Neutral Citation Number: [2020] EWHC 685 (Ch)

Case No: CH-2019-000186

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
ON APPEAL FROM THE COUNTY COURT AT OXFORD
HHJ MELISSA CLARKE

7 Rolls Building, Fetter Lane
London EC4A 1NL

Date: 20 March 2020

Before:

MR JUSTICE ZACAROLI

- -

Between:

VALE OF AYLESBURY HOUSING TRUST LIMITED	**Appellant**
- and –	
JASON RICHENS	**Respondent**

Jonathan Manning and **Anneli Robins** (instructed by **Blake Morgan LLP**) for the **Appellant**
Desmond Kilcoyne and **Peter Jolley** (instructed by **Direct Access**) for the **Respondent**

Hearing dates: 25 February 2020

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This is an appeal against the order of HHJ Melissa Clarke dated 22 May 2019 in which she dismissed the claim for possession made by the Claimant, Aylesbury Housing Trust Ltd, against the Defendant, Jason Richens ("Mr Richens"), in respect of premises at 5 Verney Road, Winslow ("The Property") and discharged an anti-social behaviour injunction obtained by the Claimant against Mr Richens in the circumstances I describe below.

2. Mr Richens' grandfather ("Mr Townsend") had occupied the Property for many years prior to 2006 under a tenancy granted by Aylesbury Borough Council. He was the sole tenant. The Claimant took over the Council's housing stock in 2006. At that time, the Property was also occupied by Mr Richens, who had been living there with his grandfather since he was 12, and Mr Richens' brother ("Colin").

3. It is common ground that at some time in the period January to June 2007 an assured shorthold tenancy was entered into between the Claimant and Mr Townsend. It is in dispute as to whether that tenancy was with Mr Townsend alone or whether the tenants were Mr Townsend, Mr Richens and Colin.

4. Mr Townsend died on 30 March 2017. At that time, and over the ensuing months, Mr Richens suffered a series of devastating events. He lost his grandfather, his brother-in-law and a friend in quick succession, and his fiancée suffered a miscarriage.

5. On 3 November 2017 Mr Richens was arrested following starting a fire in the kitchen of the Property. He pleaded guilty to simple arson under section 1(1) and 1(3) of the Criminal Damage Act 1971 and received a suspended prison sentence of 24 months, on condition that he attend an alcohol treatment programme.

6. On 14 February 2018 (wrongly dated 14 February 2017) the Claimant issued an application against Mr Richens for an anti-social behaviour order. The order was granted on 15 February 2018, precluding Mr Richens from returning to the Property. On 11 April 2018 it was continued on an interim basis until 15 February 2020 or further order in the meantime, but varied so as to permit him to return to the Property conditional on continued engagement with mental health services and continued attendance at the alcohol treatment course. He complied with those conditions and has been living at the Property with no further issues since then.

7. In the meantime, on 16 March 2018, the Claimant issued an application for possession of the Property. It claimed that the Property had been let to Mr Richens' grandfather by way of an Assured Tenancy Agreement on 17 July 2006, and that Mr Richens had succeeded to this tenancy upon the death of his grandfather. The re-amended particulars of claim (dated 19 July 2018) alleged numerous breaches of the tenancy agreement. Possession was sought pursuant to grounds 7, 9, 12 and 14 of Schedule 2 to the Housing Act 1988.

8. Ground 7 is a mandatory ground and provides as follows:

> "The tenancy is a periodic tenancy (including a statutory periodic tenancy), or a fixed term tenancy of a dwelling-house in England, which has devolved under the will or intestacy of the former tenant and the proceedings for the recovery of possession are begun not later than twelve months after the death of the former tenant or, if the court so directs, after the date on which, in the opinion of the court, the landlord or, in the case of joint landlords, any one of them became aware of the former tenant's death.
>
> For the purposes of this ground, the acceptance by the landlord of rent from a new tenant after the death of the former tenant shall not be regarded as creating a new tenancy, unless the landlord agrees in writing to a change (as compared with the tenancy before the death) in the amount of the rent, the period or length of term of the tenancy, the premises which are let or any other term of the tenancy.
>
> This ground does not apply to a fixed term tenancy that is a lease of a dwelling-house—
>
> (a) granted on payment of a premium calculated by reference to a percentage of the value of the dwellinghouse or of the cost of providing it, or
>
> (b) under which the lessee (or the lessee's personal representatives) will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the dwelling-house."

