Appeal Ref: BM80119A
Case No: E3PP8048

IN THE COUNTY COURT AT BIRMINGHAM
Appeal from the order of DDJ Nadarajah of 28 June 2018

Birmingham Civil Justice Centre
The Priory Court, 33, Bull Street, Birmingham B4 6DS

Date: 13 August 2018

Before :

HHJ WORSTER

- -

Between :

Iram Kassam	**Appellant/ Defendant**
- and -	
(1) Harjit Gill **(2) Jagbir Gill**	**Respondents/ Claimants**

- -
- -

Michael Singleton (instructed by **Community Law Partnership**) for the **Appellant/Defendant**
Aaron Walder (instructed by **Emms Gilmore Liberson**) for the **Respondents/Claimants**

Hearing date: 6 August 2018
Draft Judgment: 9 August 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ WORSTER

HHJ WORSTER:

1. This is the Defendant's appeal against the order of DDJ Nadarajah of 28 June 2018. The Judge made an order for the possession of Englestede Lodge in Handsworth Wood on or before 12 July 2018 on Ground 8 of Schedule 2, Part 1 of the Housing Act 1988, gave a money judgment of £13,386.49 and made an order for costs of £325. A copy of the judgment is at page 13 of the appeal bundle (references to numbers in square brackets in this judgment are to the pages of the appeal bundle). I heard the appeal on 6 August 2018. I refer to the parties as the Claimants and the Defendant.

2. The appeal raises two issues. The first is whether the possession proceedings should be struck out as an abuse of process, and the second is whether the notice seeking possession under Ground 8 was invalid. The hearing before the Judge was the first hearing of the proceedings, and she made an order without a trial, proceeding summarily pursuant to CPR Part 55.8.

3. On 18 July 2018, Mr Sweeting QC, sitting as a Deputy High Court Judge granted permission to appeal on the following grounds [11] [15]:

    2. The Judge was wrong to find as a fact that the Claimants had used Solicitors to conduct litigation in circumstances where there was no evidential basis for concluding the same.

    3. The Judge was wrong to not strike out the claim in light of the fact that the claim had been issued and prosecuted in breach of section 12 Legal Services Act 2007.

    5. The Judge was wrong to find as a matter of law and fact that Ground 8 in Schedule 2 to Housing Act 1988 was proven.

    Permission was refused on other grounds and the appeal listed for full hearing on 6 August 2018.

4. However, the allegation that the claim is an abuse of process and should be struck out has meant that the appeal has taken a slightly different course to the norm. The Defendant's case is that – whether or not the appeal succeeds on the basis that the Judge was "wrong" on the material before her - the claim should still be struck out as an abuse of process. The sensible and proportionate course was to determine that issue within the appeal rather than remitting it to a District Judge for determination. Consequently, directions were given in the appeal for the Claimants to serve witness statements relating to the issue at the heart of the abuse allegation (essentially ground 3).

5. On 26 July 2018 witness statements were served from Mr Gill and a Mr Turner, who was the employee of the organisation "Remove a Tenant" who were engaged by the Claimants in relation to the claim. The case was then in the High Court, and the appeal was listed to be heard by me on 6 August 2018. Having seen the witness statements, the Defendant applied (in effect) to cross examine the Claimants witnesses. On 2 August 2018 I made an order providing for some limited disclosure by the Claimants of the documents potentially relevant to the issue of the conduct of

the claim, and for Mr Gill and Mr Turner to attend for cross examination. Given the issues, it seemed to me that without seeing these documents and hearing these witnesses, it would be difficult to determine the abuse of process issue. The relevant documents were duly produced (they are referred to in this judgement with the prefix H), and Mr Gill and Mr Turner attended the appeal hearing and gave oral evidence.

6. Despite their best efforts, the parties were unable to obtain an approved transcript of the Judge's judgment. Given the efforts which had been made to have this appeal heard quickly, and the good pragmatic reasons for hearing the abuse point, the hearing of the appeal proceeded with a copy of an unapproved transcript which the court obtained on the morning of the appeal. The was plainly preferable to adjourning the matter. The hearing lasted a full day, and I reserved judgment.

7. **The Background**

The Claimants are husband and wife. They are the owners of Englestede Lodge. They let the property to the Defendant on an Assured Shorthold Tenancy from 21 November 2016. The agreement is dated 12 November 2016 [86] and gives the Claimant's names as "HS Gill and JK Gill"; that is Harjit Singh Gill and Jagbir Kur Gill. The rent was £1,750 per calendar month, and the agreement provided for a deposit of £3,5000. The Defendant paid the deposit and took up occupation, but she failed to keep up the payments of rent. The payment history set out at paragraph 10 of the Particulars of Claim [72] shows that the arrears were over £5,000 by the end of 2017, and have continued to rise since that time. There were some payments made (which I assume relate to Housing Benefit) but by March 2018 the arrears had risen to £10,520.

