Case No: **J03EC319**

IN THE COUNTY COURT AT CENTRAL LONDON

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

17 November 2023

BEFORE:

HIS HONOUR JUDGE LUBA KC

B E T W E E N:

MR MOHAMMED FAISAL KHAN

Claimant

- and -

NOTTING HILL GENESIS

Defendant

Hearing dates: *12 and 13 October 2023*
Written submission: *10 November 2023*

Ms Anna Watterson appeared on behalf the Claimant.

Mr Tom Morris appeared on behalf of the Defendant.

JUDGMENT

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

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Introduction

1. Mr Mohammed Faisal Khan ('Mr Khan') seeks damages for his alleged unlawful eviction from a social housing tenancy. His former landlord, Notting Hill Genesis ('NHG'), resists the claim. It asserts that his tenancy was lawfully ended by a surrender of it by him.

2. The trial was conducted over two days. I heard and read the evidence of Mr Khan. His was the only lay witness evidence in support of his claim. NHG's evidence was given solely by its Project Director, Ms Emily Thomson. In addition, I had the benefit of a single joint expert report from a Mr Philip Costa dealing with valuation. The Trial Bundle exceeded 350 pages.

3. I was considerably assisted by the succinct written and oral submissions of Ms Watterson for Mr Khan and Mr Morris for NHG. Despite there being substantial agreement as to the relevant legal principles, I was taken to a Joint Bundles of Authorities containing some 15 items. Further authority was put to me in the course of the trial. Hence the need to reserve what might otherwise have been an *ex tempore* judgment. In the event, I called for further written submissions on other authorities that I will mention in this judgment but which had not been included in the materials for trial.

The Factual Background

4. In giving the following account of the facts, I shall obviously not be able to offer a review of all the material that was in evidence before me. To keep this judgment to a manageable length, when I refer to documents I shall do so only by reproducing extracts rather than whole documents. However, it should be understood by any reader that I have had regard to *all* the material to which I was taken at trial and to the whole of any document from which I have adopted an extract.

5. Mr Khan was born in July 1978. In 2001, he married his first wife (Yulya) and they had a daughter (Amirah) who was born in early 2002 (she is now 21). The young family initially lived with Mr Khan's sister but were made homeless when the sister had to give up her council flat for its redevelopment.

6. They applied to Westminster Council for homelessness assistance and were provided with temporary accommodation at a series of addresses over several years. The absence of a settled home fractured the marital relationship. Yulya returned to her family in her native Ukraine, taking Amirah with her. Mr Khan was then moved by the council to smaller temporary accommodation while he continued to bid for social housing under the council's housing allocation scheme.

7. In 2010, he made a successful bid for a one-bedroom property at 190G Gloucester Terrace in Westminster. It is a split-level, self-contained, first floor flat which forms

part of a substantial mid-terraced Victorian house, long since converted to accommodate 10 such flats. He was granted a periodic weekly starter tenancy commencing on 31 May 2010 which, a year later, became an assured tenancy protected by the Housing Act 1988. Mr Khan moved in, kitted-out the flat, and made his home there as a single man.

8. Mr Khan's first landlord was Paddington Churches Housing Association (PCHA). In 2011 or 2012, shortly after Mr Khan had become a PCHA tenant, it merged with three other social landlords - Springboard, Pathmeads and the Genesis Housing Group – to become known as Genesis Housing Association ('Genesis'). In July 2017, Genesis announced that it would merge with another social landlord, Notting Hill Housing. The merger was completed in April 2018, to produce Notting Hill Genesis (NHG), one of the largest housing associations in London.

9. In September 2016, Mr Khan married his second wife (Oleta). Oleta had moved into the flat at 190G to live with Mr Khan. It was their matrimonial home, although the tenancy remained in Mr Khan's sole name. The rent was kept up to date and, indeed was in credit. From time to time, especially during holidays, Mr Khan's older daughter Amirah would travel to the UK to visit and would stay at the flat with her father and his new wife, Oleta. In due course, the new couple had a child, his second daughter – Ru – born in late April 2017.

10. On 27 April 2017, two days before his second daughter's birth, Mr Khan was arrested in respect of serious criminal offences. He was remanded in custody. In September 2017, he was convicted at trial. In December 2017, he was sentenced to 22 years imprisonment.

11. After Mr Khan's arrest, Oleta and the newborn Ru remained in the flat. Alone with a very young baby, Oleta lacked the means to maintain the household and, in particular, to pay the rent. Luckily, the rent was sufficiently in credit that there was no immediate difficulty.

12. But things were soon going to become more difficult because Oleta had enrolled to become a university student. She intended to remain in the flat. But she would be dependent on student finance and welfare benefits. She would need financial help to cover the rent.

13. This should not have caused any particular difficulty. In some circumstances, where one spouse is unable to pay their rent, the other spouse may receive assistance to pay that rent through the housing benefit scheme[1] or through the housing element of Universal Credit, despite the fact that the tenancy is not in their name. That meets the policy objective that a lone spouse should be able to maintain and retain the rented marital and family home notwithstanding that the named tenant, the other spouse, is not in occupation. For some reason, however, Mr Khan was given the impression by

[1] See for example, *Housing Benefit Regulations 2006* SI No 213 regulation 8.

someone at Genesis (by then, his landlord) that his wife could not receive such help towards the rent unless she was also a tenant.

14. In early January 2018, Mr Khan wrote to Genesis. He told them of his imprisonment and stated: *"I would like to have my wife Oleta…and my daughter Ru…to be put on my tenancy please".* He explained that *"my wife and child are entitled to Housing Benefit but cannot make a claim unless their names are on the tenancy agreement".*

15. This letter triggered an internal email on 9 January 2018 between Genesis officers, attaching the letter, and stating: *"The tenant is in prison and wants his wife and daughter to be added onto his household (sic). Can you contact his wife to discuss what documents they need to provide".*

16. That was acted upon promptly and a neighbourhood manager (whom Mr Khan believed to be known as 'Mark') went to visit Oleta at the flat. He – Mark - was not sure what to do about her circumstances and wrote on 12 January 2018 to someone else in Genesis asking: *"I was hoping you could help with this one?".* His message recorded that Oleta wanted *"to be added onto the household details as well as their 8-month-old baby"* but noted that she had no official documents showing that she had lived in the flat for *"over a year".* The message concluded *"…should we not be looking to evict Mr Khan here?".* That is a surprising endnote for an officer of a social landlord which, one assumes, commits itself to sustain rather than terminate tenancies.

