Neutral Citation Number: [2013] EWCA Civ 415

Case No: B5/2012/2172

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BRIGHTON COUNTY COURT
(HIS HONOUR JUDGE SIMPKISS)
Claim 1BN03474

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2013

Before:

LADY JUSTICE ARDEN

LORD JUSTICE JACKSON

SIR JOHN CHADWICK

BETWEEN:

PAUL JOHNSON and others	**Claimants/ Respondents**
- and -	
ANNE ALEXANDER OLD	**Defendant/ Appellant**

Ms Liz Davies instructed by Brighton Housing Trust for the Appellant
Mr James Browne instructed by Access Legal for the Respondents

Hearing date : 7 March 2013

Approved Judgment

Sir John Chadwick:

1. This is an appeal from an order made on 31 July 2012 by His Honour Judge Simpkiss, sitting in the Brighton County Court, in proceedings seeking possession of a flat known as The Flat, 11 Heath Road, Haywards Heath, Sussex. The appellant is the tenant of that flat. The issue raised by the appeal is whether (as the appellant contends) a payment made at the commencement of the tenancy, pursuant to a requirement in the tenancy agreement that "The first six months rent are to be paid in advance", must be treated as a "tenancy deposit" for the purposes of section 212(8) of the Housing Act 2004. It was common ground before His Honour Judge Simpkiss that, if that issue were resolved in favour of the appellant, notice to determine her tenancy, purportedly given under section 21 of the Housing Act 1988, was of no effect; and that these proceedings for possession must be dismissed.

The underlying facts

2. The appellant, Mrs Anne Old, went into possession of the flat on or about 1 May 2009 under an agreement of that date made with the respondents, Paul Johnson, Damian Wood and Nigel Howell, as landlords. The intention of the parties, expressed at clause 1.4 of the agreement, was "to create an Assured Shorthold Tenancy as defined in Part 1 of the Housing Act 1988". The term of that tenancy was six months from 1 May 2009 to 31 October 2009: paragraph 1.6.1. The rent was expressed to be £950 per calendar month, payable in advance (paragraph 1.7.1); but, as I have said, the agreement required (at paragraph 1.7.8) that the first six months' rent were to be paid in advance. The agreement required, also (at paragraph 1.8.1), payment of a deposit of £1,425.

3. In March 2009, before taking possession, Mrs Old had paid to the landlords' agents (i) a "holding deposit" of £300 and a non-refundable administration fee of £115 and (ii) £950 in respect of the first month's rent. On 22 April 2009 the agents requested payment of "the deposit - £1425.00 and the remaining five months' rent @ £950 - £4,750": that is to say, payment of £6,175 in aggregate. Mrs Old pointed out that she had already paid the holding deposit of £300; and, after taking credit for that sum, she made a further payment of £5,875 on 29 April 2009. It is common ground that the agents paid the sum of £1,425 into a deposit protection scheme; that they paid £950 to the landlords in respect of the first month's rent; that they held the balance of £4,750 in their own account; and that they made payments to the landlords out of that sum of £950 in respect of rent in each of the five months June 2009 to October 2009.

4. The fixed term tenancy created by the May 2009 agreement expired on 31 October 2009. Mrs Old did not hold over under that agreement. Rather, she entered into a new tenancy agreement of the flat on 1 November 2009 for a further six month fixed term. The terms in that agreement as to rent, payment of six months' rent in advance and payment of deposit were the same as in the May 2009 agreement. On 27 October 2009 Mrs Old had paid a further £5,700 to the landlords' agents: that sum was treated in the same way as the earlier payment under paragraph 1.7.8 of the May Agreement.

5. The tenancy created by the November 2009 agreement expired on 30 April 2010. Again, Mrs Old did not hold over under that agreement: she entered into a new tenancy agreement on 1 May 2010 for a further six month term. The rent under that agreement was increased to £1,000 per calendar month; and that agreement, also,

contained the requirement for payment of six months' rent in advance and for payment of a deposit of £1,425. On 29 April 2010 Mrs Old paid £6,000 to the landlords' agents; and, again, that sum was treated in the same way as the earlier payments under paragraph 1.7.8.

6. The six month contractual term of the tenancy created by the May 2010 agreement expired on 31 October 2010. There was no further tenancy agreement. Mrs Old remained in possession of the flat, under the statutory periodic tenancy which then arose by virtue of section 5 of the Housing Act 1988. It appears that she paid rent (£1,000) in each of the months of November and December 2010 and January and February 2011. She did not pay rent in March 2011; but did make a further payment of £1,000 in April 2011. She made no payments of rent in May or June 2011. From July 2011 she was in receipt of housing benefit (at the rate of £692.32 per month): and this was paid to the landlords' agents. The effect was that Mrs Old fell into arrears in respect of the rent due under the statutory periodic tenancy from March 2011.