8. The Claimants had previously attempted to deal with the matter themselves, and had served a section 21 notice on the Defendant. I do not know the detail, but it seems that the notice was invalid. The only relevance of that matter is that it forms part of the reason for the Claimants' decision to seek some assistance in obtaining possession of the property. Rather than going to a solicitor, they decided to engage the services of "Remove a Tenant". Remove a Tenant is the trading name of Fentham Group Limited, a company trading from offices in Hampton in Arden, in Solihull. Mr Gill's evidence is that it had been recommended to him (or his son) by a barrister.

9. Remove a Tenant carries on business providing services to landlords who wish to obtain possession of their property. At the top of its letterhead, underneath its trading name, are the words "Opening your doors for you" [H3]. Remove a Tenant are not solicitors. At the foot of the invoices it sent the Claimants in this case is this rubric [H16]:

> *Fentham Group are not Litigators. We offer assistance in the preparation and administration of possession claims from information and documentation supplied by the landlord relative to such claims*

10. At the hearing on 28 June 2018 a point arose (to which I return) as to who had signed the statement of truth to the Claim Form. The Duty Solicitor representing the Defendant submitted that it was neither the Claimant nor the Claimant's solicitor, but that it appeared to be an "agent". He submitted that in previous cases that had been sufficient to lead to the dismissal of the claim [58]. The solicitor who had been instructed to represent the Claimants at that hearing, a Mr Chumba, told the Judge that

Remove a Tenant were not solicitors. Despite that, at paragraph 4 of the unapproved transcript of her judgment, the Judge says this:

> *I understand Fentham Group is an organisation that assists landlords in cases like this. Indeed I have looked at the website and they are regulated by the SRA and there is an in house solicitor in that organisation.*

Mr Walder confirmed to me, on instruction, that that is not the case. Fentham Group do not have an inhouse solicitor and they are not regulated by the SRA.

11. Mr Turner is one of 3 employees who work for the Fentham Group from its offices in Hampton in Arden. He has no formal legal qualification or training, although he has received some in house training as part of his employment with Remove a Tenant over the last 4 years. He was previously an insurance assessor. He is paid by commission.

12. His evidence was that clients are offered a package, for which they pay up front. That evidence reflects the terms of the invoices sent by Remove a Tenant to Mr Gill for the work in this case at [H16] and [H21]. [H16] is undated but the index to the documents disclosed dates it at 17 April 2018. Under the heading "*Service"* is refers to Step 1 – the service of notice seeking possession. The cost is £55 plus VAT, and the invoice recites that "*This invoice once paid is taken as an instruction to perform the above service"*.

13. [H21] has the date 2 May 2018 in the index. Under the heading "*Service*" it provides for step 2 – preparing of case papers for possession claim and advocate representation. The cost is £495 plus VAT, and there is a further payment of £355 for court costs, which would be the issue fee. Again, payment is taken as an instruction to perform the service.

14. At paragraph 4 of his witness statement, Mr Gill says that on or around 13 April 2018, he and his wife instructed Fentham Group to serve a section 8 notice. In the documents produced at [H1] is a document on Remove a Tenant paper entitled "Authorisation". It says this:

> I*/we authorise Fentham Group … to assist me/us in the administration of my/our claim for the recovery of my/our property* [address given]
> *I/we also request that they serve any notices required as agents on my/our behalf and use their address as* [Fentham Group's address] *as the correspondence address in all matters relating to said claim.*

The document is then signed by both Claimants, and dated 13 April 2018. At the foot of the page is this:

> **Please note Fentham Group Ltd are not solicitors nor are we litigators, we can only advise and assist in the preparation and administration of possession claims. as the claimant(s) you will be conducting your case as a litigant(s) in person, If required we can arrange Advocate representation for any hearings that should arise which will require a separate instruction through solicitors prior to such hearings.*

15. I accept that Mr Gill well understood that Remove a Tenant were not solicitors, and that in the documents recording their agreement with their clients, Fentham Group make that plain.

16. Mr Gill visited Remove a Tenant's offices on a number of occasions (he thought 6, Mr Turner could not really recall but thought 6, 7 or 8) and his wife accompanied him on all but one of those visits. Remove a Tenant do not make or keep file notes, or diarise appointments, so that the precise dates of those visits is not easy to pinpoint other than by reference to the other documents or steps taken. The evidence from Mr Turner and Mr Gill is to the effect that Mr Gill would telephone before he arrived. As he put it, he could *"... pop along and get advice"*.

17. Following the first meeting, a section 8 notice was served on the Defendant by Remove a Tenant. It is signed by Mr Turner as the landlord's agent, and the address and telephone numbers of Remove a Tenant are given as contact details, *for and on behalf of the Claimants.* The covering letter is at [H3] and the notice at [82]-[84]. Mr Singleton accepts that there is no requirement that such a notice be served by a solicitor. The statutory form provides for service by an agent. This is not conducting litigation.