17. A solicitor advising Genesis responded on the same day to the effect that Mr Khan was an assured tenant and that only he (Mr Khan) could ask for his wife to be made a joint tenant. If he did that, a *"deed of assignment would have to be prepared transferring the tenancy from his sole name into his and his wife's joint names."* [My emphasis].

18. There were then further exchanges in the course of which the solicitor made it plain to the neighbourhood manager that *"she [Oleta] can claim HB without being the joint tenant"* (see paragraph 13 above). The manager responded on 16 January 2018 that he would *"advise her"* (i.e. Oleta). If the correct advice had then been given and acted upon by Oleta, by Genesis, and by the local council responsible for housing benefit administration, no further difficulty would or should have arisen.

19. Mr Khan's account, which I accept, is that he had several telephone calls with Mark, to and from the prison, in 2018 and 2019. It seems that Mark was satisfied that Mr Khan wanted Oleta to become a joint tenant. Mr Khan's account, which I accept (not least because he referred to it in correspondence a few months later - see paragraph 23 below), is that he received from what was now NHG, in August 2019, a single page document about adding a person to a tenancy to become a joint tenant. He signed it and returned it. But he was later told it had not been actioned.

20. That was soon confirmed because, in September 2019, he was told by Oleta that she had tried to get housing benefit but that her claim was refused because her name was not on the tenancy. Mr Khan became concerned, because by now significant arrears were accruing by reason of non-payment of rent.

21. By December 2019, NHG were also concerned about the escalating arrears. Mark had been replaced by a new housing officer, Ms Hajanee Gnanenthiran (later Hajanee Jeyaratnam) who had taken over in September 2019. She wrote to NHG's external solicitors seeking advice because: Mr Khan remained in prison; he remained the sole tenant; his wife and daughter were still in the flat; and he was in rent arrears. The solicitor's advice in response was, rather surprisingly, directed to how NHG might lawfully recover possession from Mr Khan and to "re-homing" the wife and daughter.

22. Oleta wrote to Hajanee on 20 December 2019 that she would have Mr Khan get in touch with her (Hajanee) *"to discuss the issue and sign the tenancy over to me".*

23. For his part, Mr Khan wrote to Genesis again on 21 December 2019. His letter requests that *"the tenancy be transferred to my partner… and my daughter Ru…"* The letter refers to his having *"previously signed a letter of authority and a transfer of tenancy in August 2019 for Oleta and Ru… to be put on the tenancy".* He states in terms that *"the previous document was provided by my housing officer Mark. He was liaising with Oleta with the transfer of the tenancy since 2017"*. He adds "*The whole problem would have been remedied if Mark my housing officer did his job properly and put my partner's name and daughter's name on the tenancy"*. The letter concludes: *"All we want is to put my partner and daughter name on the tenancy so the rent can be paid".*

24. This letter was followed by a telephone call made by Mr Khan to Genesis on 23 December 2019. That triggered another internal email from the call handler to the housing officer Hajanee about *"the transfer of tenancy from himself to his partner and solely Oleta"* and that *"the reason for them wanting to transfer to her is to fit the housing benefit criteria"*. Mr Khan continued to call NHG from prison, later in December 2019 and in January 2020, to establish what was happening. He received no response.

25. By the end of December 2019, NHG's external solicitors were asking whether a decision had been taken to start the possession recovery process by serving notice on Mr Khan. No doubt such a decision would have required at least the authority of Hajanee's line managers, Susheel Thompson and/or Debbie Smith.

26. However, NHG responded to the solicitors that they were *"…Still deciding whether to add her [Oleta] as a joint tenant or assign her the tenancy".* The solicitors correctly advised in reply that an assignment, or the addition of Oleta to the tenancy, would require the tenant's (Mr Khan's) consent.

27. By 15 January 2020, someone at NHG had drafted what they described as "an agreement letter" and sent it to the solicitors for advice.

28. Hanajee got in touch with Oleta again on 21 January 2020 about collecting further copies of documents demonstrating that she was residing at the flat *"in order for me to begin the process of the assignment"* and making it clear that this would require a *"few signatures"* from Mr Khan.

29. On 17 February 2020, a housing officer from NHG – presumably Hajanee – wrote to Mr Khan indicating that his arrears were £3,764.52 and that he had been served with a Notice Seeking Possession on that date. The letter was sent to the flat, notwithstanding that NHG knew that Mr Khan was in prison and that it had Mr Khan's prison address.

30. On the same day, Hajanee wrote to Oleta attaching a "Deed of Assignment" and a "consent letter" for her to take to the prison. The email's list of attachments described the second document as an "assignment letter".

31. The Deed itself had been professionally drawn and pre-dated for Wednesday 19 February 2020. But it was incomplete, requiring population with the details of the date that was recorded on the original tenancy agreement (as the date that was made) and the identity of the landlord it had been made with.

32. Sadly, the accompanying 'letter' had obviously not been drafted by the solicitors, as evidenced not least by the inclusion of this paragraph:

> *"I understand that with Notting Hill Genesis clause and its written consent where an assignment to a person who would qualify as a successor to the tenancy, Ms Oleta…will be given a new tenancy."*

33. Quite apart from the confusing terms in which that is expressed, an assignment is of course – as any lawyer or professional housing manager would/should know – the antithesis of a 'new tenancy'. It is the transfer of the existing 'old' one, to one or more alternative tenants.

34. For his part, Mr Khan denies that he saw or signed these two documents. If there ever were any fully completed and signed copies, they are not (or are no longer) in the possession of NHG. Indeed, its pleaded case was that *"Those were never signed by the Claimant".*

35. In the course of his oral evidence, Mr Khan accepted that he had signed something in early 2020 that Oleta had sent to him in prison and that Hanajee had given to her to bring to him. Indeed, he had not only accepted that fact, but had actually asserted that such a thing had happened almost immediately afterwards (see the letter of March 2020 referenced below at paragraph 42).

