to intervene in the appeal.

5. The appeal was very well argued on both sides. For the reasons that follow, I have come to the conclusion that the judges below were wrong to hold that s. 7 IA 1978 applied. But I would nevertheless uphold their decisions on the basis of clause 13.2 of the tenancy agreement, and would therefore dismiss the appeal.

The legislative background

6. It is convenient next to set out the relevant statutory provisions. It is common ground that Mrs D'Aubigny's tenancy was an AST. As is well-known, a landlord can (as the law currently stands) recover possession of property let under an AST by serving a notice under s. 21 HA 1988. This provides in s. 21(1) as follows:

> "**21 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."

In the present case, Mrs D'Aubigny's tenancy was a fixed term tenancy that had expired and been followed by a statutory periodic tenancy.

7. The Deregulation Act 2015 added two sections, s. 21A and s. 21B, to the HA 1988. These respectively provide, so far as material, as follows:

> "**21A Compliance with prescribed legal requirements**
>
> (1) A notice under subsection (1) or (4) of section 21 may not be given in relation to an assured shorthold tenancy of a dwelling-house in England at a time when the landlord is in breach of a prescribed requirement.
>
> (2) The requirements that may be prescribed are requirements imposed on landlords by any enactment and which relate to–
>
> (a) the condition of dwelling-houses or their common parts,
>
> (b) the health and safety of occupiers of dwelling-houses, or

(c) the energy performance of dwelling-houses.

…

21B Requirement for landlord to provide prescribed information

(1) The Secretary of State may by regulations require information about the right and responsibilities of a landlord and a tenant under an assured shorthold tenancy of a dwelling-house in England (or any related matters) to be given by a landlord under such a tenancy, or a person acting on behalf of such a landlord, to the tenant under such a tenancy.

(2) Regulations under subsection (1) may–

(a) require the information to be given in the form of a document produced by the Secretary of State or another person,

…

(3) A notice under subsection (1) or (4) of section 21 may not be given in relation to an assured shorthold tenancy of a dwelling-house in England at a time when the landlord is in breach of a requirement imposed by regulations under subsection (1).

…"

8. The relevant requirements for s. 21A and s. 21B were prescribed by the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, SI 2015 No 1646 (**"the AST Notices Regulations"**). Regs 2 and 3 respectively provide, so far as material, as follows:

"**2 Compliance with prescribed legal requirements**

(1) Subject to paragraph (2), the requirements prescribed for the purposes of section 21A of the Act are the requirements contained in–

(a) regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 (requirement to provide an energy performance certificate to a tenant or buyer free of charge); and

(b) paragraph (6) or (as the case may be) paragraph (7) of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 (requirement to provide tenant with a gas safety certificate).

(2) For the purposes of section 21A of the Act, the requirement prescribed by paragraph (1)(b) is limited to the requirement on a landlord to give a copy of the relevant record to the tenant and the 28 day period for compliance with that requirement does not apply.

3 Requirement for landlord to provide prescribed information

(1) A landlord under an assured shorthold tenancy of a dwelling-house in England, or a person acting on behalf of such a landlord, must give the tenant under the tenancy the information mentioned in paragraph (2).

(2) The information is the version of the document entitled "How to rent: the checklist for renting in England", as published by the Department for Communities and Local Government, that has effect for the time being.

(3) The information may be provided to the tenant–

(a) in hard copy; or

(b) where the tenant has notified the landlord, or a person acting on behalf of the landlord, of an e-mail address at which the tenant is content to accept service of notices and other documents given in connection with the tenancy, by e-mail.

…"

9. It can be seen that so far as an EPC is concerned, reg 2(1)(a) of the AST Notices Regulations cross-refers to reg 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012, SI 2012 No 3118 (**"the Energy Performance Regulations"**). Reg 6 of these regulations provides, so far as material, as follows:

"**6 Energy performance certificates on sale or rent**

(1) Subject to regulation 8, this regulation applies where a building is to be sold or rented out.

(2) The relevant person shall make available free of charge a valid energy performance certificate to any prospective buyer or tenant–

(a) at the earliest opportunity…

…

(5) The relevant person must ensure that a valid energy performance certificate has been given free of charge to the person who ultimately becomes the buyer or tenant."

10. So far as a GSR is concerned, reg 2(1)(b) of the AST Notices Regulations cross-refers to reg 36(6) and (7) of the Gas Safety (Installation and Use) Regulations 1998, SI 1998 No 2451 (**"the Gas Safety Regulations"**). Reg 36 of these regulations requires landlords to ensure that any relevant gas fitting and flue is maintained in a safe condition (reg 36(2)); that each such appliance and flue is checked at least every 12 months (reg 36(3)(a)); that in the case of a lease (which includes a tenancy of less than 7 years) commencing after the regulations came into force each appliance and flue has been checked within 12 months before the lease commences (reg 36(3)(b)); and that a record

of any appliance so checked, containing certain detailed information, is made and retained until there have been two further checks (reg 36(3)(c)). Reg 36(6) then provides:

> "**36 Duties of landlords**
>
> …
>
> (6) Notwithstanding paragraph (5) above, every landlord shall ensure that–
>
> (a) a copy of the record made pursuant to the requirements of paragraph (3)(c) above is given to each existing tenant of premises to which the record relates within 28 days of the date of the check; and
>
> (b) a copy of the last record made in respect of each appliance or flue is given to any new tenant of premises to which the record relates before that tenant occupies those premises …"

11. The above statutory provisions can be summarised as follows. Landlords of premises let under an AST cannot serve a s. 21 notice unless they have complied with statutory requirements (i) to ensure that a valid EPC "has been given" to the tenant; (ii) to ensure that a copy of a GSR "is given" to the tenant; and (iii) to "give" the tenant the current version of "How to Rent".

