Case No: G02EC127

IN THE COUNTY COURT AT CENTRAL LONDON

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

Date: 19 July 2021

BEFORE:

HIS HONOUR JUDGE LUBA QC

COURTNEY JEAN STURGISS
TANYA GUPTA

Claimants

- v -

RICHARD PAUL BODDY
BELLA AUDE
BRAIDEN MOFFAT
ELRICA RAJA

Defendants

Hearing date: *21 May 2021*

Mr Winston JACOB (of Counsel) appeared on behalf of the Claimants

Miss Georgia PURNELL (of Counsel) appeared on behalf of the First Defendant

The Claimants attended by telephone

The First Defendant attended by video link

The Second and Fourth Defendants attended in person

The Third Defendant did not attend

APPROVED JUDGMENT

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

Introduction

1. Flat-sharing (or house-sharing) by unrelated individuals is now a commonplace way of living. Particularly in towns and cities with significant mobile populations of young single people or students who need a place to live but cannot afford, or do not need, a house or flat of their own or on their own.

2. This case is concerned with the impact of the law on those commonplace flat-share or house-share situations where the owner does not themselves live at the property but allows others to do so and those others are unrelated to one another.

3. In any such flat- or house- sharing arrangement, at the outset, a property owner will let the house or flat to several individuals on a joint tenancy at an agreed rent for the whole property. They may be, particularly in respect of a larger property, as many as four individuals whom I shall call "A, B, C and D."

4. The owner is content that those individuals agree among themselves which rooms in the house or flat they each occupy and what arrangements they make as to the apportionment between themselves of contributions towards the rent and/or household bills. They share the use of the kitchen and other communal areas, but each has their own bedroom. Usually, one of the tenants will collect up the contributions and make the regular rental payments to the landlord or agent as well as dealing with utility bills.

5. In time, one occupier will want to leave and will find another to replace them. My suggested D may be replaced by E. In the modern day, E may be a friend or

acquaintance of D or will have responded to an internet-posting offering ‘a room in a flat (or house) share’.

6. Usually, the newcomer will be informally ‘vetted’ by the other remaining residents to ensure that they will be a suitable ‘fit’ in the property. Often, the incumbent occupiers take the opportunity at such a changeover to swop rooms, so that the one arriving may not necessarily take the room of the one departing.

7. The owner or agent is told of the change. The occupiers are now A, B, C and E. This is the first ‘churn’ in the identity of the occupiers.

8. Over following months and years, the occupiers will leave, in turn, and be replaced. There are often multiple further ‘churns’.

9. A decade or so on, the occupiers may be M, N, O and P. The only record of A, B, C or D ever having lived at the property may be the appearance of their names on increasingly dog-eared post in an ever-growing pile in the communal hallway or in a faded copy of their original tenancy agreement held somewhere in the files of the property owner or their agent.

10. The informality of such arrangements may well suit the owner, who receives regular monetary payments from a single individual for the whole property and need never trouble with the burden of advertising available rooms to let or having to engage agents to recruit and vet new prospective residents. For their part, the occupiers may leave at will, subject simply to an understanding that they must find a replacement acceptable to their fellow occupiers before doing so.

11. Commonly, the first tenants will have paid a tenancy deposit to the owner. Each of A, B, C and D may have contributed to that. When they each leave, in turn, they arrange that the incoming occupier replacing them will reimburse them for their ‘personal share’ of that original deposit or ‘bond’. The same thing happens at the next churn, and so on.

12. As ever, things run smoothly until they do not. When issues arise between the owner and now current occupiers, recourse may need to be made to the law.

13. But much of our property law in England & Wales derives from generations-old judge-made common law rules overlaid by legislation built up over many years and often lagging behind commonplace 'real life' arrangements such as flat- or house- sharing. It tends to be concerned with the nature of the legal relationship between the current parties as derived from the history commencing with the initial letting.