7. On 28 April 2011 the landlords served a notice, purportedly under section 21 of the Housing Act 1988, requiring possession of the flat at 11 Heath Road on 30 June 2011. Mrs Old did not vacate the flat. Proceedings (1BN02322) were commenced by the issue of a claim form on 26 July 2011. Those proceedings do not appear to have been pursued; perhaps for the reason that it was thought that, by reason of section 5(3)(d) of the Housing Act 1988, the landlords could not treat 30 June 2011 as the last day of a period of the tenancy for the purposes of section 21(4)(a) of that Act. Be that as it may, a further notice was served on 15 August 2011, seeking possession on 31 October 2011.

8. The present proceedings (1BN03474) were commenced by the issue of a claim form on 16 November 2011. These proceedings came before Deputy District Judge Collins, sitting in the Brighton County Court, on 20 January 2012. He dismissed the claim for possession. The landlords appealed to the County Court Judge. That appeal came before His Honour Judge Simpkiss on 31 July 2012. He allowed the appeal, set aside the order of the Deputy District Judge and ordered that Mrs Old give possession of the flat on or before 11 September 2012. Mrs Old appeals from that order to this Court, with permission granted by Lord Justice Lewison on 15 October 2012.

The statutory framework

9. It is not in dispute that each of the fixed term tenancies created by the May 2009 agreement, the November 2009 agreement and the May 2010 agreement were assured shorthold tenancies for the purposes of Chapter 2 of Part 1 of the Housing Act 1988. Nor is it in dispute that, when the fixed term tenancies created by the May 2009 agreement and the November 2009 agreement came to an end, no statutory periodic tenancy arose under the provisions of section 5 of that Act. That follows from section 5(4) of the Act; which provides that the periodic tenancy referred to in section 5(2) shall not arise if, on the coming to an end of the fixed term tenancy, the tenant is entitled, by virtue of the grant of another tenancy, to possession of the same or substantially the same dwelling-house as was let to him under the fixed term tenancy. But – and again it is not in dispute – when the fixed tenancy created by the May 2010 tenancy came to an end on 31 October 2010, the tenant was entitled to remain in possession of the flat under the statutory periodic tenancy which then arose by virtue of section 5. The terms of that tenancy were those set out in section 5(3): in

particular, the periods of the tenancy were the same as those for which rent was last payable under the preceding fixed term tenancy (section 5(3)(d)). The statutory periodic tenancy was, itself, an assured shorthold tenancy for the purposes of Chapter 2 of Part 1: section 19A of the Act.

10. Section 21(4) of the Housing Act 1988 provides, so far as material, that a court shall make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy if it is satisfied (a) that the landlord or, in the case of joint landlords, at least one of them has given to the tenant a notice in writing stating that, after a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling-house is required by virtue of that section; and (b) that the date specified under paragraph (a) is not earlier than the earliest day on which, apart from section 5(1), the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a).

11. Chapter 4 of Part 6 of the Housing Act 2004 contains provisions for the purposes of safeguarding tenancy deposits paid in connection with assured shorthold tenancies within the meaning of Chapter 2 of Part 1 of the 1988 Act. Section 213(1) of the 2004 Act requires that any tenancy deposit paid to a person in connection with an assured shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme: that is to say, in accordance with a scheme in force pursuant to arrangements made by the appropriate national authority under section 212(1) of the Act. Section 213(3) required (before amendment by section 184(1) of the Localism Act 2011) that where a landlord received a tenancy deposit in connection with an assured 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 14 days beginning with the date on which it is received. In that context "tenancy deposit", in relation to an assured shorthold tenancy means "any money 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": see section 212(8) of the Act.

12. Section 215 of the 2004 Act ("Sanctions for non-compliance") provides, so far as material:

> "215(1) Subject to subsection 2A, if a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when –
>
> (a) the deposit is not being held in accordance with an authorised scheme, or
>
> (b) section 213(3) has not been complied with in relation to the deposit."

For the purposes of section 215, a "section 21 notice" means "a notice under section 21(1)(b) or (4)(a) of the Housing Act 1988 (recovery of possession on termination of a shorthold tenancy)".

