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Case No: CH-2022-000228

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/03/2024

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

MERRYCK LOWE **Appellant**

- and -

THE GOVERNORS OF SUTTON'S HOSPITAL IN CHARTERHOUSE **Respondent**

- -
- -

Tom Morris (instructed by **JMW Solicitors LLP**) for the **Appellant**
Shomik Datta (instructed by **Stone King LLP**) for the **Respondent**

Hearing dates: 21 February 2024

- -

Approved Judgment

This judgment was handed down at 12pm on Thursday 21 March 2024 by circulation to the parties or their representatives and by release to the National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

What is this Case About?

1. This case concerns the statutory requirements for the provision of information by landlords to their tenants, where the tenancy is a shorthold tenancy and a deposit is paid by the tenant which is protected under a deposit protection scheme. The issues are whether the landlord in this case complied with certain specific requirements to provide information about when it could retain the deposit paid by the tenant, and to provide confirmation by way of a certificate that the tenant had been given all the information he was entitled to. The case also concerns the consequences if such requirements were not in fact met.

2. After a trial in the Central London County Court the trial Judge, HHJ Luba KC, decided that the landlord had fully complied with its requirements. The tenant now appeals that decision, and argues that the Judge came to the wrong conclusion; and in consequence he argues that the landlord is liable to pay him a financial penalty (or more accurately a number of such penalties, given that there have been a number of tenancies between the parties since 2010).

3. I have come to the view that the Judge was correct, and that the appeal must therefore be dismissed, for the detailed reasons set out below.

What is the relevant background?

4. Charterhouse Square is an historic space in central London, run as a charity. Some properties within it are let as residential dwellings. In January 2010 the Appellant, Mr Lowe, came to be a residential tenant of a flat in the Square, at 2 Preachers Court. He entered into a contractual tenancy with his landlord, which I shall refer to as "*Charterhouse*". He paid a deposit of £3,300. There was a written tenancy agreement dated 24 January 2020. In clause 5.3, this contained provisions about how the deposit was to be held and what it could be used for.

5. Certain categories of tenancy, referred to as assured shorthold tenancies, qualify for particular protection in law. In January 2010, the contractual tenancy between Mr Lowe and Charterhouse did *not* qualify as a shorthold tenancy, because the annual rent paid was above the specified limit for such tenancies, which in January 2010 was £25,000. But that was to change as from 1 October 2010, when the relevant limit was increased to £100,000. Mr Lowe's contractual tenancy was automatically transformed into an assured shorthold tenancy as from 1 October, by operation of law.

6. One of the forms of protection provided in connection with shorthold tenancies concerns protection of tenants' deposits. Relevant provisions are in sections 213-214 of the Housing Act 2004 (extracts are set out in Annex 1 to this Judgment). One aspect of this is the requirement that the deposit be dealt with in accordance with an authorised scheme. There are a number of such schemes available. Another aspect (Housing Act 2004, s.213(5) and (6)) is that the law requires certain prescribed information to be provided by the landlord to the tenant. This is set out in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI No. 797) ("*the 2007 Order*"), at para. 2(1) (again see Annex 1 to this Judgment). The prescribed information has to be provided within a time-limit, which until 2011 was 14 days but is now 30 days. Part of

the prescribed information (para. 2(1)(a)-(f)) is about the authorised deposit scheme being used by the landlord. Other parts though (para. 2(1)(g)) are about such terms of the tenancy itself as relate to the deposit, including the circumstances in which it has to be returned, or those in which it may be retained by the landlord, in whole or in part. The landlord also has to confirm that such information provided about the tenancy is accurate to the best of its knowledge and belief by providing a signed certificate. If these requirements are not complied with, then the law specifies certain consequences: depending on the circumstances, the deposit must be repaid to the tenant or paid into a designated scheme account (Housing Act 2004, s. 214(3)); and the landlord must pay a penalty, which must be at least the same amount again as the deposit, or up to three times as much (Housing Act 2004, s.214(4)). In Ayannuga v. Swindells [2012] EWCA Civ. 1789, Lewison LJ said, by reference to Housing Act 2004, s. 212(2), that the purpose of a tenancy deposit scheme is both to safeguard tenancy deposits and to facilitate the resolution of disputes. It seems to me clear that the prescribed information provisions I have referred to are intended to promote this latter purpose, for example by requiring transparency as to the landlord's rights to make use of the deposit and the tenant's right to demand its return.

7. In this case, in September 2010, anticipating that Mr Lowe's tenancy would become an assured shorthold tenancy as from 1 October, Charterhouse's agents, Daniel Watney, sent him a letter. This had various enclosures. These included the required information about the designated scheme under which the deposit was to be held. There is no issue about that. But it also included a form headed, "*A - Prescribed Information*", designed to include information about the tenancy. I will refer to this as the "*Prescribed Information Document*." It had two features relevant to this Appeal. The first is that, in describing the circumstances in which the deposit would be released or deductions might come to be made from it, it mistakenly referred to "*Clause 6 of the Tenancy Agreement attached*." This was wrong. No Tenancy Agreement was attached, and moreover the provisions about use of the deposit in Mr Lowe's tenancy agreement were not in clause 6 (indeed, that agreement did not even contain a clause 6). They were in clause 5.3. The second issue is that although the letter sent to Mr Lowe by Daniel Watney was signed, and although the Prescribed Information Document contained the wording of an appropriate certificate, the certificate itself was not signed: only the letter was.

8. Neither point seemed to be a problem at the time. October 2010 came and went. In January 2011 the fixed term of Mr Lowe's original (now shorthold) tenancy expired, but he remained in occupation and, as everyone is agreed, a statutory periodic tenancy – also a shorthold tenancy - then arose by operation of law, which carried on until June 2011.

9. This was then replaced by another fixed term tenancy for about a year. In fact, between January 2010 and August 2015, there were a total of 8 different tenancy arrangements between Charterhouse and Mr Lowe, either fixed term (arising by agreement), or statutory periodic (arising by operation of law). The final tenancy (no. 8), a statutory periodic tenancy which arose in August 2015, continues today. All were shorthold tenancies. For current purposes it is accepted there was no further attempt, after September 2010, to comply with the requirement that Mr Lowe be provided with prescribed information about his deposit: the only attempt made was that in respect of

Mr Lowe's initial tenancy, by means of Daniel Watney's letter, although there were 8 tenancies in all.

10. In due course of time, unfortunately, Mr Lowe and Charterhouse came to fall out. For some time now they have been engaged in disputes about 2 Preachers Court. The dispute has included failed attempts by Charterhouse to regain possession. The present litigation about the deposit forms part of this overall picture. The deposit was in fact repaid by Charterhouse in early 2023 (although it was then repaid by Mr Lowe, as I will explain further below). Be that as it may, Mr Lowe's present point is that Charterhouse is liable to pay penalties – which have to be paid to him – given its failures properly to handle his deposit.