14. Assume that it is now many years since the initial letting to A, B, C and D. As the owner knows, the present occupants are M, N, O and P. What is the nature of their legal relationship? How might payments for current occupation be varied or increased? Who (if anyone) is responsible for repairs? If the owner wants the property back, what steps does she or he need to take to recover possession. And, if there was originally a tenancy deposit, for whom or how is it still held?

15. In the instant case, the dispute arises as a claim by two relatively recent flat-sharers for an order penalising the flat-owner for failing to protect their deposit at the point of the particular churns which brought them each into the flat.

16. Their case is that, at each churn, there was a surrender of the tenancy held by the particular combination of occupiers who were in the flat before it occurred and the grant of a new assured shorthold tenancy to the new combination of occupiers who occupy the flat after it occurs. They say that statute requires that the owner protects the tenancy deposit afresh at each churn and that he did not do so at the churns which brought each of them into the flat.

17. The claims are defended. The owner contends by his Defence that the claimants and the current occupiers are mere licensees. They do not hold assured shorthold tenancies, so no obligation to protect any tenancy deposit arose with their arrival. In any event, neither of them has actually paid him any deposit or part thereof. So, there was nothing to protect and failure to protect 'nothing' could not give rise to a penalty.

18. The matter was somewhat ambitiously listed for resolution at a 90-minute hearing before a Deputy District Judge. Because of the then virulent COVID pandemic, that hearing was conducted by telephone. No live evidence was advanced. The Court had only the untested witness statements of the parties and their witnesses.

19. The judge gave an immediate *ex tempore* judgment dismissing the claim. He held that the claimants were mere licensees. The churns which brought them each to the flat were not the occasions of the grant of new assured shorthold tenancies. Even if that was wrong, the claimants had no standing to sue for the imposition of penalties for non-protection of the deposit because none had ever paid the owner a deposit.

20. From the order dismissing their claim, the claimants appeal to this Court. I directed a rolled-up oral hearing to determine both the applications for permission to appeal and (if granted) the appeal itself. That took place on 21 May 2021.

21. The parties were respectively represented by solicitors and counsel. I thank them for the quality of their preparations for the hearing, the skeleton arguments provided and the economy and skilful delivery of their oral submissions. In addition to an Appeal Bundle of over 250 pages, I had a Joint Bundle of Authorities and Materials of no less than 15 items.

22. The 'rolled up' appeal hearing was held in open court but as a hybrid. By their choice, the claimants attended by telephone and the first defendant (who lives abroad) attended by video link. The hearing occupied a full court day and I reserved judgment.

The Facts

23. Mr Richard Boddy is the owner of the three bedroomed flat at Flat 5, 34 Sunderland Avenue, Maida Vale, London ("the Flat"). He bought it in 2003 and then lived in it for less than 12 months before moving out, to live elsewhere. Since 2013, he has lived and worked overseas.

24. On 19 June 2004, Mr Boddy let the flat by way of a written assured shorthold tenancy agreement to four individual joint tenants named Freidrich, Otley, Magni and Larssen. He no longer has a copy of the tenancy agreement. He took a deposit of £1,745 at the grant of the tenancy. The weekly rent under it was £349 and that deposit represented the equivalent of five weeks' rental. At that time, there was no obligation on landlords to protect such deposits and the deposit was not protected.

25. Since 2004, having made deductions for breakages at the property, Mr Boddy continues to hold a balance from the original deposit in the sum of £1,205.

26. As to his understanding of the situation at and since entering into the 2004 tenancy, Mr Boddy's evidence as given in his witness statement was:

> "[9] The 2004 Tenancy was essentially a 'flat share'. The tenants made arrangements themselves for substitutions of occupiers from time to time. As I have been distant geographically and overseas … the existing tenants would find a replacement whenever one of them wished to leave the Flat. Very often this was done without my consent or knowledge and I believe there have been around 10 different occupants of the Flat over the years."
>
> [10] I understand that the tenants advertise the vacant room themselves and decide who they would like to live with them from those that apply, or sometimes organising for friends to replace them…
>
> …
>
> [12] I had little or no visibility on the arrangements that were made between the tenants for transfer of amounts, or the split of the original deposit into the individual 'room bonds'. These amounts were negotiated individually between incoming and outgoing individuals…
>
> [13] Many of the occupiers of the Flat over the years have been ex-pats and the flexibility of the arrangements without the need for formalities such as fixed terms, written agreements and renewals has suited them. It has also suited me as it has meant that I've had less involvement finding tenants for the flat and all of the tenants have generally been good ones, paying their rent and keeping the flat in decent condition.
>
> …
>
> [16] There was no managing agent involved in the letting or management of the Flat as tenants preferred to take advantage of a rent significantly below the market rate, rather than have the rent loaded by an additional 15% to cover the cost of a managing agent as well as proper fixed term tenancies and the like. I believe that all the tenants accepted this and enjoyed the financial benefits and flexibility it brought them."

27. Although this is a legal context in which descriptions used by laymen can be misleading, it is noticeable that Mr Boddy refers to the occupiers in his statement (not just in these extracts but throughout) as his 'tenants' and to what he receives from them as 'rent'. Nothing in his statement (made in October 2020) indicates how the rent payable for the Flat in 2004 (of £349 per week) had become a monthly rent in the figure

of "£2,295" identified by him as the monthly rent payable for each of April and May 2020.

28. In accordance with the arrangements outlined in his statement, Mr Boddy allowed the original tenants under the 2004 Tenancy to find suitable substitute occupiers to replace them and then to leave the flat. He permitted later occupiers to do the same. None of the original joint tenants now remain. There have been a number of 'churns'.

29. For the purposes of this claim it is only necessary to set out the facts relating to the 'churns' which brought the claimants (Miss Sturgiss and Miss Gupta) to the flat and/or those that occurred after they came to the flat.

30. In October 2018, those in occupation were Bella Aude, Braiden Moffat, and a couple called Jordan Ryan and Rebecca Ramsay. The couple decided to leave. The first claimant, Miss Courtney Sturgiss was found to replace them. There was a reshuffling of the room allocation in the flat. Miss Sturgiss moved in on 17 October 2018. She paid £1,050 to the outgoing occupiers and thereafter £702 per month towards the overall monthly rent. I will call this "Churn A". The occupiers were now Aude, Moffat and Sturgiss. Miss Aude took the responsibility for collecting up the rents and paying Mr Boddy.

31. In early April 2019, Mr Moffat was looking to leave the flat and the second claimant, Miss Tanya Gupta was found to replace him. Again, there was a reshuffling of rooms. Miss Gupta paid Mr Moffat the sum of £800 and to Miss Aude her agreed share of the monthly rent at £660. Mr Moffat sent an Email to Mr Boddy on 5 April 2019 to let him know about the change of occupiers and to provide the name and Email address of Miss Gupta. She moved in later in April 2019. The occupiers were now Aude, Gupta, and Sturgiss. I will call this "Churn B". Miss Aude continued to take the responsibility for collecting up the rents and paying Mr Boddy.

32. On 8 January 2020, the then occupiers sent Mr Boddy an Email in which, having raised a number of matters about aspects of the Flat, they asked "We would also like to know what type of tenancy we are under – whether it's an Assured Shorthold tenancy or not." On 11 January 2020, he replied "Yes it's an AST. I can draft a contract if that helps as we have been operating on a roll forward of the existing one for many years".

33. By early 2020, Miss Gupta was looking to leave. She asked Mr Boddy for a reference. On 27 January 2020, he gave her one. It stated "This…is to confirm that Tanya Gupta has been a tenant in the above property since 15th April 2019…Their last rent payment was £689, which was paid on time on 15 January 2020. During the tenancy, they have been responsible and timely in their rent payments which were due monthly…I can confirm that the tenant is respectful, friendly and helpful. They made no unreasonable demands during their tenancy"

34. Despite that glowing reference, Miss Gupta found it difficult to obtain a replacement for herself in the flat. She stated that this was because she could not explain to any enquirers her actual - or their potential – rights or responsibilities in relation to the deposit.