The May 2010 tenancy agreement

13. As I have said, in these proceedings the landlords seek to rely on the notice given (or purportedly given) under section 21(4)(a) of the Housing Act 1988 on 15 August 2011. In the events which had happened, at the time when that notice was given the relevant tenancy for the purposes of the application of section 215(1) of the Housing

Act 2004 was the statutory periodic tenancy which had arisen on 1 November 2010 by virtue of section 5 of the 1988 Act. So far as material in the present context, the terms of that tenancy were the same as those of the fixed term tenancy created by the May 2010 tenancy agreement. In most respects, those were the same as the terms of the May 2009 tenancy agreement and the November 2009 tenancy agreement.

14. Clause 1.1 of the May 2010 tenancy agreement defines the "Landlord" and the "Tenant". Clause 1.2 defines the "Landlord's Agent". Clause 1.3 records that the Landlord lets and the Tenant takes the Property for the Term at the Rent payable upon the terms and conditions of the agreement. Clause 1.4 records that the agreement is intended to create an Assured Shorthold Tenancy as defined in Part 1 of the Housing Act 1988. Clause 1.5 defines "the Property". Clause 1.6 ("the Term") provides that:

> "1.6.1 The Term shall be from and including the first of May 2010 to and including the Thirty First of October 2010. . . .
>
> 1.6.2 The "Term" is to include a statutory periodic tenancy or any contractual periodic tenancy that is defined in para 1.6.1 as following the fixed term.
>
> 1.6.3 If on the coming to the end of the fixed term agreed above, the Landlord does not seek possession and the Tenant remains in the Property, they will be considered, by virtue of section 5 of the Housing Act 1988, to have a statutory periodic tenancy. This will continue until ended by either party."

15. Clause 1.7 ("Rent") is in these terms (so far as material):

> "1.7.1 The Rent shall be £1,000 per calendar month, payable in advance.
>
> . . .
>
> 1.7.3 The first payment of £1,000 being due on First of May 2010 or prior to the date of taking possession.
>
> 1.7.4 Thereafter the "Rent Due Date" will be the First day of each month during the Term of this agreement.
>
> 1.7.5 Overdue rental payments will be subject to interest at the rate of 6% per annum calculated from the date the payment was due up to the date payment is received.
>
> . . .
>
> 1.7.8 The first six months rent are to be paid in advance (£5,700) (*sic*) and on the First of October 2010 and thereafter on alternate months (1st December 2010, 1st February 2011, 1st April 2011 etc) two month's rent is payable and to continue in this manner for the duration of the tenancy.
>
> 1.7.9 The tenant can be re-referenced at the end of the six month term. If the tenant can be satisfactorily referenced, then clause 1.7.8 will not apply and the rent can be paid on a calendar month basis."

16. It is clear that the amount shown in parenthesis in paragraph 1.7.8 – "(£5,700)" – is the result of an error by the draftsman: six months' rent, in the context of the May 2010 tenancy agreement, is £6,000: the figure of £5,700 has been inaptly transposed from the early May 2009 and November 2009 tenancy agreements. It is also clear that "re-referenced" and "satisfactorily referenced", in paragraph 1.7.9, have their origin in the circumstances in which the May 2009 tenancy agreement (in which they first

appeared) was executed. The administration fee (£115) paid by Mrs Old in March 2009 was said to be in order "to enable a credit reference search to be completed": see "Additional Notes for Guidance to Applicants" which accompanied the "Tenancy Application" which she signed on 13 March 2009. In an e-mail sent on 19 March 2009, the landlords' agents informed her that:

> "We have heard back from our referencing company who have carried out their checks and have put you through as a category B, which means acceptable credit score but no salaried income! We are therefore happy to proceed with your application to take the tenancy at the above address [Flat 11 Heath Road, Haywards Heath], subject to six month's rent and the deposit being paid in advance."

In those circumstances, "can be re-referenced at the end of the six-month term" and "If the tenant can be satisfactorily referenced", in paragraph 1.7.9 of the May 2009 tenancy agreement, must be read as meaning "a further credit reference search may be carried out at the end of the six month term" and "subject to that further credit reference proving satisfactory to the landlords . . .".

17. Clause 1.8 ("Deposit") provides that the Deposit of £1,425 will be paid by the Tenant to the Landlord's Agent; and that it will be held as security for the performance of the Tenant's obligations under the agreement. In particular, paragraph 1.8.5 provides that "subject to the Tenancy Deposit Protection scheme rules" the Deposit will be refunded to the Tenant, less any deductions, within 10 days once (*inter alia*) possession of the Property has been returned to the Landlord. Until returned, the Deposit is to be protected by The Deposit Protection Service in accordance with its terms and conditions. Clause 6 sets out "Tenancy Deposit Protection Prescribed Information".