18. The Defendant telephoned Remove a Tenant, acknowledging receipt of the notice and then sent Mr Turner a letter [H5]. She was hoping to raise some money to pay the rent. The Claimants were not prepared to accept her promises, and it appears that Remove a Tenant were instructed to proceed to step 2.

19. In his witness statement Mr Gill says this [19]:

> *5. On or around 9 May 2018, my wife and I instructed [Mr Turner] to prepare the Claim Form and Particulars of Claim ("the Forms") seeking possession of the property. As the Forms were to be completed and submitted to the Court online, we were asked to attend Mr Turner's offices ... at approximately 2pm to complete the Forms.*
>
> *6. Upon arrival, Mr Turner called my wife and I into his office to complete the online Forms together with his assistance. My wife and I double checked the information on the Forms and we were both satisfied with their contents. Due to the Forms being online, and set up within the HMCTS possession claims online system, we were unable to manually sign the forms and therefore under the instructions of Mr Turner, to ensure legality of the forms, Mr Turner asked me to tick the box to verify the Statement of Truth. Mr Turner sought conformation from my wife that she was happy for me to do so on behalf of both of us, which she happily agreed to. I Harjjt Singh Gill, ticked the box and proceeded to the payment process.*
>
> *7. In view of the above it is my contention that the Statements of Truth were signed and verified by my wife and I.*

20. The Claim form as issued is at [69]-[70], and the Particulars of Claim are at [71]-[74]. Mr Turner's evidence is that Remove a Tenant do not have a PCOL account, and that

the forms were issued using an account Remove a Tenant opened on the Claimants behalf in the Claimants name. Mr Singleton asked Mr Gill a series of questions about how the forms were filled out. He asked firstly about the details of the Claimant. These are given on the Claim Form and Particulars of Claim as: *Mr/Mrs Harjit / Jagbir Gill*. Mr Gill said that this was typed in by Mr Turner, but that he and his wife were there at the time. The explanation for the compression of the names of both Claimants into one is that there is a limited amount of room in the box. It means that (strictly speaking) neither Claimant has given their full names, which are Harjit Singh Gill and Jagbir Kaur Gill.

21. Mr Turner's evidence in his witness statement was that when Mr and Mrs Gill attended, both forms were open on his computer screen. In his evidence he confirmed that he was referring to the draft PCOL application and that the claim would have been put together over a period in draft form and saved. His evidence was "*we draft it so that he can go through it, change and amend it and if ok submit"*. He thought that he would have started the draft prior to the meeting when the claim was submitted.

22. Contrary to the written evidence, it seems that Mrs Gill did not check the contents of these forms herself. Mr Gill accepted that it was he who checked the forms and that his wife was happy for him to do that on her behalf, but that she did not read them herself. There is a similar error in Mr Turner's witness statement, where he says that the answers on the forms were double checked by Mr **and** Mrs Gill. They were not.

23. **Who signed the statement of truth on the Claim Form?**
Pausing there in the history, I turn to the question of whether the Claimants signed the statement of truth on the Claim Form [70] for the purposes of the CPR. The format of the statements of truth on the Claim Form and the Particulars of Claim [74] is the same:

> ***Statement of Truth***
> *I believe that the facts stated in this form are true*
> *Signed MrMrs Harjit / Jagbir Gill date 09 May 2018*
> *Claimant*
> *Full name Mr/Mrs Harjit / Jagbir Gill*

The reproduction of the Claimants "signatures" and their names in the statement of truth follows the same compressed format as the names which were typed in by Mr Turner and which appear at the top of the Claim Form on [69].

24. The issue that arose at the hearing on 28 June 2018 was whether the Claimant(s) had signed the statement of truth. The Duty Solicitor pointed out that under the statement of truth as printed on the Claimant Form [70] next to the box requiring "the Claimant or the Claimant's solicitor's address to which documents or payments should be sent…" is the address of the Fentham Group, together with the e mail info@removeatenant.com and Remove a Tenant's telephone number. That suggested that it was not the Claimants who had signed the statement of truth but Remove a Tenant. I now have Mr Gill's evidence on the point.

25. What are the requirements of the CPR in these circumstances?

(1) CPR Part 22.1(6) requires that a statement of truth to a statement of case must be signed by the party, their litigation friend or legal representative. PD 22 para 3.1 is to the same effect.