9. Grounds 9, 12 and 14 are discretionary grounds for possession and provide as follows:

Ground 9

> "Suitable alternative accommodation is available for the tenant or will be available for him when the order for possession takes effect."

Ground 12

> "Any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed."

Ground 14

> "The tenant or a person residing in or visiting the dwelling-house—
>
> (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality,
>
> (aa) has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions, or
>
> (b) has been convicted of—
>
> (i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
>
> (ii) an indictable offence committed in, or in the locality of, the dwelling-house."

The Judge's decision

10. Mr Richens contended before the judge that a housing officer from the Claimant had visited the Property on 27 January 2007 and had offered a tenancy agreement with Mr Townsend, Mr Richens and Colin as joint tenants. He contended that they accepted that tenancy, signing two copies of the document, retaining one and handing the other back to the housing officer.

11. The judge heard evidence from Mr Richens, Colin and his mother ("Mrs Bidwell"), each of whom had been present throughout the meeting with the housing officer. They each gave similar (albeit slightly contradictory) evidence as to the circumstances in which agreement was reached with the housing officer for a joint tenancy with Mr Townsend and his grandsons. She also heard evidence from Mr Richens' sister ("Samantha") who had been at the Property when the housing officer arrived but had left before the relevant discussion occurred. She corroborated the fact of the meeting.

12. The contemporaneous documentary evidence before the judge consisted of the following:

    i) A copy of the tenancy agreement commencing on 17 July 2006, bearing the signatures of Mr Townsend, Mr Richens and Colin dated 27 January 2007 (the "January Document"). Under the "names of the tenant(s)" on the first page, Mr Townsend's name appears in type, and Mr Richens' and Colin's names have been added in manuscript. The

numbering of the clauses in the body of the agreement runs from 505.1 to 517. The January Document is not signed by the Claimant. No copy of it has been found on the Claimant's files. It was first produced by Mr Richens upon it being annexed to his Defence, dated 8 May 2018.

ii) A further copy of the tenancy agreement, bearing the signature of Mr Townsend dated 2 March 2007 (the "March Document"). In this version the numbering of the clauses is corrected, and runs from 1 to 10. On the first page, Mr Townsend's name is again the only one appearing in type as the tenant. The names of Mr Richens and Colin have been added again in manuscript but then crossed out. At the top of the page, in manuscript, are the words "New Tenancy Agreement Mr Townsend Only to Sign". The March Document was also signed by the Claimant.

iii) A letter dated 14 June 2007 from Mr P.R. Fitzgerald, the Neighbourhood Manager of the Claimant, to Mr Townsend, which states: "I write concerning the Tenancy Agreement you recently returned to these offices. I would advise you that the named tenant **only** is to sign this agreement. I have enclosed another tenancy agreement and will be obliged if you can sign and return the completed agreement to me as soon as possible."

iv) A further version of the tenancy agreement, bearing the signature of Mr Townsend dated 18 June 2007 (the "June Document"). This is in the same form as the March Document, except that "XXXXXX" has been typed into the second box under the heading "names of the tenant(s)" and into the second signature box. Accordingly, the only named tenant is Mr Townsend and he alone has signed it as tenant. The June Document is not signed by the Claimant (Mr Townsend having mistakenly added his signature again as landlord).

13. The judge heard evidence from two witnesses for the Claimant, neither of whom had been employed by it at the relevant time: Ms Deborah Ruff and Ms Samantha Rowett. Ms Rowett had carried out a detailed investigation into the matter, searching for relevant documents and speaking to certain current employees who had been employed back in 2007 in an attempt to identify the housing officer said to have visited the Property in January 2007. No record was found of any tenancy recording Mr Richens as tenant, and no record was found of any meeting with Mr Richens and his grandfather as alleged in January 2007. Ms Ruff said that it is "exceedingly unusual" to create an intergenerational joint tenancy, as this would circumvent the statutory succession rules which provide social landlords with much needed flexibility. There was in evidence an email from a Miss Crawley, who said that the Claimant would not have offered an inter-generational tenancy agreement of the kind Mr Richens claims was entered into.