11. Three particular complaints are the focus of this Appeal, which arise as follows:

    i) The first two points relate to the information supplied in September 2010. Mr Lowe says that the information supplied was deficient. First, that is because of the misleading reference in the Prescribed Information Document to "*Clause 6 of the Tenancy Agreement attached*": Mr Lowe says that did not provide him with the prescribed information about how his deposit might be used. Second, Mr Lowe says the landlord's certificate on the Prescribed Information Document was deficient because it was not signed; only the covering letter was signed. It also purported to certify information which in fact was inaccurate.

    ii) Next, Mr Lowe has a technical point, which is about Charterhouse's ability to rely in relation to his later tenancies, on the prescribed information supplied to him in September 2010 in connection with his original tenancy. The point arises because in law, since there were 8 tenancies in all, technically there were also 8 separate deposits paid by him, even though in practice the money stayed in the same place all the time. That is because of the decision of the Court of Appeal in Superstrike v. Rodrigues [2013] EWCA Civ. 669 [2013] 1 WLR 3848, which has the effect that a new obligation to pay a deposit arises on each occasion there is a new tenancy, but is discharged by the landlord offsetting against that new obligation the money it already holds and is due to pay back. In such a case, does the law require the same prescribed information to be provided over and over again? Generally the answer is no: the law now takes a pragmatic view, and says that if the necessary prescribed information was initially provided in connection with a shorthold tenancy, then even though further tenancies may follow between the same parties which in the technical sense involve the payment of further deposits, the provision of the prescribed information at the outset is in effect rolled over, and it need not be provided again. Mr Lowe's technical point though is this: the relevant statutory language requires the original tenancy in the sequence to have been a *shorthold tenancy*, and he says that the tenancy he entered into in January 2010 was *not* a shorthold tenancy. It does not matter that it later became one by operation of law. He submits that the first shorthold tenancy he entered into was in fact the statutory periodic tenancy which arose in January 2011; but that cannot be relied on by Charterhouse, because he was not provided with any prescribed information within 14 days of that tenancy coming into effect. In fact, he says, no information at all was ever supplied to him in connection with *that* tenancy, only his earlier one.

12. Mr Lowe now accepts that the amount of any penalty, if payable, should be £3,300 in respect of each default by Charterhouse. But he says that Charterhouse is liable to pay multiple penalties, because each time there was a new tenancy there was a new default. So he is entitled to 8x £3,300 – i.e., £24,400. On this point, Charterhouse responds by saying that any claim by Mr Lowe for a penalty is subject to a 6 year limitation period, and so even if he has a valid complaint in principle, he is entitled only to one penalty of £3,300, not 8, because his claim was issued only in June 2021, and by then, the only claim which was not time-barred was that relating to any default in respect of the final tenancy in the series, i.e. that arising in August 2015. Mr Lowe's riposte is to say that in fact, given the nature of the claim for a penalty, which arises under statute and is therefore to be regarded as an action on a specialty, the relevant limitation period is not 6 years, but 12 years. So he has claims in respect of all 8 tenancies and deposits.

What did the Judge Decide?

13. In a comprehensive and careful Judgment dated 22 October 2022 HHJ Luba KC in the Central London County Court rejected Mr Lowe's claim. As far as concerns the matters in issue in this Appeal, Judge Luba KC held (in summary):

    i) It did not matter that the Prescribed Information Document referred mistakenly to Clause 6 of a different tenancy agreement, which Mr Lowe was not sent, because it must have been obvious to him that this was a mistake, and he would have known to look instead at clause 5.3 of this own tenancy agreement. So on a proper view of the Prescribed Information Document, construed from the point of view of reasonable person in the position of Mr Lowe, the prescribed information *was* supplied. Alternatively, even if that was wrong, it did not matter because the statutory language gives some flexibility: it is enough if the information supplied is "*substantially to the same effect*" as that required (see Housing Act 2004, s. 213(6)(a)), and that was so here (see HHJ Luba KC's Judgment at [135]-[137]).

    ii) Neither did it matter that the certification language in the Prescribed Information Document was not itself signed by the landlord, because the covering letter was signed by the landlord's agent on its behalf, and that was sufficient to comply with the statutory requirement. Again, alternatively, any deficiency was addressed by the language of the statute which validates performance if it is "*substantially to the same effect*" as that required, and here sending a certificate under cover of a signed letter was "*substantially to the same effect*" as sending a signed certificate (Judgment of HHJ Luba KC at [128]-[130]).

    iii) The original deposit paid by Mr Lowe *was* paid in connection with a shorthold tenancy, either because his original (January 2010) tenancy became one, or because his later (January 2011) tenancy was one from its inception, and the deposit was sufficiently connected with both (Judgment of HHJ Luba KC at [146]).

    iv) The relevant limitation period is six years, not 12, and so even if Mr Lowe had had any valid complaint, he would only have been able to seek a penalty in connection with the last of the alleged defaults in the series, namely that in August 2015 (Judgment of HHJ Luba KC at [52]).

14. Mr Lowe now challenges all these findings, by means of his Grounds of Appeal Nos. 1 to 8. I will deal with them in turn below. There are also two further Grounds, 9 and 10, which I will comment on briefly.

Grounds 1-3: Was the prescribed information provided about use of the deposit?

15. Prescribed information in relation to tenancy deposits is set out in para. 2 of the 2007 Order. As already noted, key extracts are set out in Annex 1 to this Judgment. For the purposes of Grounds 1-3, however, the key language is that in para. 2(1)(g)(vi), which is as follows:

> *"(1) The following is prescribed information for the purposes of section 213(5) of the Housing Act 2004 ('the Act')—*
>
> *…*
>
> *(g) the following information in connection with the tenancy in respect of which the deposit has been paid—*
>
> *…*
>
> *(vi) the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy ….* "

16. In seeking to comply with sub-paragraph (vi), the Prescribed Information Document supplied by Daniel Watney said as follows:

> "*A15 The deposit will be released following the procedures set out in Clause 6 of the Tenancy Agreement attached.*
>
> *A16 Deductions may be made from the Deposit according to Clause 6 of the Tenancy Agreement attached. No deductions can be made from the Deposit without written consent from both parties to the Tenancy Agreement.*"

17. The Judge held that this was sufficient compliance. In doing so, he accepted the submission of Mr Datta, counsel for Charterhouse, that Mr Lowe, if he had been confused by the reference to a "*Clause 6*" given the absence of a Clause 6 in his own agreement, would easily have been able to skim that agreement and would immediately have seen what provision it did make, albeit under a differently numbered clause (clause 5.3), about the circumstances in which his deposit might be retained.

