Neutral Citation Number: [2020] EWHC 3538 (QB)

Claim No: D3PP2043
Appeal Ref: BM00014A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
ORDER OF HIS HONOUR JUDGE WILLIAMS
DATED 14 JANUARY 2020

Birmingham Appeal Centre
Priory Courts, 33 Bull Street
Birmingham B4 6DS

Date: 21/12/2020

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

NORTHWOOD SOLIHULL LIMITED	**Claimant/ Respondent**
- and –	
DARREN FEARN	**First Defendant/ First Appellant**
- and –	
VICKY COOKE	**Second Defendant/ Second Appellant**
- and –	
SHARON FEARN	**Third Defendant/ Second Respondent**

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- -

James Byrne (instructed by **The Community Law Partnership**) for the **Second Appellant**
James Browne (instructed by **Dutton Gregory LLP**) for the **Respondent**

Hearing date: 8 December 2020

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JUDGMENT

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 11am on 20 December 2020.

MR JUSTICE SAINI :

This judgment is in 6 main parts as follows:

I.	Overview:	paras. [1-8]
II.	The Facts:	paras. [9-15]
III.	The Section 8 Issue:	paras. [16-72]
IV.	The Confirmatory Certificate Issue:	paras. [73-90]
V.	Substantial Compliance:	paras. [91-109]
VI.	Conclusion:	paras. [110-111].

I. Overview

1. This appeal concerns the question whether company law relating to execution of documents applies to certain statutory notices served by a corporate landlord upon its tenants in possession proceedings.

2. More specifically, the issue on appeal is the nature of the formal requirements for service of a notice by a limited company landlord seeking possession of residential premises under section 8 of the Housing Act 1988 ("the 1988 Act"). Must such a notice be "executed" by the company in accordance with section 44 of the Companies Act 2006 ("the CA 2006"), as a condition of validity under the 1988 Act?

3. In summary, section 44 of the CA 2006, requires two authorised signatories or a director to sign in the presence of a witness when a company executes a document. The notice in issue in this appeal was not executed in this way, but was merely signed by the corporate landlord's property manager, who was not a director. I will call this "the Section 8 Issue".

4. The separate, but related, issue which arises on the application for permission to cross appeal, is whether a confirmatory certificate signed by a corporate landlord under The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI 2007/79, also has to be executed in accordance with section 44 of the CA 2006, as a condition of validity. The certificate in this case was not so executed. It was only signed by a single director of the landlord company. I will call this the Confirmatory Certificate Issue.

5. For reasons given in a detailed judgment dated 14 January 2020, HHJ Williams ("the Judge") sitting in the County Court at Birmingham, held in the landlord's favour on the Section 8 Issue, but in the tenants' favour on the Confirmatory Certificate Issue. In other words, he held section 44 of the CA 2006 did not apply to a notice seeking possession but did apply to a confirmatory certificate. The former was accordingly valid, and the latter was invalid.

6. By a consequential order dated 14 January 2020 ("the Order"), the Judge made an order for possession and awarded the tenants certain sums by way of a penalty for breach of section 214(4) of the Housing Act 2004 (in respect of the failure by the landlord to provide them with a confirmatory certificate), such sums to be set off against rent arrears.

7. Both aspects of this Order are appealed. The Second Appellant ("the tenant") argues in her appeal that the Judge was wrong in law on the Section 8 Issue, but right on the Confirmatory Certificate Issue. The landlord says the opposite: the Judge was right in

law on the Section 8 Issue but wrong on the Confirmatory Certificate Issue (and therefore the financial penalty falls away). By way of a Respondent's Notice, the landlord also seeks possession on alternative grounds, if they fail in relation to the Section 8 Issue.

8. The order for possession has been stayed pending this appeal. The First Appellant (a former tenant) has taken no part in this appeal. The Third Defendant below (the tenants' guarantor) did not participate in the proceedings at any stage.

II. The Facts

9. The Order appealed from was made in a claim for possession of a residential property as 48 Gilliver Road, Shirley, West Midlands, B90 2DB ("the Property"). The Property was let by the Respondent ("the landlord") to the First and Second Appellants ("the tenants") under an Assured Shorthold Tenancy dated 25 July 2014 ("the Lease").

10. The Lease provided for: (i) a term of twelve months from and including 6 August 2014; (ii) rent of £695 per calendar month payable in advance on the sixth day of the month; (iii) a deposit of £1,025 ("the Deposit") to be protected with the government approved Tenancy Deposit Protection Scheme ("the Scheme"), as detailed in Appendix A to the Lease.