14. The Claimant challenges the judge's central findings of fact. I will accordingly set out her findings in detail. The judge said that she did not understand the Claimant to be submitting that Mr Richens, Colin, Mrs Bidwell and Samantha were all lying as regards the meeting with the Claimant's housing officer in January 2007. She understood the Claimant's submission to be that they were mistaken or misremembering.

15. She nevertheless identified (at [18] of her judgment) the relevant question as being "whether, on the balance of probabilities, Mr Richens, his brother, his mother and his sister, are all lying about the meeting which they say took place with the claimant's housing officer, in which a joint tenancy was offered by the housing officer on terms set out in a printed tenancy agreement and which Mr Richens, his brother and his grandfather all accepted as evidenced by their signatures".

16. She considered it was "difficult to understand" how all of them could be mistaken, particularly because she had a counterpart tenancy agreement signed by Mr Richens, his grandfather and Colin which appeared to have been a document produced by the Claimant.

17. She went on to answer the question she had posed for herself in the negative, saying, at [20]: "Taking all of the evidence into account I am satisfied on the balance of probabilities, that Mr Richens and his family are telling the truth." She provided a number of reasons:

    i) She could discern no reason to consider that Mr Richens' mother, sister and brother had lied to the court in a conspiracy to pervert the course of justice;

    ii) The evidence of Mr Richens' witnesses was slightly contradictory of each other which tended to suggest it was truthful (since if their memories exactly coincided that would suggest concoction);

    iii) The document signed by Mr Townsend and his grandsons appeared to be a Claimant-produced tenancy agreement in the form which the Claimant was producing such documents in early 2007, and Mr Townsend's signature could not have been added during the proceedings (because he died before they commenced) and she felt it was unlikely that the document would have been concocted prior to his death;

    iv) She placed little weight on the absence of documents within the Claimant's records of either the joint tenancy or a meeting in January 2007, because there was insufficient evidence about the Claimant's processes and practices in 2007 to know whether the absence of evidence was significant or not;

    v) She also placed little weight on the fact that the relevant housing officer could not be found, criticising the Claimant's attempts to locate her;

vi) She accepted that the housing officer may have been wrong to offer a joint tenancy, but noted that it appeared that the Claimant was in a state of flux and mistakes may well have been made (noting the mistake as to the numbering in the January Document, which needed to be corrected by the March Document), but she concluded on the balance of probabilities that the Claimant's housing officer did attend the Property and offer a joint tenancy, "having first informed Mr Richens that she wished to satisfy herself of his ability to pay the rent, and after looking at his bank statements as evidence of that. I am also satisfied on the balance of probabilities that the grandfather and grandsons signed their copy of the tenancy agreement to accept the offer, believing that by doing so, they were becoming co-tenants of the property."

vii) With regard to the March Document and the June Document (as a result of which, certainly so far as the June Document is concerned, the Claimant obtained the signature of Mr Townsend to a tenancy with him as the sole tenant), she concluded that this was insufficient to "withdraw the offer of a co-tenancy" such offer having been accepted by the signature of Mr Townsend and his grandsons on the January Document;

viii) Finally, she took into account that it was not in dispute that the Claimant had "accepted rent" from Mr Richens since 2007, as an "additional factor".

18. In light of these findings of fact, the judge concluded that neither Ground 7 nor Ground 9 was made out. So far as Ground 7 is concerned, Mr Richens' tenancy had not devolved to him under a will or intestacy: it vested in him as surviving joint tenant by operation of law. Similarly, the judge concluded that since Mr Richens was already a joint tenant, the provisions of Annex 2 of the tenancy agreement (providing for the circumstances in which alternative accommodation would be made available) did not apply, so that Ground 9 was not made out.

19. As to Grounds 12 and 14, there was no dispute that these had been made out, but the judge exercised her discretion against ordering possession. In addition, the judge exercised her discretion to discharge the anti-social behaviour order.