18. Clause 5.3 of Mr Lowe's tenancy agreement is as follows:

> "***5. TENANT'S OBLIGATIONS***
>
> *The Tenant agrees*
>
> …
>
> ***5.3 Deposit***

> *To pay to the landlord on the signing of this agreement the deposit as specified in the Schedule to be held by the Landlord until the expiration of the Tenancy as security towards the Tenant's liability for:*
>
> *a) Any outstanding rates taxes outgoings*
>
> *b) Dilapidations*
>
> *c) Rent owed to the Landlord*
>
> *d) Any sum expended by the Landlord in remedying any breach of covenant by the Tenant*."

19. The Judge's views are summarised in his Judgment at [136]-[137], from which I think it clear that he considered that either the Prescribed Information Document, properly construed, gave Mr Lowe the information he needed; or even if not, he was given information "*substantially to the same effect*". Thus at [137] of his Judgment the Judge said:

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

20. I agree with the Judge on the first of his lines of analysis. I think he made an error in connection with the second, by referring to section 213(6) of the Housing Act 2004, but nonetheless consider that overall he was also correct to conclude that on any view there had been substantial compliance with the requirements of the 2007 Order, and that that was enough. I will explain my reasoning below.

The Construction Approach

21. The issue of how to interpret a statutory notice containing an obvious error is not an unusual problem. There are some well-known principles, in the line of authority starting with Mannai Investments v. Eagle Star [1997] AC 749. The Courts in such cases have to balance the requirement for proper compliance with the statute with a practical approach to the treatment of obvious errors which cause no real prejudice. The principles are usefully summarised by Arnold LJ n Pease v. Carter [2020] 1 WLR 1459, a case about the validity of a notice seeking possession served under s.8 Housing Act 1988.

22. The starting point is that a statutory notice is to be interpreted as it would be understood by "*a reasonable recipient reading it in context*" (the language derives from the Mannai case, but is quoted by Arnold LJ at [19(i)] of his Judgment in Pease v. Carter). If such a reasonable recipient would appreciate that the notice contained an error, and would in fact appreciate the meaning the notice was intended to convey, then that is how the notice should be interpreted. If the notice, so interpreted, complies with the statutory requirements, then so be it: they are satisfied, despite the error.

23. The Judge plainly thought those principles in play here. I think he was correct to do so, and in applying them reached a correct decision which it was open to him to reach. His logic, in line with Mr Datta's submissions, was obviously as follows:

    i) A reasonable person in the position of Mr Lowe would have appreciated that the Prescribed Information Document contained an error: and obviously so, because it referred to Clause 6 of a different tenancy agreement altogether than the one he in fact had.

    ii) The same reasonable person would have understood what meaning the Prescribed Information Document was in fact intended to convey, which was to say that the required information (as to the circumstances in which the whole or part of the deposit may be retained by the landlord) could be found in a corresponding term in the tenancy agreement he *did* have. It would not have taken long to find it, in cl. 5.3.

    iii) The Prescribed Information Document so construed satisfied the statutory requirement, which was to notify the tenant of the circumstances in which all or part of the deposit might be retained by the landlord. Those circumstances were set out in cl. 5.3, which defined the landlord's rights to make deductions from the deposit and the tenant's right to recover it.

24. In my opinion, this analysis by the Judge was correct. Another way of looking at it is to say that the statutory purpose was fulfilled. The relevant part of the statutory purpose is to avoid disputes by promoting the provision of information about what rights a landlord and tenant have under their tenancy agreement in relation to any deposit. That purpose was achieved here, because on a proper construction of the Prescribed Information Document, the tenant was told, *you can find those rights spelled out in the provision in your tenancy agreement which deals with the treatment of your deposit*. And so he could, in cl. 5.3, headed "*Deposit*".

A Pleading Point

25. I should add that in connection with this part of the Appeal, i.e. the part concerned with the question of compliance with sub-paragraph 2(1)(g)(vi) of the 2007 Order, Mr Datta on behalf of Charterhouse took a pleading point by way of his Respondent's Notice. His point was that Mr Lowe's pleaded case at trial did not include any complaint that sub-paragraph 2(1)(g)(vi) had not been complied with. The pleaded case was only about sub-paragraph 2(1)(g)(vii) (the requirement for signed certification, which I deal with below). A possible complaint about sub-paragraph 2(g)(vi) only emerged in Mr Lowe's trial witness statement, and was in fact only squarely put for the first time in his counsel's Skeleton Argument for trial. Mr Datta argued that the Judge had been wrong to allow it to be raised at trial, as a non-pleaded point (as the Judge did at [132] of his Judgment), and said that Charterhouse had been prejudiced by this, because it was not given the opportunity to investigate the relevant factual background properly and he had been disadvantaged by having to deal with the argument more or less on the hoof.

26. I reject this complaint about the way the Judge dealt with the issue. In my opinion, he was entitled as a matter of case management to deal with the issue on its merits. Late amendments, or indeed the raising of points which are never formally the subject of an

amendment application, are not to be encouraged. All the same, in appropriate cases the Court undoubtedly has the power to resolve such points, as long as it is satisfied they can fairly be dealt with. That is the view the Judge took here, because he said in terms in his Judgment at [131] that although the point was not pleaded, it was fully argued, and Mr Datta was able to deal with it. He may have had to do so on the hoof, but the Judge was satisfied – correctly I am sure – that he was able to do so ably and fairly. The point made before me about Charterhouse not having had the opportunity to conduct further factual investigations I am afraid rings rather hollow: it is difficult to see what they would have been, and how they would have added anything to the investigations (in particular as to disclosure of relevant documents) which were carried out anyway; and even during the hearing before me, over a year after the hearing before HHJ Luba KC, Mr Datta was not able to say that there was any specific document which Charterhouse was prejudiced in not having had available. The Judge plainly took the view he had all the factual material likely to have a bearing on the new complaint, and was satisfied it had been fully argued, and so felt he was able to deal with it fairly. Mr Datta has not persuaded me that the Judge was wrong to do so.

27. What I would say, however, is that the failure to make any complaint about sub-paragraph 2(1)(g)(vi) before trial rather reinforces my conclusion on the question of construction I have addressed above. The fact that no point was taken for such a long time, even though Mr Lowe was obviously motivated to identify deficiencies in the Prescribed Information Document, emphasises the point that a reasonable person is likely to have construed it as in fact containing the required information about treatment of the deposit. Mr Lowe himself saw no problem with it for about 12 years, including during 2021 and 2022, when he was locked in combat with Charterhouse about the adequacy of their Prescribed Information Document.