36. At trial, Mr Morris made an oral application, in light of what he considered to be the 'fresh' evidence emerging in cross-examination about this 'signing' process, that NHG be permitted to re-amend its Amended Defence to assert (in reversal of its previous position) that Mr Khan *had* signed at least one of the two documents that Oleta was said to have taken to him, if not both. When it became clear that the application was opposed, and that, if the application succeeded, it would be followed by a cross-application to adjourn the trial, Mr Morris withdrew it.

37. I am satisfied that Mr Khan *did* sign *something* in February 2020. I am not satisfied that it is or was either or both of the two documents that were sent to Oleta by Hajanee. Mr Khan was clear in his evidence that he signed one document, consisting of one paragraph and with no header. He has no copy. His description matches neither of the documents sent by Hajanee to Oleta.

38. In an internal email written by an NHG manager some two years after the event it is recorded that *"the assignment was done on 19 February 2020 according to Northgate".* Northgate is the record management system maintained by NHG. Although that system records what entries to it are made, and by whom, and when, and enables documents to be scanned-into or attached to it, I was shown no such material.

39. But it appears that from late February 2020 onwards, NHG considered that Oleta was or had become the tenant of the flat. The rent account for the flat was at some stage changed from his name to her name, although the tenancy start date recorded on it remained the same (31 May 2010).

40. Whatever had happened eventually 'worked' in the sense that, by June 2020, NHG was receiving rent paid directly by housing benefits and also small monthly payments deducted from Oleta's welfare benefits and paid towards the arrears. NHG treated the historic arrears on the rent account as Oleta's liability and took payments from her benefits to clear them off.

41. Mr Khan promptly heard from Oleta in late February 2020 that she had been told by Hajanee that he was no longer the tenant. He tried to speak to Hajanee but she declined to take his calls as she considered he was no longer an NHG tenant. The pleaded case for NHG is that it had at Mr Khan's "*request, let the flat to [Oleta]".*

42. In March 2020, Mr Khan wrote directly to a senior NHG manager for whom he had a name, Mr Miles Langham. After salutations, his letter read *"I was sent a tenancy agreement for me to sign to have my wife and daughter Ru Khan to be added on the tenancy, but I'm really confused – it says nothing about a joint tenancy. Last time, Mark sent my wife a contract for me to sign which was a joint tenancy back in 2018-2019.*" In respect of what he had more recently signed, he wrote *"I've signed it because Hajanee told my wife to sign it quick to avoid more rent arrears which I did. I wrote to Hajanee twice to clarify the contract to me, but I have not heard back from*

her…I thought it was to sign my wife and child on my tenancy, which I had since 2010.".

43. Unhappily, Mr Khan's relationship with Oleta later broke down and they were divorced in September 2020.

44. Since then, Mr Khan has continued to complain to NHG and others, including the Housing Ombudsman, that he has always been and remained a tenant of his flat. In August 2021. he wrote at length to Ms Thomson who was by then a Regional Manager for NHG, asserting that his name had been "removed unlawfully" from the tenancy.

45. By December 2021, he had engaged legal representation by ALC solicitors. On 21 December 2021, Hajanee wrote to those solicitors purporting to explain what had happened. In her letter she simultaneously asserted that Mr Khan had signed the deed of assignment and that "[Oleta] was given a new tenancy in February 2020 and has been the sole tenant since then". Exactly the same dual assertions were made by MsThomson in her letter to Mr Khan's solicitors dated 14 February 2022 referring both to a signed Deed of Assignment and a "new tenancy" given to Oleta in February 2020. She indicated that she aimed to provide "these documents" shortly, following a review. No such documents were then provided, and none were in evidence before me. Indeed, it is conceded that there is no document representing a "new tenancy agreement" in the sole name of Oleta nor a signed Deed of Assignment.

46. Almost simultaneously with this correspondence, NHG were dealing with the termination of Oleta's tenancy of the flat at 190G to facilitate her move to another address by way of transfer to another NHG property. On 7 February 2022, Oleta completed a form to surrender the tenancy of the flat. On 22 February 2022, the 'Tenancy surrender form (transfers)' that she had signed was countersigned by Susheel Thompson.

47. Later in 2022, Mr Khan heard that Oleta had left the flat. In April 2022, NHG informed his solicitors that the flat "is now void and items that belong to Mr Khan have been left within the property". A list of items was provided. Mr Khan engaged new solicitors. They asked NHG not to re-let the flat.

48. The present claim was initiated in September 2022, seeking - by an accompanying application notice - an interim injunction to prevent a re-letting. But it was too late. On 27 September 2022, NHG's solicitors disclosed that the flat had been re-let to a new tenant on 23 June 2022. In those circumstances, the injunction application was dismissed by consent.

49. Mr Khan has since elected to abandon any attempt to return to the flat and the claim was conducted at trial as a claim for damages alone.

The competing cases

50. As indicated in the opening paragraph of this judgment, the contention of Mr Khan is that he was unlawfully evicted. His tenancy, first granted in 2010, was not ended by him or by any acts of his. The steps that he himself took were nothing more than an attempt to do what was necessary to ensure that Oleta could get benefits paid to meet the rent falling due on his flat which was their home. If that meant putting her name on the tenancy as well as his, he was agreeable to that. He had not disposed of *his* tenancy by notice to quit, by assignment, by surrender or by any other means. He had never intended that his tenancy be ended or given up and he had signed nothing to that effect. His tenancy was ended only by the repudiatory conduct of NHG in treating him as no longer the tenant of it and treating someone else (Oleta) being a new tenant of it.

51. The case for NHG is that Mr Khan's tenancy was ended by a surrender. Not by deed of surrender, but by surrender by operation of law. On an objective assessment, Mr Khan had offered his tenancy back to NHG so that they could grant a new tenancy to Oleta. She could then claim benefits for the rent in her name. That is what had happened. Mr Khan had been removed from NHG's records in February 2020 and Oleta substituted as a new tenant in his place, and by his consent. Nothing unlawful had occurred. Mr Khan's tenancy had been determined by a consensual mechanism recognised by law.