(2) CPR Part 5.3 provides that:

> *Where any of these Rules or any practice direction requires a document to be signed, that requirement shall be satisfied if the signature is printed by computer or other mechanical means*

(3) PD 55B provides for the PCOL scheme. The relevant provisions are these:

> ***Starting a claim***
> *6.1 A claimant may request the issue of a claim form by*
> *(a) Completing an online Claim Form at the PCOL website;*
> *(b) Paying the appropriate fee electronically …*
>
> ***Statement of truth***
> *8.1 CPR Part 22 requires any statement of case to be verified by a statement of truth. This applies to any online claims …*
>
> ***Signature***
> *9.1 Any provision of the CPR which requires a document to be signed by a person is satisfied by <u>that</u> person entering his name on an online form.*

[my emphasis]

26. I regarded Mr Gill as an honest witness. He was obviously angry at having to go through the process of proving his case when, to his mind, his tenant owed him a lot of rent and had no good reason for not giving back possession of the property. Mr Turner was not a particularly impressive witness. He was prepared to confirm on oath that his witness statement was true on the basis that he knew "pretty much" what it said. Even after he had had the opportunity to read it and had confirmed it unchanged, there were discrepancies between what was in the statement and the evidence he gave. But I accept the evidence Mr Gill gave (and which Mr Turner confirmed) that when it came to ticking the box (or clicking the icon) on the online form to signify agreement to the statement of truth on the Claim Form, it was Mr Gill who did that. His evidence is that he was advised (by Mr Turner) that he should do this "to make it legal" and that he asked his wife if she agreed to him doing that, and she did. He was not making that up.

27. Is that sufficient to comply with the requirements of the rules? No. The notion of a signature is that it is applied personally. That is reflected in the requirements of CPR Part 5.3 and PD55B para 9. This "signature" was applied by Mr Turner when he entered the Claimants names on the online form. Mr Gill accepted that he did not enter his name on this form.

28. As I understand it, the section of the online form which provides for the verification of the information in the Claim Form by making a statement of truth does not make provision for the entry of the Claimants name. The Claimants name is only inserted

once during the online process, and that is at the start. At the statement of truth stage the form requires that a box be ticked (or an icon clicked) next to a provision indicating that by doing so the Claimant is verifying the truth of the contents of the Claim Form. There is also a reference to the consequences of making a false statement. The Claimants name and "signature" as we see it printed out on the Claim Form at [70] is automatically inserted by the online system next to the statement of truth (here in the same compressed format). No doubt that makes the form less time consuming to complete, but it is not a happy fit with the requirements of the rules or the PD.

29. What are the consequences of that failure in this case? CPR Part 22.2(1) provides that:

(1) If a party fails to verify his statement of case by a statement of truth –
(a) the statement of case shall remain effective unless struck out; but
(b) the party may not rely on the statement of case as evidence of any of the matters set out in it.

(2) The court may strike out a statement of case which is not verified by a statement of truth

30. Whilst the Claimants have failed to comply with the requirement of the rules for the signature of the statement of truth on the Claim Form, on the facts of this case I would not strike it out. The form was completed by Mr Turner who entered the Claimants names, but Mr Gill knew what was in the form, and he (with his wife's authority) clicked the statement of truth icon to signify its truth. So far as he was concerned, he was verifying the Claim From. That may not comply with the letter of the rules, but in the context of the online process, it meets the purpose of the provisions. The fact that the Claimants cannot rely on the Claim Form as evidence is not a problem for their case, for they signed a witness statement verifying the particulars of claim [75] for use at the first hearing.

31. Returning to the history, having clicked the statement of truth icon, Mr Gill handed back to Mr Turner, who proceeded to pay the issue fee with Remove a Tenant's card. The document at [H18] records the payment by the Fentham Group of the issue fee of £325, which came from its account [H20]. Mr Turner's evidence was that the Claimants had already paid them for this expense by meeting the "step 2" invoice. Mr Singleton characterised this as "putting them in funds".

32. The Claim Form identified a date for the first hearing. The Claimants had paid for "advocate representation" and on 25 June 2018 signed a further authority for Remove a Tenant to instruct Jeffreys Solicitors to arrange for an advocate to represent them at the hearing only, in accordance with CPR Part 42.1.3 [H22].

33. In preparation for that hearing Remove a Tenant undertook the following further work:

(i) preparation of a witness statement verifying the claim for the Claimants to sign [75];

(ii) preparation of a hearing bundle, which it sent to Jeffreys to pass on to the advocate, with a note about the proposals the Defendant had made to it, and the Claimants response [H26]. Copies were also sent to the Defendant [99] and the Court;

(iii) signed certificates of service in relation to the section 8 notice and the hearing bundle [77]-[80]. These were signed by Mr Turner as the "Claimant's …friend". In the box next to his signature, which requires completion is signing on behalf of a firm or company, he typed "Administrator Fentham Group".

34. Following the hearing, on 29 June 2018 Jeffreys invoiced Remove a Tenant for the advocates fee. Whilst the documents at [H48] and following are redacted, it is apparent that the Claimants' case was only one of a number where Jeffreys had provided the advocacy service for clients of Remove a Tenant that week. Remove a Tenant paid Jeffreys direct. On 2 July 2018 Jeffreys provided an attendance note of the hearing on 28 June 2018 [H27].

35. On 10 July 2018, solicitors came on the record for the Defendant. They had an exchange of correspondence with Remove a Tenant about a stay pending an application for permission to appeal [103] [101]. An appeal notice was issued on 11 July 2018, and the order stayed by HHJ Barker QC pending appeal.