The Grounds of Appeal

20. The Claimant sought permission to appeal on eight grounds. Grounds 1 to 3 all challenge the judge's conclusion that there was a joint tenancy. Grounds 4 and 5 relate to the Judge's conclusion that neither Ground 7 nor Ground 9 of Schedule 2 to the Housing Act 1988 was made out. It is common ground that if the Claimant fails on all of Grounds 1 to 3 then it cannot succeed on Grounds 4 and 5. On the other hand, if the Claimant succeeds on any of Grounds 1 to 3, then, subject to one proviso, the case will need to be remitted to the County Court. The proviso is that Mr Richens submits that I can nevertheless determine that the Claimant is incapable of satisfying either Ground 7 or Ground 9 by reason of the terms of the tenancy agreement.

21. By an order dated 11 November 2019 I gave permission on Grounds 1 to 5.

22. Grounds 6-8 relate to the judge's exercise of discretion. By my order of 11 November 2019, permission to appeal was refused in relation to these Grounds, and there has been no application to renew the application for permission in respect of them.

23. I will address each of Grounds 1 to 3 in turn, in the order dealt with in the Claimant's skeleton.

Ground 2

24. Under this Ground, the Claimant challenges the judge's findings of fact, contending that she failed to consider all the evidence before her and reach conclusions on the basis of that evidence as a whole. In particular, the Claimant contends that the judge, at paragraph 18 of her judgment, adopted the wrong approach by asking the wrong question. It highlights two points:

    i) The judge recorded that no submission had been made to her that Mr Richens and his family were indeed all lying.

    ii) The judge was wrong to ask herself the question whether on the balance of probabilities, Mr Richens, his brother, his mother and his sister were are all lying. The correct question is whether, on the totality of the evidence, the Claimant offered a joint tenancy to Mr Richens, his brother and grandfather which they accepted by their signature.

25. As to the first point, the Claimant contends that it put directly to each of the witnesses (apart from Samantha) that the meeting did not happen and that no agreement for a joint tenancy was reached. Mrs Bidwell certainly understood the questioning to be implying that she was lying. The Claimant accepts that it was not suggested to the witnesses that they had conspired to fabricate their evidence, but contends that it was not necessary to do so. I consider that the Claimant did sufficiently put its case to the witnesses to lay the foundation for a submission that they were not telling the truth. However, this point does not in itself go anywhere because, as is clear from [18] of the judgment, the judge in any event posed for herself the question whether the witnesses were all lying.

26. As to the second point, I consider that the form of the question posed by the judge was – at least in part – wrong. It may sometimes be the case that a finding that a particular event did not occur, notwithstanding evidence of witnesses that it did, can logically only be explained on the basis that the witnesses were lying. Indeed that was the case, in my judgment, in relation to the question whether there was any meeting with a housing officer for the Claimant. While not impossible, it is inherently unlikely, if the meeting did not take place at all, that Mr Richens, his mother, sister and brother all genuinely, but mistakenly, thought that it did.

27. It is different, however, in relation to the question whether the Claimant's housing officer had in fact offered a joint tenancy which had been accepted by the signatures of Mr Townsend and his grandsons. Here, the position is more nuanced, because there is much greater scope for the witnesses to be wrong in their collective recollections that such an agreement was reached without having lied. Indeed, it is possible that they genuinely, but mistakenly, believed at the time that there had been an offer for a joint tenancy.

28. In the form of the question the judge posed for herself at [18] of the judgment, the issues as to whether the meeting took place at all, where a tenancy was offered and whether it was accepted are rolled into the same sentence. Accordingly, to the extent that the question related to the latter two issues, I consider that it constituted a misdirection.

29. That is not necessarily determinative, however, of this appeal. The critical question is whether, in reaching her conclusion on the relevant issue (whether an agreement for a joint tenancy was reached at the meeting in January 2007) the judge was led into error by the form in which she had posed the question in [18] of her judgment or whether, despite the form of the question, she nevertheless reached a decision which she was entitled to make. In this respect, her conclusion was expressed in [26] of her judgment, where she found, on the balance of probabilities, that the Claimant's housing officer had gone to the Property and offered a joint tenancy and that Mr Townsend and his grandsons had accepted it by signing the January Document.

30. This being an appeal against a finding of fact, it is common ground that there is a particularly high hurdle to overcome. As summarised by Lord Sumption in *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2019] AC 358, at [41], it must be shown that the judge fundamentally misunderstood the issue or the evidence or that she plainly failed to take the evidence into account, or that she arrived at a conclusion which the evidence could not on any view support.

