Neutral Citation Number: [2022] EWCA Civ 40

Case No: CA-2021-000388 (formerly A2/2021/0132 & A2/2021/0496)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
Mr Justice Saini
D3PP2043

Royal Courts of Justice Strand, London, WC2A 2LL

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE SNOWDEN

- -

Between:

NORTHWOOD (SOLIHULL) LIMITED

- - - - - - - - - - - -

- - - - - - - - -

A2/2021/0132

Date: 26 January 2022

NORTHWOOD (SOLIHULL) LIMITED

- and -

VICKY COOKE

And Between:

(1) DARREN FEARN (2) VICKY COOKE (3) SHARON FEARN

Respondent (Claimant at 1st instance)

- and –

Appellant (2nd Defendant at 1st instance)

3rd Respondent

A2/2021/0496

1st Respondent **Appellant**
2nd Respondent

JUSTIN BATES AND TOM MORRIS (instructed by **JMW Solicitors**) for the **Respondent in the appeal and for the Appellant in the cross-appeal**

CHRISTOPHER HEATHER QC and STEPHEN COTTLE (instructed by **The Community Law Partnership**) for the **Appellant/Respondent Vicky Cooke**

The 1st and 3rd Respondents in the 2nd appeal did not appear and were not represented

Hearing date: 18 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 2pm on Wednesday 26 January 2022.

Lord Justice Lewison:

Introduction

1. The main issues on this appeal concern the manner in which documents required to be given to a residential tenant are to be authenticated. There are two documents in issue:

   i) A certificate given to the tenant under section 213 of the Housing Act 2004 (providing information about the deposit scheme); and

   ii) A notice given under section 8 of the Housing Act 1988 seeking possession.

2. The landlord in relation to each notice is a limited company. The tenants' Defence asserted that neither document was valid because neither had been authenticated in the manner required by section 44 of the Companies Act 2006. No other defence relevant to this appeal was pleaded. On an appeal from HHJ Williams, Saini J held that the first of these documents was invalid unless it was authenticated in the manner required by section 44; but that the second was valid although it had only been signed by the landlord's agent. His judgment is at [2020] EWHC 3538 (QB), [2021] 1 WLR 1937.

3. The tenant appeals against the second of these conclusions; and the landlord crossappeals against the first. The judge took the question of the validity of the section 8 notice before that of the certificate. But since the giving of the certificate precedes the giving of the section 8 notice, I will take them in chronological order.

The statutory requirements about the documents

The certificate

4. Part 6 Chapter 4 of the Housing Act 2004 contains the primary legislation about deposit schemes. Since the relevant events in this case it has been amended, with effect from 6 April 2017, by the Housing and Planning Act 2016. At the time of those events, section 212 of the 2004 Act relevantly provided:

> "(1) The appropriate national authority must make arrangements for securing that one or more tenancy deposit schemes are available for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies.
>
> …
>
> (9) In this Chapter–
>
> (a) references to a landlord or landlords in relation to any shorthold tenancy or tenancies include references to a person or persons acting on his or their behalf in relation to the tenancy or tenancies…"

5. Section 213 relevantly provided:

> "(1) Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme.
>
> (2) No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).
>
> (3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 days beginning with the date on which it is received.
>
> (4) For the purposes of this section 'the initial requirements' of an authorised scheme are such requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit.
>
> (5) A landlord who has received such a tenancy deposit must give the tenant and any relevant person such information relating to— (a) the authorised scheme applying to the deposit, (b) compliance by the landlord with the initial requirements of the scheme in relation to the deposit, and (c) the operation of provisions of this Chapter in relation to the deposit, as may be prescribed.
>
> (6) The information required by subsection (5) must be given to the tenant and any relevant person— (a) in the prescribed form or in a form substantially to the same effect, and (b) within the period of 30 days beginning with the date on which the deposit is received by the landlord.
>
> …
>
> (10) In this section— 'prescribed' means prescribed by an order made by the appropriate national authority."

