IN THE COUNTY COURT AT CENTRAL LONDON

Case No: F00BT511

Courtroom No. 51

Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 16th December 2019

Before:
HIS HONOUR JUDGE LETHEM

B E T W E E N:

LAKHANY

and

PREMPEH

MR V ZAIWALLA appeared on behalf of the Applicant
MR T VANHEGAN appeared on behalf of the Respondent

JUDGMENT
(Approved)

HHJ LETHEM:

1. This judgment relates to the appeal of Miss Cynthia Prempeh against an order for possession made by Deputy District Judge Goodman on 26 July 2019 whereby the Deputy District Judge made a possession order, gave a money judgment for £11,173.54, made an order for monies for use and occupation and costs. In doing so she also indicated that the Appellant could make a freestanding claim against the landlord, Miss Lakhany, in relation to a potential claim relating to non-protection of a deposit, alternatively that statutory information had not been provided in relation to the deposit. The appellant's notice was filed on 16 August 2019.

2. The background is that historically Miss Appiah-Baker and Miss Prempeh had been tenants of 16 Amelia House, 11 Bouvlevard Drive, London, NW9. As I have indicated Miss Lakhany was the landlord. The parties entered into an agreement dated 16 December 2016 naming both defendants as tenants. At that time a deposit of £1,500 was paid. Subsequently at some stage it seems that Miss Appiah-Baker left the property and the second defendant, Miss Prempeh, maintains that there was then a further agreement dated 17 December 2017. In part that was occasioned, she says, by the fact that she was then the sole tenant of property.

3. Thus, at the trial of the matter before the Deputy District Judge, the defendant denied that the appropriate landlord was Ms. Lakhany but instead that it was the person named in the 2017 agreement, O Sullivans. On this basis, Ms. Lakhany would have no cause of action. The existence of the 17 December 2017 agreement was denied by the landlord and it was asserted that that was a forgery.

4. Returning to the history of the matter, the defendant fell into arrears and on or about 23 April 2019 the landlord served notice under Section 8 of the Housing Act specifying grounds 8, 10 and 11. That is found at page 106 onwards in the bundle from which it can be seen that the notice was signed by solicitors who gave their address at the end of the document.

5. Subsequently proceedings were issued and the matter listed before the Deputy District Judge on 26 July 2019. It is important to note that the matter was listed in the short and undefended PCOL list and the transcript shows that the case was called on at 4.03 in the afternoon and that argument concluded at 4.40 in the afternoon and was followed by a very short judgment. At the hearing the landlord was represented by counsel Miss Magdelaini, the defendants by the duty solicitor Mr Smith. Also present at the hearing was a Mr Lakhany, who is an employee of O'Sullivan and Company managing agents and brother-in-law of the Claimant.

6. Now it is apparent from the transcript that the issues that emerged during the course of the hearing were as follows. Firstly, the issue over which was the correct tenancy, the one dated 16 December 2016, or the later one proposed by the defendant dated 17 December 2017. The defendant of course argued that it was the latter tenancy agreement, which named O'Sullivan's, the managing agents, as the landlord. Of course the claimant in the proceedings, the respondent today argued that the subsequent, the 2017 document, was a fabrication. Thus Miss Prempeh was advancing a defence which would have been a defence to the entire claim, namely that the wrong party had brought the proceedings and that it should be O'Sullivan's, not Miss Lakhany.

7. The second matter that emerged during the course of the proceedings was an argument that the Section 8 notice was invalid because it did not comply with Section 47 of the Landlord and Tenant Act 1987.

8. Thirdly, it was contended by the defendant that a deposit was paid, that this was not protected and/or the prescribed information required under Section 213 of the Housing Act 2004 was not given. In those circumstances, of course, she would have a claim for up to three times the deposit pursuant to Section 214 of the Act.

9. Now I have stated that these matters became apparent during the course of the trial, because it is equally apparent that the District Judge had no papers at the commencement of the trial. Nevertheless, the Deputy District Judge decided to press on with the hearing and to resolve the issues then and there. She heard the evidence of Mr Lakhany, who was cross-examined and who said that he did not grant the 2017 tenancy and it was, in essence, a forgery. The appellant did not give evidence on the issue at the hearing, neither was she given such an opportunity. It would be right to record, as Mr Zaiwalla points out on behalf of the landlord, that the transcript shows that there was a dialogue between the appellant and the Deputy District Judge during the course of the hearing, during which the defendant was able to make some of the points that she wished to do.