11. It was common ground before the Judge that the tenants paid the Deposit on or around 25 July 2014, which in turn was protected under the Scheme. A Confirmatory Certificate under the 2007 Order was served on the tenants on 25 July 2014.

12. Following non-payment of rent, the landlord served a notice on the tenants seeking possession on 27 March 2017 ("the Notice"). At that time arrears of rent amounted to £3,533.46. I was informed at the hearing that arrears currently stand at £2,425.00 (and net of the Counterclaim the sum due is £375.00).

13. On 11 April 2017, the landlord issued the claim for possession, which was based upon alleged arrears of rent and made pursuant to Grounds 8, 10 and 11 of Schedule 2 of the 1988 Act (explained below).

14. The tenants opposed the making of a possession order, primarily on the basis that the County Court lacked jurisdiction to make such an order because the Notice was defective.

15. In addition, they made a Counterclaim for payment of penalties as a result of the landlord's alleged failure to comply with the requirements to provide the tenants with a valid certificate confirming the accuracy of any such information.

III. The Section 8 Issue

16. Section 7 of the 1988 Act provides that a court may not make an order for possession of a property let on an assured tenancy, save on one or more of the grounds set out in Schedule 2 to the 1988 Act.

17. Part 1 of Schedule 2 contains “mandatory” grounds where the court *must* make an order for possession if the ground is proven to apply. As explained above, Ground 8 was relied upon by the landlord and was held by the Judge to have been made out.

18. Part 2 of Schedule 2 contains “discretionary” grounds. In such cases a landlord must not only prove that the ground applies to the facts of the case but must also persuade the court that it is reasonable to order possession.

19. In the present case the landlord relied upon discretionary Grounds 10 and 11. The Judge did not decide that issue because he found that the landlord was entitled to possession on the (mandatory) Ground 8 basis.

20. Section 8 of the 1988 Act provides for a notice seeking possession to be served by the landlord before issuing possession proceedings.

21. A number of requirements are set out, but the requirement most relevant to the appeal is at section 8(3) which requires the notice to be “in the prescribed form”.

22. The material parts of Section 8 are as follows (with my underlined emphasis):

> “8 Notice of proceedings for possession.
>
> (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.

…"

23. It will be noted that by section 8(1)(b), the court has the power to dispense with a notice seeking possession if it considers it "just and equitable" to do so.

24. However, by Section 8(5) the court may *not* dispense with a notice seeking possession in connection with Ground 8. Accordingly, a defective notice seeking possession is fatal to a possession claim brought under Ground 8 but may be dispensed with under Grounds 10 and 11.

25. In its Reply the landlord invited the court to dispense with the notice seeking possession in the event that the Notice relied upon was held to be invalid.

The Regulations

26. The Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment No. 2) Regulations 2016 SI 2016/1118 ("the Regulations") provide that a landlord wishing to serve a notice pursuant to section 8 of the 1988 Act must use Form 3 in the schedule to those regulations, or (paragraph 2) "a form substantially to the same effect".

27. Form No. 3 in the Regulations provides at section 6 a signature clause, which is in the following terms:

"6 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 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… Date…

Please specify whether: landlord/licensor/joint landlords/landlord's agent

Name(s) (Block Capitals)…

Address…

Telephone: Daytime… Evening…

28. The Section 8 Notice sent by the landlord on 27 March 2017 was in the terms of this Form No.3 above and I was informed (on instructions) by Counsel for the landlord that this document was signed by a Marie Miles, who was not a director of the landlord, but a person who acted as its property manager. Her signature is not that clear, but one can just about make it out. I set out the actual form at paragraph 35 below.

29. There was an issue before me in relation to the evidence as to the authority of the person who signed the notice. There was nothing stated expressly in the judgment (by way of

any findings) on this matter, but I was told by the tenant's Counsel (who also appeared below) that, following the handing down of judgment), he inquired as to whether the Judge had found that the person who signed the notice was authorised to sign on behalf of the landlord. The Judge confirmed he had done so. That is recorded in a contemporaneous note before me.

30. It was argued on behalf of the tenant there was in fact no evidence at trial as to who signed the notice, and this was an error by the Judge. I found this a surprising submission, and I raised the point that there must have been some evidence on this issue, or at least no contradiction to the landlord's position at the trial that the individual who signed the notice would be presumed to have authority (as a person signing purportedly for the company without any countering evidence).