Surrender by operation of law: the legal principles

52. The common law has long recognised that a sole periodic tenancy can be ended by acts which amount to a surrender by operation of law in the absence of a deed. In short summary, that occurs where the acts of the tenant are inconsistent with the continuation of the tenancy and the landlord accepts, by its acts, that it treats the tenancy as ended. The acts of each must unequivocally be inconsistent with the continuation of the tenancy.

53. The jurisprudence has, in the modern age, been helpfully reviewed and summarised by Morgan J in giving the judgment of the Court of Appeal in *QFS Scaffolding Ltd v Sable & Anor* [2010] EWCA Civ 682, [2010] L&TR 30. At paragraph [10] he identified the following principles:

> i) there is no legal distinction between a surrender by operation of law and an implied surrender;
>
> ii) the term surrender by operation of law is applied to cases where a landlord or a tenant has been a party to some act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the tenancy had continued to exist;
>
> iii) the principle does not depend upon the subjective intentions of the parties but upon estoppel;

> iv) in this context, there is no estoppel by mere verbal agreement; there must in addition be some act which is inconsistent with the continuance of the tenancy;
>
> v) in point of time, the surrender is treated as having taken place immediately before the act to which the landlord or the tenant is a party;
>
> vi) the conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended; there must be either a relinquishment of possession and its acceptance by the landlord, or other conduct consistent only with the cesser of the tenancy;
>
> vii) it has been said that the circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ended;
>
> viii) an agreement by the landlord and the tenant that the tenancy shall be put an end to, acted upon by the tenant's quitting the premises and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law; the giving and taking of possession must be unequivocal;
>
> ix) where the tenant requests the landlord to let the property to a third party, and the landlord does so, the lease is surrendered at the time of the new letting; the surrender does not take place before the time of the new letting; it is essential that the new letting is effected with the consent of the original tenant; if the original tenant does not consent or know of the new tenancy, there is no surrender; the original tenant's consent may be inferred from conduct or from long acquiescence in the new arrangement;
>
> x) a surrender by operation of law may take place where the landlord, with the original tenant's consent, accepts a new tenant as his direct tenant; the consent of the landlord and the original tenant is needed.

54. His Lordship added, by way of additional comment that:

> [12]. The requirement that the conduct of the parties must be inconsistent with the continuation of the lease has been described as "a high threshold": … The above propositions stress that the conduct must be unequivocal.

55. Although each case will turn on its own facts, Mr Morris took my attention to *Collins v Claughton* [1959] 1 WLR 145, CA as one very factually similar to the present. In it, a statutory Rent Act tenant wrote to his landlord, that:

> As I have come to an agreement with my wife on changing name in rent book into her name … would you be kind enough to grant same as she is going to see [the rent] is paid in the future herself.

56. There the landlord acted upon that message and changed the name on the rent book to the wife's name and accepted rent from her. A finding of surrender by operation of law was upheld on appeal. But in contrast, in *Hoggett v Hoggett and Others* (1980) 39 P. & C.R. 12, CA, the court - having cited and distinguished *Collins* - made clear that surrender must involve a giving of possession which was, on the facts of that case, inconsistent with mere temporary absence and with the fact that the tenant's personal property remained in the premises.

57. I consider that the best 'steer' is not to be taken from either of those decisions, which turn on particular facts, but from applying the principles from *Sable* to the facts of the instant case.

Surrender by operation of law: the principles applied to the facts

58. What then, in the instant case, is there to demonstrate that the conduct of *both* parties was inconsistent with the continuation of the tenancy granted in 2010?

59. As to *the tenant's* acts, Mr Morris invited me to find from the terms of Mr Khan's communications with his landlord at the material time (summarised above) that he was plainly giving up his own tenancy in favour of a new tenancy to his wife Oleta. He relied in particular to the references to 'transfer' in the correspondence and to '[Oleta] solely' in a note of his telephone call.

60. In contrast, Ms Watterson invited me to consider other parts of the letters, and other contemporaneous documents that I have reviewed above, and to find from the language of them that Mr Khan was expressing a desire to retain the tenancy he had held for almost a decade by 2020 and which he was seeking to maintain as a family home for his wife and his child.

61. My assessment of all the factual material before me is that it gets nowhere near demonstrating that Mr Khan's statements and actions were inconsistent with the continuance of his tenancy. First, the language of 'transfer' (when he used it) had been, I accept from his evidence, introduced by his landlord – particularly by Hajanee - and not by him. Second, a fair reading of the documents demonstrates that what he was doing was seeking to *add* his wife to his tenancy and not replace him by her. Third, he was *never* offering possession or delivery of possession. He, his wife, his child and all his personal possessions were to remain in his flat by whatever method the landlord gave effect to his desire to achieve a situation in which she could attract entitlement to benefits and pay his or their rent for the flat. Fourth, the history of his long prior occupation of temporary accommodation and desire for a settled home of his own up to 2010, weigh heavily against the suggestion that he was giving up in 2019/2020 the tenancy that it had taken him so long to secure.

62. It might have been suggested that Mr Khan had come to realise that he would be in prison for so long that the only sensible course would be to give up his tenancy in favour of his wife. But any such suggestion is negatived by the language he was using at the time when writing to his landlord. It was replete with references to his appeals against conviction, his appeals against sentence, and even to a 'retrial'. This is contemporaneous evidence that whatever he was doing was being done in a context in which he expected to be home sooner rather than later.

63. Moreover, if what he had sought to do by his actions was displace himself as tenant in favour of his wife, it is noticeable that as soon as he realised that NHG were treating him as having done that, he disputed and contested it through senior NHG management, through its complaints process (even going so far as to complain that Hanajee had, in effect, misled him), with lawyers, and to the Housing Ombudsman (who eventually determined that his complaint had not been properly handled by NHG, leading to a recommendation for compensation).

64. In short, I accept Ms Watterson's central submission that, however carefully one dissects particular language out of any particular statement made by Mr Khan at the time, what one certainly cannot find is an unequivocal act or series of actions inconsistent with the continuation of his tenancy.

65. But even if that be wrong, what of *the landlord's* acts? Were they unequivocal indicia of treatment of Mr Khan's tenancy as at an end?