31. I also bear in mind that a trial judge is not required to refer expressly to all of the evidence and that an appeal court is bound to assume, in the absence of compelling evidence to the contrary, that the trial judge had taken the whole of the evidence into account: see *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, per Lord Reed JSC at [48]. In this case, as I have noted, the Judge's conclusion that Mr Richens and his family were telling the truth was prefaced with the statement "…taking all of the evidence into account". Moreover, where the judge has expressly referred to evidence in one part of her judgment then it would require particularly compelling reasons to conclude that she had not taken account of it when expressing her reasons for a conclusion in another part of the judgment.

32. Mr Manning contended that the judge had indeed been led into error by asking the wrong question. He submitted that she had sought to fit the documentary evidence around the finding that she had already made on the basis of her believing the oral testimony of the witnesses, and thus failed to test the oral evidence of Mr Richens and his family against the totality of the evidence.

33. He stressed the importance of contemporaneous documents and the caution with which oral testimony should be treated, particularly given the length of time which had passed since the relevant events: see, for example, *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, per Males JL at [48]-[49]; *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), per Leggatt J at [22].

34. Mr Kilcoyne, who appeared for Mr Richens, submitted that the starting point is that there was undoubtedly a meeting on 27 January 2007 with the Claimant's housing officer, because Samantha's evidence to that effect had not been challenged, alternatively that it was open to the judge so to find.

35. I do not agree that the Claimant's decision not to challenge the evidence of Samantha means that it must be accepted. A judge is not bound to accept the evidence of a particular witness merely because it was not specifically challenged in cross-examination if, for example, the weight of evidence at trial as a whole points in the other direction (and nothing in the judgment suggested the judge thought otherwise).

36. I note, however, that the Judge did not reach her conclusion on this basis. Moreover, in asking the question that arises on this appeal (namely, was the judge *entitled* to reach the conclusion that she did?) it is undoubtedly a relevant factor that, in relation to an issue that turned to a large extent on the credibility of the witnesses' oral evidence, the judge had unchallenged corroborative evidence from Samantha. Where (as I have pointed out above) the judge was entitled to conclude that a finding that the meeting did not take place at all logically required her to conclude that Mr Richens and his family were all lying, I consider that the judge was also entitled to place particular weight on the unchallenged evidence of Samantha. That is particularly so where her evidence contained specific points of recollection (as opposed to merely stating agreement with the evidence of others), namely that she was there when the housing officer arrived and that she left as her brothers came in.

37. Accordingly, I consider that it is appropriate, in assessing the judge's conclusion that agreement was reached for a joint tenancy, to start from the premise that she was entitled to conclude that there had been a meeting with the housing officer in January 2007. In addition, as there was no challenge to the authenticity of the January Document or Mr Townsend's signature on it, the judge was entitled to take account of the fact that the January Document must have been signed by Mr Townsend prior to the Claimant having made any suggestion to Mr Richens that he might be required to leave the Property.

38. The crux of the Claimant's appeal against the judge's finding of fact is the contention that she failed to take certain evidence into account. Mr Manning referred to the following matters which he submitted the judge failed to take into account.

39. First, Mr Manning submitted that the judge failed to take into account the inherent unlikelihood of the Claimant having offered a joint tenancy on an inter-generational basis, given the clear statement in the email from Miss Crawley that the Claimant would not have done so, and the evidence from Ms Ruff that to do so would in effect give rise to an extra-statutory succession and deprive the Claimant of the flexibility which the statutory provisions were designed to give it.

40. It is true that the judge did not expressly refer to these matters in [20]-[28] of the judgment, where she set out her reasons for her conclusion. She had, however, referred to Ms Crawley's email at [13]. More importantly, she accepted (at [24]) the possibility that the housing officer had been wrong to offer a joint tenancy. The evidential basis for that acceptance can only have been (1) the Claimant's evidence that it was extremely unusual, and against its policy at the time, to offer such an inter-generational tenancy and it would not have wanted to do so and (2) the Claimant's actions in subsequently requiring Mr Townsend to enter into the March and June Documents under which he was the sole tenant (to which I refer below).