18. Clause 2.5 ("Ending the Tenancy") is in these terms:

> "2.5.1 If the Tenant intends to vacate at the end of the fixed term, or at any later date, he agrees to give the Landlord at least one month's prior Notice in writing.
>
> 2.5.2 While the tenancy is periodic the one month's written Notice must expire the day before a Rent Due Date."

"Rent Due Date" has a defined meaning: paragraph 1.7.4. But, other than in paragraph 1.7.4, paragraph 2.5.2 is the only place in the tenancy agreement where that term appears.

The judgments in the Brighton County Court

19. The Deputy District Judge accepted the tenant's case that "when payments were made six monthly in advance, at that point of those payments being made, five months was actually a security": paragraphs 9 and 12 of the judgment which he delivered on 20 January 2012. As he put it (at paragraph 12):

> ". . . I have come to the clear view that this was in fact, this payment of rent in advance when the agreement only provided for rent to be paid monthly in advance, was, in effect, the taking of a tenancy deposit."

And, in the light of that conclusion, he held (at paragraph 17) that:

> ". . . a tenancy deposit was paid but when the Section 21 Notice was served it was not properly protected and therefore it was not validly served and therefore the possession claim must fail."

20. His Honour Judge Simpkiss, on appeal from the order made by the Deputy District Judge, took a different view. After setting out the factual background, the terms of the May 2009 tenancy agreement and the relevant provisions in sections 212 and 215 of the Housing Act 2004, he directed himself (at paragraph 22 of the judgment which he delivered on 31 July 2012) that: "The key words . . . in section 212(8) are 'as security for'". He referred to the decision of this Court in *Woods v Wise* [1955] 2 QB 29 and observed that "the Court must look at the surrounding facts and construe this agreement objectively as to what the parties actually intended, and that it should also be alert to the possibility that landlords might try and disguise a payment so as to avoid the provisions of the Housing Acts". He went on to say this:

> "30. Whilst accepting that this clause [clause 1.7] is not as felicitously drafted as it ought to be, and that the first part of clause 1.7 is predicated on monthly rent in advance, the Court cannot ignore paragraphs 1.7.8 and 1.7.9 and should do its best, if it is possible, to construe the clause so as to make sense, and in my judgment it is not difficult to make sense of this clause.
>
> 31. What this whole clause means is that six months' rent is payable generally in advance, but if there are suitable credit checks then 1.7.8 would be waived and monthly payments would then satisfy the rent covenant, and then at the end of six months further reference would be taken up and, if satisfactory, the provisions of 1.7.1, 1.7.3 and 1.7.4 would apply.
>
> 32. I am not going to redraft this provision but you have to construe the whole of the clause and see if you can reconcile 1.7.8, 1.7.9 with the earlier sub clauses, and in my judgment it is plain that you can and that this is an agreement which expressly requires the tenant to pay six months' rent in advance. The reason for that payment is clearly about the Respondent's or tenant's credit, but the payment is, nevertheless a performance by the tenant of a principal obligation."

At paragraph 26 of his judgment, the judge had referred to the submission advanced before him on behalf of the landlords:

> " . . . the payment made by [the tenant] was not a payment to secure an obligation, but was a payment to comply with a primary obligation, namely that of paying rent. There is nothing unusual about advance rent being required and that payment being objectively categorised as rent rather than security for rent, . . ."

The judge concluded:

> "35. What one would expect, if there was a rent deposit agreement, is that a sum of money would be held to secure the payment of rent, and repaid at the end of the term if all the rent had been paid. This cannot be categorised as that and however one looks at the surrounding facts it does not alter my judgment that this is advance rent and a genuine advance rent payment.
>
> 36. There are various ways of dealing with the risks of a tenant not paying rent because of poor credit, or an inadequate credit reference, one of them is to obtain security in the form of a guarantee, one would be to obtain a rent deposit, but equally, in a short term lease or tenancy, one can require full payment of the rent

> up front. In my judgment that is the correct analysis, objectively, of this transaction and I do not agree with the District Judge's decision and overturn the decision.".