The facts

12. The Khans are the registered leasehold owners of Flat 3, Bullingham Mansions, Pitt Street, London W8 4JH (**"the Flat"**). There is an unusual background to the grant of the tenancy of the Flat but the details do not matter for present purposes. It suffices to say that Mrs D'Aubigny has lived in the Flat since 2002, which was formerly owned by her husband. He sold it to the Khans, who let it back to him. She took proceedings under s. 37 of the Matrimonial Causes Act 1973 against her husband and the Khans, which were compromised by a Consent Order approved by HHJ Everall QC sitting in the Family Court on 1 August 2018. This provided among other things for the Khans to let the Flat to Mrs D'Aubigny by way of AST for a fixed term taking effect from 7 February 2018 to 31 January 2020.

13. The form of tenancy agreement was annexed to the Order and although it appears never to have been signed it was common ground that Mrs D'Aubigny held the Flat on the terms of that agreement. It duly provided for the Flat to be let by way of AST for a Term from 7 February 2018 to 31 January 2020. Clause 12.2 provided that if the Khans allowed Mrs D'Aubigny to remain in the Flat after expiry of the Term a statutory periodic tenancy would arise under s. 5(2) HA 1988 on a weekly basis. Clause 12.3 provided that the Khans would have the right to recover possession if (i) the Term had expired; (ii) they had given two months' notice of their intention to recover possession; and (iii) at least 6 months had passed since the date of the agreement.

14. Clause 13 of the tenancy agreement provided, so far as material, as follows:

> "13.1 Any notice to the Landlord sent under or in connection with this

agreement shall be deemed to have been properly served if:

13.1.1 sent by first class post to the Landlord's address given in clause 13.4; or

13.1.2 left at the Landlord's address given in clause 13.4; or

13.1.3 sent to the Landlord's fax number or email address stated in the Parties clause.

13.2 Any notice sent to the Tenant under or in connection with this agreement shall be deemed to have been properly served if:

13.2.1 sent by first class post to the Property; or

13.2.2 left at the Property; or

13.1.3 sent to the Tenant's fax number or email address stated in the Parties clause.

13.3 If a notice is given in accordance with clause 13.1 or clause 13.2 it shall be deemed to have been received:

13.3.1 if delivered by hand, at the time the notice is left at the proper address;

13.3.2 if sent by first-class post, on the second Working Day after posting; or

13.3.3 if sent by fax, at 9.00 am on the next Working Day after transmission; or

13.3.4 if sent by email, fax, at 9.00 am on the next Working Day after sending."

An address was given for the landlords in clause 13.4. Neither party gave a fax number or e-mail address in the Parties clause.

15. The Term expired on 31 January 2020 but the Khans did not immediately seek to recover possession. That meant, as recognised by clause 12.2, that a periodic tenancy arose pursuant to s. 5(2) HA 1988 (which provides that on the expiry of a fixed term tenancy, other than in certain circumstances, a periodic tenancy arises under s. 5). Such a tenancy is (by virtue of s. 19A HA 1988) an AST.

16. As set out above, landlords of a property let on an AST can recover possession if they serve a notice under s. 21 HA 1988. The Khans' solicitors served a s. 21 notice on Mrs D'Aubigny on 17 March 2020 by first class post and recorded delivery. There was no dispute that Mrs D'Aubigny duly received it on or about that date. But when the Khans brought a claim against her for possession of the Flat, she defended the claim on the basis that the s. 21 notice was invalid, her case being that the Khans had failed to serve her with an EPC, GSR or How to Rent. The Khans replied that their solicitors had sent all three documents to Mrs D'Aubigny on 3 March 2020 by first class post and

recorded delivery, and relied on clause 13.2 of the tenancy agreement and in the alternative on s. 7 IA 1978. I will come back to look at the evidence on this point in more detail below.

The proceedings

17. The Khans issued their claim for possession in the County Court at Wandsworth in August 2020. There was also a claim for rent arrears. Mrs D'Aubigny defended the claim on the basis already referred to, namely that the s. 21 notice was invalid as no EPC, GSR or How to Rent had been served, and also counterclaimed for damages for disrepair.

18. The claim came on for trial before DDJ Davis on 30 March 2023. He took the view that the one day for which the case was listed was nothing like enough to try all the issues but, as he records in his unreserved judgment given that day, he suggested to the parties that if he was not being asked to make any findings as to credibility, he could use the time to determine the claim for possession, with the claim for rent arrears and the counterclaim for disrepair to be dealt with on another occasion, and "upon a clear indication being given by the claimant that I was not going to be invited to make any findings as to credibility" he proceeded to hear the claim for possession. He did however, as well as having witness statements, hear short oral evidence from both Dr Khan and Mrs D'Aubigny.

19. In his judgment DDJ Davis set out with conspicuous clarity the issues he had to resolve. The first was whether a gas safety check had taken place on 7 November 2019. He found that it had. The next issue was whether the EPC, GSR and How to Rent had been sent. He also resolved that in favour of the Khans, finding that they had been sent by first class post and recorded delivery, correctly addressed to Mrs D'Aubigny at the Flat, and that they had not been returned.

20. The third issue was whether s. 7 IA 1978 applied. He held that it did. His essential reasoning is found at [24]:

> "In my judgment the words in brackets, "serve", "give" and "send" can and should be interpreted to be used as substitutes for the words served by post. That, it seems to me, is a purposive interpretation of this particular statute and is to be preferred to the rather restrictive interpretation contended for by the defendant. I am satisfied that by using the word "given" in section 21, 21B and the regulations which I have already mentioned, Parliament intended that the relevant parts of the 1988 Housing Act and the regulations thereunder, authorised any document to be served by post."

21. That meant that it was for Mrs D'Aubigny to prove that she did not receive the documents. He held that she had not done so: her evidence "amounts only to an assertion that she did not receive them", and that, he held, was insufficient to prove that the documents were not served on her. It followed that the documents were by s. 7 IA 1978 deemed to have been served on 5 March 2020, and the s. 21 notice was valid.

22. He then considered clause 13.2 of the tenancy agreement in case he was wrong. He held that the EPC, GSR and How to Rent were within clause 13.2: the parties had not

sought to restrict what the word "notice" means, and any reasonable and ordinary person reading the tenancy agreement would assume that any documents that are required by law to be served before a s. 21 notice could be served could well be included in the word notice.

23. He therefore made a possession order against Mrs D'Aubigny. That has been stayed pending determination of the present appeal.