6. The "prescribed information" to be provided to a tenant in accordance with section 213(5) and the "prescribed form" under section 213(6) are both the subject of the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 ("the 2007 Order"). Article 2 of the 2007 Order was amended by section 30 of the Deregulation Act 2015. The amendments took effect on 26 March 2015. Article 2 in its amended form provides:

> "(1) The following is prescribed information for the purposes of section 213(5) of the Housing Act 2004 ('the Act')— (a) the name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit; (b) any information

contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in sections 212 to 215 of, and Schedule 10 to, the Act; (c) the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy ('the tenancy'); (d) the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy; (e) the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit; (f) the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and (g) the following information in connection with the tenancy in respect of which the deposit has been paid— (i) the amount of the deposit paid; (ii) the address of the property to which the tenancy relates; (iii) the name, address, telephone number, and any e-mail address or fax number of the landlord; (iv) the name, address, telephone number, and any e-mail address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy; (v) the name, address, telephone number and any e-mail address or fax number of any relevant person; (vi) the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and (vii) confirmation (in the form of a certificate signed by the landlord) that— (aa) the information he provides under this subparagraph is accurate to the best of his knowledge and belief; and (bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.

(2) For the purposes of paragraph (1)(d), the reference to a landlord or a tenant who is not contactable includes a landlord or tenant whose whereabouts are known, but who is failing to respond to communications in respect of the deposit.

(3) In a case where the initial requirements of an authorised scheme have been complied with in relation to the deposit by a person ("the initial agent") acting on the landlord's behalf in relation to the tenancy—

(a) references in paragraph (1)(b), (g)(iii) and (vii) to the landlord are to be read as references to either the landlord or the initial agent;

> (b) references in paragraphs (1)(d), (e), (g)(iv) and (vi) and (2) to the landlord are to be read as references to either the landlord or a person who acts on the landlord's behalf in relation to the tenancy.
>
> (4) In any other case, references in paragraphs (1)(d), (e), (g)(iv) and (vi) and (2) to the landlord are to be read as references to either the landlord or a person who acts on the landlord's behalf in relation to the tenancy.
>
> (5) Section 212(9)(a) of the Act (references to landlord include persons acting on landlord's behalf) does not apply for the purposes of this article."

7. Although the amendments did not take effect until 26 March 2015, article 3 of the amended order (which was inserted by section 30 (3) of the Deregulation Act itself) provides that "paragraphs (3) to (5) of article 2 are treated as having had effect since 6th April 2007", subject to certain transitional provisions (which do not apply in our case).

8. The Explanatory Notes accompanying section 30 of the Deregulation Act 2015 (by which the amendments were made) stated:

> "154. The amendments would rectify a problem which has been identified with the prescribed information order which is that it does not clearly allow (as the Government intended) for a letting agent's details to be provided in the prescribed information instead of the landlord's. The amendments to article 2 of the order would make it clear that each of the references to 'the landlord' in the order are to be read as references to either the landlord or the letting agent where relevant."

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

10. Section 11 of the Interpretation Act 1978 provides:

> "Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act."

The section 8 notice

11. In order to seek possession of property let on an assured shorthold tenancy, the landlord must give notice under section 8 of the Housing Act 1988. It relevantly provides:

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

12. The Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 prescribe forms for use by landlords. The forms are set out in a schedule to the regulations; but regulation 2 permits the use of a form "substantially to the same effect". A landlord wishing to serve a notice pursuant to section 8 of the 1988 Act must use Form No 3 in the Schedule (as substituted by the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 2016). Form No 3 contains a signature clause, which is in the following terms:

> "Name and address of landlord/licensor
>
> To be signed and dated by the landlord or licensor or the landlord's or licensor's agent (someone acting for the landlord or licensor). If there are joint landlords each landlord or the agent must sign unless one signs on behalf of the rest with their agreement.
>
> Signed … Date …
>
> Please specify whether: landlord/licensor/joint landlords/landlord's agent
>
> Name(s) (Block Capitals) …
>
> Address …

Telephone: Daytime … Evening"

Authentication of documents by a company

13. Section 43 of the Companies Act 2006 deals with the making of contracts by a company. One way in which this can be done is by a person acting under the company's express or implied authority. No particular formality is required beyond any formalities that would apply to a contract made by a natural person.