This appeal

21. In her grounds of appeal, dated 16 August 2012, the appellant contends that the judge was wrong in law in three respects: (1) in holding that the relevant tenancy agreement required the appellant to pay six months' rent in advance; (2) in concluding that the payment of six months' rent at the beginning of the tenancy was not a payment of five months' rent as "security"; and in concluding that five months' rent was not a "deposit" as defined in section 212(8) of the Housing Act 2004; and (3) in failing to hold (a) that, if (as the appellant contends) the payment of five months' rent was a deposit, the landlords had failed to comply with section 213 of the Housing Act 2004 (in that the deposit had not been dealt with in accordance with an authorised scheme), (b) that, in those circumstances, the section 21 notice on which the landlords rely should not have been given (section 215(1) of the 2004 Act) and (c) that the notice could not be relied upon. Accordingly, it is said, the judge was wrong to make an order for possession.

22. In amplification of the first of those grounds it is said that the judge failed to take sufficient account of the following matters: (a) "the clear and plain wording of clauses 1.7.1, 1.7.3 and 1.7.4 that the rent was £950 (*sic*) per calendar month and was due on the first day of each month"; (b) the context that the landlords' agents had drafted the tenancy agreement and had included those clauses rather than deleting them; (c) the context that the landlords' agents' usual terms and conditions required only one month's rent to be paid in advance and that this was altered after credit checks on the appellant had confirmed her to be a Category B risk, thus indicating a need for security against the risk that she would not pay her rent; (d) the context that the landlords' agents paid the rent to the landlords on a monthly basis "thus confirming that at the beginning of the agreement all parties had understood the rent to be due monthly"; (e) the context that the remaining part of clause 1.7.8 – which provided for two months' rent to be paid in advance if a periodic tenancy were to arise at the end of the fixed-term - was not put into effect; and (f) the rule (at regulation 7 of the Consumer Contracts Regulations 1999) that, if there is any doubt about the meaning of a written term, the interpretation which is most favourable to the consumer should prevail.

23. The relevant question, in the present context, is whether, on 15 August 2011 – that date on which the notice on which the landlords rely in these proceedings was given to the tenant – a tenancy deposit "has been paid in connection with" the tenancy on which the dwelling house (the flat) was then held. In that context "a tenancy deposit" means "any money intended to be held . . . as security for – (a) the performance of any obligations of the tenant, or (b) the discharge of any liability of his": section 212(8) of the 204 Act. In the events which had happened, the tenancy on which the flat was held on 15 August 2011 was the statutory periodic tenancy which arose, by virtue of section 5 of the Housing Act 1988, on 1 November 2010.

24. The only money which could be said to have been paid with the intention that it be held as security for the obligations of the tenant under that tenancy is (i) the sum of

£1,425 paid (as to £300) on 13 March 2009 and (as to £1,125) on 28 April 2009 and (ii) the sum of £6,000 paid by the tenant to the landlords' agents on 29 April 2010. In my view it is impossible to contend that the payment of £950 on 28 March 2009 or the payment of £4,750 made on 28 April 2009 or the payment of £5,700 made on 27 October 2009 were made with the intention that the payment be held as security for the obligations of the tenant under the statutory periodic tenancy which arose on 1 November 2010. It is, I think, accepted on behalf of the tenant that the payment of £950 on 28 March 2009 was made in respect of the first month's rent under the May 2009 tenancy agreement. It might be said that the payment of £4,750 on 28 April 2009 was made with the intent that it be held as security for the tenant's obligation to pay rent under the May 2009 tenancy agreement; but the obligation to pay rent under that tenancy agreement is not an obligation in respect of the statutory periodic tenancy which arose on 1 November 2010. And it might be said that the payment of £5,700 on 27 October 2009 (or a part of that payment corresponding to five months' rent) was made with the intent that it be held as security for the tenant's obligation to pay rent under the November 2009 tenancy agreement; but, again, the obligation to pay rent under that tenancy agreement is not an obligation in respect of the statutory periodic tenancy which arose on 1 November 2010.

25. It is not in dispute that the payments amounting to £1,450 made in March and April 2009 were made with the intent that they be held as security for the obligations of the tenant under the May 2009 tenancy agreement; and so were a tenancy deposit paid in connection with that tenancy. That deposit was not repaid to the tenant when the tenancy created by the May 2009 tenancy agreement came to an end on 31 October 2009. There would be force, I think, in an argument that, in the events which happened, the parties agreed that the £1,450 should be retained in satisfaction of the requirement (in paragraphs 1.8.1) that the tenant provide a deposit of that amount in respect of the obligations under the November 2009 tenancy agreement and the May 2010 tenancy agreement. The latter would include the tenant's obligations under the statutory periodic tenancy which arose on 1 November 2010: section 5(3)(e) of the Housing Act 1988. But it is unnecessary to address that argument. It has not been raised on this appeal: no doubt because it is accepted on behalf of the tenant that, in relation to the Deposit of £1,450, it cannot be said that section 215 of the Housing Act 2004 has the effect of invalidating a section 21 notice.