10. At the conclusion of the hearing Deputy District Judge Goodman concluded that the 2016 tenancy agreement was the operative one and that accordingly she should make a possession order pursuant to ground 8 and that she should enter a money judgment leaving the defendant to pursue the counterclaim for alleged breaches relating to the deposit by way of a freestanding claim. It has been conceded on the appeal by Mr Vanhegan that the maximum recovery on the deposit claim was £6,100, namely the deposit, plus three times the deposit that was paid. He conceded that the rent payable on the property was £1,500 per month that the arrears at the hearing were £11,173.54. Accordingly, by a process of maths, it is clear that the setoff for the deposit could not extinguished the arrears or displaced the Section 8 criteria of two months arrears at the date of service of the notice and at the date of the hearing. Thus the deposit argument goes purely to the money judgment and not to the issue of possession.

11. Amended grounds of appeal were filed dated 25 September 2019. Those grounds advanced six separate grounds for the appeal to be allowed. Under ground one it is argued that the defendant has had an arguable defence that the second tenancy agreement was the operative one and that the claimant was no longer a party to the proceedings. It is made clear that the argument would have provided a full defence to the entire claim. The point is made that the agent was permitted to give evidence, that there was no witness statement from the agent and that the appellant was ready and willing to give evidence but not given such an opportunity.

12. Mr Vanhegan during the course of the appeal conceded that this was essentially a criticism of the conduct of the trial. In the circumstances he accepted that his fourth, fifth and sixth grounds really merged into his first ground. The fourth, fifth and sixth grounds were as follows. Ground four that the decision to prefer the 2016 agreement was irrational. Ground five that the Deputy District Judge had pre-determined the issue of validity of the tenancy and ground six that the conduct of the hearing denied the defendant a fair trial. Thus essentially the appeal was argued on the basis that grounds one, four, five and six were part and parcel of the same point.

13. The second freestanding ground of appeal, ground two was that the Section 8 notice is in truth a rent demand. As such it has to comply with Section 47 of the Landlord and Tenant Act and be signed by that Landlord as opposed to an agent, that it failed so to comply and as such it was defective. As this was an order under ground 8, namely a mandatory order, the court had

no power to dispense with the Section 8 notice.

14. The third ground was that there was a defence of setoff arising out of the deposit claim. That contrary to the indications given at the trial, it is more properly typified as a setoff and thus a defence to the claim as opposed to a counterclaim. As such the grounds suggest that the court should have tried the issue of the money claim or given direction for trial, taking into account the setoff and that in the course of doing so the court would have considered its discretionary power to allow up to three times the deposit.

15. I turn then to consider some general observations concerning the law relating to appeals. Of course every appeal is limited to review of the decision of the lower court, as is provided by CPR 52.10(1) and (2) and (4). CPR 52.21(3) provides that the appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings, and that it is not permissible to allow an appeal simply because an appeal Judge comes to, or would have come to, a different decision to that of the lower court.

16. It seems to me that this appeal engages two aspects of the District Judge's powers. The first was a case management decision to proceed to dispose of the case by way of a trial at the first hearing. The second, of course, was the conduct of the trial and in particular the decision on the point of law relating to Section 47.

17. Thus I remind myself of the law in relation to both case management and substantive trials. It seems to me that the decision in *Lakhani and Others v Mahmud* [2017] EWHC 1713 (Ch) provides a useful framework. At paragraph 18 the court said this:

> 'An appeal is a review not a re-hearing and that this court should not interfere with the case management decision of this kind. If the court has applied all the correct principles and has taken into account matters which should be taken into account and left out of account matters which were irrelevant unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge'.

It continues,

> 'It goes without saying that as with all evaluations, multifactorial evaluations of degree which feed into case management decisions are particularly hard to disturb'.

At paragraph 19 of *Lakhani* the court said this:

> 'Secondly, the observations of Lewis LJ in the *Mannion v Ginty* [2012] EWCA Civ 1667 as cited by the Master of the Rolls in *Clearway Drainage Systems Limited v Miles Smith Limited* [2016] EWCA Civ 1258, as to the importance of appellate courts upholding robust fair case management decisions should be borne in mind. Equally important however the observations of Green J in *Joshi & Welch Limited v Tay Foods* [2015] EWHC 3905 "Robustness is good but sometimes needs tempering", and the undesirability of permitting parties to use rules as a tripwire to create injustice'.