31. There was no transcript of the hearing before the Judge and discovering what had been said on this issue would require substantial investigation, including consulting with the former legal advisers of the landlord. Rather than requiring such disproportionate steps to be undertaken, or a remitting this issue to the Judge (as considered during oral submissions), I decided as a matter of case management and in furtherance of the overriding objective, to allow the landlord to submit a short statement clarifying the position. I made a direction in this regard when reserving my judgment.

32. A short statement from Ms Miles was in due course provided and, as one would expect, she confirms that she was authorised to act for the landlord in signing the Notice. Counsel for the tenant has submitted a helpful note to me in response to this evidence. He opposes admission of the evidence and forcefully reiterated his submission that there was an error of factual evaluation and I should find that the decision of the Judge was 'plainly wrong' and allow the appeal on that basis. Manzi v King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882 at [15] was relied upon.

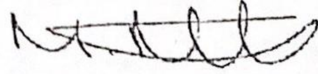
33. Even if there was substance in this point, on the facts before me, I would not have simply rejected the Notice but would have remitted the signature issue to the trial Judge. Had I done that, nothing has been said to me which would indicate the trial Judge would come to any different conclusion to that I can reach.

34. In the interests of effective case management, I allow admission of the evidence and make a finding that Ms. Miles signed the Notice. Any claimed prejudice to the tenant which may arise may be a matter for costs submissions.

35. Turning back to the relevant part of the Notice signed by Ms Miles, it was in the following terms (I have included the text struck through by Ms Miles in the precise form in the evidence):

"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 

Date 27/3/2017

Please specify whether landlord/~~licensor/joint landlords/landlord's agent~~*
Northwood Solihull Ltd
115 Stratford Road
Shirley
Solihull
B90 3ND

Telephone:

Daytime 0121 7333663
Evening None

…."

36. It was common ground before me that *if* Ms. Miles had struck out all of the text under her signature but left in "landlord's agent", the Notice would have been valid.

37. Counsel for the tenant has however forcefully argued that that there is real significance in the fact that Ms Miles signed as "landlord" and not as "landlord's agent". He submits, as I explain further below, that by choosing to sign as "landlord", the landlord effectively took on the responsibility of complying with section 44 of the CA 2006. I now turn to that provision.

<u>The Companies Act 2006</u>

38. The tenant submits that unless the Notice was executed in accordance with this provision it was not valid, and the Judge was wrong to hold to the contrary.

39. Counsel for the landlord (who did not appear below) argues that the Judge was right to decide, for the reasons he gave, that section 44 had no application (and the landlord seeks to supplement the Judge's reasons). The landlord concedes however that if section 44 applied, it was not complied with (because only Ms Miles, an agent, signed) and the Notice was accordingly invalid.

40. Section 44 appears within Part 4 of CA 2006. Part 4 is entitled "A Company's Capacity and Related Matters". Sections 43-47 appear under a sub-heading entitled "Formalities of doing business under the laws of England and Wales or Northern Ireland".

41. Section 43 sets out how a company may enter into a contract. I note that by section 43(1)(b) any person acting under that company's authority may bind the company. Apart from the usual contractual rules of offer, acceptance and consideration no further

formalities are required where a company contracts through an agent acting under its authority.

42. Section 44 of the CA is in the following terms:

> "(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."

43. Section 44 is accordingly concerned with imposing some formality on execution of a "document". It sets out at sub-section (2) how that may be done in the absence of the company's seal and identifies a number of different persons who (when coming together) can do this act (by their *own* personal signatures) on behalf of a company.

44. However, the difficulty in this case (and indeed in earlier case law) arises because there is no definition given in the section, or indeed the Act itself, of *which* documents are required to be executed in this manner.

45. It seems clear that in order to answer that question one needs to look at the specific document the validity of which is in issue and the statutory context in which the issue arises. This requires one to assess whether that statutory context requires the artificial person (a company) *itself* to undertake the act of signing the document, or expressly or impliedly allows an *agent* of the company (usually a natural person) to undertake this act on its behalf. Complications may arise where the agent itself is an artificial person, but that is not an issue in the present appeal.

<u>Does section 44 of the CA 2006 apply to the Notice?</u>

46. Before considering the case law which might assist one in determining whether a Section 8 Notice is the type of document which had to be "executed" in accordance

with section 44 to be valid, it helps to consider the issue as a matter of principle and common sense.