14. Section 44 of the Companies Act 2006 is headed "Execution of documents". It relevantly provides:

> "(1) Under the law of England and Wales or Northern Ireland a document is executed by a company–
>
> (a) by the affixing of its common seal, or
>
> (b) by signature in accordance with the following provisions.
>
> (2) A document is validly executed by a company if it is signed on behalf of the company–
>
> (a) by two authorised signatories, or
>
> (b) by a director of the company in the presence of a witness who attests the signature.
>
> (3) The following are "authorised signatories" for the purposes of subsection (2)–
>
> (a) every director of the company, and
>
> (b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.
>
> (4) A document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company.
>
> (5) In favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2). A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property."

15. In *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314, [2010] 1 WLR 2750 this court considered section 99(5) of the Leasehold Reform, Housing and Urban Development Act 1993. That sub-section provided:

> "Any notice which is given under Chapter I or II by any tenants or tenant must—(a) if it is a notice given under section 13 or 42, be *signed by* each of the tenants, or (as the case may be) by the tenant, by whom it is given; and (b) in any other case, be signed *by or on behalf of* each of the tenants, or (as the case may be) by or on behalf of the tenant, by whom it is given." (Emphasis added)

16. At [15] Lloyd LJ said that the relevant question was:

> "… is this notice one which was signed "by" the company or was it only signed "on behalf of" the company?"

17. The contrast in language between the two parts of the sub-section was the critical feature. Section 99 (5)(a) is restricted to signature "by" the tenant, whereas section 99 (5)(b) permits a signature either "by" or "on behalf of" the tenant. This, in my judgment, is borne out by Lloyd LJ's reference to his own earlier judgment (as Lloyd J) in *St Ermins Property Co Ltd v Tingay* [2002] EWHC 1673 (Ch), [2003] L & TR 6 (referred to in *Hilmi*) in which he said:

> "20. Mr Walker, for the tenant, submits, and I agree, that if s.99(5)(a) stood on its own nothing in it would carry an implication that the notice to be signed by the tenant cannot be signed on behalf of the tenant by a duly authorised agent. There is nothing of personal skill or discretion in the giving of a s.42 notice.
>
> 21. The position would be much as it is under many other aspects of landlord and tenant legislation. This sort of point has been considered in many contexts within that statutory regime, or perhaps I should say those statutory regimes."

18. Reverting to *Hilmi*, at [20] Lloyd LJ said:

> "The question being, therefore, how an artificial person, here a company registered under the Companies Acts, does the act of signing a document, it is necessary to find the answer in either or both of (a) the body's own constitutional documents, which could prescribe what it can do and how it can go about doing it, and (b) the general law on the subject governing all such entities. Since there is no reliance here on the memorandum and articles of the company, …the only recourse must be to the general law."

19. The debate in that case turned on the question whether it was apposite to use the word "execute" in connection with a document such as a notice. At [28] Lloyd LJ said that he accepted the submission that:

> "… at any rate in the context where some degree of formality is required to make a document valid and effective for some

> particular legal purpose (and the point can only arise in such a context), it is appropriate and natural to speak of the execution of the document, as a matter of ordinary language. That is so even for a document to be made under hand rather than by deed. In particular, it is so for a document which is to be signed by, as distinct from on behalf of, a legal entity such as a limited company."

20. Accordingly, this court held that the document in question (in that case notice given under section 13 of the 1993 Act) was invalid unless authenticated in the manner prescribed by what is now section 44 of the Companies Act 2006.

21. The judge in our case held that the reasoning in that case applied to the requirement in article 2 of the 2007 Order which required the certificate to be "signed by" the landlord.

22. There are a number of reasons why I consider that the reasoning in *Hilmi* is not directly applicable to this case. First, as a general rule, a person is treated as having signed a document if it is signed on his behalf and with his authority. In *London County Council v Agricultural Food Products Ltd* [1955] 2 QB 218, Romer LJ put it this way:

> "It is established, in my judgment, as a general proposition that at common law a person sufficiently "signs" a document if it is signed in his name and with his authority by somebody else; and in such case the agent's signature is treated as being that of his principal."