The first appeal

24. Mrs D'Aubigny appealed with the permission of HHJ Bloom given after an oral hearing. The appeal was heard by HHJ Baucher, who delivered judgment on 1 December 2023.

25. There were two grounds of appeal, namely that DDJ Davis had been wrong (1) in relation to s. 7 IA 1978 and (2) in relation to clause 13.2. HHJ Baucher dismissed both grounds. On s. 7 she effectively adopted the same view as DDJ Davis. On clause 13.2 she agreed that a reasonable person would have understood the parties to have meant by the word notice to encompass documents such as the EPC, GSR and How to Rent.

26. The Khans had served a Respondent's notice which sought to uphold the decision on the alternative ground that the same result would have been reached even if they had been required to prove service at common law without the benefit of either s. 7 IA 1978 or clause 13.2. HHJ Baucher recognised that it was strictly unnecessary to consider it but did so briefly. She said:

> "53. The findings of the deputy district judge were clear, and they were not the subject of appeal. He found: all three documents were sent, they were sent to the correct address, they were not returned, the method of service had been effected to bring the section 21 to the attention of the tenant, and the tenant's only evidence was a bare denial of receipt.
>
> 54. … While I accept that the deputy district judge's findings were in the context of him finding that the Interpretation Act applied, I do not consider that for the respondent's argument to hold sway further evidence needed to have been adduced at the hearing before the deputy district judge and that the respondent needed to have put to the tenant that the documents had come to her attention. There are two ways of "giving"; actual and deemed. In my view, given the deputy district judge's findings included that the section 21 notice had been received and come to the appellant's attention, I consider that the only conclusion the deputy district judge could properly have reached, had he been required to do so, was that the service of the documents had been proved by the respondents on the balance of probabilities.
>
> 55. Thus, had I been so required, I would have upheld the decision of the deputy district judge on the basis that the same result would have been reached if the respondent had been required to prove service at common law without the benefit of the deeming provisions."

She therefore dismissed the appeal.

Grounds of Appeal

27. Mrs D'Aubigny appeals (with permission given by myself). There are three Grounds of Appeal:

(1) HHJ Baucher was wrong to find that s. 7 IA 1978 applied to the requirement to give an EPC, GSR and How to Rent.

(2) She was wrong to find that these documents were "notices" for the purposes of clause 13.2 of the tenancy agreement.

(3) Insofar as she also dismissed the appeal on the basis of the Respondent's notice, she was wrong to find that the only viable conclusion was that these documents were received by Mrs D'Aubigny.

28. The Khans served a Respondent's notice contending that if the statutory presumption in s. 7 IA 1978 did not apply, the common law presumption would have applied and led to the same result.

Ground 1: s. 7 IA 1978

29. I have set out s. 7 IA 1978 at paragraph 1 above. The issue can be shortly stated. When s. 7 says that it applies "Where an Act authorises or requires any document to be served by post" is it necessary for the relevant provision (which by s. 23 IA 1978 can be in subordinate legislation) to expressly say that a document must, or may, be served *by post*? Or is it sufficient that it simply uses an expression such as "serve", "give" or "send" in circumstances where this permits service by post?

30. The point is a short one to state, but it is not entirely easy to resolve. It is common ground that although there are a handful of decisions which touch on the question, there is no authority binding on this Court and we have to decide the point for ourselves.

31. The starting point is that the statutory provisions which require the EPC, GSR and How to Rent to be given to a tenant do not say anything about how that is to be done (other than, in the case of How to Rent, saying that it can be provided in hard copy or, in appropriate circumstances, by e-mail). But "give" is an ordinary English word, and on its natural and ordinary meaning if A is required to give a document to B, that simply means that A must cause B to receive it: see *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, [2019] 1 WLR 104 at [15] per Lord Carnwath JSC:

> "It is common ground that, by virtue of the opening words of paragraph 8 of Schedule 4A to [the Local Government Finance Act 1988], the three specific methods there set out do not exclude other methods of service available under the general law. There is no serious dispute as to what that entails. In *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 WLR 177, 185 (a case under the Landlord and Tenant Act 1954), Lord Salmon said:
>
> > "According to the ordinary and natural use of English words, giving a notice means causing a notice to be received. Therefore, any

> requirement in a statute or a contract for the giving of a notice can be complied with only by causing the notice to be actually received – unless the context or some statutory or contractual provision otherwise provides . . ."

(No distinction is drawn in the cases between "serving" and "giving" a notice: see *Kinch v Bullard* [1999] 1 WLR 423, 426G.) To similar effect in *Tadema Holdings Ltd v Ferguson* (1999) 32 HLR 866, 873 Peter Gibson LJ said (in a case relating to service of a notice under the Housing Act 1988): " 'Serve' is an ordinary English word connoting the delivery of a document to a particular person." "

32. It is therefore common ground that one way in which A can "give" a document to B is by sending it to B in the post, so long as B does actually receive it. It may be noted that there has been some judicial disagreement as to whether the critical question is whether A has caused the document to be delivered to B's address, or whether B has to actually receive the document himself. The question arose in *Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2017] EWCA Civ 153, [2017] ICR 1370, and on appeal [2018] UKSC 22, [2018] 1 WLR 2073, where an employer gave an employee notice of termination of her employment by a letter in fact delivered to her address on 26 April, but not received by her until 27 April as she only then returned from holiday. The date of giving notice affected the date her employment ceased and that had significant consequences for her pension entitlement. Both Lewison LJ in this Court and Lord Briggs JSC in the Supreme Court (with whom Lord Lloyd-Jones JSC agreed) delivered dissenting judgments in which they took the view that the notice was given on 26 April when it was delivered; but the majority in both Courts held that notice was not given until the following day. Lady Hale JSC (with whom Lord Wilson and Lady Black JJSC agreed) accepted the employee's submission that notice was only given when the letter came to the attention of the employee and she had either read it or had had a reasonable opportunity of doing so.

33. For present purposes however the significant point is that if a statutory provision simply provides that A is required to give a document to B, A does not have to physically hand the document to B, but can send it in the post. Provided that B does in fact receive it, A will thereby have "given" it to B (or, as regs 2 and 3 of the AST Notices Regulations refer to, will have "provided" it to B).