35. She asked Mr Boddy to clarify whether the existing tenancy deposit was protected or would be protected. He confirmed that the initial deposit taken in 2004 had never been protected (because it did not have to be) and that no deposits had been taken by him or protected since. He wrote to her in January 2020 that "I prefer we keep the existing arrangement and once you have found someone else Bella [Aude] and Courtney [Sturgiss] are comfortable with, they reimburse your amount". Pressed further, he responded with a message "Please make sure the same arrangement applies as when you moved in".

36. Miss Gupta advertised her room on the internet (www.spareroom.com) at a rental of £689pcm. Miss Elrica Raja responded. In due course, she paid Miss Gupta £800 and by the next rent date she had moved in. She paid her contribution toward the global rent due on 15 February 2020. The occupiers were now Aude, Sturgiss and Raja. I will call this "Churn C". Mr Boddy was copied into the Email exchanges between Miss Raja and the other occupants about her replacing Miss Gupta and she first met Mr Boddy in a joint video call that all the occupiers (Aude, Sturgiss and Gupta) had with Mr Boddy on 23 February 2020. As before, Miss Aude continued to take the responsibility for collecting up the rents and paying Mr Boddy.

37. In March 2020, with the COVID emergency having materialised, Miss Sturgiss quit her job in the UK, took an emergency flight 'home' to Australia, and left the flat. She informed Mr Boddy that she would be moving out and that she accepted a rental liability

up to 15 May 2020. She anticipated that, in the then COVID environment, she would find it difficult to arrange a replacement in the flat. She left her key in her room and, having left in circumstances of urgency, did not clean her room before leaving. She told Mr Boddy to "keep the bond to pay for the remainder of my rent and for a cleaner to clean my room".

38. For several weeks, the property remained occupied only by Miss Aude and Miss Raja. They informed Mr Boddy of the position and he agreed that they would not need to cover the cost of the empty room left by Miss Sturgiss themselves i.e. to make good her contribution to the total rent. They set about finding a replacement and were fortunate to find, in response to advertising, someone to move-in during June 2020. I will call this departure/arrival episode "Churn D". Miss Aude, Miss Raja and the new incumbent, I understand, remain in occupation to date.

39. On 13 August 2020, Miss Sturgiss and Miss Gupta issued this CPR Part 8 claim seeking damages arising from the non-protection of their deposits. Miss Sturgiss sought the sum of £348 said to represent the non-returned element of her deposit. The Claimants each seek a remedy of a multiplier of no less that one times their deposit and a maximum of three times the deposit. In summary, the basis of the claim is that at each of the churns the existing assured shorthold tenancy was surrendered, and a new assured shorthold tenancy arose in respect of which a deposit was paid but not protected.

40. In compliance with the procedural rules, Miss Aude, Mr Moffat and Miss Raja were added to the proceedings as parties although they seek no remedy or relief, and none is sought from them.

41. Mr Boddy's defence denies that "as a matter of law, the Claimants were tenants under various assured shorthold tenancy agreements in respect of" the flat and asserts that the "basis in law for the Claimants' occupation amounted to an inferred/implied licence to occupy or remain in the Property subject to termination on reasonable notice." Further, his response to each asserted claim in respect of tenancy deposits is that "no tenancy deposit was paid to him in connection with a shorthold tenancy and by reason of that fact, none of the statutory requirements" is engaged.

The Statutory Provisions

42. Housing Act 2004 introduced a statutory requirement that landlords protect tenancy deposits taken from assured shorthold tenants. Section 213 (as amended) sets out the various conditions and requirements. Section 213(10) defines "relevant person" as any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant.

43. Section 214 provides, so far as material:

> **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 …
>
> (2A) Subsections (3A) and (4) apply in the case of an application under subsection (1) if the tenancy has ended (whether before or after the making of the application) and the court
>
> (a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit …
>
> (3)…
>
> (3A)…
>
> (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."