36. **The Conduct of litigation**
The "conduct of litigation" is a reserved legal activity for the purposes of the Legal Services Act 2007, and may only be carried on by an authorised person, or an exempt person. Remove a Tenant are neither. By section 14(1) it is an offence for a person to carry on a reserved legal activity unless entitled to do so. It is a defence for the accused to show that the accused did not know and could not reasonably have been expected to know, that the offence was being committed. On summary conviction the maximum sentence is 12 months imprisonment or a fine or both, and on indictment 2 years or a fine or both.

37. Schedule 2 paragraph 4 (1) of the 2007 Act provides that:

The "conduct of litigation" means –
(a) the issuing of proceedings before any court in England and Wales,
(b) the commencement, prosecution and defence of such proceedings, and
(c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)

38. Neither Mr Singleton nor Mr Walder had been able to find any decided case which considered the interpretation of that paragraph other than the very recent decision of the Court of Appeal in *Ellis v Ministry of Justice* CA 12 June 2018. That was an appeal from a decision of Mrs Justice May to commit Mr Ellis for contempt of court. The only available report is a Lawtel note of the Court of Appeal decision. The original decision is not on BAILII and Lawtel have informed Mr Singleton that they

await an approved transcript from the Court of Appeal, and that there may be some delay.

39. Paraphrasing the relevant aspects of that short report, Mr Ellis was a former solicitor who had assisted various litigants in person to bring claims which had routinely been struck out as an abuse of process and totally without merit. In 2016, he was made subject to an order restraining him from issuing claims on behalf of others or from assisting others to bring claims in contravention of the 2007 Act. He nevertheless persisted in "assisting a number of individuals to bring abusive claims". The MOJ made a committal application alleging breaches of the 2016 order. May J found that Mr Ellis had "assisted in and managed cases for other people". She considered that his actions amounted to the "conduct of litigation" by the "prosecution of proceedings" within paragraph 4(1)(a) and the "performance of any ancillary functions in relation to such proceedings" within paragraph 4(1)(c). On that issue the Court of Appeal held that the judge had been entitled to find that the appellant had acted in breach of the 2016 order by "assisting in and managing cases for other people within the meaning of the Act".

40. There is limited assistance to be gained from that short report, and any views I express are to be treated with caution given that I do not know what the underlying facts of that case were, nor how May J or the Court of Appeal approached the interpretation of Schedule 2 paragraph 4(1) of the 2007 Act.

41. Mr Walder submits that sub-paragraph 4(1)(c) is to be read with (a) and (b). His point was that on its own, the phrase "*any ancillary functions relating to such proceedings*" is such a wide term that it would catch all sorts of things which are not understood to be proscribed. He submitted that the words of (c) refer to the performance of ancillary functions to (a) and (b). In other words the performance of ancillary functions in relation to the issuing of proceedings, or their commencement, prosecution and defence.

42. That is not a literal reading of the paragraph. The term "*such proceedings*" in (b) refers back to the words *"... proceedings before any court in England and Wales"* in (a); and so (on normal principles) the use of the term "*such proceedings*" in (c) should mean the same thing. But there is force in Mr Walder's submissions. Two points were identified in the course of submissions. Firstly the draftsman provides an example of the sort of ancillary function (c) is referring to – the entering an appearance. That appears to refer to the process by which a party acknowledges service, and by doing so may accept the jurisdiction of the court. The current rules provide that an acknowledgement of service must be signed by the defendant or the defendant's legal representative; CPR Part 10.5(1)(a). In other words, this is an act which only a party or their solicitor would be authorised to undertake, and which may be characterised as a step in the action.

43. Secondly, the practice of the courts has been to allow those who are not authorised for the purposes of the Act to provide assistance to litigants in the preparation of their cases. That practice is reflected by the terms of the *Practice Guidance (McKenzie Friends)* [2010] 1 WLR 1881. Paragraph 19 deals with the approach of the courts to the grant of a right of audience or a right to conduct litigation to a lay person, including an MF, and the reasons for that approach.

> *Courts should be slow to grant an application from a litigant for a right of audience or a right to conduct litigation to any lay person, including an MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.*

44. Paragraph 27 deals with remuneration. In doing so it identifies the sort of work which an MF might be expected to undertake, presumably without breaching the terms of the 2007 Act.

> *Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be recovered from the opposing party.*

45. The third point in favour of (what would be) the narrower interpretation of this paragraph, is that this is a statutory provision which provides for a criminal offence, and the court would normally construe the meaning of such a provision narrowly.

46. The emphasis of the statutory definition at (a) and (b) is on the activity involved in the issue (or commencement) of proceedings, their prosecution and defence, rather than in the provision of assistance to a litigant in preparing or presenting their case. I read the words of (c) to refer to functions ancillary to the activities in (a) and (b).