26. It follows that the relevant question can be re-formulated and expressed more narrowly: was the sum of £6,000 paid by the tenant to the landlords' agents on 29 April 2010 paid with the intention that it be held as security for the obligations of the tenant under the statutory periodic tenancy which arose on 1 November 2010? In my view the answer to that question is plainly "No".

The first ground of appeal

27. For my part, I would accept that, on a first reading, there is some tension between the provisions in paragraphs 1.7.1, 1.7.3 and 1.7.4 on the one hand and those in paragraph 1.7.8 on the other hand. If paragraph 1.7.8 had not been included in clause 1.7, there can be little doubt that paragraphs 1.7.1, 1.7.3 and 1.7.4, read together (and in the absence of paragraph 1.7.8) would lead to the conclusion that rent under the fixed term tenancy created by the May 2010 tenancy agreement became due month by month and was payable, in advance, on the first of each month. So, it could be said, payment in April 2010 of a sum equal to six months' rent was paid, not to discharge a

current obligation, but as security for the discharge of the payment obligations in respect of rent which would become due and payable on 1 June, 1 July, 1 August, 1 September and 1 October 2010. But, as the judge pointed out, clause 1.7 must be construed as a whole: and the clause includes paragraphs 1.7.8 and 1.7.9. Those paragraphs – and in particular, paragraph 1.7.8 - cannot be ignored.

28. Paragraph 1.7.8 contains two distinct limbs: "[1] The first six months rent are to be paid in advance and [2] on the First of October 2010 and thereafter on alternate months (1st December 2010, 1st February 2011, 1st April 2011 etc) two month's rent is payable . . .". The effect (ignoring, for the moment, paragraph 1.7.4) is to require payment in advance on or before 1 May 2010 of the rent for each of the months of May, June, July, August, September and October 2010; to require payment on 1 October 2010 of the rent for each of the months of November and December 2010; to require payment on 1 December 2010 of the rent for each of the months of January and February 2011; to require payment on 1 February 2011 of the rent for each of the months of March and April 2011; and so on for the duration of the statutory periodic tenancy (if any) that might arise on 1 November 2010. In that context, it is pertinent to have in mind that (as the parties must be taken to have appreciated when they entered into the May 2010 tenancy agreement) the landlords would not be entitled to possession of the flat on 31 October 2010 (at the end of the fixed term) unless they had given notice under section 21(1)(b) of the Housing Act 1988 on or before 31 August 2010; and that, if the tenant remained in possession after 31 October 2010, a statutory periodic tenancy would, necessarily, arise under section 5 of that Act.

29. It follows (ignoring for the moment, paragraph 1.7.4) that paragraph 1.7.8 requires (by way of examples) that payment of the rent for the month of September 2010 be made on or before 1 May 2010; that payment of the rent for the month of November 2010 (if no notice has been given under section 21(1)(b) of the 1988 Act on or before 31 August 2010 and the tenant remains in possession after 31 October 2010) be made on or before 1 October 2010; and that payment of the rent for the month of February 2011 be made on or before 1 December 2010. On a first reading, the dates for payment of rent under paragraph 1.7.8 may appear inconsistent with paragraph 1.7.4; which provides that the "Rent Due Date" will be the first day of each month. Under paragraph 1.7.4 (if it stood alone) the dates for payment of the rent for the months of September 2010, November 2010 and February 2011 would be, respectively, 1 September 2010, 1 November 2010 and 1 February 2011.

30. The key to resolving that apparent inconsistency is found in paragraph 1.7.9:

> "1.7.9 The tenant can be re-referenced at the end of the six month term. If the tenant can be satisfactorily referenced, then clause 1.7.8 will not apply and the rent can be paid on a calendar monthly basis."