47. The purposes of a Section 8 Notice are essentially twofold: (i) 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 (ii) as a gateway to court proceedings - if the landlord does not serve a valid notice on the tenant then he will need to seek the Court's dispensation in order to proceed with his claim, and in the case of Ground 8 failure to serve a valid notice is an absolute bar to reliance on that ground.

48. Purely as a matter of context and purpose of the Regulations and Section 8 of the 1988 Act, it is hard to identify a convincing reason why (when furthering these two purposes) the formality of execution complying with section 44 CA 2006 would be necessary as a condition of validity of a Notice. Why does it matter to a tenant that the corporate landlord has undertaken this technical step when serving this very preliminary (albeit important) notice? Although a Notice has important consequences it does share many characteristics with a letter before claim.

49. Further, the very fact that the Notice can be signed by a landlord's agent like Ms Miles (where no section 44 requirement would apply), strongly suggests that less formal methods of verifying notification were considered as acceptable by the draftsman of the Regulations.

50. I accordingly begin with the provisional view that it would be odd if section 44 of the CA 2006 applied to a Section 8 Notice.

Hilmi

51. Before the Judge, and before me on appeal, both parties made extensive reference to the judgment of the Court of Appeal in Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd [2010] EWCA Civ 314; [2010] 1 WLR 2750. Each party contends that this case supports its position and it is clearly a decision of substantial relevance.

52. In that case, the Court of Appeal considered whether a statutory notice given by a corporate tenant under section 13 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"), which had been signed by one director of the company whose signature was not witnessed, was invalid as falling to comply with section 36A of the Company's Act 1985 (the statutory predecessor of section 44 of the 2006 Act). (I pause here to record that the parties are agreed that the analysis in Hilmi of section 36A of the 1985 Act applies without any modification to section 44 of the 2006 Act).

53. Section 13 of the 1993 Act provided that (with my underlining)):

> "(5) Any notice which is given… by any tenants… must –
>
> If it is a notice given under section 13… be signed by each of the tenants… by whom it is given…"

54. In that case, the relevant tenant was a company. How was it to sign such a notice?

55. In addressing this issue, Lloyd LJ (who gave the only reasoned judgment) undertook an extended analysis as to whether the signature of such a notice was (in general and as a matter of language) the "execution of a document" at all, so as to engage the statutory formalities. It was submitted on behalf of the tenant company that those formalities applied only to documents which can fairly be said to be "executed", and that one would not naturally speak of a simple notice requiring no more than a signature, however important its effect, as being executed.

56. That submission had been the subject of inconsistent decisions in the County Court. Lloyd LJ rejected it for the following reason at [28]:

> "I would accept the submission of [Counsel for the freeholder] 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 points 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."

57. It is convenient at this stage to refer to a submission by Counsel for the landlord made on appeal. He argued that the correct test to be applied for the application of section 44 CA 2006 should be that the relevant document (i) is required to be signed by the landlord or tenant personally and not by any third party and (ii) the document must directly affect the contractual rights of at least one party to the agreement in a manner which "is more than trivial".

58. I consider that the first part of this submission is in principle correct and supported by Hilmi (and I will consider it further below), but I reject the second part. It advances a vague and unspecific criterion based on the "triviality" (or not) of the relevant document. That is not a safe or legally certain criterion. I also do not see why as a matter of principle the contractual impact of a document should be determinative, noting in particular that companies normally become bound to contracts simply through their agent's signatures.

59. Returning to Hilmi, Lloyd LJ went on to conclude that section 36A of the 1985 Act applied to a claim notice under the 1993 Act. His reasoning at [31]-[32] is critical:

> "31. In my judgment, section 36A did prescribe how a company registered under the Companies Acts could itself sign a document which was required for some formal legal purpose. A notice under section 13 or section 42 of the 1993 Act is such a document. I do not rely on the inclusive definition of the document in section 744 of the Companies Act 1985. A notice in writing as required by either section of the 1993 Act is plainly a document, whatever definition of "document" one may use. Therefore I conclude that the notice in the present case, which was signed only by one director and did not have the Company's common seal (if it has one) affixed to it, was not signed by the Company.

> 32. If it were sufficient for the board to authorise one person to sign on behalf of a company, I can see no reason why it should have to be a director. It could be, for example, the company's solicitor. But the real point is that it was not sufficient for the Company to give authority even to a single director to sign. It had to resolve that it would itself sign the document, and the way in which it could and should have done so was by following the appropriate legal process in accordance with either section 36A(2), affixing its common seal, or alternatively section 36A(4), using the signatures of two directors or a director and the secretary."