"Substantially to the same effect"

28. The Judge's second line of analysis raises a question about the proper interpretation of ss.213(5) and 213(6) of the Housing Act 2004. Subsection 213(5), as noted, is the provision requiring the landlord to give certain *prescribed information* to the tenant. Subsection 213(6) then provides, relevantly (my emphasis added):

> *"(6) The information required by subsection (5) must be given to the tenant and any relevant person–*
>
> *(a) in the prescribed form or in a form substantially to the same effect ...".*

29. The underlined words reflect an established statutory technique, in cases where a statute contains wording which on its face seems to requires strict compliance: the wording is a signal that strict compliance with form is not in fact required, because the statute is more concerned with substance than form, and so even if the apparently mandatory language is not complied with, that does not matter as long as the statutory purpose is fulfilled: see, for example, TFS Stores Ltd v. The Designer Retail Outlet Centres (Mansfield) General Partners Ltd [2021], per Males LJ at [39], and Pease v. Carter [2020] 1 WLR 1459 (already referenced above), where Arnold LJ at 39(iv) put the point as follows:

> "*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*."

30. In this case, however, Mr Morris argued that Charterhouse could not rely on the "*substantially to the same effect*" language in s.213(6)(a) of the Housing Act 2004 to rescue its defective compliance with sub-paragraph 2(1)(g)(vi) of the 2007 Order, because the language in s. 213(6)(a) was concerned only with deficiencies as to *form*; and while one might say that the failure to provide a signed certificate under para. 2(1)(g)(vii) was a deficiency as to form (I will come to that below in dealing with Grounds 4-6), the same could not be said of the deficiency in connection with sub-paragraph 2(1)(g)(vi), since that was not a compliant about *form*, but instead about *information*, and if there was a failure to provide the correct *information*, then the position could not be salvaged by saying that information "*substantially to the same effect*" had been supplied.

31. In making that submission Mr Morris relied on the following statement of Lewison LJ in Northwood Solihull Ltd v. Fearn [2022] EWCA Civ. 40, [2022] 1 WLR 1661, which he said supported it. Fearn was a case about the form in which a certificate had been supplied, and consequently at [9] Lewison LJ commented as follows (Mr Morris particularly emphasised the words underlined):

> *"The critical provision is paragraph g(vii); and in particular the words 'in the form of a certificate signed by the landlord'. This is the only part of the 2007 Order which can plausibly be read as prescribing a 'form' as opposed to 'information'. Even then it does not prescribe any particular phraseology. In addition, section 213(6) permits use of a form 'substantially to the same effect'".*

32. I am not persuaded by Mr Morris' argument. It is a clever point but respectfully I consider that it proceeds on a false premise. Its logic is to say that because only compliance with sub-paragraph 2(1)(g)(vii) can be saved by the words "*substantially to the same effect*", the earlier parts of paragraph 2 in effect require strict compliance, with no room for flexibility. I think that is looking at it the wrong way round. The right way to look at it is that it is only sub-paragraph 2(1)(g)(vii) needs the flexibility of the saving words ("*substantially to the same effect*"), because that is the only part of para. 2 which even appears to be require strict compliance. The earlier parts do not. They are not prescriptive as to form, including as to use of any particular phraseology. All they require is the provision of *information*, in whatever form and however expressed. Viewed in that way, it seems to me that Mr Morris' argument would give rise to a logical inconsistency, because it would mean that one *could* legitimately apply a degree of flexibility in determining whether there was compliance with the one part of the 2007 Order which on its face *is* mandatory (sub-paragraph 2(1)(g)(vii)), but could not be similarly pragmatic in assessing whether there was compliance with the earlier parts of the 2007 which are *not* mandatory.

33. I am fortified in that view by the approach of the Court of Appeal in an earlier case on the 2007 Order, Ayannuga v. Swindells [2012] EWCA Civ. 1789. That was not concerned with sub-paragraph 2(1)(g)(vii), but instead with sub-paragraphs 2(1)(c)-(d) (which concern provision of information about the tenancy deposit scheme the landlord is using). It was common ground in that case that the correct question to ask was whether there had been substantial compliance (see per Etherton LJ at [29]). Lewison LJ identified the issue as follows, in his Judgment at [35]:

> *" … The approach that we must take is clearly laid down by the court in Ravenseft Properties Ltd v. Hall to which Etherton LLJ has referred to. We must compare the form or information prescribed on the one hand and the information in fact supplied on the other. We must then ask, in light of the purpose of the notice or the provision of information, whether the substance of the information has been supplied bearing in mind that that is a matter of fact and degree."*

34. Mr Morris in his submission sought to argue that there was a tension between what Lewison LJ said in the Fearn case (quoted above), and what he said in Ayannuga. On proper analysis, however, I do not detect any such tension. In Fearn he said that some flexibility was justified even where the form of the required certificate was prescribed; the reasoning in Ayannuga reflects the same or a similar approach being applied in connection with the information requirements of the 2007 Order, which is entirely logical, because they are less, not more prescriptive, than sub-paragraph 2(1)(g)(vii), and so it makes good sense in assessing compliance to ask "*in light of the purpose … of the provision of information, whether the substance of the information has been supplied …*".

35. Returning to the facts of the present case, I think Mr Morris *was* correct to say that the Judge's reasoning in [136] of his Judgment was flawed, because it proceeds on the basis that the saving words in s.213(6)(a) ("*substantially to the same effect*") apply in the context of sub-paragraph 2(1)(g)(vi). I agree they do not apply, because sub-paragraph 2(1)(g)(vi) is not concerned with form. I do not think it makes any difference to the outcome, however, because it is clear that the conclusion the Judge came to in connection with sub-paragraph (2)(g)(vi) was that on any view *the substance* of the required information had been supplied, because Mr Lowe had been told that he could find information about the possible retention of his deposit in the terms of the lease which he already had. The statutory purpose, of promoting transparency with a view to avoiding disputes, was therefore satisfied. In my opinion the Judge therefore reached the right answer, albeit by the wrong route on this particular point.

Grounds 4-6: Was a compliant certificate provided?

36. The issue here is that although the covering letter accompanying the Prescribed Information Document was signed, the certification contained in that document itself was not. Was that sufficient?

37. As to what para. 2 of the 2007 Order requires, the relevant language is as follows (emphasis added):

> *"(1) The following is prescribed information for the purposes of section 213(5) of the Housing Act 2004 ('the Act')—*
>
> *…*
>
> *(g) the following information in connection with the tenancy in respect of which the deposit has been paid—*
>
> *…*
>
> *(vii) confirmation (in the form of a certificate signed by the landlord) that—*
>
> *(aa) the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and*
>
> *(bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief".*

38. Turning then to what was provided by the landlord in this case, the covering letter from Daniel Watney was attached as an Appendix to the Judgment of HHJ Luba KC. Likewise, I append a copy as Annex 2 to this Judgment. After referring in the penultimate paragraph to the Prescribed Information Document which was attached, the letter went on to say:

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

39. The Judge found that the covering letter was signed, and had been sent to, and received by, Mr Lowe, together with the Prescribed Information Document as an attachment (see at [112]).