That paragraph makes it clear (i) that paragraph 1.7.8 is intended to apply unless and until (after the end of the fixed six month term) the tenant receives a more satisfactory credit reference and (ii) that, for so long as paragraph 1.7.8 does apply, it has the effect of suspending the provisions of paragraph 1.7.4. To put the point another way, paragraph 1.7.4 – and, so far as necessary, paragraphs 1.7.1 and 1.7.3 – are to have effect subject to paragraph 1.7.8 for so long as paragraph 1.7.8 does apply: that is to say, until paragraph 1.7.8 is dis-applied following a further credit reference. Given that paragraph 1.7.9 appears to contemplate that the tenant will not be re-referenced until after the end of the fixed six month term, it follows that – if clause 1.7 is read as

a whole - the parties must be taken to have intended that paragraph 1.7.4 would not have effect during the fixed six month term. That conclusion is consistent, first, with the factual position that would exist if the first six months' rent were paid on or before 1 May 2010 (as the first limb of paragraph 1.7.8 requires) – because there would then be no more rent to pay until the end of the fixed six month term – and, second, with the fact that paragraph 1.7.4 itself is, in form, an interpretation provision which defines a term (the "Rent Due Date") which is only of relevance when the statutory periodic tenancy has arisen (see paragraph 2.5.2).

31. For those reasons I would reject the first of the appellant's grounds of appeal. It seems to me that His Honour Judge Simpkiss was correct to hold that, read as a whole, the May 2010 tenancy agreement did require that the first six months' rent be paid, in advance, on or before 1 May 2010.

32. In reaching that conclusion I have given no weight to the submission, advanced on behalf of the appellant, that paragraphs 1.7.8 and 1.7.9 of the tenancy agreement were introduced – by way of variation of the landlords' agents usual terms and conditions – only after the tenant had been categorised as a Category B risk; and that this indicated "a need for security against the risk that she would not pay her rent". I would accept – although there is no express finding of fact by the Deputy District Judge to that effect – that paragraphs 1.7.8 and 1.7.9 are an addition to the agents' usual standard form terms and conditions; and that those paragraphs were introduced following receipt of the credit reference and in order to meet the risk that the tenant might not pay her rent month by month during the term of the tenancy. But, as Judge Simpkiss pointed out (at paragraph 36 of his judgment), there are various ways of dealing with the perceived risk that a tenant who is the subject of an inadequate credit reference will not pay his rent month by month; and one of those ways is to require payment of the rent "up front". It seems to me plain that that is what the landlords, perhaps on the advice of their agents, decided was the appropriate way to deal with the perceived risk in the present case. The fact that they chose to deal with the risk in that way – rather than taking a guarantee or a rent deposit – is no reason for refusing to give effect to the terms of the tenancy agreement.

33. Nor have I given weight to the submission that the fact that the landlords' agents paid the rent to the landlords on a monthly basis confirmed that "at the beginning of the agreement all parties had understood the rent to be due monthly". There is no finding that the tenant knew of the arrangements between the landlords and their agents as to the manner in which the agents would account for the monies which they received from the tenant. And, even if she did, as the judge pointed out (at paragraph 34 of his judgment) "the arrangements between the agents and the landlord are neither here nor there" and "whatever the arrangements between the landlord and [the agents] the [tenant] would have been able to argue successfully that she had paid the full rent for the term". Equally, as it seems to me, there is no substance in the submission that the second limb of paragraph 1.7.8 – which provided for two months' rent to paid in advance if a periodic tenancy were to arise at the end of the fixed-term - was not put into effect. The obligations of the parties in relation to the first six months' rent are to be determined by construing the tenancy agreement into which they entered: they are not to be determined by events which occurred six months later. And, finally in this context, I have found no assistance in the rule (at regulation 7 of the Consumer Contracts Regulations 1999) on which the appellant seeks to rely. I am not persuaded

that there is any doubt about the meaning or effect of clause 1.7 of the May 2010 tenancy agreement; and, if there were, I am not persuaded that the interpretation for which the tenant now contends would be the most favourable to her. For example, *prima facie* at least, it would not be for her benefit to treat the £6,000 paid on 29 April 2010 (or any part of that sum) as security for the payment of future rent (rather than as, itself, payment of rent that had become due) in circumstances where the tenant was liable (under paragraph 1.7.5) for interest at the rate of 6% per annum on unpaid rent: her interests were best served by treating the rent as paid rather than as unpaid but secured .

The second ground of appeal

34. I turn, therefore, to the second ground of appeal: that the judge was wrong to conclude that the payment of six months' rent at the beginning of the tenancy was not a payment of five months' rent as "security". It is, I think, common ground that, if part of the payment made on 29 April 2010 was a payment as security for the future payment of five months' rent not then due, then and to that extent, the payment was a "tenancy deposit" within the meaning of section 212(8) of the Housing Act 2004.