60. Hilmi is authority for the proposition that a notice under section 13 of the 1993 Act when given by a corporate tenant is a document which must be executed by that company in accordance with (what is now) section 44 of the CA 2006. The broader principle underlying the decision is however on the following lines: if the legislation in issue and context expressly requires a signature by the relevant person *itself*, there is no other way of a corporate person satisfying this requirement other than by way of the general law (which requires execution under section 36A or its successor).

61. Although not strictly binding in relation to the issues before me on appeal, Lloyd LJ's reasoning as to when and why formal execution under the predecessor of section 44 of the CA 2006 is required, goes a long way towards answering the questions on the appeal (and indeed the cross-appeal).

Analysis and conclusion

62. I turn then to the issue of Section 8 Notices and the application of this reasoning in Hilmi. Counsel for the tenant made attractive submissions to the effect that when Hilmi is analysed, the Judge was wrong to hold that CA 2006 did not apply on a number of grounds. His main submission was that what was said at [28] of Hilmi covered Section 8 Notices. This was because a notice seeking possession under Section 8 of the 1988 Act is a document which requires a degree of formality to make it valid and effective for the legal purpose of giving notice of seeking possession. He referred to what he called the "very strict" requirements of Regulation 3(c) and 'Form No. 3' in the Regulations, which prescribe the form which such a notice must take.

63. Counsel for the tenant also argued that the Judge had erred in law and mis-directed himself by asking the wrong question when he considered whether or not somebody apart from the landlord was able to sign the Section 8 Notice, by concentrating on who could sign the notice. He submitted that the Judge did not, therefore, ask the appropriate questions which he said were: (1) who did sign the notice, and (2) if the notice was signed by a company did the formalities of the signature on the Notice to comply with section 44 of CA 2006.

64. In response, Counsel for the landlord made forceful submissions in support of the Judge's approach, but he also advanced a number of new and additional arguments which require one to venture into territory concerning the general application of section 44 of the CA 2006 in other situations. I say nothing further about them beyond my observations at paragraph [56] above where I was not persuaded by them. It did seem to me however that the reason the landlord advanced these wider submissions was really

to support its case on the cross-appeal. The landlord did not need these arguments to support the Judge's conclusions on the Section 8 Issue.

65. In his judgment, the Judge drew a distinction between the requirement of the statutory provision considered in Hilmi, which required a notice to be signed by a particular individual (in that case a tenant) alone, and Form No. 3 which allows either the landlord or his agent to sign. He noted that Lloyd LJ had accepted that the question of whether a document was signed "by" or "on behalf of" a company "which cannot itself hold a pen and apply it to a piece of paper… may seem a somewhat metaphysical enquiry." Nevertheless, Lloyd LJ had held that the statutory provision meant that the notice needed to be signed "by" the company, which in turn brought to bear the formal execution requirements for documents under s. 36A of the Companies Act 1985.

66. In my judgment, the Judge was correct to conclude that the decision in Hilmi must be considered in that narrow context. As Lloyd LJ had observed, "a statutory provision which requires personal signature of a document of a kind relevant to a company which is not a contract or a deed is very unusual."

67. The Judge's approach, which involved assessing the particular statutory provision pursuant to which the Notice was given and identifying what its requirements actually were, was correct and accords with the general principles I have sought to summarise above.

68. In my judgment, unlike the statutory provision considered in Hilmi, it is significant (and indeed determinative) that there is no corresponding express requirement under section 8 of the 1988 Act that the notice seeking possession be signed "by" the landlord by whom it is given. Further, the relevant prescribed form, Form No. 3, expressly contemplates the notice being signed on behalf of a landlord by its agent.

69. I agree with the Judge that if the tenant's interpretation was correct it would result in a potential absurdity in that a director could not validly sign unattested a notice seeking possession on behalf of a corporate landlord, but an appointed third party agent could do so by virtue of the express provisions of Form No. 3.

70. As I have indicated above, this dispute has only arisen because Ms Miles crossed out the wording "licensor/joint landlords/landlord's agent" on the prescribed form. Had she signed as "landlord's agent" there would have been no difficulty. The fact that it is argued that the choice of crossing-out is crucial amply demonstrates the excessively technical nature of the point advanced by the tenants. Imposing the technicality of section 44 of the CA 2004 execution serves no sensible purpose.

71. In short, in the absence of any express statutory requirement that the Notice be signed "by" the landlord, it could be (and was) validly signed on behalf of the landlord by an authorised signatory without the need to comply with s. 44 of the 2006 Act. There was no other feature of the statutory context which persuaded me that this was not a determinative matter.