66. An initial difficulty in answering that question arises from the quite remarkable paucity of evidence from the landlord's side. Neither of the housing officers (Mark and Hajanee), who dealt with Mr Khan's tenancy after he was imprisoned, was called to give evidence. The landlord's position appeared to be that because they no longer worked for the organisation they would not/should not be called. But even if that be understandable, what of their line-managers at the time (Debbie Smith and Susheel Thompson), who presumably took the significant decisions about what should happen in 2019/2020? There was an unexplained absence of evidence from them.

67. True it is that Ms Emily Thomson gave evidence as a senior officer subsequently responsible for the property, but she became involved only in 2021 some considerable time after the acts said to represent the unequivocal termination of the tenancy. She did not appear to have been involved in any of the relevant acts or decision-making.

68. Extraordinarily, NHG provided its disclosure documents for the trial in redacted form (without permission of the Court). One understands that it might have sought permission to redact Oleta's current address or email details but there were wholesale redactions of material that would have enabled the Court to understand *who* in NHG had been saying or writing what to *whom* in 2017-2021. Even more bizarrely, nothing was put before the Court as to the content of the 'Northgate records' i.e. the entries on, sources of, and materials attached-to, the landlord's own case management system. It must also be noted that NHG did not call Oleta – who had been at the centre of communications in 2019/20 between Mr Khan and NHG. That is notwithstanding the fact that she would still appear to be a tenant of theirs (at a different address).

69. NHG's initial position in pre-action correspondence appeared to be that Mr Khan's tenancy had not ended but had been assigned from his sole name to his wife's sole name. But that position fell away when no record of any such completed assignment process could be found. Its case at trial therefore was that Mr Khan had ended his

tenancy by surrender and it – NHG - had granted a 'new' tenancy to Oleta. But that was not sustained by any evidence as to who at NHG had sanctioned that way of dealing with the matter or how it was compatible with NHG's rules, practices or procedures. Most social landlords are exceptionally careful about regulating to whom, and on what authority, and in accordance with what lettings/allocation policies, new tenancies are granted. There was no evidence of any document representing the grant of, or terms of, the alleged "new tenancy".

70. In my judgment, taken as a whole, the material before the Court is hopelessly inconsistent with the treatment by NHG of Mr Khan's tenancy as at a final end. By early 2020, NHG had a written procedure for the termination of tenancies by surrender.[2] It was not operated to take a surrender from Mr Khan.

71. The same written procedure makes explicit provision as to what may happen when a sole tenant is (as in this case) in prison and his partner, a non-tenant, remains living in the property. It provides (at 10.1) that:

> We may consider granting a joint tenancy to formalise the arrangement and offer the partner security. These cases should be considered on a case-by-case basis by the Local Manager and Legal Caseworker. Please refer to the *Sole to Joint Tenancy procedure* for further guidance"

72. That was what Mr Khan was led to believe was happening when Mark was the Local Officer. But I had no evidence from him (Mark) or from his successor (Hajanee) or from his or her Manager or from the Legal Caseworker as to why the procedure had not been followed. Likewise, there was no *Sole to Joint Tenancy procedure* in evidence before me.

73. As to *actions* actually consistent with the ending of Mr Khan's tenancy, true it is that someone in NHG re-badged the rent account with Oleta's name and took the rent from her. But NHG's own documents record that the tenancy to which that rent account applied was a tenancy having started in 2010 and continuing. It had not ended. That much is made clear by the landlord's treatment of Oleta as liable to pay the arrears accrued under it. In truth, it was Mr Khan's old tenancy. It was still his tenancy when on 17 February 2020 he was sent a Notice Seeking Possession. There is no proper account of what happened between that date and 19 February 2020 (two days later) when NHG suddenly switched tack and treated Oleta as its new tenant of the same property. Ms Emily Thomson's bald account (although she had no personal involvement in the process, is that *"the tenancy was brought to an end and a new tenancy was granted to [Oleta]"*. (Witness statement, para [18]).

74. What one has, standing back, is a picture of hopeless muddle and seeming administrative and managerial incompetence at NHG. That is so, even though they were dealing with as commonplace a situation in social housing as one spouse continuing in occupation while the other, in whose name the tenancy is held, is temporarily absent. There is, to my mind, nothing *un*equivocal at all in the landlord's

[2] *Ending a Tenancy Procedure*, NHG September 2019 para 2.0

actions. What one has here is the exact opposite. A scenario of lack of clarity and confusion about what should be done and what was being done and why.

75. Against that background, I have no hesitation in rejecting the contention that Mr Khan lost his tenancy by the operation of the principles of lawful termination described as 'surrender by operation of law'. He lost his tenancy because NHG wrongly deprived him of it and purported to let his flat to another (Oleta).

76. Strictly, his tenancy endured. But, as he understood, he cannot both have his cake and eat it. At trial, he elected to seek recompense rather than reinstatement. The effect of that election is that "his tenancy would properly be deemed to have ended, albeit unlawfully, at the time of his wrongful eviction."[3]

77. The parties were not entirely clear as to *when* Mr Khan should be retrospectively treated as having lost his right to occupy i.e. as having been wrongfully evicted. In the joint instructions delivered to the valuer (see below), they suggested that Mr Khan should be treated as having lost his right to occupy in May 2022 – after Oleta had moved elsewhere and before NHG relet the flat to a third party in June 2022.

78. For my part, I consider that the better view is that NHG deprived Mr Khan of his right to occupy his flat in February 2020. From that date it treated him as having no right in the flat at all. As Mr Morris aptly put it in his skeleton argument at [22]: *"By treating Oleta as its tenant, it unequivocally took the possession of the property from the Claimant".* That was no different from its position in May 2022. In any event, I do not consider that anything of significance turns on the different dates.