23. In the same case, Denning LJ said:

> "On the wording of this tenancy agreement, I think that a signature by proxy was permissible on this notice to quit. Take the case where the tenants desire to determine the tenancy. The notice has to be in writing "signed by the tenants." *But the tenant is a limited company which cannot write its own name. It can only sign by proxy, as, for instance, by a director or secretary signing on its behalf*." (Emphasis added)

24. In *Newbold v Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288 legislation provided for compensation for damage caused by coal mining. In order to make the claim, the owner of the property was required to give the required notice. Notice had been given in the name of one of three co-owners of the property in question, and was signed by engineers (Mr Talby and Mr Harbord) instructed by the co-owners. Sir Stanley Burnton said:

> "58. I have difficulty in seeing how either Mr Talby or Mr Harbord can be regarded as the giver of a damage notice in any meaningful sense. If I ask my personal assistant to type up a notice to quit in my name, and to post it, the notice is given by me, not by my personal assistant. If I ask her to sign it in my name or expressly on my behalf, and to post it, it remains a notice

> given by me. It is not a notice given by her. So I do not think that Mr Talby and Mr Harbord can be regarded as the givers of the notices, notwithstanding that they filled in the forms and in Mr Harbord's case signed it.
>
> 59. On the other hand, if, without my authority, someone produces a notice in my name, the notice is not given by me, even if I am named as the person giving the notice.
>
> 60. The third possibility is that my personal assistant, having been authorised by me to produce and to send a notice from me, in error puts someone else's name in the notice. In this case, it seems to me that the notice is not one given by me unless it is obvious to the recipient that the name of the giver of the notice is an error and that both it is I who authorised the giving of the notice and that the error was to substitute the incorrect name for my name…"

25. The question is one of agency and authority. If the giver or signatory of the notice is authorised, then the giving and signing of the notice counts as giving or signing the notice by the principal. That is what Lloyd J himself said in *St Ermins Property Co Ltd*.

26. These principles of agency apply equally to companies. In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 506 Lord Hoffmann referred to the rules (called "rules of attribution") which determine which acts "count as acts of the company". They are contained primarily in the company's constitutional documents and in company law. He went on to say:

> "These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. and having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort."

27. The rules of attribution are concerned with what acts count as the company's acts. They do not attempt to blur the distinction between the company as a legal person on the one hand, and an agent of the company as a different legal person on the other.

28. These principles also apply to acts permitted by statute. In *General Legal Council (on the application of Whitter v Frankson* [2006] UKPC 42, [2006] 1 WLR 2803 Lord Hoffmann said at [4]:

> "The general principle is that when a statute gives someone the right to invoke some legal procedure by giving a notice or taking some other formal step, he may either do so in person or authorise someone else to do it on his behalf. *Qui facit per alium facit per se*. Thus in *R v Kent Justices* (1873) LR 8 QB 305 a landowner was entitled to appeal against a rating assessment by a notice "signed by the person giving the same or by his attorney". It was signed by his attorney's clerk. Blackburn J said, at p 307, that as the clerk had authority from the appellant to sign on his behalf, that was sufficient."

29. He went on to say at [5]:

> "There are statutes which, exceptionally, require a personal signature and exclude performance by an agent. In *Hyde v Johnson…* the Court of Common Pleas considered Lord Tenterden's Act …which required that an acknowledgement of a statute-barred debt should be signed "by the party chargeable thereby". The court was struck by the contrast with the Statute of Frauds 1677 … which was enacted for a very similar purpose but said that the necessary memorandum should be signed by the party to be charged "or some other person thereunto by him lawfully authorised". The absence of a similar express provision for agency made the court conclude that a personal signature was required."

30. In my judgment, *Hilmi* concerned that kind of exceptional statute. There is no equivalent in the Housing Act 2004 or the 2007 Order.

31. Second, the legislation under consideration in *Hilmi* did not include any equivalent to section 212 (9) of the Housing Act 2004 or article 2 (3) of the 2007 Order both of which expressly envisage actions being carried out by agents. Moreover, the decision in *Hilmi* was statutorily reversed in England by the Leasehold Reform (Amendment) Act 2014, which came into force on 13 May 2014; and in Wales by the Housing (Wales) Act 2014, which came into force on 1 December 2014. In relation to notices given since those dates notices may be signed by or on behalf of the tenant. That statutory reversal tends to show that Parliament did not set great store by formal execution by a company (or, indeed, personal signature by the tenant).