47. In the course of his helpful submissions, Mr Walder explored the hypothetical case of helping his grandmother bring proceedings. He did so to emphasise his point that the nature of the individual acts which he would undertake in order to assist her would not be very different from the work Remove a Tenant did for the Claimants, and no one would be troubled by his involvement. I take his point; but there is another important point here. The courts are generally less concerned with the question of whether the assistance a litigant is offered on an ad hoc basis by a trusted relative who is involved because he has the interests of litigant at heart amounts to conducting litigation, than when that “assistance” is being provided by a commercial organisation for a fee. It may well be that the well-intentioned grandson will cross the line from time to time without the court being at all troubled. The policy which underlies the need for those conducting litigation to be trained, insured and subject to discipline is unlikely to be undermined by that sort of “assistance”.

48. I accept the point that it is the nature of the “assistance” which Remove a Tenant undertake which is the focus of the statutory test, but that assistance is to be seen as a whole and in context. The context here is that Remove a Tenant are in business to provide these services for a fee, aware of the restrictions on the work it can undertake, and of the fine line between assistance and conducting litigation. They provide a package of services, which in the particular circumstances of this case, included functions which were ancillary to the issuing of these proceedings and their prosecution. It was more than assisting with clerical or mechanical matters; Remove a

Tenant were closely involved in the issue and prosecution of this claim. Its role included providing advice, drafting the proceedings, paying the issue fee, preparing a witness statement and certificates of service, preparing a hearing bundle and serving it on the Defendant and the Court, making arrangements (through properly qualified solicitors) for an advocate to represent the Claimants, paying for that service, and corresponding with the other party (albeit briefly).

49. Within that package is the drafting and issue of the claim form. I can accept that the online PCOL form involves some box ticking, but it also involves some drafting and the identification of how to put the claim. It is not particularly complicated, but the point is that the drafting was done by Mr Turner. More importantly perhaps for the purposes of the statutory definition of the conduct of litigation, Mr Turner has filled in the form in such a way that (on my reading of the rules) he has entered the Claimants name(s) on the form, thereby applying their signature to it. He has also entered Remove a Tenant's address in circumstances where that has then appeared on the Claim form as the "Claimant or Claimant's solicitor's address to which documents or payments should be sent …".

50. The evidence of Mr Gill is that he ticked the statement of truth icon, and Mr Turner's evidence is that he entered his address only as a correspondence address. That mitigates the position, but I have concluded that the package of work taken together, and this aspect in particular, crossed the line, and breached the provisions of the 2007 Act. If I am wrong about that, it came perilously close.

51. That is a conclusion I reach on the evidence before me. At the start of the hearing Mr Walder raised the question of whether it was appropriate to proceed to consider whether Remove a Tenant had conducted this litigation without them being added as a party. It was not suggested that I adjourn, and despite having some informal notice of the hearing, no application was made by Remove a Tenant to be joined. I make it plain that Remove a Tenant is not bound by this decision or the findings I make above, for the simple reason that it is not a party to this litigation and has not been heard on the issue by the court .

52. **Should the claim be struck out as an abuse of process?**
At the heart of Mr Singleton's submission are the observations of Lord Bingham and Baroness Hale in *Lewisham LBC v Malcolm* [2008] UKHL 43 @ [19] and [104]. In that case it was argued that a Notice to Quit served by Lewisham was an unlawful act under the Disability Discrimination Act 1995. In the event it was found that the notice was not unlawful, but in the course of his speech Lord Bingham said this:

> *Parliament has enacted that discriminatory acts proscribed by the 1995 Act are unlawful. The courts cannot be required to give legal effect to acts proscribed as unlawful.*

Baroness Hale agreed that the court cannot be expected to give legal effect to an unlawful act.

53. Mr Singleton's submission is that because the issue of this claim involved a breach of the criminal law, the court cannot, or should not, give effect to the proceedings and make an order for possession. I agree that the Court has a discretion to strike out the

claim if it is found to be an abuse of process, but this is not a case like *Lewisham*. To succeed in establishing a legal right to possession Lewisham had to have served a valid notice to quit. If that notice had been unlawful, the court would not have given it legal effect, and Lewisham would have been unable to establish the claim. The position in this case is different. The Claimants have a perfectly good claim in law for possession. What has happened is that in issuing and prosecuting that claim, a third party (albeit one acting for them) has broken the law. That has no direct effect on the validity of the Claimants cause of action or their ability to prove their case. Apart from anything else, the Claimants have not broken the law. I am satisfied that Mr and Mrs Gill were unaware of the problem.