The assessment of damages

79. Damages for wrongful deprivation of a tenancy are available under both statute and the common law. Although Mr Khan's case was advanced as seeking to establish both, Ms Watterson focussed on statutory damages because: (a) they would be significantly higher than any awarded at common law; and (b) the statutory scheme prevents the award of both in respect of the same unlawful eviction.[4]

80. One might think it surprising that a social landlord (as opposed to a private landlord) would ever face a claim for damages for wrongful eviction, but this is far from being the first such case.[5] As Lord Wilson has stated, such *"landlords rarely perpetrate unlawful evictions of their tenants. When they do so, it is usually, as here, as a result of honest misjudgement and scarcely ever … as a result of any deliberate intention to act unlawfully.*"[6] Parliament has not amended the 1988 Act to remove social

[3] *Osei-Bonsu v Wandsworth LBC* 1 WLR 1011, CA 1025D-E
[4] Housing Act 1988 section 27(5).
[5] For others, see *Osei-Bonsu v Wandsworth LBC* 1 WLR 1011, CA, *Loveridge v Lambeth LBC* [2014] 1 WLR 4516, UKSC, and *Lutman v Ashford BC* [2018] March *Legal Action* 29, county court at Canterbury.
[6] *Loveridge v Lambeth LBC* [2014] 1 WLR 4516 at [15]

landlords from its scope, despite an invitation from the Supreme Court that it might consider doing so.[7]

81. The statutory approach to assessment of recompense for unlawful eviction is set out in the Housing Act 1988 sections 27 – 28.

82. Before I come to the statutory *quantification* of damages, I need to deal with whether there is scope for their *mitigation*. That arises because section 27(7)(a) provides that:

> (7) If, in proceedings to enforce a liability arising by virtue of subsection (3) above, it appears to the court—
>
> (a) that, prior to the event which gave rise to the liability, the conduct of the former residential occupier or any person living with him in the premises concerned was such that it is reasonable to mitigate the damages for which the landlord in default would otherwise be liable, or
>
> (b) …
>
> the court may reduce the amount of damages which would otherwise be payable to such amount as it thinks appropriate.

83. In this case, the question of mitigation was not raised by the Defence or canvassed at Pre-Trial Review or raised in the Agreed List of issues for trial. That is despite it being well established that reliance on this provision "should be pleaded and particularised".[8] This might well have been fatal to any attempt to rely on mitigation.[9]

84. But on the eve of trial, by an application notice dated 10 October 2023, NHG sought permission to amend to include reliance upon it. That application had not been sealed and issued before the trial started but, on an oral application, I permitted Mr Morris to treat it as listed.

85. The application was opposed, but Ms Watterson very fairly expressed surprise that mitigation had not earlier been expressly pleaded, given the factual background in this case. Mr Morris was prepared to advance his argument limited to the factual material before the Court. I granted the application (for reasons given in a short *extempore* judgment) and gave permission to Ms Watterson to elicit, by examination in chief of her client, any additional material necessary to enable her to meet the case on mitigation.

86. As the text of section 27(7)(a) indicates, the Court may abate the damages that would otherwise be awarded by reference to any conduct of Mr Khan that he engaged-in and that occurred ***prior to*** the event which gave rise to the liability i.e before the unlawful eviction. Such abatement can only be applied when the Court considers such mitigation 'reasonable' and only to the extent that the court considers 'appropriate'.

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[7] Ibid at [30]

[8] *Regalgrand Ltd. v. Dickerson & Wade* (1996) 29 H.L.R. 620 at 625,

[9] As in both *Kalas v Farmer* [2010] HLR 35 and *Lutman v Ashford BC* [2018] March Legal Action 29, county court at Canterbury.

87. As to the correct approach, it is well settled that the Court must look at the *"tenant's conduct in the light of the surrounding facts"* and its *"conclusion will depend upon all the circumstances of the case."*[10]

88. Section 27(7)(a), seen in context, was obviously intended to catch the class of case in which the tenant's own conduct, whether by way of breach of the terms of his tenancy or otherwise, is rightly to be regarded as mitigating the landlord's liability in damages for his unlawful eviction. Most egregiously, these will be cases of wanton damage to the premises, anti-social behaviour, abuse of the landlord or others, etc. The conduct need not be the direct cause of the eviction.

89. In *Osei- Bonsu,* the tenant directed domestic abuse towards his wife. That led her to give notice to end their joint tenancy. The notice was invalid, and the landlord unlawfully evicted. But the Court of Appeal found that his *"eviction was clearly the culmination of an unbroken chain of events starting with the plaintiff's conduct… and if, as I conclude, the plaintiff's conduct was not merely deserving of condemnation but also precipitated the course of events leading logically to his dispossession, that in my judgment, amply satisfies the requirements of this provision*".[11] That conduct was found to justify a two-thirds reduction in the statutory damages.

90. In the instant case, Mr Morris relies on two matters as constituting the relevant pre-eviction conduct: (1) rent arrears; and (2) the commission of the criminal offences for which Mr Khan was imprisoned.

91. The first matter, *rent arrears,* is advanced in the Amended Defence on the basis that Mr Khan was responsible for arrears of some £6377.32. That appears to be the arrears figure as at the date on which NHG closed the rent account (9 March 2022). Indeed, in his submissions, Mr Morris invited me to treat the correct figure as the £8567 arrears stated to be the sum as at the date in 2022 that 190G was last re-let.

92. But in this case, NHG deprived Mr Khan of possession on 19 February 2020 when it decided that he was no longer the tenant, that it would not deal with him, that Oleta was the tenant of the property, and that the tenancy was in her sole name. At that date, the arrears were £3,764.52 or the equivalent of about six months unpaid rent.

93. Does the existence of *those* arrears make it reasonable to mitigate statutory damages for eviction? They had after all – at virtually the same time – justified commencement of a lawful means of terminating the tenancy, by service of a Notice of Seeking Possession. There is clear authority that non-payment of rent can constitute relevant 'conduct' for the purposes of this statutory provision.[12]

94. But, as ever, context is all. Mr Khan was sentenced on 21 December 2017. As soon as 5 January 2018, he wrote to his landlord explaining that what he wanted to avoid was

[10] *Regalgrand Ltd. v. Dickerson & Wade* (1996) 29 H.L.R. 620 at 625.
[11] *Osei-Bonsu v Wandsworth LBC* 1 WLR 1011, CA at 1021D-E
[12] *Regalgrand Ltd. v. Dickerson & Wade* (1996) 29 H.L.R. 620

"the rent not to be paid" and pointing out that in the course of his tenancy over the seven previous years he had *"never been in arrears".* NHG did not put before the Court any copy rent statement for any date prior to September 2019. But that he was only in about six months arrears by the date of his eviction in early 2020 suggests that he must have been in significant credit in January 2018.