The relevant facts

32. On 25 July 2014 Northwood Solihull Ltd granted Mr Fearn and Ms Cooke an assured shorthold tenancy of a house in Shirley. One of the terms of the tenancy required the tenants to pay a deposit to be protected in accordance with the government approved tenancy deposit protection scheme, as described in an appendix to the tenancy. The

tenants paid the deposit on or about 25 July 2014, which in turn was protected under the scheme. A confirmatory certificate was served on the tenants on 25 July 2014. That is the first of the documents in issue.

33. The certificate concluded with these words: "We (being the Landlord) certify that (i) The information provided is accurate to the best of our knowledge and belief. (ii) We have given the Tenant(s) the opportunity to sign this document by way of confirmation that the information is accurate to the best of the Tenant(s) knowledge and belief.

> Landlords(s): Northwood Solihull Ltd
>
> Signature(s): [A Brown]
>
> "Dated: 26th July 2014
>
> Tenant(s): Miss Vicky Cooke & Mr Darren Fearn
>
> Signature(s):
>
> [D Fearn & V Cooke]
>
> Dated: 25/7/14"

34. Ms A Brown, who signed the certificate, was a director of the landlord company. I should note at this point that it was not suggested in the Defence that Ms Brown was not in fact authorised to sign the certificate. The only relevant point taken was that the certificate did not comply with the formalities of section 44.

35. The tenants fell into arrear with the rent. On 27 March 2017 the landlord served a notice on the tenants seeking possession. At that time arrears of rent amounted to £3,533.46. That is the second document in issue.

36. That notice concluded with the words:

> "6. Name and address of landlord/ licensor:
>
> Northwood Solihull Ltd
>
> 115 Stratford Road
>
> Shirley
>
> Solihull
>
> B90 3ND
>
> To be signed and dated by the landlord or licensor or the landlord's or licensor's agent (someone acting for him). If there are joint landlords each landlord or the agent must sign unless one signs on behalf of the rest with their agreement.

> Signed [M Miles]
>
> Date 27/3/2017
>
> Please specify whether landlord/~~licensor/joint landlords/landlord's agent~~"

37. Ms Miles, who signed the notice, was the landlord's property manager; but she struck out the words "landlord's agent" from the form. The judge found that she was in fact authorised by the landlord to give the notice.

The questions

38. In a case such as this one, two separate questions arise:

> i) What is required in order to comply with the statute and ii) What
>
> are the consequences of non-compliance?

Approach to compliance with statutory requirements

39. The courts have considered the question of compliance with statutory requirements on a number of occasions. The starting point, in my judgment, is to consider first what the statute requires and then to see whether the document in issue satisfies the statutory requirements: see *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] L & TR 180 at [22] (quoted in *Hilmi* at [18]).

40. In *Prempeh v Lakhany* [2020] EWCA Civ 1422, [2021] 1 WLR 1055 at [56] Nugee LJ said that the court should be slow to interpret statutory requirements about the form of a notice (in that case also a section 8 notice) as invalidating a notice on account of "a purely formal defect that has not in fact caused the tenant any prejudice at all".

41. In *Stidolph v American School in London Educational Trust Ltd* (1969) 20 P & CR 802 a landlord purported to serve notice on the tenant under Part II of the Landlord and Tenant Act 1954. That Act required a notice to be in a prescribed form or a form substantially to the like effect. The notice was unsigned, but was accompanied by a covering letter signed by the landlord's solicitors. Lord Denning MR said:

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

42. The question for Lord Denning was whether the documents, taken together, contained the right information and were "sufficiently authenticated".

43. In *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2021] EWCA Civ 688, [2021] Bus LR 1407 Males LJ put the point this way:

> "39 The citation above [from *Chiltern Railway Co v Patel* [2008] Bus LR 1295] demonstrates, in my judgment, that a declaration will be "in the form or substantially in the form" prescribed if the declaration as a whole fulfils all the essential purposes of the prescribed form and that, despite the use of apparently mandatory language, Parliament is not to be taken to have insisted on an interpretation which is contrary to commercial sense."