At paragraph 20:

> 'Appellant Tribunal is entitled to assume that even if the lower court has not specifically mentioned an item of evidence, it has taken it into account. As the Supreme Court said in *Henderson v Foxworth Investments* [2014] UKSC 41, "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration"'.

18. I adopt those observations, particularly in relation to this case where they have some resonance. I have to bear in mind that this was a District Judge who took the case after four o'clock in the afternoon and at the end of a busy PCOL list. Thus the time and luxury afforded to me was simply not available to the Deputy District Judge on the day in question. It follows therefore that an appeal is not a re-hearing and that the judge at first instance has a generous ambit of discretion, as is demonstrated by the well-known authority of *G v G* [2012] EWHC 167 where it was stated that:

> > 'It would not be useful to enquire whether different shades of meaning were intended to be conveyed by words such as 'blatant error' used by the President in the present case, or clearly wrong, plainly wrong or simply wrong used by other judges in other cases.

All these various expressions are used in order to emphasise the point that the appellate court should only interfere where they consider that a judge at first instance has is not merely preferred an imperfect solution, which is different from an alternatively perfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible.

19. Lastly I take into account the observations *in Staechelin v ACLBDD Holdings Limited* [2019] EWCA Civ 817, recently decided by the Court of Appeal where at paragraph 29, the court said this:

> 'If I may repeat something I have said before in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5: "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:
>
> (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents, including transcripts of evidence.

(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."'

The court went on:

'Thus, it is a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong'. Well what is plainly wrong mean? The Supreme Court explained in *Henderson v Foxworth Investments* the following:

'Given that an extra division correctly identified that an appellate court can interfere where it is satisfied that the trial Judge has gone plainly wrong, and considering that the criteria were met in the present case, there must be some value in considering the meaning of that phrase, but there is a risk that it may be misunderstood. The adverb plainly does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the judge. It does not matter whatever degree of certainty the appellate court considers that it would have reached. What matters is whether the decision under appeal is one that no reasonable Judge could have reached. Thus it is the case that an appellate court is bound with unless there is compelling reason to the contrary to assume that the trial Judge has taken the whole of the evidence into consideration. '.

That forms the legal framework for the appeal.

20. At the outset of the hearing Mr Vanhegan produced a second witness statement from the defendant dated 9 December 2019 and a tenancy deposit form from the Tenancy Deposit Scheme. No formal application was made before me to admit those items. Had such an application been made I would have considered it in light of the recent decision of *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, particularly at paragraph 26 onwards where the appellate court sets out a spectrum of factors to be taken into account in deciding whether to admit new evidence before the appellate court. I confess I would have had concerns that this evidence relied upon by Mr Vanhegan was evidence of fact going to the heart of the decision below. While I cannot form a concluded view, it is certainly open to doubt that I would have permitted reliance upon that additional evidence. In the circumstances as the application was not made and I have not had to rule upon it and I dismiss from my mind all the information contained in the second witness statement and the Tenancy Deposit Scheme.

21. Against that background then I turn to the grounds of appeal and it is convenient for me to start out of order, dealing with ground two first. This asserts that the s.8 notice was defective because it is a demand and, as such, had to conform to the requirements of s.47 Landlord and Tenant Act 1987. This, it seems to me, is based on a legal analysis and is not influenced by the other grounds which relate to the conduct of the trial and as such it stands alone from the remainder of those grounds.

22. As I have indicated Mr Vanhegan has argued that the Section 8 notice served in accordance with the Housing Act is, in truth, a demand for rent and thus it must comply with Section 47

of the Landlord and Tenant Act. Section 47 of the Landlord and Tenant Act provides as follows:

47 Landlord's name and address to be contained in demands for rent etc.

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1), then (subject to subsection (3)) any part of the amount demanded which consists of a service charge or an administration charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

(3) ……

(4) In this section "demand" means a demand for rent or other sums payable to the landlord under the terms of the tenancy.

It is useful to contrast that wording with the section that immediately follows it under the Landlord and Tenant Act 1987, namely Section 48, which provides:

48 Notification by landlord of address for service of notices.

(1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.

(2) Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

(3) …..

23. Against that statutory background, I consider the Section 8 notice in this particular case. Provision is made at paragraph six in the Section 8 notice for the name and address of the

landlord to be included in the notice. This has simply been struck through. Below the space for provision of the notice the following words appear:

> 'To be signed and dated by the landlord or licensor or the landlord's or licensor's agent, someone acting for the landlord or licensor. If there are joint landlords, each landlord or the agent must sign unless one signs on behalf of the rest with their agreement'.