54. Mr Walder's submission was that this was a case analogous to *Ul-Haq v Shah* [2009] EWCA Civ 542, which was considered by the Supreme Court in *Summers v Fairclough Homes* [2012] UKSC 26. In *Ul-Haq* the driver of a car was injured as a result of the negligence of another driver, and brought a claim for damages. He also conspired to support the fraudulent claim of his mother, who was said to be a passenger in the car, but in fact was not. Whilst the driver had been fraudulent, the court recognised that his substantive claim survived, and did not strike it out as an abuse of process. In *Summers v Fairclough* at [49] the Supreme Court recognised that the court did have the power to strike out a genuine claim, but described that as a draconian step, and always a last resort. In its conclusion at [65] it said this:

> *... we have concluded that the power should in principle only be exercised where it is just and proportionate to do so, which is likely to be only in very exceptional circumstances.*

55. This is not such an exceptional case. It would neither be just nor proportionate to deprive the Claimants of their judgment. They have committed no wrong. I raised with Mr Walder the question of whether it was appropriate to strike out because that was the only means the court had to prevent this sort of abuse. He submitted that it was a matter for the criminal law, not for this court. Having considered the matter, I agree. The proportionate response would be to disallow costs, but save for the issue fee, none are claimed. There is no discernible effect on the fairness of the trial, and it should not prevent the Claimants proceeding with their claim.

56. **Ground 5 - The Section 8 Notice**

This is a freestanding point. The parties agree that the effect of the relevant provisions of the Housing Act 1988 is that without a valid section 8 notice, the court cannot order possession pursuant to ground 8.

57. Ground 8 is in the following terms

> *Both at the date of the service of the notice under section 8 of this Act relating to the proceedings for possession and at the date of the hearing*
> *(a) if rent is payable weekly or fortnightly, at least eight weeks rent is unpaid*
> *(b) if rent is payable monthly then at least two months rent is unpaid*
> *(c) if rent is payable quarterly, at least one quarter's rent is more than three months in arrears*

(d) if rent is payable yearly, at least three months' rent is more than three months in arrears
and for the purpose of this ground "rent" means rent lawfully due from the tenant

58. The notice in this case [82]-[84] is in the prescribed form (Form 3). At paragraph 3 it sets out some of the text of ground 8, including the irrelevant provisions at (a)(c) and (d), but omits to include the words I have highlighted in bold. That is despite the fact, that the printed instructions on the form under paragraph 3 say this:
Give the full text (as set out in the Housing Act 1988 as amended) of each ground which is being relied on. Continue on a separate sheet if necessary.

59. Paragraph 4 of the notice says this:

Give a full explanation of why each ground is being relied on; Grounds 8 and 10; The rent of £1750 is due monthly in advance as per a tenancy agreement commencing on 21st November 2016 and at the date of service of its notice the tenant owes more than 2 months' rent and is a total of £10520.39 in arrears.

[my underlining]

60. The most recent case of relevance is *Masih v Yousah* [2014] EWCA Civ 234. The notice in that case read as follows:

Your landlord intends to seek possession on ground 8 in Schedule 2 to the Housing Act 1988 ... which read(s): that the tenant owed at least two months' rent both when the landlord served notice that he wanted possession and still owes two months' rent at the date of the court hearing.

61. Floyd LJ refers to the decision of *Mountain v Hastings* [1992] 2 EGLR 53, summarising its effect in this way (again the underlining is mine);

19. The Court of Appeal held that the grounds in schedule 2 of the Act may be validly specified in the notice in words different from the statutory language, provided that the words are adequate to achieve the legislative purpose of giving the tenant the information which the provision requires to be given in the notice to enable the tenant to consider what he should do and to do that which is in her power to put things right and to best protect her against the loss of her home.

20. Ralph Gibson LJ said that it was adequate to specify the ground in the notice in terms which set out all the necessary information, ie the substance of the ground. The notice was nonetheless held defective in that case because the notice did not include the requirement that the rent was unpaid at both the date of the service of the notice and the date of the hearing and that "rent" meant rent lawfully due.

21. The Court of Appeal rejected the submission that the notice in fact gave the information required for ground 8 because the notice in the defective form

could give the impression that the ground was already established and that nothing could be done to rectify it.

62. Floyd LJ then deals with the facts of *Masih*:

The notice in the present case firstly specified ground 8 and secondly specified that two months' rent was owing both at the date of the notice and at the date of the hearing. This is a significant distinction from the notice in Mountain v Hastings. The only point open to Miss Masih is the absence of the words "rent lawfully due".

22. Is a statement that "rent is owed" different in substance from a statement that rent is lawfully due? A statement that rent is unpaid is plainly not the same as a statement that rent is lawfully due. The party served with a notice stating that rent is unpaid would not appreciate that it would be open for him to say that although the rent is indeed unpaid, it was not lawfully due. Although it is true that in Mountain v Hastings the notice went on to state the total amount due and payable, this was still only in relation to what was due at the date of the notice. It did not contain the assertion that the amount was lawfully due or owed at the date of the hearing. Mountain v Hastings does not assist on the different question which arises here.