35. I would reject that second ground of appeal. As I have said, a "tenancy deposit" for the purposes of Chapter 4 ("tenancy Deposit Schemes") of Part 6 of the Housing Act 2004 is "any money 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". It seems to me impossible, consistently with the conclusion which I have reached as to the true construction and effect of clause 1.7 of the May 2010 tenancy agreement, to contend that the whole or any part - and, in particular, an amount equivalent to five months' rent (£5,000) – of the £6,000 paid by the tenant on 29 April 2010 was paid with the intention that it be held by the landlords, or by their agents or anyone else, as security for the performance of any obligations of the tenant, or as security for the discharge of any liability of the tenant, arising under or in connection with the relevant tenancy. There are two reasons which lead me to that conclusion.

36. First, it is important to have in mind the distinction –which the judge pointed out at paragraph 25 of his judgment – between money paid to discharge an existing obligation and money paid with the intent that it be held as security for the performance of some other (primary) obligation or as security for the discharge of some other (primary) liability. Money paid in order to discharge a current liability is not paid with the intention that it be held as security for the discharge of that liability. The payer's intention is that the liability will be discharged by the payment itself; and so there can be no need to provide security for the discharge of the liability in the future.

37. Relating that example to the facts in the present case, it has not been suggested that any part of the £6,000 paid by the tenant on 29 April 2010 – in particular, an amount equivalent to one month's rent (£1,000) – was paid with the intention that it be held as security for the discharge of the tenant's liability to pay rent in respect of the month of May 2010 on 1 May 2010. And, given that the tenant's obligation under paragraph 1.7.8 was (as I have held) to pay the rent in respect of the months of June, July, August, September and October 2010 in advance on 1 May 2010, there is no basis for a submission that any other part of the £6,000 paid by the tenant on 29 April 2010 –

say, an amount equivalent to one month's rent (£1,000) – was paid with the intention that it be held as security for the discharge of a liability to pay rent, say, in respect of the month of September on 1 September 2010. The effect of paragraph 1.7.8 was that that rent in respect of the month of September 2010 should be paid on 1 May 2010, not on 1 September 2010; and the payment on 29 April 2010 was, in part, a payment in discharge of that liability in the same way as it was, in part, a payment of the liability to pay the rent in respect of the month of May 2010 on 1 May 2010. The point can be tested by asking, rhetorically, how the tenant would have responded to a demand, on 1 September 2010, for rent in respect of the month of September 2010. It is, I think, impossible to avoid the conclusion that her answer would have been: "why are you asking me for rent which I have already paid?". And, if it had been suggested to her that she would be liable for interest at 6% per annum on rent for the month of September 2010 if she did not meet that demand by payment of £1,000 forthwith, her answer might have been expressed in stronger terms of indignation.

38. Second, it is important to have in mind that the relevant question is whether the £6,000 paid by the tenant on 29 April 2010 was paid with the intention that that that money – or any part of that money – be held as security for the performance of any obligations of the tenant, or as security for the discharge of any liability of the tenant, arising under or in connection with the tenancy to which the notice served on 15 August 2011 relates. As I have explained, the tenancy to which the notice served on 15 August 2011 relates is the statutory periodic tenancy which arose on 1 November 2010 by virtue of section 5 of the Housing Act 1988. It seems to me impossible to contend that any part of the £6,000 paid on 29 April 2010 was paid with the intention that it be security for the tenant's liability to pay rent (or to perform any other obligations) under the statutory periodic tenancy. The reason is that both parties must be taken to have intended that, by 1 November 2010, the whole of the £6,000 paid on 29 April 2010 would have been applied in the discharge of the rent payable under the fixed term tenancy. It would not have been in contemplation that any part of that sum would remain to be available as security for obligations arising on or after 1 November 2010.

The third ground of appeal

39. Given my conclusion that no part of the £6,000 paid by the tenant on 29 April 2010 was paid with the intention that that money – or any part of that money – be held as security for the performance of any obligations of the tenant, or as security for the discharge of any liability of the tenant; and, in particular, for the performance of obligations or the discharge of liabilities arising under or in connection with the tenancy to which the notice served on 15 August 2011 relates, it is unnecessary to address the third ground of appeal: that section 215(1) of the Housing Act 2004 prevents the landlords from relying on the notice given on 15 August 2011.

Conclusion

40. For the reasons which I have set out, I would dismiss this appeal.

Lord Justice Jackson:

41. I agree.

Lady Justice Arden:

42. I also agree.