The Judgment of DDJ Brafield

44. The judge's judgment opens with a succinct statement of the nature of the claim. He having read the witness statements and heard counsel, his judgment helpfully summarises the written evidence and the competing contentions of the parties.

45. On the central contention, that there had been surrender of existing tenancies and re-grants at each relevant churn, he found at [10] that although Mr Boddy had been "kept informed" about changes of occupancy that nevertheless fell "far short of his actively

being consulted about the matter and engaging with the arrival of a new occupier, having the opportunity to renegotiate new terms.". The judge found this a "more important point" described by him later in the same paragraph as "the decisive point.". He stated that "a casual email saying, "By the way, this is what is happening…"" fell "far short" of the requirements of law for a valid surrender of an old tenancy and the grant of a new one. At [12] he said: "I am not satisfied that there was anything approaching a genuine acceptance and renegotiation. So, there could not… have been a surrender and re-grant."

46. However, he also found that the occupiers were not tenants at all. He accepted the contentions advanced for Mr Boddy that the occupiers did not have exclusive occupation and were mere licensees. On the absence of exclusive possession he stated at [11] that "It is a hypothetical question, but I cannot see that they would have been in a position to complain if he had said, "I want to come and stay in one of the bedrooms". I think that is right." At [12], he explained that the arrangements at the flat "bore, rather, the hallmark of a casual rolling licence without a fixed definable term or notice period." Accordingly, he appears to have concluded that for want of exclusive possession and a definable term or notice period it could not be said that anyone occupying after the original tenants could be a tenant.

47. In any event, he found at [13] that even if he was wrong and that these were tenancies and were taking effect by surrender and re-grant, the claims failed because the statutory scheme only enabled a tenant who had actually paid over a deposit (to the landlord or agent) to sue for the statutory penalty. Only the four original joint tenants had paid a deposit *to the landlord*.

48. Pursuant to his judgment, the judge made an order sealed on 7 December 2020 dismissing the claim and ordering the claimants to pay the costs of Mr Boddy assessed at £6,000.

Grounds of Appeal

49. With my permission given at the hearing for the addition of a further ground, the Amended Grounds of Appeal extend to some nine grounds. They can be clustered as

challenges to each of the three essential dimensions of the judge's judgments: that the nature of the relationships between occupiers and owner were such that they were not tenants; that there was no surrender and regrant at each churn; and that the claimants could not rely on the statutory regime as they had personally paid no deposit to Mr Boddy.

Tenancy/Licence

50. Ms Purnell submitted that in so far as the grounds sought to attack the judge's finding that he was dealing with circumstances in which the occupiers were licensees rather than tenants, the appeal court ought not to interfere. The judge had read the evidence, drawn proper inferences from it, and made findings of fact that the occupiers did not enjoy exclusive possession for a term whether of any particular room or of the flat as a whole. She argued that any interference with those findings would be impermissible in proper exercise of an appellate function and that permission to appeal should be refused.

51. I agree that the judge was drawing inferences and conclusions from the factual evidence he read but I do not agree that his findings on the absence of exclusive possession and the absence of a term are incapable of being impugned on appeal.

52. Ground 1 contends that the judge was wrong in fact *and/or law* to find licences rather than tenancies. Ground 3 contends that he was similarly wrong to find no exclusive possession and, by Ground 4, equally wrong to hold that Mr Boddy could have shared possession with the occupiers. By Ground 9 it is said that he was wrong to find, on the evidence, that there was no term of any tenancy.

53. I am satisfied that all of Grounds 1, 3, 4 and 9 demonstrate real prospect of success. I grant permission to appeal

54. It has never been part of Mr Boddy's case that there was no legal relationship between himself and those in occupation. He has never done otherwise than to accept that he received monthly payment of a fixed sum each month tendered on behalf of those in occupation for their enjoyment of the premises.