95. Of course, payment of the rent is a tenant's primary liability. But Mr Khan did exactly what he needed to do to avoid arrears occurring. He asked his landlord to confirm that his wife was in occupation and/or to add her name to his tenancy. Had that been handled properly, it would or should have led to the regularisation of Oleta's benefit entitlement in good time to avoid the accrual of any arrears. It is no part of the case for NHG that Oleta was unable or unwilling to participate in that process or that there was some problem or difficulty in her dealings with the housing benefit authorities. Indeed, and to the contrary, she was in due course happy to suffer a reduction in her own welfare benefits to meet the arrears, which ought never to have arisen, by small instalments.

96. In my judgment, Mr Khan was not in arrears because he did not have the means to pay or because he failed to do anything to secure payment. He did everything he reasonably could to ensure that the rent was paid and to prevent arrears arising.

97. The proper reading of the evidence is that he was failed by his landlord. Social landlords like NHG are – or should be – in the business of helping tenants sustain their tenancies. NHG had the policy and procedure in place to achieve that (see above). NHG's standard template letter about arrears (one of which was sent to Mr Khan on 26 November 2019) indicates that it has in-house *Welfare Benefit Advisers*. No such adviser appears, remarkably, to have been asked by it to advise in this case. The letter concludes:

> As a Notting Hill Genesis tenant you have access to Notting Hill Genesis's Tenancy Support Network where you can access help with employment, debt, budgeting and more. If you want access to this support …get in touch with me. [signed, Housing Officer]

98. Mr Khan had been asking for 'support' from NHG since January 2018, but none was forthcoming. Its officers failed Mr Khan. There has been no good explanation for that failure.

99. Fortunately, the terms of Mr Khan's tenancy prevented NHG from relying on the mandatory ground (Ground 8) for possession for rent arrears. It is inconceivable that, had the landlord pressed on with a lawful claim for possession on a discretionary ground in 2020, any judge would have found it reasonable to order possession in this context and on these facts.

100. In short, I do not consider it reasonable to abate the statutory damages by reference to the failure to pay rent beyond ordering that such sum as I would otherwise award will be abated by the arrears themselves as they stood on 19

February 2020 i.e. by £3,764.52. Even that is, at least in this respect, generous to the landlord given its failure to assist its tenant in response to his requests.

101. The second conduct relied upon by the landlord is the *commission of the offences* for which Mr Khan was arrested in April 2017, convicted in September 2017 and sentenced in December 2017. These were certainly serious offences. They included possession with intent to supply controlled drugs including Cocaine and MDMA. Given that the sentence imposed on conviction was 22 years imprisonment, the quantities involved and the extent of Mr Khan's involvement in the criminality must have been very significant indeed.

102. But does this criminal conduct, which led to this weighty sentence, render it reasonable to apply an abatement of damages for Mr Khan's unlawful eviction over two years later by his social landlord? The landlord led no evidence at all as to any connection between the offences and the flat at 190G or even as to any connection with the area in which the flat was situated. There was no suggestion that the crimes affected any neighbour or other resident of the area. Of course, they will have (at least potentially – assuming the drugs entered circulation) affected someone somewhere.

103. Mr Morris's submission was that the offences were, in effect, the 'domino' that led to the loss of the tenancy. Had they not been committed Mr Khan would not have been remanded in custody and later imprisoned. Had he not been imprisoned he would have been in occupation of 190G and been able to pay the rent himself. It was his offending, his conviction and his imprisonment that set in-train the events which eventually led (on NHG's case) to Oleta replacing him as tenant in February 2020.

104. Nothing in this judgment seeks to excuse or ignore Mr Khan's offending. But in this country the punishment for such offending (unconnected in any way to a tenant's home) does not normally include eviction from an offender's home. The punishments available to the courts for criminal offending were imposed to their full extent and effect here. As I have explained, policy considerations point to the retention, where possible, of the offender's home for the benefit of his partner and any children. If an offender is imprisoned, but his impecunious spouse remains in the family home, the state will (in the form of welfare benefits) provide, as explained above, the financial assistance for that home to be maintained.

105. As I have already explained, had Mr Khan received from NHG the response and support he was entitled to expect, even under its own procedures, his tenancy would still have been extant (in sole or joint names) at least at the point of his eviction. His was a tenancy which enjoyed security of tenure. There was no ground of possession available to his landlord by dint of his offending. It does not follow that because he is an offender, his landlord is in any way justified in unlawfully depriving him of his home.

106. Mr Morris's submissions invite me, in reality, to look not at what happened between the offending and the eviction but to take account of what happened

afterwards. Mr Khan's marriage to Oleta did not survive the strain of their separation (but was enduring as at the date of the eviction). In due course, she left the flat, but that too was much later. True it is that those things might have happened even if NHG had given Mr Khan the assistance he was entitled to expect rather than having unlawfully deprived him of his tenancy. But they happened *after* the event. I am not persuaded by those submissions.

107. But Mr Morris is right that with such a long sentence of imprisonment there was always at least a significant risk that at some stage in the course of his lengthy absence from the flat Mr Khan might find himself unable to pay the rent, or otherwise maintain the tenancy. What had been a tenancy with a prospect of surviving a lifetime had been rendered significantly more 'vulnerable' as a result of his lengthy incarceration. His recent marriage (even if Oleta had been helped in timely fashion to get the benefits to pay his or their rent) might well not have survived his continued absence. Alternatives, such as relying on his adult daughter to move in and occupy the flat as his caretaker might well have come to nought (not least because she was working in Ukraine!). Anything he set up by local arrangements with his extended family or friends to keep-up his flat and maintain his rent payments might have fallen through.

108. I do accept that, even with arrangements for early release on licence and opportunities for potential 'home leave', Mr Khan was going – by reason of his offending – to be away from the property for very many years. That necessarily carried with it the considerable risk that his tenancy might, for a host of possible reasons, not be capable of being maintained until he took up occupation again. And that would be so even if NHG had responded to his situation perfectly properly.