Now immediately after that passage the document is signed by Philip Ross Solicitors and it is dated 23 April 2019. Provision is made within the signature box for an address for the solicitors and that address is provided in this document. It has been argued, and is not controversial, that for the purposes of Section 47 the address of an agent cannot be provided. Mr Vanhegan relied upon the decision of *Beitov Properties v Martin* [2012] UKUT 133 and that was not in contest. Thus Mr Vanhegan argued that this is a demand. In doing so he relied upon the decision in *Torridge District Council v Jones* [1985] 18 HLR 107, and to the extract that is found in his skeleton argument at paragraph 34:

> 'This is a warning shot across the bows of the tenant and the object of it is to warn him that unless he repairs what is stated as the ground upon which the possession is to be sought, he is going to be liable to court proceedings. It seems to me as plain as a pikestaff that the object of the notice is to bring to the tenant's notice the defect of which the complaint is made to enable him to make a proper restitution before proceedings commence and to deal with that. It seems to me that it is plain that this subsection does requires specification sufficient to tell the tenant what he has to do to put matters right before the proceedings are commenced'.

Mr Vanhegan in his skeleton continued:

> 'In other words where rent arrears are relied upon the notice must tell the tenant how much they had to pay to avoid proceedings being commenced. This is clearly a demand for rent'.

He also relied upon the wording of the statement of Rates Act 1919 at Section Two which provides as follows:

> 'The expressions "demand for rent" and "receipt for rent" shall include rent book, rent card and any document used for the notification or collection of rent due for the acknowledgement of rent of the same'.

Thus Mr Vanhegan emphasised that any document used for notification of rent due is a demand for the purposes of the Rates Act 1919.

24. He made the point that Section 47 is mandatory and because the Section 8 notice is a demand, the Section 8 notice is defective. Because this was a ground 8 claim Mr. Vanhagen submitted that it was not open to the Deputy District Judge to dispense with Section 8 notice. In those circumstances she was plainly wrong to come to the decision that she had.

25. In support of these arguments Mr Vanhegan has referred me to another decision emanating from this court. Namely the decision of His Honour Judge Saunders in *C Y Properties Management Limited v Tawakalyu Enitan Babilola*. In particular, he has relied upon paragraph 38 of that decision where the learned Judge says:

> ‘I accept Mr Brown’s submission in paragraph 14 of his further submissions that the purpose of the notice seeking possession has been set out correctly by Oliver LJ in *Torridge District Council v Jones* which highlighted the need for the notice to tell the tenant what they have to do to put matters right, in this case pay rent. I agree that this should be regarded as a demand for rent’.

That carries through to the ratio in the *C Y* decision at paragraph 46,

> ‘I therefore consider the Deputy District Judge made an error of law and/or that there were a procedural irregularity by not considering the validity of the Section 8 notice for the reasons set out above’.

In support of the suggestion that I ought to follow this authority Mr Vanhegan has also referred me to the decision of the Supreme Court in *Willers v Joyce (No. 2)* [2016] UKSC 44 and in particular at paragraph 9 of that decision where Lord Neuberger stated as follows:

> ‘So far as the High Court is concerned, puisne judges are not technically bound by the decisions of their peers, but they should generally follow a decision of the Court of coordinate jurisdiction unless there is a powerful reason for not doing so. I would have thought the Circuit Judges should adopt much the same approach to decisions of Circuit Judges’.

Therefore, in Mr Vanhegan’s submission, I ought not to depart from the *C Y* decision unless there are powerful reasons, and of course he indicated that there are no such reasons.

26. Mr Zaiwalla on behalf of the respondent landlord submitted to me that the Section 8 notice is not a demand for rent. He referred me to the wording of Section 8 which provides as follows:

> **8 Notice of proceedings for possession.**
>
> (1) The court shall not entertain proceedings for possession of a dwelling-house let on an assured tenancy unless—
>
> (a) the landlord or, in the case of joint landlords, at least one of them has served on the tenant a notice in accordance with this section and the proceedings are begun within the time limits stated in the notice in accordance with subsections (3) to (4B) below; or
>
> (b) the court considers it just and equitable to dispense with the requirement of such a notice.
>
> (2) The court shall not make an order for possession on any of the grounds in Schedule 2 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the court.
>
> (3) A notice under this section is one in the prescribed form informing the tenant that—

(a) the landlord intends to begin proceedings for possession of the dwelling-house on one or more of the grounds specified in the notice; and

(b) those proceedings will not begin earlier than a date specified in the notice in accordance with subsections (3A) to (4B) below; and

(c) those proceedings will not begin later than twelve months from the date of service of the notice.