55. The normal hallmarks of a tenancy are exclusive occupation, for a term, at a rent.

56. Taking those in reverse. There is no dispute that rent was sought and accepted in respect of this flat from those in occupation for the time being. The regular monetary payment is described as 'rent' by all parties. The payee knows and accepts that it is being tendered by one on behalf of all in respect of the whole. Over time, it has increased from that originally sought from the initial tenants. Nothing is payable in respect of services. What is paid is called rent by the parties, what is expected is described as rent by Mr Boddy and what each occupier understands themselves to be paying is a share of the rent. The judge reached no contrary conclusion.

57. The rent is (and as far as the evidence shows) paid monthly. It goes to the 'lead tenant' on the 15th of each month from each occupier and is paid over as a single composite sum for the flat to Mr Boddy on the 19th of each month. No-one has led evidence of any "fixed term" tenancy so the term (if any) must be periodic. The obvious inference from the undisputed facts is that the term is a periodic one i.e. monthly.

58. Do the occupiers enjoy exclusive possession of the flat? Or would they, if Mr Boddy arrived and presented himself, be required to admit him to live there with them? In my judgment, these questions answer themselves from the uncontroversial facts. The permitted occupiers collectively enjoy exclusive possession of the flat to the exclusion of Mr Boddy and anyone else. At any particular time, Mr Boddy may or may not know the names or other identifiers of those who hold exclusive possession from him but that matters not. The arrangement he set up, even with the original four joint tenants, envisaged such a possibility. He was content with it and cannot now be heard to complain as to it.

59. The judge appears to have been influenced by a misunderstanding that the arrangements were such that a departing occupier was not obliged to give notice. The obligations to give notice are those imposed by statute in the absence of any express contractual provision. Notice was no feature of the arrangements in normal practice because, at each churn, no-one gave notice because they found a replacement in accordance with those arrangements. The exception of course was Miss Sturgiss. She did not find a replacement and was required to give notice. In March 2020 she did so, accepting an obligation to pay rent during her notice period.

60. The three necessary indicia all being in place, and there being nothing special or unusual in the nature of the arrangements between the parties, the Court is driven inexorably to the conclusion that the occupiers are tenants not licensees.

61. Commendably, for the period of 15 or more years prior to these proceedings, Mr Boddy had not sought to suggest otherwise. He calls the occupiers his tenants. He writes references referring to them as tenants. He calls what they pay him rent. He recognises and seeks to discharge his statutory responsibilities as landlord in relation to the condition and safety of the flat.

62. I consider there to be no basis upon which the judge could properly have found otherwise than that the relationship between the occupiers and the owner was that of landlord and tenant. Grounds 1, 3, 4 and 9 each succeed. The judge appears not to have articulated the obvious consequences of his own conclusion, namely that it would render the occupiers deprived of any of the statutory rights attaching to tenants and of any security of tenure. They would be protected from virtually immediate ejection on a no-fault basis only by the fall-back provisions of the Protection from Eviction Act 1977.

Surrender/Re-grant

63. The decisive point for the judge was, as he clearly stated, that Mr Boddy was not sufficiently involved in the process at each churn for it to constitute a surrender of the immediately prior tenancy and the grant of a new one.

64. Any surrender would have had to have been a surrender by operation of law in the absence of a deed. The judge correctly directed himself to the leading modern authority on such surrender - *Sable v QFS Scaffolding Ltd* [2010] L&TR 30 - and the principles set out therein.

65. He found, in summary, that because it fell to the tenants to replace one of their number departing and because the landlord played no part in that process, (beyond being informed at or shortly after it happened) then what occurred could not amount to surrender by the outgoing tenant group and the grant of a fresh tenancy to the newly constituted group.

66. Ground 2 asserts that the Judge misconstrued the evidence before him as to the extent of the landlord's knowledge in relation to the specific 'churns' with which I am concerned. Ground 5 contends that the judge was simply wrong not to find that these were instances of surrender and re-grant.