109. In her closing written submissions Ms Watterson put the position as one in which the offending *"was little more than part of the factual background to the eviction or one of the remote causes.".* I consider that this significantly understates the position. If the offences had not been committed the scenario which the landlord and now the Court has had to deal would not have unfolded at all. As I have stated, the offending put the ability of Mr Khan to maintain his tenancy at real and significant risk.

110. Having considered all the circumstances, I am satisfied that it is 'reasonable' to make an abatement of the statutory damages otherwise payable by the landlord in this case on this basis. The extent of the abatement is such as the Court finds 'appropriate'. This cannot be a matter of scientific assessment. It is rather "*a judicial judgment which is not capable of mathematical precision. It again has to be taken in the light of all the facts"*.[13] Having carefully considered all those facts, I judge an abatement in the amount of 40% of the statutory damages to be appropriate to reflect the extent to which the offending put Mr Khan's tenancy 'at risk' even though he was the tenant of a social landlord with security of tenure.

[13] *Regalgrand Ltd. v. Dickerson & Wade* (1996) 29 H.L.R. 620 at 625

111. Having dealt with the case on 'mitigation', I can now turn to the assessment of those damages.

Quantum

112. The proper approach to the assessment of damages is set out in the 1988 Act as follows:

> **28.— The measure of damages.**
> (1) The basis for the assessment of damages …is the difference in value, determined as at the time immediately before the residential occupier ceased to occupy the premises in question as his residence, between—
> (a) the value of the interest of the landlord in default determined on the assumption that the residential occupier continues to have the same right to occupy the premises as before that time; and
> (b) the value of that interest determined on the assumption that the residential occupier has ceased to have that right.
> (2) In relation to any premises, any reference in this section to the interest of the landlord in default is a reference to his interest in the building in which the premises in question are comprised (whether or not that building contains any other premises) together with its curtilage.
> (3) For the purposes of the valuations referred to in subsection (1) above, it shall be assumed—
> (a) that the landlord in default is selling his interest on the open market to a willing buyer;
> (b) that neither the residential occupier nor any member of his family wishes to buy; and
> (c) that it is unlawful to carry out any substantial development of any of the land in which the landlord's interest subsists or to demolish the whole or part of any building on that land.

113. Those provisions require the Court to award damages equal to the difference in value between (1) the landlord's interest with the property free of the tenant's right to occupy and (2) the landlord's interest with the property subject to the tenant's right to occupy. That difference is to be assessed on the hypothesis set out in the section, primarily that the landlord is selling in the open market to a willing buyer.

114. This is a subject on which the Court obviously requires appropriate expert valuation advice and opinion. In the instant case, that has been provided by the report of Mr Costa. His appointment as single joint expert was by agreement and his instructions were also in terms agreed by the parties. He has provided the Court with a written report and neither party applied for him to give oral evidence at trial. Provision was made for either party to put questions to him about his report but there were no such questions.

115. It is extraordinary that although the statutory valuation exercise takes as its starting point "the landlord's interest" in the property in question, the joint instructions to the expert did not tell him what the nature of the landlord's interest in 190G was. Did it own the freehold of the whole or any part of the building at 190? Or

was it just the leaseholder of flat 190G within it? If the latter, what was the nature of, and unexpired term of, its lease?

116. In the absence of any clarity, or any request by him for elucidation, Mr Costa seemingly treated the nature of NHG's interest in 190G as being that of a leaseholder holding (and wishing to sell) a new lease for a full term of 125 years. Neither party challenged that starting point or questioned the expert about it. The Court therefore, and somewhat unusually, proceeds on the basis that the parties are agreed that this is the right - or at least mutually accepted - starting point for assessing the value of the landlord's interest in this case.

117. Mr Costa assessed the sale value of such a lease on the open market with vacant possession as £590,000. He considered that if offered for sale subject to Mr Khan's right to occupy (an assured tenancy) it would realise £385,000, a difference of £205,000. His assessment of those values is based on his professional experience, market comparables, and experience of transactions by auction. Neither party challenged these figures or assumptions or suggested alternatives.

118. At trial, Mr Morris sought to develop an oral argument that the surveyor had failed to reflect the fact that, as at the notional valuation date, Mr Khan had been in arrear of rent to the extent of at least 8 weeks and was thus vulnerable to eviction on a mandatory ground (Ground 8). Accordingly, the value of his right to occupy should have been adjusted to reflect that fact.

119. There were several difficulties with that proposition. First, the expert had not been asked to address that feature in the joint instructions. Second, the expert had not been asked to deal with it by written questions from NHG. Third, the exercise for the valuer was to treat the landlord's interest as deflated by the impact of the actual right to occupy enjoyed by the tenant.[14] That right was, in this case, to an assured tenancy the contractual terms of which restrained any reliance on Ground 8. I am not satisfied that any adjustment to the valuer's valuation should be made by the Court on this basis.

120. I accordingly assess the statutory damages as having a starting point at £205,000. From that, I deduct the abatement of 40% (£82,000) to achieve £123,000. From that, I then deduct the rent arrears of £3,764.52. That produces £119,235.48.

121. Ms Watterson accepted that an award at that scale would eclipse any alternative award for damages at common law. I need therefore say nothing further about any such damages.

122. Ordinarily, Mr Khan would also be entitled to special damages for the value of his personal possessions left at 190G and of which the landlord had disposed. But no such claim has been pressed to trial and there is no relevant schedule of loss. That may be because the landlord made the possessions available for collection in 2022 but

[14] *Loveridge v Lambeth LBC* [2014] 1 WLR 4516, UKSC.

Mr Khan was unable to make arrangements for their collection and storage while he remained incarcerated.

Outcome

123. For the reasons given above, the claim succeeds. There will be judgment for the Claimant for £119,235.48.

124. Following sight of this judgment in draft, the parties have been able to agree a minute of order reflecting that outcome. After the application of an uplift (as a result of the sum awarded exceeding a Part 36 offer made by the Claimant) and the addition of interest, the sum for which judgment will be entered is £145,800.89. I will deal with any further consequential matters at the formal handing-down of the judgment.

HHJ Luba KC

17 November 2023