40. The relevant parts of the Prescribed Information Document were as follows, including the signature blocks to be executed by the tenant and the landlord:

> *"The Landlord confirms that the information, provided to the Agent and the Tenant is accurate to the best of his knowledge and belief and that the Tenant had the opportunity to examine the information*
>
> *The Tenant confirms he has been given the opportunity to examine this information. The Tenant confirms by signing this document that to the knowledge of the Tenant the information above is accurate to the best of his knowledge and belief.*

Signed by the Tenant

Signed by the Landlord/Agent".

41. The Judge thought that this was enough to satisfy the statutory requirements. Was he correct to do so? Again, I consider that he was.

42. I think the question which arises is a straightforward one. Para. 2 of the 2007 Order requires the landlord's certificate to be signed. That is a matter of form, falling within s.213(6)(a) Housing Act 2004, as the parties were agreed. Here the certificate was not signed, so the relevant requirement as to form was not met. But was the documentation provided in "*a form substantially to the same effect*"?

43. In my opinion it was, when one looks at the covering letter and the Prescribed Information Document taken together, which is what HHJ Luba KC did. As Arnold LJ indicated in Pease v. Carter (see above at [21]), a formally defective notice will be "*substantially to the same effect*" as the prescribed form "*if it nevertheless fulfils the statutory purpose*". Here as it seems to me – and I understood Mr Morris to agree - the statutory purpose behind the certification requirement in sub-paragraph 2(1)(g)(vii) the 2007 Order is to provide confirmation on behalf of the landlord that someone has turned their mind to the matter of supplying the tenant with the information required under sub-paragraphs 2(1)(g)(i)-(vi). Here, that had happened, and obviously so since the required information was that contained in the Prescribed Information Document which was sent to the tenant. Looking at the overall context, it does not seem to me it matters that the Prescribed Information Document itself was not signed in this case. Plainly, the certificate it contained was one the landlord was happy with and was content to give, or have Daniel Watney give on its behalf. By allowing the proposed certificate to be sent under cover of Daniel Watney's letter, Charterhouse was saying as much.

44. The only qualification, as it seems to me by reference to the terms of the letter, was that the landlord wanted the tenant to sign its certificate first. That is understandable, because part of the confirmation to be given by the landlord was to be that the tenant had been given the opportunity to sign any document supplied to him, containing the prescribed information (see para. 2(1)(g)(vii)(bb) of the 2007 Order: "… *he has given the tenant the opportunity to sign any document containing the information provided by the landlord"*). The course of action invited by Daniel Watney's letter, namely of asking the tenant to sign first, was obviously intended to give the tenant the opportunity to sign which the statute required, and then to allow the landlord in turn to sign, in light of the tenant's confirmation.

45. In this case, as the Judge held, the tenant Mr Lowe never did sign his part of the certificate, although Daniel Watney's letter and enclosures were sent to and received by him. The Judge dealt with this at [128] of his Judgment, as follows (my emphasis added):

> "*[128] First, on the certificate in the instant case, the first of the signatures intended to appear is that of the tenant. I have found that the unsigned certificate was supplied to the tenant to sign under cover of a letter inviting signature and return. As a matter*

> *of logic, one would expect that the next signature, that of the landlord, would then be entered, on return, after receipt from the tenant of the form signed by him. Here the form was received by the tenant (as I have held) but not returned. So, it is by the tenant's failure, not the landlord's, that there is no version which bears the landlord's signature*".

46. Ground 6 of Mr Lowe's Grounds of Appeal is a challenge to this conclusion, put on the basis that it was wrong for the Judge to proceed on the basis that Mr Lowe as tenant was somehow at fault: the statutory scheme imposes obligations on the landlord, and any failure cannot be excused by saying that the tenant has failed to do something.

47. I agree with that as a statement of general principle, and I think the Judge was wrong to emphasise what he perceived as the tenant's failure, because that was focusing on the wrong issue. But it seems to me that the same facts are relevant to determining what the Judge, in the next paragraph of his Judgment, correctly identified as the most important issue, which was whether the relevant statutory purpose had in substance been achieved. It seems to me that it had, because in sending the letter and Prescribed Information Document, what Charterhouse was effectively saying was: *Here is the information we are required to give you, and the certificate you are entitled to receive; we are happy to give the certificate in this form, but one thing we need to do is to give you the opportunity to review what we are sending you, so please do so and let us know when it is done; but as far as we are concerned everything is in order and we are happy to give the certificate the 2007 Order requires*.

48. If that is the right way of construing the letter and the Prescribed Information Document taken together, as I think it is, then is seems to me that the statutory purpose of requiring confirmation in the form of a certificate from the landlord was achieved. Taken together, the signed covering letter and the Prescribed Information Document were "*substantially to the same effect*" as a signed certificate, because Charterhouse were effectively saying: *as far as we are concerned, we believe we have done what we need to and we are happy to confirm as much by means of a certificate*. I fail to see why that is not "*substantially to the same effect*" as having provided a signed certificate.

49. The Judge's conclusion was expressed as follows in his Judgment at [129]:

> "*[129] Second, and more importantly, here the recipient knew who had sent him the document, who had signed the covering letter, and that the covering letter asserted that what was enclosed was 'The Prescribed Information as required under the legislation'. The statutory objective had been achieved. The prescribed information had been given by the landlord's agent as a specified enclosure to a document signed by an identified individual member of staff of the agent. The certificate and booklet gave the tenant all the information the statute required. It fulfilled the statutory purpose*.
>
> *[130] In my judgment, this is either satisfaction of the statutory requirements by the route of the form of certificate being 'substantially to the same effect' as that required or it is saved by the application of a sensible, purposive, and constructive*

> *approach to the interpretation of these prescriptive statutory requirements …* ".

50. Plainly, what the Judge was doing here was to read the covering letter and the Prescribed Information Document together (along with the other enclosures to the letter). That seems to me the correct approach in principle. The same approach was taken by the Court of Appeal in Stidolph v. American School in London Educational Trust Ltd [1969] 20 P&CR 802 (referred to by Lewison LJ in the Fearn case at [41]). That case was concerned with a notice served on a tenant under Part II of the Landlord and Tenant Act 1954. The notice was required to be in a prescribed form or in a form substantially to the like effect. The notice was unsigned, but a covering letter was signed by the landlord's solicitors. Lord Denning MR said at pp. 804-806:

> "*The regulations do not make it mandatory to use the prescribed form. It is sufficient to use a form 'substantially to the like effect'. Any defect in the prescribed form can be made good by the covering letter or the stamped, addressed envelope. They can and should be read together. So long as the envelope contains the information which the Act requires, and is sufficiently authenticated, the notice is a good notice. The requirement of a notice should not be turned into a trap for the landlord*."