34. In those circumstances Mr Bates' argument for the Khans was very simple. It was that the statutory provisions in question permitted the giving of the documents by post; thus although they did not "require" the documents to be served by post, they did "authorise" them to be served by post. That was sufficient to engage s. 7 IA 1978.

35. Mr Westgate's argument for Mrs D'Aubigny was also simple, namely that s. 7 IA 1978 applies if a statutory provision expressly requires service to be by post, or if it expressly authorises service by post. Many statutory provisions do expressly authorise service by post: see for example s. 115(2) of the Taxes Management Act 1970 ("Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post"), s. 99(1)(b) of the Leasehold Reform, Housing and Urban Development Act 1993 ("Any notice required or authorised to be given under this Part … may be sent by post"), and s. 233(2) of the Local Government Act 1972 ("Any such document may be given to or served on the person in question either by delivering it to

him, or by leaving it at his proper address, or by sending it by post to him at that address"). But if, as in the present case, a statutory provision does not expressly provide that a document may be served (or given or sent etc) by post, then although A can use the post to give B the document, this is not a case where it is the statutory provision that *authorises* service by post but a case where the statutory provision merely does not prohibit it; it is the general law, and the ordinary meaning of the word "serve" or "give", that permits it, rather than any authority conferred by the statutory provision.

36. I have not found it easy to resolve this question: indeed the very simplicity of the point to my mind makes it quite difficult. Both judges below considered that the words in brackets, namely "(whether the expression "serve" or the expression "give" or "send" or any other expression is used)", indicated that Parliament intended these to be synonyms for "serve by post", and Mr Bates sought to support this reasoning, pointing to the width of the words "or any other expression". But I do not think this argument bears the weight sought to be placed on it. On any view the purpose of the words in brackets was to make it clear that it was not necessary before the section applied for the very word "serve" to be used; "give" or "send" or any other expression would do in place of "serve". But this does not tell one whether the statutory provision also needs in terms to authorise service (or giving or sending etc) *by post*. As Mr Westgate submitted, that depends on whether Parliament meant that the words in brackets such as "give" were to be treated as synonyms for "serve by post", or whether all that was meant was that one could use "give" instead of "serve". I do not think that can be said to be evident simply from the language used, but if anything to my mind the latter is the more natural reading.

37. Moreover, as Mr Westgate said, if Parliament had intended s. 7 to apply simply by use of the word "serve" or "give" without any reference to post, then it would have been very easy to draft something to that effect, but one would expect it to be in rather different terms. Such a provision would most naturally say that where an Act refers to service of a document (whether by using the word "serve" or "give" etc), then, unless the contrary intention appears, the person serving the document may do so by post and if he does so, the other consequences follow. Indeed I think Mr Westgate is right that if the section means what Mr Bates submitted it did, then the words "by post" ("authorises or requires any document to be served *by post*") could equally well have been omitted and are therefore otiose. Mr Bates said that they were not otiose as some statutory provisions refer to service but on their true construction do not allow service by post. But I do not see why that would matter: such a case would be catered for by the words "unless the contrary intention appears".

38. Some other subsidiary arguments were relied on by both sides which I have not found of much assistance. In the end the point that I have found most persuasive is that the IA 1978 is by definition an Interpretation Act. The very purpose of such an Act is to tell one what words used in other statutory provisions mean. In fact the IA 1978, which consolidated the IA 1889 with amendments, does go beyond that (as did the IA 1889): thus for example s. 1 IA 1978 provides that every section of an Act takes effect as a substantive enactment without introductory words; and s. 2 that any Act may be amended or repealed in the Session of Parliament in which it was passed. Such provisions are not really about interpretation. But most of the Act is, and s. 7 is in a group of sections (ss. 5 to 11) headed "Interpretation and Construction", each of which tells one how words and expressions used in Acts are to be interpreted and construed.

And for this purpose s. 7 indicates what its scope is: it is concerned with "References to service by post". This is admittedly the heading of the section, but it was not disputed that, as it is put in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) at §16.7:

> "A heading is part of an Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief guide to the material to which it relates and that it may not be entirely accurate."

On its face therefore s. 7 is concerned with statutory provisions that *refer* to service by post.

39. The same point is if anything even clearer from the predecessor section, s. 26 IA 1889. The IA 1889 also contained a long list of sections whose purpose was to give the meaning of words and expressions used in other statutory provisions, grouped together under the heading "New General Rules of Construction". Many of these sections were headed "Meaning of …" and s. 26 was one of these. It provided:

> "**26 Meaning of service by post**
>
> Where an Act passed after commencement of this 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 shall be deemed to be effected by properly addressing, prepaying, 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."

On its face therefore this section was concerned with the *meaning* of service "by post". It was not suggested that s. 7 IA 1978, which re-enacted s. 26 IA 1889 in almost identical terms, had any different effect from s. 26.

40. In those circumstances I have come to the conclusion that Mr Westgate's submissions are to be preferred. What s. 7 IA 1978 is concerned with (and what s. 26 IA 1889 was concerned with) is the effect of a statutory provision that refers in terms to service "by post". It does not matter whether the word "serve" is used or some other expression such as give or send or anything else to like effect; but the statutory provision must in my judgement refer to serving (or giving, sending etc) a document by post. I do not consider that it is applicable to one that simply refers to giving a document, without any reference to this being done by post; such a statutory provision neither *requires* nor *authorises* service by post, even though I accept that it does not prohibit it. The statutory provisions in question here are all of this type, and it follows that in my view s. 7 IA 1978 does not apply to them.

41. That conclusion is consistent with such discussion of the point as there is in the decisions that we were referred to. In date order they are as follows. In *Postermobile plc v Kensington and Chelsea Royal London Borough Council* (2000) 80 P&CR 524, a decision of a Queen's Bench Divisional Court, the relevant statutory provision was condition 4 in para 8 of sch 3 to the Town and Country Planning (Control of

Advertisements) Regulations 1992, SI 1992 No 666. This provided that:

> "At least 14 days before the advertisement is first displayed, the local planning authority shall be notified in writing by the person displaying it of the date on which it will first be displayed and shall be sent a copy of the relevant planning permission."