41. In other words, the judge had taken into account the evidence of Ms Ruff and Ms Crawley indicating the unlikelihood of the Claimant as an institution having set out to offer a joint tenancy, but had determined that the likely consequence was that the housing officer had made a mistake, rather than that no offer of a joint tenancy had been made. I do not think it can be said that this was an unreasonable conclusion or one that no judge could have reached on the basis of the evidence.

42. Second, Mr Manning submitted that the judge had failed to take into account the March Document, the June Document and the letter of 14 June 2007 to Mr Townsend in determining whether, on the balance of probabilities, an agreement had been reached in January 2007.

43. It is true that when the judge dealt with these documents in the relevant part of the judgment, at [27], she merely concluded that "it was too late to withdraw the offer" of the joint tenancy which had been made and accepted on 27 January 2007. On its face, this fails to address the right question, which is the extent to which the later documents, which show that the Claimant's position was that it wanted a tenancy with Mr Townsend alone, sheds light on the question whether the alleged agreement had been reached in January 2007 at all.

44. I consider that the point is answered, however, in the same way as the first objection. The judge's preparedness to accept the possibility that the housing officer was mistaken in offering a joint tenancy pre-supposes that the Claimant itself did not wish to do so. The later documents indicate that the Claimant as an institution indeed did not wish to do so. That in turn supports the suggestion that if the housing officer had reached agreement for a tenancy in the form of the January Document, she had been wrong to do so. As I have noted above, however, the judge's acceptance that the housing officer may have been wrong indicates that she took into account and gave weight to the later documents. Accordingly, I do not accept that the judge, in not

specifically referring to the impact of the later documents on the question whether there had been an agreement as alleged by Mr Richens, failed to take into account relevant evidence in reaching her conclusion.

45. Moreover, as Mr Kilcoyne submitted, the fact that someone (most likely from the Claimant) wrote in manuscript on the March Document "Mr Townsend only to sign" and the fact that in the letter of 14 June 2007 Mr Townsend is advised the "the named tenant **only** is to sign…" (emphasis as in the original) is at least consistent with the Claimant having received by that stage a copy of a tenancy agreement signed by more than just Mr Townsend. The only possible candidate for such a document, among those available at trial, is the January Document. As Mr Manning submitted, this is far from conclusive on the point, but it is at least some contemporaneous documentary evidence which corroborated Mr Richens' case that a copy of the January Document, signed by the three supposed joint tenants, was brought back to the Claimant by its housing officer.

46. Third, Mr Manning submitted that the judge failed to have regard to Mr Richens' conduct, following the death of his grandfather in 2017, when the Claimant sought to evict him from the Property. In particular, Mr Manning points out that Mr Richens' conduct in failing to refer to the joint tenancy agreement that was in his possession and, on the contrary, repeatedly requesting that the Claimant provide him with a copy of his grandfather's tenancy agreement, was inconsistent with his case. The judge, however, made express reference to the failure of Mr Richens to raise the matter of the joint tenancy earlier in her judgment (at [3]-[4]). She also referred to the difficulties Mr Richens was then encountering in his personal life at the time, culminating in the arson he committed at the Property in November 2017. I infer that she mentioned these matters because they provided an explanation for his failure to refer to the joint tenancy at the time. As I have noted above, in the absence of compelling evidence to the contrary (which there is not) it is not open to me to conclude that the judge failed to take into account evidence when reaching her conclusion at [20]-[28] of the judgment simply because it is referred to in a different part of the judgment.

47. Another factor which it is submitted the judge failed to take into account was the lack of objection from Mr Richens when the Claimant sought Mr Townsend's subsequent agreement to a tenancy in his sole name (leading to the execution of the June Document). I do not think the judge's conclusions are vitiated by this failure, however, given that there was no evidence that Mr Richens was aware of the subsequent communications between the Claimant and Mr Townsend. It is true that there was some evidence that Mrs Bidwell was aware that the Claimant had been pressing Mr Townsend to sign a sole tenancy agreement, but it was not established that Mr Richens was aware of it.