67. As to the extent to which a landlord needs to know – in advance - that joint tenant X is being replaced by joint tenant Y, Mr Jacob relied on *Tower Hamlets v Ayinde* [1994] 26 HLR 631. There, on markedly different facts, the Court of Appeal found that having been told that an outgoing tenant had departed and had installed a replacement, a landlord was thereafter fixed, by its conduct, with the new incumbent by surrender and re-grant. The short point is that the landlord's acceptance of the new set up amounted to a completion of the process of surrender and re-grant even in circumstances where it had not known of the switch of occupiers when or before it took place.

68. Here, there was in place, as the landlord's own evidence sets out, a prior arrangement that at the departure of one or more individuals the property would be treated as, in effect, re-let to those remaining and the new arrival(s). The arrangement did not require the landlord to participate in any way at the time or to be informed each time (although the Judge found he was). Given that this was a structure of the landlord's own making he can hardly be heard to complain if the law gives effect to what has been agreed through the medium of surrender and re-grant.

69. As explained in *QFS*, the authorities on surrender are infused by the concept of estoppel i.e. the landlord who has acted consistently with the termination of a tenancy and the acceptance of a new tenancy cannot later resile. In the current context, it would be absurd to think that the landlord could insist that an individual who was a joint tenant before a 'churn', and had left after it, was still a tenant even though he was accepting rent he knew (or can be taken to have known) was being tendered on behalf of a new group.

70. Mr Jacob has satisfied me that both Grounds 2 and 5 should attract the grant of permission to appeal. To my mind it is not necessary to finally determine Ground 2 (as to whether the judge erred as to the facts) because even on his own understanding of

the material before him the judge was in any event bound to find that there had been surrender and regrant. Accordingly, I allow the appeal on Ground 5.

Deposit/Penalties

71. If the judge was, as I have found, wrong on tenancy/licence and these were tenancies arising from surrender and regrant at each of the churns A, B and C, that is not sufficient to bring the claimants relief on this appeal or in their claim.

72. They must still demonstrate that, contrary to the judge's conclusion, they either paid or are to be treated as having paid a deposit to the landlord in relation to each of the three relevant re-granted tenancies.

73. It appears to be common ground that: (1) the landlord was paid a deposit of £1,745 in respect of the original tenancy in 2004; (2) that sum had been diminished (by reason of agreed and proper deductions) to £1,205 by the date of arrival of the first of the claimants; (3) that is the sum to be taken as the sum paid or treated as paid (if any) on the re-grants; (4) such sum was not protected at or following each of the re-grants; and (5) the sum is still held by the landlord.

74. The judge was correct to find, and the contrary has not been contended, that none of the occupiers since the initial four have paid anything directly to the landlord themselves. They have, at most, only paid any money in respect of a deposit to the outgoing tenants to reimburse them for their personal and notional 'carried forward' share of the original deposit.

75. On that basis, one can understand why the judge declined the statutory remedy sought in respect of payment to a landlord of a deposit.

76. However, as he recognised, the decision in *Superstrike Ltd v Rodrigues* [2013] 1 WLR 3848 may be relevant on this issue.

77. Grounds 6 and 7 of the Grounds of Appeal contend that he erred in not following and applying that authority and in not holding that there was deemed to be a payment to the

landlord even though no ‘new’ money passed to him. I grant permission on those grounds.

78. *Superstrike* is not a straightforward case. As Miss Purnell submitted, and as the judge found, its particular facts are very different from those of the instant case. But, as the Court of Appeal there held, for the reasons set out at [28]-[38] of the judgment, there can be circumstances in which the deposit taken at the inception of an original tenancy is *treated as* paid (again) and received (again) when a new tenancy follows immediately from an earlier one.

79. Miss Purnell submits that a central plank of the reasoning in *Superstrike* was that, in the circumstances of that case the Court of Appeal held that: *“The tenant should be treated as having paid the amount of the deposit to the landlord in respect of the new tenancy, by way of set-off against the landlord's obligation to account to the tenant for the deposit in respect of the previous tenancy, given that the landlord did not seek payment out of the prior deposit for the consequences of any prior breach of the tenancy agreement.”* That, in effect, spoke to deemed payment arising from a mutuality of obligation between the original payor of the deposit and the landlord under the new tenancy. In the instant case, the landlord’s obligation was to repay the original four tenants and it is to them that he must account for the monies still held. He owes nothing to the current tenants, and they have paid nothing to him.