Pill LJ held that s. 7 IA 1978 did not apply, saying (at 532):

> "Section 7 bears the heading "References to Service by post". Condition 4 does not set out the manner of service and does not allow the incorporation of section 7."

Morison J agreed (at 535).

42. In *Moviestar Trade Mark* [2005] RPC 26, a decision of Mr Richard Arnold QC (as he then was) sitting as the Appointed Person, the relevant statutory provision was rule 31(1) of the Trade Marks Rules 2000, SI 2000 No 136. This provided as follows:

> "An application to the registrar for revocation under section 46(1)(a) or (b) of the registration of a trade mark shall be made on Form TM26(N) together with a statement of the grounds on which the application is made; the registrar shall send a copy of the application and the statement to the proprietor."

The question was whether s. 7 IA 1978 applied to the sending of the copy by the registrar. On this Mr Arnold said at [26]:

> "As for s.7, I am not sure that this applies at all. The [Trade Marks Act 1994] does not expressly authorise the service of documents by post, it merely confers a general rule-making power with respect to inter alia "the service of documents" (s.78(2)(c)). As I have discussed, even the 2000 Rules do not expressly authorise the Registrar to send documents by post. I have concluded that it is within his powers under the Rules to do so, but I doubt that the mere fact that the Registrar is not acting *ultra vires* the Rules amounts to authorisation by the 1994 Act within the meaning of s.7 of the 1978 Act. Even if s.7 would otherwise apply, however, it is my opinion that a "contrary intention" appears from r.31(2) for reasons that I give below."

43. In *London Borough of Southwark v Akhtar* [2017] UKUT 0150 (LC), [2017] L&TR 564, a decision of Judge Elizabeth Cooke sitting in the Upper Tribunal (Lands Chamber), the relevant statutory provision was s. 20B(2) of the Landlord and Tenant Act 1985. This provides as follows:

> "Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

The First-tier Tribunal had found that s. 7 IA 1978 applied to notices given under this

sub-section on the basis that "s. 7 gives an implied authority to give a notice by post where that is permitted at common law." But Judge Elizabeth Cooke disagreed, accepting at [66] a submission, based among other things on *Postermobile*, that:

> "s. 7 is not engaged where nothing is said about service by post."

It is fair to add however that there does not appear to have been any dispute on the point.

44. Those are the only cases we were referred to which are directly on the point. We were also shown *Newcastle City Council v Abdallah* [2024] UKUT 140 (LC), [2024] HLR 33, a decision of the Deputy Chamber President, Martin Rodger KC, in the Upper Tribunal (Lands Chamber) where he said at [26]:

> "Section 7, 1978 Act applies to notices given by local authorities, because section 233(2), 1972 Act, specifically authorises service by post. It also applies to notices and other documents served under the 1925 Act or any instrument affecting property (at least in relation to documents required by statute), because section 196(4) and (5) authorise service of those by post."

But since in that case the relevant statutory provisions did refer to service by post this does not seem to me to assist one way or the other.

45. I also think that no real assistance can be obtained from two other sources that we were taken to. One is *Weekes on Property Notices: Validity and Service* (3rd edn, 2021), where Mr Tom Weekes KC says at §6.41:

> "Although a notice can usually be 'served' by sending it by post so long as it is received by the recipient, an Act 'authorises or requires any document to be served by post' only if it *expressly* permits service by post."

But this is admittedly based on what Judge Elizabeth Cooke said in *Akhtar* and I do not think adds anything to that decision.

46. The other is an article by Sir Noel Hutton (retired First Parliamentary Counsel) which the industry of Mr Westgate and his team unearthed in the perhaps unlikely setting of the Journal of Legislation of the Notre Dame Law School in Indiana: *The British Interpretation Act* (1979) 6 J Legis 15. Here Sir Noel says of s. 7 IA 1978 (at 18):

> "The common law rule is that where a notice or document is to be given or served it must be handed to the party concerned. The clause does not alter that but brings in supporting provisions for Acts which expressly authorise postal service."

But it would appear that Sir Noel was mistaken in thinking that at common law a document could only be served or given by handing it to the recipient. If that had been the common law rule, then what he says would make perfect sense; but since it is not (see the citation from *UKI* at paragraph 31 above), I do not think any weight can be placed on it.

47. So one is left with the three decisions I have referred to; none of them of course is binding on us, in none of them does there appear to have been any extensive argument, and in *Moviestar* Mr Arnold's views are quite tentatively expressed. Nevertheless for what it is worth they are all in line with the view I have come to.

48. Mr Bates placed some reliance on a statement by Rix LJ in *Freetown Ltd v Assethold Ltd* [2012] EWCA Civ 1657 at [25] that s. 7 IA 1978:

> "provides a general statutory code regarding sendings by post and that the statutory presumption is that it will apply – unless a contrary intention appears."

But in that case the relevant statutory provision, s. 15(1)(b) of the Party Wall etc Act 1996, did contain an express authority to serve by post ("A notice or other document required or authorised to be served under this Act may be served on a person … (b) by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom"), and there is nothing to suggest that Rix LJ was concerned with the present question at all. Indeed at [36] Rix LJ said:

> "It is as if section 7 (which goes back in its origins to very similar language in section 26 of the Interpretation Act 1889) provides the incorporated meaning of service by post in any statute which authorises or requires any document to be "served by post"."

That if anything seems more in line with Mr Westgate's submissions.

49. Mr Bates also relied on the fact that a number of statutory provisions have expressly disapplied s. 7 IA 1978 when on Mr Westgate's submissions it would not have applied anyway. One example will suffice. Para 4(1) of sch 1 to the Enduring Powers of Attorney Act 1985 provided:

> "Subject to sub-paragraph (2) below, before making an application for registration, an attorney shall give notice of his intention to do so to the donor."

The Act did not specify as to how such notice might be given. Nevertheless, para 8(2) provided:

> "Notwithstanding anything in section 7 of the Interpretation Act 1978 (construction of references to service by post), for the purposes of this Schedule a notice given by post shall be regarded as given on the date on which it was posted."