51. As Mr Datta for Charterhouse submitted, the same logic is applicable in this case. If the Prescribed Information Document and the covering letter are read together, then the contents of the former were sufficiently authenticated by the signature on the latter, because that signature in effect confirmed that the landlord was content that it was providing the required information and as far as it was concerned was content to certify that it had done what was required.

52. Finally, and in light of the conclusions already expressed in relation to Grounds 1-3, I see nothing in the discrete point raised as part of Mr Lowe's Ground 5, which is that the certificate provided was also deficient in certifying the accuracy of the information provided by Charterhouse because that information was inaccurate in referring to "*Clause 6 of the Tenancy Agreement attached*". If the information provided is properly to be construed in the manner I have suggested, then it was not inaccurate in any relevant sense, or not substantially so. To put it another way, if the information supplied was sufficient to fulfil the statutory purpose and thus to comply with the statutory requirements, then the certificate of compliance must have been properly given as well.

Ground 7: Was the deposit paid in connection an original shorthold tenancy?

53. In my opinion this is a short point and the Judge was right about it.

54. The relevant language is in s.215B of the Housing Act 2004, as amended. Section 215B was introduced into law in March 2015, as a response to the practical problem created by the decision in the Superstrike case I have referred to above – i.e., the problem that if, technically, multiple deposits are deemed to be paid in cases where there are multiple rolling tenancies created by operation of law, then on the face of it the prescribed information requirements under the Housing Act 2004 have to be complied with again and again. Parliament plainly thought that undesirable, and so the scheme of s.215B is

that if the required information is properly supplied at the outset, it does not need to be supplied again.

55. For present purposes, I need only quote from s.215B(1)(a)-(c), which describe the first three conditions which need to be fulfilled before s.215B as a whole is engaged:

> *"(1) This section applies where –*
>
> *(a) on or after 6 April 2007, a tenancy deposit has been received by a landlord in connection with a shorthold tenancy ('the original tenancy'),*
>
> *(b) the initial requirements of an authorised scheme have been complied with by the landlord …*
>
> *(c) the requirements of s.213(5) and 6(a) have been complied with by the landlord in relation to the deposit when it is held in connection with the original tenancy …*
>
> *… .*"

56. Section 215B(2) then goes on to say that where the section applies – i.e., broadly, where the prescribed information requirements have been complied with in connection with the original tenancy – then the landlord will be treated as also having complied with them in connection with any later shorthold tenancies in the same chain.

57. The point taken by Mr Lowe at trial was that since his original, January 2010 tenancy had *not* been a shorthold tenancy when it was entered into, the deposit he paid was *not* paid in connection with a shorthold tenancy; it was paid in connection with something else – his contractual tenancy. His first shorthold tenancy was really the statutory periodic tenancy which arose in January 2011, but neither was his deposit paid in connection with that tenancy, again because it had been paid in connection with his original contractual tenancy in January 2010.

58. The Judge rejected what he described as these "*singularly unattractive*" submissions in his Judgment at [146], and I think was correct to do so. Section 215B is engaged where, "*on or after 6 April 2007, a tenancy deposit has been received by a landlord <u>in connection with a shorthold tenancy</u>"* (my emphasis). The words "*in connection with*", in my opinion, are sufficiently pliable to cover the situation in which a deposit is paid in respect of something which is not a shorthold tenancy, but which later becomes one by operation of law, as happened here on 1 October 2010. A deposit was certainly received by the landlord. Was it received *in connection with* a shorthold tenancy? I think it clearly was, because the landlord continued to hold it, and the tenant was content to let the landlord continue holding it, when the original contractual tenancy became a shorthold tenancy. That is more than enough in my view for one to be able to say the deposit was received *in connection with* the later shorthold tenancy.

59. The gist of Mr Lowe's argument as I understand it is that one must stop the clock at the point of receipt – here, January 2010 – and nothing that occurs thereafter is relevant to determining what the receipt was *in connection with*. But that is quite artificial, as the Judge pointed out, given what he described as the "*ambulatory*" nature of the regime

of assured tenancies under the Housing Act 1988, which means that tenancies can move in and out of assured status and into shorthold status (Judgment at [27] and at [146]). In such an environment, it makes no sense to take such a restrictive approach, and as the Judge put it, to "*ossify the treatment of the statutory scheme in its application to a particular tenancy*." I respectfully agree, and therefore also agree with the Judge's conclusion that Mr Lowe's deposit, although originally paid in connection with his January 2010 contractual tenancy, can properly be regarded as having been received *in connection with* either the shorthold tenancy which arose by operation of law in October 2010, or that which arose in January 2011 when the period of the new statutory periodic tenancy commenced. In either case, the prescribed information was provided within the relevant time limit, because it was provided in September 2010, before either of the tenancies commenced and thus before the deposit was received *in connection with* either of them.

Ground 8: Is the relevant limitation period 6 or 12 years?

60. The short point here is whether a claim for a penalty under s.214(4) of the Housing Act 2004 is subject to a limitation period of 12 years or 6. It is common ground that this depends on construction of s.9 of the Limitation Act 1980. Section 9 prescribes a six year limitation period where an action is brought to "*recover any sum recoverable by virtue of any enactment*". Mr Lowe's argument is that an action brought to claim a penalty is not one brought to "*recover any sum recoverable by virtue of any enactment",* because this language is limited to those cases where the claimant is seeking to recover - in the sense of *get back* - something the claimant has previously had but has handed over to the defendant. Only in such cases is there a six year limitation period. In other cases, where the claimant is seeking to bring a claim under statute to obtain something from the defendant for the first time – such as a penalty – the relevant limitation period is 12 years, under s.8 Limitation Act 1980 (which stipulates a longer limitation period for actions on a specialty, including claims brought under statute).