44. This court considered that question further (specifically in relation to section 8 notices) in *Pease v Carter* [2020] EWCA Civ 175, [2020] 1 WLR 1459. After a review of the authorities, Arnold LJ said:

> "39. The conclusions which I draw from this survey of the authorities are as follows:
>
> (i) A statutory notice is to be interpreted in accordance with *Mannai v Eagle* [1997] AC 749, that is to say, as it would be understood by a reasonable recipient reading it in context.
>
> (ii) If a reasonable recipient would appreciate that the notice contained an error, for example as to date, and would appreciate what meaning the notice was intended to convey, then that is how the notice is to be interpreted.
>
> (iii) It remains necessary to consider whether, so interpreted, the notice complies with the relevant statutory requirements. This involves considering the purpose of those requirements.
>
> (iv) Even if a notice, properly interpreted, does not precisely comply with the statutory requirements, it may be possible to conclude that it is "substantially to the same effect" as a prescribed form if it nevertheless fulfils the statutory purpose. This is so even if the error relates to information inserted into or omitted from the form, and not to wording used instead of the prescribed language."

45. In *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 18 I said at [48]:

> "… where a notice is capable of two interpretations, one of which will lead to the conclusion that it is valid, and the other to the conclusion that it is invalid, the former interpretation should be preferred."

Does the certificate comply with the requirements?

46. The certificate was given on 25 July 2014. The amendments made by the Deregulation Act 2015 were not then in force. The 2007 Order (as it then stood) required the certificate under paragraph (g) (vii) to be "signed by the landlord". But section 11 of the Interpretation Act 1978 requires expressions used in subordinate legislation to be given the same meaning as in the primary legislation, unless the contrary intention appears. On 25 July 2014 there was no contrary intention. It follows that "landlord" in the 2007 Order had at that time the meaning given by section 212 (9) of the Housing Act 2004. It therefore included a person acting on behalf of the landlord in relation to the tenancy. Accordingly, interpreting article 2 (1)(g)(vii) of the 2007 Order in conformity with section 212 (9), the certificate was valid at the time it was given if signed by a person acting on behalf of the landlord in relation to the tenancy. Ms Brown was such a person. On the face of it, therefore, the certificate was valid at the time it was given. In addition, what the landlord is to certify is that certain information "is accurate to the best of his knowledge and belief". In the case of a company, that knowledge and belief can only be that of a human being, whose knowledge and belief is attributable to the company under the rules of attribution.

47. The judge in our case said at [87]:

> "A confirmatory certificate had the particular legal purpose of ensuring that the information that a landlord was required to provide a tenant in connection with any deposit was accurate to the best of the landlord's knowledge and belief. There was clearly a legislative decision made to impose some formality as to who must sign in this context."

48. That conclusion overlooks section 212 (9) (which the judge did not quote); and at [90] he said that the amendments made to the 2007 Order did not affect his conclusion. For the reasons I have given, I do not agree with the judge.

49. The certificate does include the words "We (being the Landlord)" but I do not consider that of itself that invalidates it. In the first place, those words are not themselves prescribed either by the primary legislation or, indeed, by the 2007 Order. The substantive requirement of signature was, as I have said, satisfied by Ms Brown's signature. Second, applying the ordinary rules of attribution Mrs Brown's signature counted as that of the company. Third, Ms Brown was clearly not personally the landlord. The landlord was a limited company, and she was a natural person. Her signature could not sensibly be understood as indicating that that she was a company, and if it is suggested that the certificate describes her personally as "we being the landlord" (i.e. as being the same legal person as the landlord) that was, in my judgment, an obvious error which the reasonable recipient of the certificate would have ignored.

50. Do the amendments made by the Deregulation Act alter the position? Although there is a general presumption against retrospective legislation, that presumption may be rebutted by clear statutory language. In this case, the amendments to article 2 of the 2007 Order made by the Deregulation Act itself state in terms that they are to be treated as having had effect since 6 April 2007. One of the amendments was the disapplication of section 212 (9) of the Housing Act 2004. I find it difficult to avoid the conclusion

that a certificate that was valid at the time it was given can no longer be validated by section 212 (9) of the Act.