23. Mr Carrott submits that the words "lawfully due" do bring additional meaning. A notice merely stating that rent is owed is not sufficient to alert a tenant to the fact that she may have, for example, a counter claim based on the cost of repairs which the landlord should have carried out, which she might claim to set off against the rent. He also pointed out a further example where the landlord had failed to comply with the statutory duty to give the tenant particulars of his address, see section 48 of the Landlord and Tenant Act 1987, which prevents a landlord from recovering rent where he has failed to supply an address in England and Wales at which notices may be served on the landlord by the tenant.

24. It was particularly important here, submitted Mr Carrott, that the words "lawfully due" were present in the notice because Miss Masih disputed that the rent was due on the grounds that the rent had been waived by the landlord and on the ground that she was entitled to set off a sum by way of counter claim for repairs. He submitted further that a strict approach to the requirements of section 8 was essential in the case of mandatory grounds unlike discretionary grounds where a more liberal approach to notices might be applied.

25. I cannot accept those submissions. In contrast to a statement that rent is unpaid, a statement in a section 8 notice that the rent was owed in my judgment is sufficient notice to enable a recipient to appreciate that it would be an answer to the claim to show that the rent was not lawfully due, thus the recipient of a notice using the word "owe" is aware that he or she must find some basis for showing that the rent is not owed. Thus Miss Masih's defence of waiver is a defence that the rent is not owed. Miss Masih's desire to counter claim for repairs is, if she is right that she is able to set it off against the rent,

> *equally a claim that the rent is not owed. Of course if she is wrong about the set-off then it is not an answer whether the notice is phrased with the word "owed" or "lawfully due". The same can be said of Mr Carrott's example based on section 48 of the Landlord and Tenant Act 1987. Although section 48(2) says that rent otherwise "due" shall be treated as not being due, the effect of it not being due is also that it is not owed.*
>
> *26. In order for this submission to succeed, it would be necessary to find an example of a case where rent is owed but is not lawfully due. For my part I am unable to think of any such case and none has been suggested to us in argument.*

63. Mr Singleton's submission is that this case is somewhere between *Mountain v Hastings* and *Masih v Yousah,* but that whilst there is a reference to rent being owed at the date of the service of the notice in the particulars under paragraph 4, that does not save the landlord from failing to include the necessary words in the appropriate place under paragraph 3.

64. Mr Walder submits that it is an objective test and that the notice should be read as a whole. I agree. He accepts that the grounds as set out under paragraph 3 do not include an allegation that "rent" means rent lawfully due, but points to the fact that at paragraph 4 it is said that the tenant *".. owes more than two months rent".* Following the decision in *Masih* at [25] he submits that the words are adequate to achieve the legislative purpose. He submits that I should adopt a purposive approach.

65. It is important to read the full text of what is said under paragraph 4. What is says is that:

> *... at the date of service of this notice the tenant owes more than two months rent.*

66. At [22] in *Masih* Floyd LJ noted the argument that in *Mountain v Hastings* the notice went on to state that the total amount was due and payable, but he noted that that was still only in relation to what was due at the date of the notice. It did not contain the assertion that rent was lawfully due or owed at the date of the hearing. It is apparent from the result in Mountain v Hasting, and its treatment in Masih v Yousah, that without such an assertion the notice was not saved by stating that rent was owed at the date of the notice. Even taking a purposive approach, and reading paragraph 3 with paragraph 4, this notice does not contain the assertion that the amount was lawfully due or owed at the date of the hearing. I conclude that this notice is invalid and the claim under Ground 8 cannot succeed.

67. **The other grounds**

Mr Walder invited me to proceed with a summary determination of the case on the other grounds relied upon, namely Ground 10 and 11. He submitted that the court was well used to dealing with these matters on a summary basis, and that it was apparent that a lot of rent was due, and that there was no obvious way for the Claimant to meet the ongoing payments, let alone make some contribution to the arrears.

68. Mr Singleton resisted that approach. The draft Defence and Counterclaim (provided after the hearing on 28 June 2018) raised counterclaims for disrepair and in relation to

the deposit paid which the Defendant would seek to set off. I asked whether they would eliminate the claim. Mr Singleton could not say that they would, but submitted that a reduced claim may well affect the issue of reasonableness, or the extended discretion provided for by section 9(2) of the Act. He noted that these other grounds were not argued below.

69. Whilst I have some sympathy for the position in which the Claimants find themselves, I have concluded that the better course is to remit the matter for a further hearing before a District Judge, with a time estimate of 30 minutes (although the parties may ask for more). The hearing is to be expedited and listed on the first available date after 14 days. The parties are to file and serve any witness statements they wish to rely upon in relation to that hearing within 7 days of the handing down this judgment.

70. The appeal succeeds to the extent that the order made by DDJ Nadarajah is set aside. The claim is not struck out and may proceed on Grounds 10 and 11. I have not yet heard submissions on costs, and I will do so (either orally or in writing), but my provisional view is that the winner of this appeal is the Defendant and that she should have her costs to be assessed if not agreed.