61. The Judge rejected this argument. In my opinion he was correct to do so, essentially for the reasons he gave at [35]-[47] of his Judgment. I would put the matter as follows. I think it is artificial to construe the words "*recover*" and "*recoverable*" in s.9 Limitation Act 1980 as referring only to the concept of recovery in the sense of claiming back something which was previously in the claimant's possession. The law often refers to the concept of *recovery* to describe an entitlement to receive a payment of money in vindication of a legal right. It is not hard to think of examples. A successful claimant in a contract or tort claim will *recover* damages. A lender will usually have a right to *recover* interest (s.38(10)(b) of the Limitation Act refers expressly to the recovery of arrears of interest or of damages in respect of arrears of interest). A judgment creditor likewise will have a right to *recover* interest on a judgment debt. A successful party in litigation will *recover* its costs (which it may have paid, but to its own advisers, not the defendant). A joint tortfeasor will *recover* contribution from another tortfeasor in respect of their joint liability to a claimant whom they have both wronged (s.10 Limitation Act 1980 provides a six year limitation period in such cases). None of these examples involves the recovery of something previously paid over to the defendant. Instead, they involve the claimant obtaining *recovery* in the sense of obtaining a payment of money as a response to a legal entitlement which has arisen in some way and from which he benefits. In my opinion, that is the sense in which the words "*recover*" and "*recoverable*" are used in s.9 of the Limitation Act, and the Judge

correctly described this at [39] of his Judgment when he said that Mr Lowe was seeking "*to establish, by reliance on statute, an entitlement to a sum to be paid to him*."

62. As the Judge also pointed out, that view seems supported by authority: see Re Farmizer [1997] BCC 655 (CA) (where a six year limitation period was applied in a claim against company directors to recover statutory compensation for wrongful trading), and Rowan Companies v. Lambert Eggink [1999] CLC 1461 (in which David Steel J offered the view that s.9 Limitation Act is concerned with "*claims under an enactment for monetary relief whether in the form of debt, damages, compensation or otherwise*").

63. I respectfully agree with Judge's assessment and consequently reject Ground 8 of Mr Lowe's Grounds of Appeal.

Grounds 9 and 10: **What was the status of the deposit at the time of the trial?**

The Issues

64. Grounds 9 and 10 run together. They raise two inter-related but somewhat academic points, which the parties have nonetheless asked me to address since they say they may have costs consequences. They arise in the following way.

65. At the time of the trial, there was some dispute about whether Charterhouse still held Mr Lowe's deposit. This was despite efforts by Charterhouse to return it to him. They had sent him a cheque in May 2021, but he had failed to cash it: on his evidence because it was too complicated for him to do so given his banking arrangements, but the Judge considered this a somewhat disingenuous explanation and thought that Mr Lowe had not been candid and the cheque had not been cashed because it suited Mr Lowe not to do so but he did not have the candour to admit it (Judgment at [71]). The Judgment also refers (at [171(d)]) to efforts having been made to pay the deposit into Mr Lowe's bank account, which were not successful because of Mr Lowe's own failure to provide Daniel Watney with his bank account details.

66. The structure of the proceedings at the outset suggested that Mr Lowe was at best agnostic about obtaining return of his deposit, because his pleaded case did not mention the deposit in the Prayer for Relief and sought only the payment of a penalty. Charterhouse's Defence pleaded that the deposit had been returned to him on 7 May 2021. Mr Lowe did not file a Reply taking issue with this.

67. In fact, as Mr Morris explained it during the hearing before me, on instructions from Mr Lowe, Mr Lowe's reluctance to press for return of his deposit was linked to a perceived benefit of not doing so. This concerned the then pending attempts by Charterhouse to recover possession from him. One of the sanctions for non-compliance by a landlord with its statutory obligations in relation to tenancy deposits is that the landlord is inhibited from serving a notice under s.21 Housing Act 1988, for recovery of possession (see Housing Act 2004, s. 215). But that inhibition is lifted if the deposit is returned to the tenant in full (see s. 215(2A(a)), which is what Charterhouse had tried to do, but what Mr Lowe did not want to happen.

68. Given his overall determination that there was *no* default by Charterhouse, HHJ Luba KC in his Judgment did not strictly have to deal with the question of what forms of relief he would have ordered, had he been wrong on his primary analysis. But as is

often done, he went on, helpfully, to make some brief observations anyway. In the course of doing so, he (i) declined to make any finding of fact as to whether Mr Lowe's deposit was still held by Charterhouse or had been returned to him (see at [177] and fn. 70), and (ii) offered a view as to the proper construction of s.214(3) of the Housing Act 2004.

69. As to (ii), s. 214(3) is the provision which deals with what is to happen to a tenant's deposit, if the tenancy is continuing but (broadly) the Court is either satisfied that the landlord has not provided to the tenant the information he is required to provide within 30 days (see s.214(2)(a) Housing Act 2004), or alternatively is not satisfied that the deposit is in fact being held in accordance with an authorised scheme (see s.214(2)(b)). If one or other of these conditions is fulfilled, then s. 214(3) provides as follows (my emphasis added):

> *"(3) The court must, as it thinks fit, either–*
>
> *(a) order the person who appears to the court to be holding the deposit to repay it to the applicant, or*
>
> *(b) order that person to pay the deposit into the designated account held by the scheme administrator under an authorised custodial scheme,*
>
> *within the period of 14 days beginning with the date of the making of the order*."

70. As to this language, the argument made by Mr Lowe was that, had the Judge decided there was default by Charterhouse, he would have been bound to make an Order under s.214(3)(a) for return of the deposit, because of the mandatory form of s.214(3) – which uses the word "*must*". Mr Lowe argued that if there is default by the landlord, then the Court has to choose between one of the two mandated alternatives. In other words, it *has* to make an Order of some type (in this case, for return of the deposit), whatever the pleadings may say about it.

The View of HHJ Luba KC

71. The Judge thought otherwise. He considered that the introductory words in s.214(3) – "*as it thinks fit*" – gave the Court a wider discretion, which in an appropriate case could be exercised by declining to grant either form of relief referenced in the section. He said that, even if he had he been satisfied there was default by Charterhouse, he would not have ordered return of the tenant's deposit. At [171(d)] of his Judgment, he said:

> "*The present case was a paradigm for such a discretion. The present parties were subject to a continuing tenancy containing in its terms a deposit requirement to be held to meet contingencies stipulated in an express agreement. Requiring repayment would cut across that mutual set of obligations. But, in any event, the deposit had already been tendered to the tenant by cheque in form of repayment. It was only still being 'held' by the agents because Mr Lowe had not, for reasons I have found specious, banked the cheque. Alternatively, the deposit would already have*

> *been paid directly into his bank account, but for his own failure to give the agents his bank transfer details. These seem to me precisely the sorts of facts that should lead a court to decline to make a repayment order, even if it had the power to do so.*"

72. By his Ground 9, Mr Lowe seeks to challenge the Judge's conclusions on the proper construction of s.214(3), and by his Ground 10 he submits that the Judge was wrong in failing to make any finding as to whether Mr Lowe's deposit had been returned to him or not.