51. It would, however, be a very unpalatable conclusion to hold that Parliament had retrospectively invalidated a certificate that was valid at the time it was given. I do not consider that we should adopt an interpretation of the amendments which had that effect unless we are compelled to do so.

52. If the certificate cannot now be validated by section 212 (9) of the Act, did it nevertheless comply with the statutory requirements? Article 2 (3) (a) allows references in paragraph (g) (vii) to "the landlord" to be read as including a person who acts on the landlord's behalf. That extension applies where the initial requirements of an authorised scheme have been complied with in relation to the deposit by a person acting on the landlord's behalf. In the present case the certificate was given in the name of the landlord: Northwood Solihull Ltd. But it was signed by Ms Brown. Ms Brown is selfevidently not personally the landlord. The only rational conclusion is that she was a person acting on behalf of the landlord.

53. This interpretation of article 2 (3), as applied to article 2 (1) (g) (vii), has the advantage of (a) not invalidating a certificate that was valid under the previous law when given and (b) giving effect to the stated intention behind the amendments. In my judgment

that is the interpretation that we should adopt. I would hold, therefore, that the certificate was (and remained) valid.

54. But even if that is wrong, section 213 (6) permits the giving of the information in a form substantially to the same effect as the prescribed form. The judge took the view that whether or not the certificate had been signed by the landlord was "a binary matter". Either it had or it had not; and if it had not, then the certificate could not be saved by saying that it was substantially to the same effect. The first flaw in this reasoning, in my judgment, is once again that it proceeds on the assumption that only "execution by" the landlord in accordance with section 44 of the Companies Act is permitted. But as we have seen, section 212 (9) expressly extends the definition of landlord so as to include a person acting on behalf of the landlord. The judge's view was also heavily influenced by his reading of *Hilmi* which, as I have explained, cannot simply be read across to the validity of the certificate.

55. In this case the certificate gave the tenants all the information it was required to do, and was signed by a person authorised (both by the landlord and by section 212 (9)) to sign it. It fulfilled all the statutory purposes it was required to fulfil. I would hold that it was substantially to the like effect; and hence was valid.

Does the section 8 notice comply with the requirements?

56. The primary legislation governing notice given under section 8 of the Housing Act 1988 does not require signature of anything. It merely requires "service" by the landlord of a notice in a particular form.

57. It follows, in my judgment, from *Newbold* that on the face of it a landlord complies with section 8 if an agent serves notice on his behalf, even if the agent signs the notice

in the landlord's name. In addition, the form prescribed by the relevant regulations explicitly allows notice to be given by and signed by an agent for the landlord.

58. In the present case the notice under section 8 was signed by an authorised agent of the landlord. That complies both with the primary legislation and the prescribed form. The only conceivable error is that Ms Miles crossed out the wrong part of the rubric underneath her signature.

59. Once again, since Ms Miles was authorised by the landlord to sign the section 8 notice, her signature counted as that of the company. Since her signature counted as that of the company, she was entitled to cross out the part of the rubric that she did. The notice could not have sensibly been read as asserting that Ms Miles personally was the landlord. The landlord in this case was a limited company. Ms Miles is a natural person. So by definition she personally cannot be the landlord. If it is suggested that the notice purports to describe her personally as the landlord (i.e. as being the same legal person as the landlord) that is again the sort of obvious error that does not affect the validity of the notice. But even if the error cannot be cured in that way, the effect of the notice is substantially the same.

60. The judge correctly held at [47] that the purpose of the notice is (a) to warn the tenant that the landlord is considering seeking an order for possession and to give the tenant time to remedy any default and (b) as a gateway to proceedings. Both these purposes were fulfilled by the notice that was in fact given: so the *effect* of the notice was substantially the same as it would have been if Ms Miles had not crossed out the wrong part of the rubric underneath her signature. I would hold therefore that the section 8 notice was valid.