48. Finally, Mr Manning made the overarching point that the judge failed to grapple with the numerous factors which together demonstrated the unlikeliness of the events having occurred as alleged by Mr Richens. These included: a housing officer turning up unannounced (although it is fair to point out that there was evidence of two appointments, with the second being arranged because the grandsons were not at the property on the first occasion);

the fact that it would have been odd for the Claimant when dealing with 7,500 new tenancies to have made a home visit at all; the oddity that – on Mr Richens' case – the Claimant expressed concern about the ability of Mr Townsend to pay the rent when there had never been any arrears; the lack of any investigation by the housing officer as to who she was dealing with and whether they were actually living in the property; the lack of any separate discussion with Mr Townsend, despite the fact he was giving up a valuable asset; and the oddity that the housing officer, having made the effort to visit, did not bother to sign the agreement herself.

49. These are powerful factors which a judge could reasonably have taken into account in order to reject the case advanced by Mr Richens. That is not the question on an appeal however. Whether I (or any other judge) might reasonably have reached a different conclusion is irrelevant. What matters is whether on the basis of the totality of these factors the judge's conclusion was one which no judge could reasonably have reached. It is important to bear in mind that the judge had the benefit of being immersed in the oral and written evidence over a period of days. This is one of the principal reasons for the high hurdle in an appeal against findings of fact. This is of particular importance in relation to the central question whether any meeting took place at all where (for the reasons I have given above) the judge's conclusion that a finding that it did not happen logically meant the defence witnesses were all lying. Many of the factors relied on by Mr Manning go to that issue.

50. In the end, I have concluded that the judge's central findings of fact were within the range of possible conclusions that a reasonable judge could have reached.

51. Accordingly, I am not satisfied that Ground 2 is made out.

Ground 1

52. By Ground 1 the Claimant contends that the judge erred in law in three respects in reaching her conclusion that there had been an agreement reached on 27 January 2007.

53. The first alleged error is the judge's failure to deal with the Claimant's contention that there was no agreement because the housing officer did not have authority to bind the Claimant. It is true that the judge did not deal with such a contention. The closest she came to addressing it was her acknowledgment that the housing officer may have been wrong to offer a joint tenancy. The fact that she may have been "wrong" to offer such a tenancy does not mean that she had no authority to do so.

54. The main problem with this contention is that it was not advanced before the judge and the judge cannot therefore be criticised for not having dealt with it. I asked Mr Manning to identify where the argument was made in closing submissions, but he was only able to point me to a sentence where he had submitted to the judge that "the [Claimant] simply did not have the right, as a matter of law, to turn up to the property and insist that his grandchildren become joint tenants…" In my judgment, that did not get anywhere near an

allegation that the housing officer had no authority to make the agreement alleged.

55. The second problem is that there was no sufficient evidential foundation for the argument. The only evidence bearing on the point was in the statement of Ms Ruff, at paragraph 28, where she said: "I cannot believe that the Claimant would have agreed to such a grant, and if it had, it would have to have been a decision taken at the highest level with detailed notes and records placed on the tenancy file to explain why the circumstances warranted so unusual a decision." The context of this statement was her evidence in the previous two paragraphs as to the unlikeliness of the agreement having been reached because (as she said in paragraphs 26 and 27) it would in her experience have been "exceedingly unusual" as it amounted to allowing an extra-statutory succession. Her evidence in paragraph 28, therefore, went to the improbability of the joint tenancy having been offered, not to whether the housing officer could lawfully have bound the Claimant to it. I do not regard this as sufficient evidence to found a submission that the housing officer had no actual or ostensible authority to reach agreement with Mr Townsend and his grandsons as alleged in this case.

56. The second alleged error of law is that the judge failed to consider that the Claimant had no power to demand that Mr Townsend surrender his existing tenancy agreement (a valuable asset in his hands) in exchange for a joint tenancy with his grandsons. This was a point that was made to the judge (in the sentence I have already quoted above from the closing argument), albeit briefly. As developed before me, however, I did not understand the Claimant to be contending that it could not, as a matter of law, have reached the alleged agreement with Mr Townsend. Rather, it was put on the basis that since entering into a joint tenancy would have operated, at law, as a surrender of Mr Townsend's existing tenancy agreement, yet there had been no attempt made to have a separate discussion with Mr Townsend or to suggest that he take separate legal advice, the idea that the Claimant had offered him a joint tenancy was "utterly unlikely". As such, I do not think that this demonstrates any error of law. I do not accept, therefore, that the judge was guilty of any error of law in this respect.