Mr Bates is no doubt right that this and other similar examples are drafted on the assumption that s. 7 IA 1978 would (or might) otherwise apply even in a case where the relevant statutory provisions said nothing about service by post. But I do not think the assumptions of those drafting later statutes can determine the true construction of s. 7 IA 1978, and in any event such provisions are generally explicable as having been inserted from an abundance of caution. In the absence of an authoritative decision on s. 7 IA 1978, it is perhaps understandable if those drafting such provisions took the view that it was at least possible that s. 7 would be held to apply.

50. In summary therefore I would accept Ground 1 of the appeal and hold that s. 7 IA 1978 did not apply to the statutory provisions in the present case, namely those requiring the provision of the EPC, GSR and How to Rent.

51. That is not however by itself sufficient to allow the appeal.

Ground 2: clause 13.2 of the tenancy agreement.

52. I have set out clause 13.2 at paragraph 14 above. The question is whether each of the EPC, GSR and How to Rent, or the letter enclosing them, was a "notice sent to the Tenant under or in connection with this agreement".

53. Two points were argued by Mr Westgate. The first was that the documents were not "notices". The second was that they were not "under or in connection with" the tenancy agreement.

54. I do not think there is anything in the second point. Mr Westgate said that the documents were not sent "under" the tenancy agreement, which did not in fact refer to any of them, but were sent under the relevant statutory provisions. That I accept. But I think it plain that they were sent "in connection with" the tenancy agreement. It was only because Mrs D'Aubigny was (or was to be) the tenant under the tenancy agreement that they had to be given to her at all. The EPC had to be given to her under reg 6(5) of the Energy Performance Regulations, which requires an EPC to have been given to the person "who ultimately becomes the … tenant" (see paragraph 9 above). The relevant GSR (that for November 2019) had to be given to her under reg 36(6)(a) of the Gas Safety Regulations which requires a copy of the GSR to be given "to each existing tenant of the premises" (see paragraph 10 above). How to Rent had to be given to her under reg 3(1) of the AST Notices Regulations which requires it to be given by the landlord of AST to "the tenant under the agreement" (see paragraph 8 above). This is quite apart from the fact that all three documents had to be given to her before the Khans could serve a s. 21 notice terminating the tenancy, and that is evidently why they were sent in March 2020.

55. The first point however is not quite so straightforward. Mr Westgate pointed out that clause 5.5 of the tenancy agreement provided as follows:

> "The Tenant shall send to the Landlord a copy of any notice or other communication affecting the Property within seven days of receipt and shall not take any action regarding such notices or communications without the prior consent of the landlord."

That showed, he said, that not all documents affecting the Flat were "notices" for the purposes of the tenancy agreement. His submission was that in clause 13.2 "notice" was to be understood as limited to a document normally described as such, such as a notice to quit, or a s. 21 notice. None of the documents here was described in the relevant regulations as a notice: the EPC was described as a "certificate", the GSR as a "record", and How to Rent as "information … in the form of a document". Alternatively if "notice" went beyond that, it should be confined to notices that affected the parties' legal rights in relation to the Flat.

56. Mr Bates said that the tenancy agreement was designed to be a practical document

regulating the day-to-day relationship between landlord and tenant, ideally without reference to lawyers. He referred to the fact that clause 13 operated both ways and hence for the benefit of both parties. If "notice" meant some subset of documents passing between landlord and tenant, the parties could be drawn into disputes about whether particular documents counted as notices, without any clear guidance in the tenancy agreement on the point. If it were necessary to define what counted as a notice for these purposes, Mr Bates suggested that it would include any document which either of them might need to give to the other for some legal purpose.

57. On this question I prefer the submissions of Mr Bates. Neither counsel cited any learning on what a "notice" is, nor were we addressed at any length on the normal meaning of the word. But it is worth exploring the concept a little. Mr Westgate is clearly right that there are some notices which are prescribed by statute and described as such – a s. 21 notice or a s. 8 notice under the HA 1988; a s. 146 notice under the Law of Property Act 1925; a s. 25 notice under the Landlord and Tenant Act 1954 and the like. But the concept of a notice is of course not confined to notices required by statute. In many contractual relationships the parties' rights can be affected by one party giving notice to the other – some obvious examples are a notice to quit given at common law, or a notice to terminate an employment, or a notice to exercise a contractual option, or a notice requiring appointment of an arbitrator. Such notices are no doubt usually referred to as notices in the contract, but it would not matter if they were not. If an option provided that it could be exercised "by the grantee sending the grantor a letter in the form annexed", such a letter could quite naturally be referred to as a notice exercising the option even if the word notice were not used in the contract; if an arbitration agreement provided that either party could commence an arbitration by a written request to the other to appoint an arbitrator, such a request could still be referred to as a notice commencing the arbitration. The concept of a notice therefore does not depend on the word itself being used.

58. I have said that a "notice" can include a document exercising a right under a contract. But I do not think that the ordinary meaning of "notice" is confined to that. For example clause 5.1.2 of the tenancy agreement provided that:

> "The Tenant shall … immediately notify the Landlord if the immigration status of any of the Lawful Occupiers changes from that recorded in the Schedule."

If the immigration status of one of the occupiers did change and the tenant duly wrote a letter to the landlords notifying them of the change, that could I think be fairly described as a notice given under the tenancy agreement; it would moreover be surprising if the tenant could not take advantage of clause 13.1 for that purpose. So a notice can I think include a document which conveys information as well as one which exercises a right. That to my mind is well within the ordinary core meaning of a notice: for example a document which starts "Take notice that…" may be used not only to exercise a right, but also to convey information.