The consequences of non-compliance

61. If I am wrong on the question whether the documents complied with the statutory requirements, the question then arises whether that non-compliance is fatal to their validity. In answering that question, I consider that caution must be exercised in relying on cases decided before the landmark decision of this court in *Osman v Natt* [2014] EWCA Civ 1520, [2015] 1 WLR 1536. That case rejected the previous distinction that cases had drawn between requirements that were mandatory and requirements that were directory. Instead it proposed a much more nuanced test. The court distinguished between two types of case:

    i) cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process; and

    ii) cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.

62. In the first category of case, substantial compliance may be enough. But in the second category of case the court interprets the notice to see whether it actually complies with

the strict requirements of the statute. If it does not, then the court, as a matter of statutory interpretation, holds the notice to be wholly valid or wholly invalid. Many of the cases involving the second category of case (including *Hilmi*) simply decided whether the notice in issue was or was not compliant. Since *Osman* that is not the end of the enquiry. The court must go on to consider the consequences of the non-compliance.

63. I attempted to summarise the new approach in the second category of case in *Elim Court* at [52] (the paragraph references are to *Osman*):

> "The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by noncompliance on the particular facts of the case: see para 32. The intention of the legislature as to the consequences of noncompliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see para 33. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see para 34. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute.
>
> In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity."

64. This court followed that analysis in *Eastern Pyramid Group Corpn SA v Spire House RTM Co Ltd* [2021] EWCA Civ 1658. Birss LJ added two points at [40]:

> "First, the legislator can be taken to have assumed that the courts would take a realistic and pragmatic approach in determining the significance of different steps in a procedural scheme laid down by statute. A result which is impractical or unrealistic is unlikely to be what was intended. In fact this principle too can be found in *Elim Court*, at paragraph 63 when one of the landlord's submissions was rejected as unrealistic. Second, the pointers

> referred to are just that, and cannot be put too high. Taken to the extreme the first and second pointers could be taken to imply that if the relevant provision is clearly and specifically set out in the primary legislation then breach of it must lead to invalidity. However that is not right, as the result of *Elim Court* shows. The landlord's reliance on these two pointers in this case is a fair point to make but in the end it is not determinative."

The certificate

65. The hypothesis to be considered under this head is that the certificate was not signed as it should have been. Although it was signed on behalf of the landlord by a person authorised to sign it, it was not authenticated by the landlord itself in the manner required by section 44 of the Companies Act 2006.

66. In so far as there is a requirement of signature by the landlord, it is not to be found in the primary legislation. It is introduced into the 2007 Order as a parenthesis and without any explicit mandatory language.

67. That Parliament did not consider that authentication by an agent was fatal to the validity of a certificate is, to my mind, clearly shown both by section 212 (9) of the Housing Act 2004 and also by the intention behind the amendments introduced by the Deregulation Act 2015. The certificate in fact gave the tenants all the information that was required to be given to them. Thus the requirement to give the tenant "the prescribed information" was fully and precisely complied with. It is not suggested that any of the information was inaccurate. That information was authenticated on behalf of the landlord by someone authorised to do so. If an authorised and authenticated certificate, containing all the right information, is given to the tenant, I cannot see that

    any harm has been done. I would hold that even if the certificate did not strictly comply with the requirements about authentication by the landlord, it was still valid.

68. Any other outcome would, in the words of Males LJ, be "contrary to … common sense", whether commercial or otherwise.

The section 8 notice

69. The form of the notice was as prescribed by the Regulations. It was signed by an agent in the manner permitted by both the primary legislation and the Regulations. It gave the tenants all the information that they needed. The error was in crossing out the wrong part of the rubric. The operative part of the form concludes with the words "To be signed and dated by the landlord or licensor or the landlord's or licensor's agent (someone acting for him)." In this case that was complied with: the form was signed by Ms Miles as agent for the landlord. The rubric, on the other hand, is introduced by the words "Please indicate" which hardly suggests that it is of the utmost importance. It is more in the nature of an invitation than a command. I cannot think that it could have been Parliament's intention that such an immaterial error would invalidate the notice. I would hold that even if the section 8 notice failed to comply strictly with the statutory requirements, it was still valid.

Result

70. I would dismiss the tenant's appeal and allow the landlord's cross-appeal.

Lord Justice Newey:

71. I agree.

Lord Justice Snowden:

72. I also agree.