72. Therefore, the Notice was not defective and the Judge was right to so decide. The appeal is dismissed. Ground 8 was made out and the issues on the Respondent's Notice in relation to alternative grounds for possession do not arise.

IV. The Confirmatory Certificate Issue

73. As indicated above, the Judge decided this issue against the landlord. Based on his analysis of Hilmi, he held that the relevant legislation required that the Confirmatory Certificate be signed "by" the landlord.

74. The Judge decided that it was not sufficient for the landlord to give authority (even to a director) to sign such a certificate on its behalf. It had to be signed "by" the company itself in accordance with the strict requirements of section 44 of the 2006 Act. It was common ground that had not been done. Accordingly, he held that the Confirmatory Certificate was invalid and this led him to impose certain financial penalties (against the quantum of which there is no appeal). He also rejected the submission that there had been provision of information in a form "substantially to the same effect" as that in the prescribed form.

75. The landlord, by way of cross-appeal, sought permission to appeal against these findings. Having heard some preliminary submissions, I granted permission to appeal at the hearing and heard full argument from both parties. There is a substantial overlap between the arguments in relation to this issue and the Section 8 Notice issue.

76. The tenant sought to uphold the Judge's decision on the Confirmatory Certificate point for the reasons he gave.

77. I will begin with the primary legislation. Section 213 of the Housing Act 2004 provides as follows (with my underlining):

> "213 Requirements relating to tenancy deposits
>
> (1) Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme.
>
> (2) No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).
>
> (3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 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.

(7) No person may, in connection with a shorthold tenancy, require a deposit which consists of property other than money.

(8) In subsection (7) "deposit" means a transfer of property intended to be held (by the landlord or otherwise) as security for—

(a) the performance of any obligations of the tenant, or

(b) the discharge of any liability of his, arising under or in connection with the tenancy.

(9) The provisions of this section apply despite any agreement to the contrary.

(10) In this section—

"prescribed" means prescribed by an order made by the appropriate national authority;

"property" means moveable property;

"relevant person" means any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant."

78. 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 SI 2007/797 ("the 2007 Order").

79. Article 2 of the 2007 Order (as in force at the time relevant to this appeal) provides as follows (with my underlining in respect the confirmatory certificate aspects):

“2.- Prescribed information relating to tenancy deposits

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

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

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

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

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

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

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

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

(i) the amount of the deposit paid;

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

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

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

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

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

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

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

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

(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."

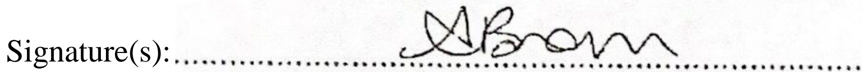
80. The relevant signature part of the Confirmatory Certificate in this case was as follows:

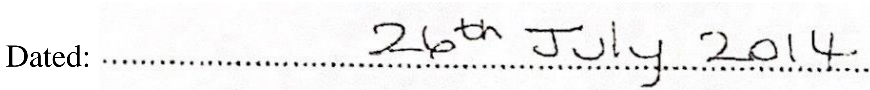
"We (being the Landlord) certify that

(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



Dated: 

Tenant(s): Miss Vicky Cooke & Mr Darren Fearn

Signature(s): ...D. [signature]...............[signature]...........

Dated: ...25/7/14...

…"

81. The person who signed under the Landlord's Name section was Ms A Brown who was, at the material time a director of the landlord company. It is common ground that if section 44 of the CA 2006 applied, this was not a valid confirmatory certificate.

82. In challenging the Judge's decision, the landlord argued that the matters relied on in support of the contention that a section 8 notice does not require execution in accordance with s.44 of the CA 2006 apply equally to a confirmatory certificate. It was submitted that a confirmatory certificate does not affect the contractual relationship between the parties. It is a document required by statute, and failure to provide it does not attract any remedy based on breach of contract. Rather, it attracts a statutory penalty whose purpose is to ensure compliance. Counsel for the landlord sought to distinguish Hilmi by referring me to the extensive consequences of the tenant's notice under the 1993 Act (as compared to the certificate in issue before me on appeal).

83. Counsel for the landlord also relied upon Ayannuga v Swindells [2012] EWCA Civ 1789, where both Etherton LJ and Lewison LJ identified the protection of deposits and the resolution of disputes as the purpose of the tenancy deposit scheme. He submitted that if the legal purpose of the requirement for the landlord's signature is separate to the general purpose of providing the information as discussed in Ayannuga, it does not follow that this demands that a corporate landlord must execute the document in accordance with section 44 of the CA 2006.