59. So what is it in general terms for a document to be a notice? I do not intend to attempt to give a comprehensive definition because this is always a difficult and risky thing to do; but it seems to me that in general a notice is simply something that notifies the recipient of something. To that there should no doubt be added two things. First, that "a notice" is I think generally to be understood as referring to a notice in writing, and

certainly so in clause 13 which refers to "Any notice … sent"; as Mr Westgate submitted, that is to be contrasted with "notice" more generally which need not be in writing. Second, that the word "notice" has an air of formality about it. An e-mail telling a friend that I intend to go to Paris next week would scarcely be called a notice, but if an employee were employed in a job which required them to tell their employer if travelling abroad, then such an e-mail might more reasonably be called a notice of intended travel. So we can perhaps say that a notice is a formal written notification of something. By that I do not mean to suggest that a notice has to be in any particular form or use any formal language: a text from a tenant to a landlord complaining that the boiler has stopped working and the roof leaks could quite reasonably be regarded as the tenant giving the landlord a notice of disrepair for the purpose of the landlord's repairing covenant. What I mean is that the notification has to be for some formal purpose; and in the case of a landlord and a tenant, I think that means in connection with their relationship of landlord and tenant.

60. In the case of the tenancy agreement, therefore, I consider that a notice would include anything in writing by which the Khans or Mrs D'Aubigny formally notified the other of something in their capacity as landlords and tenant respectively. That is pretty much the same as Mr Bates' formulation of anything which either might need to give to the other for some legal purpose. It is also not very different from Mr Westgate's alternative formulation of documents that affected the parties' legal rights in relation to the Flat. All three of these seem to me to express much the same concept.

61. But whichever of these various formulations most accurately captures what it is to be a notice, I think that the letter enclosing the relevant documents here – the EPC, the copy of the GSR and How to Rent – was a notice for the purposes of clause 13.2. It was sent by the Khans as landlords to Mrs D'Aubigny as tenant. As Mr Westgate himself said, the documents enclosed were important documents, required by legislation to be given by landlords to tenants, and containing information of acute concern for tenants under ASTs – either information about their safety, or information which would enable them to make energy choices, or information about their rights and responsibilities as renters. Mr Westgate pointed out that the documents each had an independent existence. There is some truth in this: the purpose of the EPC was to certify the energy performance of the building; the purpose of the GSR was to record the result of the last inspection. But this does not to my mind affect the fact that the purpose of the letter sending them to Mrs D'Aubigny was to notify her of the content of those documents. It is as if the letter had stated: this is to notify you that the energy performance of the Flat has been certified as on the enclosed EPC; this is to notify you that the result of the latest gas safety inspection was as recorded on the enclosed copy of the GSR. The letter was in my view a formal notification by the Khans to Mrs D'Aubigny of the information contained in the documents in connection with the relationship of landlord and tenant between them.

62. The documents were also documents which the Khans needed to give her for some legal purpose (Mr Bates' formulation). And I also consider that they were documents which affected the parties' legal rights in relation to the Flat (Mr Westgate's alternative formulation). They affected the parties' legal rights because without giving them the Khans could not serve a valid s. 21 notice. Mr Westgate pointed out that the Khans were obliged by the various regulations to give them to Mrs D'Aubigny whether or not they wished to serve a s. 21 notice, and indeed long before they could do so. That is so, but I do not think it affects the point that the effect of s. 21A and s. 21B HA 1988

was that service of these documents did affect the parties' legal rights by opening the door to service of a s. 21 notice.

63. In my judgement therefore the Khans can rely on clause 13.2 of the tenancy agreement in relation to the letter enclosing each of the EPC, GSR and How to Rent. On DDJ Davis's findings, this letter was sent by first class post to the Flat and the result is that by clause 13.3.2 it was deemed to have been received on the second Working Day after posting. This deeming provision, unlike that in s. 7 IA 1978, does not contain any provision enabling it to be rebutted by proof to the contrary. It follows that the documents are to be regarded as having been properly served before the s. 21 notice was given.

64. I add for the sake of completeness that in his skeleton argument Mr Westgate advanced an argument that it was not possible for landlords and tenants to contract out of the statutory provisions, which required landlords to ensure that the relevant documents were actually provided to their tenants. But in his oral submissions he expressly abandoned the point as being a new point that had not previously been raised, and we heard no argument on it one way or the other.

65. On that basis I would dismiss Ground 2 of the appeal, and with it the appeal.

Ground 3 and Respondent's notice: the position in the absence of deemed service

66. On the view I take of Ground 2, it is unnecessary to consider Ground 3 or the Respondent's notice (which in any event I think is to the same effect). I will however say a little about the point.

67. The evidence before DDJ Davis was as follows. Dr Khan said in his witness statement that he understood from his solicitors that the EPC, the GSR, and How to Rent were served on Mrs D'Aubigny on 3 March 2020 by first class post and recorded delivery. He exhibited a copy of his solicitor's covering letter. This was addressed to Mrs D'Aubigny at the Flat. He also exhibited a copy of what he described as his solicitor's Royal Mail book. This contained posting receipts dated 3 March 2020 for two documents addressed to Mrs D'Aubigny at the Flat with stickers giving reference numbers. Dr Khan also said that his solicitor had confirmed that the letter had not been returned. He also said that he was on the committee of the management company which takes care of the building and had a good knowledge of the procedures in place. He was aware that when any recorded post is received in the building it is signed for by the porter, Mr Phil Buttner, who then hand delivers it to the correct flat.

68. Dr Khan's evidence did not however contain any evidence, one way or the other, as to whether the recorded delivery letter was signed for. This was in contrast to the position with the s. 21 notice where he exhibited not only a similar posting receipt (dated 17 March 2020) but also a screenshot from the Royal Mail website showing that it had been delivered on 18 March 2020 and signed for by "Phil".

69. Mrs D'Aubigny's evidence was to the effect that she denied that she had received the letter or documents or that they came to her attention prior to the s. 21 notice.

70. As referred to above, both Dr Khan and Mrs D'Aubigny gave brief oral evidence before DDJ Davis. We have not been told what their oral evidence was, but the hearing was

held on terms that DDJ Davis would not be asked to make any findings as to credibility, and Mr Bates, who appeared before him for the Khans, confirmed to us that he did give an indication to that effect. His case was that Mrs D'Aubigny had done no more than simply deny receipt, and that this was not enough to rebut the presumption.