Discussion & Conclusions

73. I have come to the view that I should reject Grounds 9 and 10 as well, for the following reasons.

74. Starting with Ground 9, although I see force in Mr Lowe's submission and have some difficulty with the statutory language, ultimately I am persuaded that HHJ Luba KC must be correct, because Mr Lowe's construction would mean that the Court was straitjacketed by an inflexible requirement to select between only two alternatives in a manner which at least in some cases will make no practical sense and may result in absurdity or injustice.

75. Indeed, the present is just such a case. The Judge was rightly reluctant to say he would have made an Order for the return of Mr Lowe's deposit because on the facts that would have resulted in absurdity. The dynamic between the parties at the time was precisely the opposite of that s.214(3) is intended to cater for. Charterhouse was showing no reluctance about returning the deposit. It positively wanted to do so because by that stage it did not want Mr Lowe as a tenant. Mr Lowe on the other hand wanted his tenancy to continue, and so had a positive interest in *not* having his deposit repaid. Moreover, as at the point of the trial, as the Judge rightly recognised, the parties' tenancy was still continuing, and so it would make little sense to require return of the deposit, which by that stage had been safely held in a deposit protection scheme for over 10 years. I think the Judge correctly saw that any Order for repayment on the facts of this case would likely be futile, because while the tenancy was ongoing Mr Lowe was obliged to maintain a deposit. Any Order would just result in a money-go-round, because Mr Lowe would need to pay it back again. This is in fact just what happened, because I was told in the hearing before me that although Mr Lowe's deposit was finally returned to him in May 2023 (some time after the trial), he then sought to return it again in February 2024 to Charterhouse's agents.

76. In light of such matters, I find it very hard to think that s.214(3) is to be construed in a manner which afforded HHJ Luba no discretion at all to refuse to make an Order for the return of Mr Lowe's deposit, which he had not claimed, which he did not want to have, which he knew he would have to return even if it was repaid, and which in any event had been safely held under an appropriately designated scheme for over 10 years. During the hearing of this appeal, I described the position as somewhat unreal. Parliament cannot have intended to straitjacket the Court in a manner compelling it to make Orders which are not required and are likely to be of no practical effect.

77. It seems to me that the statutory purpose, revealed by a fair reading of s.214(3), is to ensure that in the case of a continuing tenancy, the tenant's deposit is safe. One of the

specified means of ensuring it's safety (s.214(3)(b)) is to require it to be paid into a properly designated scheme account. The same objective is obviously achieved, in a case where the deposit is already so held, by the Court simply deciding to take no further action. I am not persuaded that in such a case the statutory language requires the Court to make an entirely mechanical election between the two inflexible alternatives, neither of which is appropriate. Indeed, in the present case the alternative Mr Lowe contends for is one which he did not want to happen and which his own later actions have shown would have been pointless. The statutory language must admit of more flexibility than that. I therefore consider the Judge was correct in the conclusion he reached.

78. I can deal more briefly with Ground 10. Having rejected Mr Lowe's arguments that Charterhouse was in default, the Judge was not obliged to make any factual findings relevant to the situation which would have obtained had he decided otherwise. I think that was a sound decision by the Judge, who did not want to expend energy in resolving a rather arid question of fact which had no bearing on the outcome of the case before him, and which was an issue at all only because of the shadow boxing Mr Lowe had engaged in by way of response to Charterhouse's efforts to give him his money back. I propose to do the same, and so will say no more about Ground 10.

Overall Conclusion & Disposition

79. In light of the conclusions set out above, I would dismiss the appeal.

ANNEX 1

(1) Extracts from Housing Act 2004

Section 213. Requirements relating to tenancy deposits

(1) Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme.

(2) No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).

(3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of [30]1 days beginning with the date on which it is received.

(4) For the purposes of this section "the initial requirements" of an authorised scheme are such requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit.

(5) A landlord who has received such a tenancy deposit must give the tenant and any relevant person such information relating to–

> (a) the authorised scheme applying to the deposit,
> (b) compliance by the landlord with the initial requirements of the scheme in relation to the deposit, and
> (c) the operation of provisions of this Chapter in relation to the deposit,
> as may be prescribed.

(6) The information required by subsection (5) must be given to the tenant and any relevant person–

> (a) in the prescribed form or in a form substantially to the same effect, and
> (b) within the period of [30]2 days beginning with the date on which the deposit is received by the landlord.

…

Section 214. Proceedings relating to tenancy deposits

(1) Where a tenancy deposit has been paid in connection with a shorthold tenancy [on or after 6 April 2007], the tenant or any relevant person (as defined by section 213(10)) may make an application to [the county court] on the grounds–

> (a) that section 213(3) or (6) has not been complied with in relation to the deposit, or
>
> (b) that he has been notified by the landlord that a particular authorised scheme applies to the deposit but has been unable to obtain confirmation from the scheme administrator that the deposit is being held in accordance with the scheme.

(1A) Subsection (1) also applies in a case where the tenancy has ended, and in such a case the reference in subsection (1) to the tenant is to a person who was a tenant under the tenancy.

(2) Subsections (3) and (4) apply [in the case of an application under subsection (1) if the tenancy has not ended and] the court –

> (a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or
>
> (b) is not satisfied that the deposit is being held in accordance with an authorised scheme,

as the case may be.

…

(3) The court must, as it thinks fit, either–

> (a) order the person who appears to the court to be holding the deposit to repay it to the applicant, or
>
> (b) order that person to pay the deposit into the designated account held by the scheme administrator under an authorised custodial scheme,

within the period of 14 days beginning with the date of the making of the order.

…

(4) The court must [...] order the landlord to pay to the applicant a sum of money [not less than the amount of the deposit and not more than] three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.

(2) Extract from the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI No 797)

2.— Prescribed information relating to tenancy deposits

(1) The following is prescribed information for the purposes of section 213(5) of the Housing Act 2004 ("the Act")—

(a) the name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit;

(b) any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in sections 212 to 215 of, and Schedule 10 to, the Act;

(c) the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy ("the tenancy");

(d) the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy;

(e) the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;

(f) the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and

(g) the following information in connection with the tenancy in respect of which the deposit has been paid—

(i) the amount of the deposit paid;

(ii) the address of the property to which the tenancy relates;

(iii) the name, address, telephone number, and any e-mail address or fax number of the landlord;

(iv) the name, address, telephone number, and any e-mail address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy;

(v) the name, address, telephone number and any e-mail address or fax number of any relevant person;

(vi) the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and

(vii) confirmation (in the form of a certificate signed by the landlord) that—

(aa) the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and

(bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.

ANNEX 2

LETTER FROM DANIEL WATNEY

28 September 2010

Dear Merryk,

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

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

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

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

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

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

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

Yours sincerely

STEPHEN BIRTWISTLE