84. Attractively though these submissions were presented, the answer to this cross-appeal is in my judgment straightforward and follows from my analysis in relation to the Section 8 Issue.

85. Article 2(1)(g)(vii) of the 2007 Order provides that the prescribed information for the purposes of s. 213(5) of the 2004 Act must also include "confirmation (in the form of a certificate signed by the landlord) that" the information provided is accurate to the best of the landlord's knowledge and belief.

86. In my judgment, as in Hilmi, there is a legislative requirement that the notice/certificate be signed "by" the party serving the document. The reasoning in that case to the effect that if a document is to be signed "by" a company for some legal purpose then s. 44 of the 2006 Act prescribes how a company can itself sign such a document is clearly applicable.

87. This was also the essential basis of the Judge's reasoning and I consider it to be correct. 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.

88. Accordingly, the Judge was right to conclude that the Confirmatory Certificate, which was signed unattested by one company director only, was not validly signed by the tenant in breach of the 2007 Order.

89. Although not referred to by the Judge, his reasoning was similar to that adopted by Her Honour Judge Hand in Bali v Manaquel Company Limited (Central London County Court, 15 April 2016). In a detailed and impressive judgment, Judge Hand held that applying Hilmi and considering the legal purpose of a confirmatory certificate under the 2007 Order, it had to be signed by a landlord in accordance with section 44 of the CA 2006.

90. For completeness, I note that the 2007 Order has now been amended by the Deregulation Act 2015 so that under Article 7 either a landlord or relevant agents can sign a certificate. That does not however influence my conclusion as to construction of the 2007 Order in its original form.

V. Substantial Compliance: a form "substantially to the same effect"

91. Before the Judge, the landlord argued that if the Confirmatory Certificate was defective by reason of this signature problem, the Judge should have held that the form as signed was "substantially to the same effect" as a form executed in accordance with s.44 CA 2006.

92. The Judge rejected that submission. Before me it was argued on behalf of the landlord that not only was the Judge wrong, but there was a separate error because the Judge failed to give reasons for his conclusion.

93. The Judge dealt with this issue at [43] of his Judgment:

> "S. 213(6) of the 2004 Act provides that the prescribed information, which includes the Confirmatory Certificate, must be given to the tenants "in the prescribed form or in a form substantially to the same effect". The Confirmatory Certificate, which was not signed by the Claimant as was expressly required by the 2007 Order, was not, in my judgment, in the prescribed form or in a form substantially to the same effect. Consequently, the Defendants are entitled to an award of damages pursuant to s. 214(4) of the 2004 Act."

94. It is fair to observe that the Judge does not here give reasons for his conclusion in relation to the "form substantially to the same effect" point. That may however have been because he regarded the reasons for the lack of merit in this point as being obvious.

95. This issue was addressed by Her Honour Judge Hand in the Bali case, to which I made reference above. In that case, the certificate bore the words "pp Manaquel Ltd" in the signature lines and there was no actual signature at all. The Judge had decided that this was not a compliant notice but went on the address the "form substantially to the same effect point".

96. The material parts of HHJ Hand's judgment are as follows (with my underlining):

> "35. [Counsel for the landlord] argues however that if what has happened is that the information has been provided, but not provided in the proper form in terms of the signature on the certificate, nevertheless, if it can be said that the information has been provided substantially to the same effect then there can be no basis for thinking that the purpose of the Act has not been complied with and the alternative language in section 213(6) means that the actual wording of the Act must have been complied with.
>
> 36. I find this a very attractive argument. I entirely accept what is said by [Counsel] …that in effect my interpretation confirms a trap for the unwary. Landlords in this country are very often corporate landlords. It must be open to doubt that very many of them sign these documents in accordance with section 44 of The Companies Act 2006.
>
> 37. I am also very attracted to the argument that the alternative in section 213(6) is there to provide for the information to be valid information and within the information required by the Act so long as it in essence provides the information required by Article 2 paragraph 1. It also seems to me that whilst I accept that confirmation is important in terms of the tenant having the comfort that the information provided is accurate, in the circumstances of this case the tenant had the comfort of knowing that s/he had been provided with the information that related to the scheme that held his deposit.
>
> 38. Nevertheless, attractive though I find these points, ultimately I do not accept them. It seems to me that the information required is about the compliance of the landlord with the initial requirements of the scheme in relation to the deposit, the authorised scheme, and the operation of the provisions of this Chapter in relation to the deposit by means of the information as has been prescribed. What has been prescribed is that there should be a certificate signed by the landlord. <u>It seems to me very difficult to say that if there is not a certificate signed by the landlord then there has been the provision of information in a form substantially to the same effect. Either it is a certificate signed by the landlord or it is not.</u> In this case I have concluded that it is not and that means the prescribed information has not been supplied. Therefore I also reject Ms Holmes' alternative argument."