71. DDJ Davis found as already stated that the documents were sent by first class post and recorded delivery on 3 March 2020, and had not been returned. That has not been challenged. Having found that s. 7 IA 1978 applied, he then considered whether the statutory presumption in s. 7 IA 1978 had been rebutted. On this he said (at [26]):

> "…the next issue to decide is whether or not the defendant has proved, on the balance of probabilities, that she did not receive the documents. In my judgment, the answer to that question is 'no'. The defendant's evidence amounts only to an assertion that she did not receive them; see for example, paragraph nine on page 82 of the trial bundle. That, in my judgment, is insufficient to prove that the documents were not served upon her, following the decision of Morgan J in *Calladine-Smith v Saveorder Limited* [2011] EWHC 2501 (Ch). Applying the principles set out in that case to the evidence before me, I am not satisfied on a balance of probability that the defendant has proved she did not receive the documents."

72. As Newey LJ said in argument that seems rather odd. Mrs D'Aubigny said she did not receive the documents. If the question is whether she did receive them, it is difficult to see how one can reach a secure conclusion that she did not do so in a trial in which there is no challenge to her credibility. In general if a party wishes to submit that a witness's evidence is not to be accepted, it has to be challenged in cross-examination, as the Supreme Court has recently restated in clear terms: see *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204 at [70(i)] per Lord Hodge DPSC:

> "The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses."

73. And I do not think that the decision of Morgan J in *Calladine-Smith* really says what DDJ Davis thought it did. What he said in that case was this (at [26]):

> "The second question focuses on the word "proved" in the phrase "the contrary is proved". As I already set out, the question is: is an addressee of the letter required only to show on the balance of probabilities that the letter was not delivered or served or received by him, or does the burden on the addressee go further? Is it a requirement to lead positive evidence as to what happened to the letter? Is there a burden on him to show that the sender of the letter was aware that the letter had not been delivered or served or received? In the absence of authority and basing oneself on the statutory language alone, it seems to me quite clear that the reference to something being proved in this context is a reference to something being proved on the balance of probability. Accordingly, if the addressee of the letter proves on the balance of probability that the

> letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings of fact."

74. It seems to me that all that Morgan J meant by saying that it was not enough simply to assert that someone did not receive the letter, was that, as with any other finding of fact, the Court was not obliged to accept such an assertion at face value but could assess whether to accept it by reference to all other relevant facts and the Court's evaluation of the witness's credibility and reliability. Mr Bates submitted that the addressee of a letter had to do more than say they had never got the letter, and come up with some explanation as to why not – they might for example be able to adduce evidence that other documents in the block had gone missing, or that there was a problem with the post in that part of London, or that the porter was known to be unreliable or the like. But I think it clear from the passage I have cited from Morgan J – and even more so from the remainder of his judgment at [27]-[33] where he considers various authority – that he did not consider that it was necessary for the addressee to lead positive evidence as to what had happened to the letter. All he needs to prove is that it was not served on him. And since service as a matter of general law requires receipt (see above), that means that all he needs to prove is that he did not receive it.

75. So I have real doubts whether DDJ Davis's conclusion on this point was appropriate in the particular circumstances of this somewhat unusual hearing in which oral evidence was heard but no challenge to credibility advanced. But on the other hand, as Mr Westgate expressly accepted, DDJ Davis made his finding, it was never appealed, and Mrs D'Aubigny is therefore stuck with it.

76. The real question on this aspect of the case therefore is whether that finding also determines the result if service has to be proved without the aid of either s. 7 IA 1978 or clause 13.2 of the tenancy agreement, that is at common law.

77. On this, it is common ground that even without the benefit of s. 7 IA 1978 there is a rebuttable presumption at common law to similar effect. In *Gresham House Estate Co v Rossa Grande Gold Mining Co* [1870] WN 119 the trial judge had directed the jury that a notice to quit enclosed in a letter sent through the post was *prima facie* evidence that it had been received, and left the question to them whether it had been. A motion for a new trial on the ground of misdirection was refused, the Court (Cockburn CJ, Blackburn, Mellor and Hannen JJ) being reported as holding that:

> "if a letter properly directed, containing a notice to quit, is proved to have been put into the post-office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post-office, and was received by the person to whom it was addressed."

78. That was applied by the Privy Council on appeal from the High Court at Fort William in Bengal in *Banerji v Roy* AIR 1918 PC 102 at 112 per Lord Atkinson giving the opinion of the Board. He accepted that the presumption was rebuttable, but said on the facts:

> "That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself."

See also *Haywood* in this Court at [2017] EWCA Civ 153 at [94]-[97] per Lewison LJ and at [136] per Arden LJ. They differed as to whether, once a letter was shown to be delivered to the addressee's address, the risk of it not in fact reaching the addressee fell on the sender or the addressee; but there is otherwise no real difference between them as to the common-law presumption and as to its being rebuttable.

79. In these circumstances it seems to me that the question comes down to whether the conclusion of DDJ Davis that Mrs D'Aubigny had not rebutted the statutory presumption – a conclusion that as I have said Mr Westgate accepted had not been appealed and was binding on her – is equally applicable to the common-law presumption, and means that that presumption too would not be rebutted. In my judgement it is. I cannot for present purposes see any material distinction between the two exercises.

80. Mr Westgate submitted that the common law presumption was much more flexible than the statutory presumption and hence more easily rebutted. He relied on what Lord Atkinson said in *Banerji* about the presumption being strengthened if the letter had been signed for, and suggested that as here there was no evidence whether the recorded delivery letter had been signed for, the presumption was weakened. But I do not think this works. As appears from *Gresham House*, all that is needed at common law to generate the presumption is that a letter properly directed (that is, addressed) is put into the post-office; it is no doubt also implicit in that that the letter is pre-paid. I see no relevant distinction between that and the statutory presumption which is generated by properly addressing, pre-paying and posting a letter. Given DDJ Davis's unappealed conclusion that Mrs D'Aubigny's evidence was insufficient to rebut the latter, I think it must follow that it was also insufficient to rebut the former.

81. I would therefore not have accepted Ground 3 of the appeal had it been a live issue, and would have agreed with the way it is put in the Respondent's notice.

Conclusion

82. For the reasons I have given I would dismiss the appeal.

Mr Justice Cobb:

83. I agree.

Lord Justice Newey:

84. I also agree.