57. The third alleged error of law is that the judge wrongly took into account the fact that Mr Richens was paying rent from January 2007. Mr Manning submitted that on the facts of this case, where the Claimant was wholly unaware of the fact that Mr Richens claimed to be a joint tenant and the payment of rent by Mr Richens was not inconsistent with Mr Townsend being the tenant, the payment of rent was not determinative, or even indicative, of a tenancy. I do not accept that the judge made any error of law in this respect. At [28] of the judgment, she rejected the legal submission made on behalf of Mr Richens that payment of rent was an acknowledgment of tenancy, on the basis that she had other evidence. The most that the judge did was accept that the payment of rent was "an additional factor". While it was a weak factor, in circumstances where there was evidence that Mr Richens had been paying rent before January 2007, as well as after, and where he had undoubtedly been residing at the Property at all material times, I do not think that the judge was

wrong in law to regard it as at least a relevant factor, if only because it was relevant to Mr Richens' state of mind at the time.

Ground 3

58. The Claimant contends, under Ground 3, that the judge wrongly placed an evidential burden on the Claimant to disprove Mr Richens' positive assertion that he had a joint tenancy.

59. This is based on the judge's comment, at [23] of her judgment, that:

> "Although I accept that absence of evidence can be weighty evidence, and I bear in mind that the disputed joint tenancy agreement cannot be located in the claimant's files, nor has any documentary evidence been found about a meeting on or around the relevant date, I consider that there is insufficient evidence before me about the claimant's processes and practices in 2007 to know whether the absence of the disputed tenancy agreement and a documentary record of the meeting is significant or not."

60. I do not accept that this amounted to placing the burden on the Claimant to disprove the Defendant's assertion as to a joint tenancy. At most, it amounted to a conclusion to give limited weight to the absence of documentation from the Claimant's files.

61. This submission was alternatively framed as the judge having been wrong to take "no account", when weighing the likelihood of the competing accounts, of the fact that the Claimant's tenancy file contained no documents whatsoever suggesting any meeting occurred or joint tenancy had been agreed. I do not accept that the judge took no account of the lack of documentary evidence: she expressly bore it in mind at [23] of her judgment and provided her reasons for not finding it persuasive at [23] to [25]. Her conclusion was that in light of the shortcomings, as she saw them, in the Claimant's evidence as to its processes in 2007, she was unable to reach a conclusion as to the significance of the absence of the disputed tenancy on their files.

62. As I have noted above, the question is not whether I would have come to the same conclusion, but whether the conclusion the judge reached is one which no judge could have reached on the evidence. I do not think it was.

63. Whether the Claimant is to be criticised for not having done more to locate the housing officer is not to the point. The fact is that there were areas that were not explored, most likely due to the passage of time. For example, enquiries do not appear to have been made of the person whose signature appears on the one document that *was* signed by the Claimant, the March Document, and it had not proved possible to establish who the officer responsible for the area in which the Property was located would have been.

64. Of more significance is the fact that even on the Claimant's own case, there was not a complete record of documents that would have been on its files at the time. In particular, both the January Document and the March Document – both of which were created by the Claimant – undoubtedly found their way into the hands of Mr Townsend. On the Claimant's case there would have been no meeting, so they must have been posted, but there is no record on its files of the letters under cover of which either of them was sent.

65. Other matters which at least provided some support for the judge's conclusion in this respect are, first, the fact that the Claimant had just taken over 7,500 properties so that mistakes may understandably have been made in its record keeping (as the judge specifically noted at [25] of the judgment). In addition, there is the fact (as I have noted above) that the manuscript addition to the March Document and the terms of the letter of 14 June 2007 are at least consistent with the possibility that the Claimant had in its possession a copy of a tenancy signed by more than just Mr Townsend, and the only contender for that (among the documents still available) is the January Document.

66. For these reasons, I am not satisfied that the judge reached a conclusion that no judge could reasonably have reached on this issue.

Disposition

67. Having rejected each of the first three grounds of appeal, it is common ground that the fourth and fifth grounds do not arise. I need not address, therefore, the alternative basis on which Mr Kilcoyne sought to support the judge's conclusion that Grounds 7 and 9 under Schedule 2 of the Housing Act could not be made out.

68. For all the above reasons, I therefore dismiss this appeal.