97. It seems to me that the Judge in the present case probably had in mind the same conclusion as expressed by Judge Hand underlined at [38] above: either there was a signature by the landlord or not. A binary issue. I will consider that approach in more detail below.

98. Counsel for the landlord submitted that the test to apply in deciding whether there has been substantial compliance with a statutory requirement was that set out in <u>Ravenseft</u>

Properties Ltd v Hall [2001] EWCA Civ 2034, [2002] HLR 624, a case on notices pursuant to section 20 Housing Act 1988.

99. In that case Mummery LJ explained at [11]: "In my judgment however a detailed analysis of each decision is not a profitable exercise; the question whether a notice under section 20 is in the prescribed form or is in a form "substantially to the same effect" is a question of fact and degree in each case, turning on a comparison between the prescribed form…and the particular form of notice given….". He continued at [27]: "The question is simply whether, notwithstanding any errors or omissions, the notice is "substantially to the same effect" in accomplishing the statutory purpose of telling the proposed tenant of the special nature of an assured shorthold tenancy".

100. These observations were cited with approval more recently by Etherton LJ in Ayannuga v Swindells (cited above), which was specifically a case on compliance with the provision of prescribed information under the tenancy deposit protection regime in Chapter 4 of Part 6 of the Housing Act 2004.

101. Relying upon these cases, Counsel for the landlord submitted that, although the landlord had not signed in compliance with section 44 of the CA 2004, there was effectively substantial compliance because one director (not two directors or one director with a witness) had signed under the company name. He accepted that the purpose of the requirement for the landlord's signature on the Confirmatory Certificate is to give the tenant comfort that the information provided is accurate (see Ayannuga at [30] citing Suurpere v Nice [2011] EWHC 2003 (QB)). But, he submitted, the question which both HHJ Hand in Bali and the Judge in this case should have asked themselves is how comfort *is* given to a tenant by a signature of two individuals (as required under CA 2004) but is manifestly *absent* when only one signature is given.

102. He submitted that had either judge asked themselves that question, the answer would have been that the second signature adds nothing. Consequently, this cross-appeal should be allowed.

103. This was a powerful and attractive submission but in my judgment it fails for the following reasons.

104. First, like Judge Hand, I consider that the signature requirement (unlike for example requirements like provision of information such as the precise fax or telephone number of the landlord - see Article 2(1)(g)(iii) - is not something which can be substantially achieved. It is a binary matter. Either it is done, or it is not. That seems to me to have also been the view of the Judge in his summary dismissal of this argument. Adopting the language of Etherton LJ in Ayannuga at [29], it is hard to see how it can be a matter of "fact and degree" as to whether this form of obligation has been satisfied.

105. That in my judgment is sufficient to dispose of this point.

106. However, there is a distinct reason for rejecting the point. This was not raised by Counsel but was a potential argument I raised with them, and upon which I invited submissions.

107. The additional point can be summarised as follows:

(1) The confirmatory certificate signed by the landlord (under Article 2(1)(g)(vii)), is not, in the context of this Article, something in the nature of "information" which must be given in the "prescribed form or in a form substantially to the same effect" (Section 213(6)(b) of the 2004 Act).

(2) The language of Article 2(1)(g)(vvi) strongly suggests that such a certificate is a freestanding document which confirms the accuracy of the actual "information" set out in the sub-paragraphs above. That actual "information" is matters such as details of the deposit and names and addresses of parties such as the landlord.

108. Accordingly, a defect in the certificate (because it is not signed by the right person/entity) is not "information" of the nature which, under the statutory scheme, allows of omissions/errors to be forgiven under Section 213(6)(b). A certificate cannot accordingly be "saved" through substantial compliance with the signature obligation.

109. The cross-appeal is dismissed.

VI. Conclusion

110. The appeal on the Section 8 Notice Issue is dismissed.

111. I grant the landlord permission to cross-appeal but dismiss its appeal in relation to the Confirmatory Certificate Issue.