80. I cannot accept those submissions. It seems to me that where the landlord has entered into a construct by which, at his own design, there is a single initial payment of a deposit and thereafter a churning in the identities of tenants, he must be treated as having been ‘paid’, by each new cohort, the amount held in respect of the original cohort and each subsequent cohort. The alternative is the very artificial notion that Mr Boddy is fixed with an indefinite liability to account to his original (and long gone) 2004 tenants for such sum as is left after proper deduction in respect of acts for which they are not responsible and have assumed no responsibility. The Court should adopt an application of legal principles which makes sense of the factual context and not vice versa.

81. Accordingly, Grounds 6 and 7 each succeed.

Statutory Penalty

82. That leaves the question of the application of the statutory penalty and the appropriate multiplier. I record that Miss Sturgiss has long since abandoned her claim to the 'repayment' of any deposit to her.

83. Ground 8 asserts that the judge was wrong not to make an award. It must follow from my earlier conclusions that this Ground should have permission to appeal and that it succeeds.

84. Miss Purnell faintly contended that all that either claimant should receive is a multiple of whatever they can prove to be the amount they personally paid *by way of deposit* (rather than by way of reimbursement for furniture or on account of pre-payments for rent or utilities) to the person whom they replaced.

85. I do not consider the liability severable in that way. £1,205 is the deposit to be treated as paid and received for the tenancy of the whole flat by the tenants at each of the three churns with which I am concerned. And it is to that sum that the multiplier falls to be applied. If that is more than equity would suggest should be recovered by these two claimants alone, it has always been open to the other co-tenants to join in the claim. They have elected not to do so.

86. The fixing of the multiplier at 1, 2 or 3 times the deposit is a matter for the informed exercise of judicial discretion. Neither party suggested that I should remit the question. I have considered such guidance as is offered by *Okadigbo v Chan* [2014] EWHC 2429 on fixing the correct multiplier.

87. It seems to me that, although I have had regard to <u>all</u> the facts of the case and <u>all</u> the submissions of the parties, the following factors are particularly attracting of weight in this exercise:
    (1) The deposit was first taken at a time when deposits did not require protection;
    (2) The deposit has been retained and is still available and can now be protected;

(3) The landlord has not subsequently protected it because he believed that the informal nature of the transitions for occupancy of the flat did not require him to do so;

(4) In that view he was supported by his legal advisers and by at least one judge;

(5) Those informal arrangements contained a method of ensuring each outgoing tenant received reimbursement of their 'share' of the deposit from their arriving replacement; and

(6) The tenor of Mr Boddy's evidence, and the undertaking of his counsel to the effect that - if the matter is ruled against him - he will promptly take the steps necessary to protect the deposit which he has held and retained over 15 years.

88. These features, and the other circumstances of this case, in my judgment put this right at the bottom end of landlord 'culpability' for breach of obligations. I do not overlook Mr Jacob's submissions about the initial response Mr Boddy made to the prospect of a legal claim or as to the lowest multiplier being ordinarily fit for cases of minor or technical deficiency in compliance.

89. Nevertheless, it seems to me that imposing any multiplier more than one times the deposit would be unjust.

Conclusion

90. The appeal is allowed. Paragraph 4 and the first sentence of paragraph 5 of the Order of the Judge will be set aside.

91. The claim is retained by the Court for determination.

92. There shall be judgment for the claimants in the sum of a total £3,615 (i.e. £1,205 in respect of each of the three relevant churns which produced a new tenancy to which they were in turn either or both parties).

93. This judgment, having been circulated in draft to counsel, will be handed down in final form in open court. I would invite those counsel to submit an agreed minute of order reflecting my judgment.

HHJ Luba QC

19 July 2021