He made the point that the Section 8 notice is a prescribed form by virtue of the Assured Tenancies and Agricultural Occupancies Forms England Regulations 2016. Looking at the notice Mr Zaiwalla has argued that it is not a demand. It is a notice informing the tenant that the proceedings may be brought against him. Mr Zaiwalla pointed out that the notice does not contain the word demand, nor any passage akin to the wording required for demand. Mr Zaiwalla went on to argue that if Mr Vanhegan was correct in typifying a Section 8 notice as a demand, then it has something of a chameleon quality to it. He specifically relied upon ground 11 in schedule two, namely whether or not rent is in arrears on the date when the proceedings for possession have begun, the tenant has persistently delayed payment of rent which has become lawfully due. Thus he submitted that the landlord could serve a Section 8 notice where there were, in fact no rent arrears but where rent was the issue and thus while the notice was rent based, it would not be a demand. He pointed out that similarly, some of the grounds at schedule two are of course not rent based, for example, ground 12. Thus Mr. Vanhagen's approach would mean that the notice was a demand in some cases and not in other.

27. Mr. Zaiwalla argued that many, indeed most landlords faced with a tenant who has breached the agreement to the extent required by ground 8 would not want the rent paid but would want to be clear of the tenant and have the property restored to them. Thus on Mr Vanhegan's approach, it was argued by Mr Zaiwalla, that the landlord would be forced into a position of making a demand for the very thing that he did not wish to have. A landlord who has lost faith in the tenant does not want the rent paid; in fact what he wants is the opposite of a demand, his property back.

28. Mr Zaiwalla, amplifying his arguments in relation to the chameleon quality, pointed out that of course a Section 8 notice remains current for a year. Therefore if a tenant paid off the arrears before proceedings were issued, the landlord could wait for the arrears to accrue and use the same notice. In those circumstances if the notice were a demand, it would become a demand for arrears of rent which were not due at the time that it was actually served. Accordingly Mr Zaiwalla has argued that this is plainly not a demand, and to that extent a Section 8 notice is self-contained and does not need to comply with Section 47.

29. At paragraph 23(a) of his skeleton argument Mr Zaiwalla argued that in any event the standard form of Section 8 notice directs that the landlord, or their agent, provide the name and address. He, of course, pointed out that this is inconsistent with the decision *Beitov Properties* and another reason why it is plain that a Section 8 notice is not a demand for the purposes of Section 47. Thus Mr Zaiwalla argued that it is wrong in principle that the notice becomes opaque in the way that he described.

30. I turn then to consider how the Deputy District Judge dealt with the matter. It is plain from looking at the transcript of the proceedings that the point was raised before her on page nine

where Mr Smith said this:

> 'Could I raise another point because I think you may be more receptive to it and it may make things easier?'
>
> The Deputy District Judge: 'What? I am not adjourning it. So if it is anything to do with an adjournment'.
>
> Mr Smith: 'No, no, no. It is to do with the Section 8 Notice madam. My colleague, my learned friend showed it to me before. It does not have the name of the landlord or his address on it. Now Section 47 of the Landlord and Tenant Act 1987, I think it is, requires any demand for rent must have the name of the landlord and his address. The case of *Beitov Properties*, which is an Upper Tribunal case, confirmed that the landlord's agent or representative will not do. It has to be an actual landlord. Madam it was found by His Honour Judge Saunders recently in Central London that the Section 8 notice is a demand for rent'.

He went on to argue that this ought to indicate that the Section 8 notice was defective because it omitted the address of the landlord. The Deputy District Judge interrupted Mr Smith and said this:

> 'Where does it say that there? Say on this form, which is a standard court form. Hang on, it says six name and address of landlord to be signed and dated by the landlord or licensor or the landlord or licensor's agent or somebody acting on behalf of the landlord. If there are joint landlords each landlord or the agent must sign unless one side is on behalf of the agreement. So there is a signature that a solicitor has signed so why can the solicitor not act as an agent, that is what happened'.

31. Therefore it is plain that the Deputy District Judge lighted upon the words immediately below paragraph six on the form, construing those words as permitting the details of an agent to be included in the form. It would be right to say that Mr Smith pressed the point and the Deputy District Judge went on to say this:

> 'Look it says here to be signed and dated by the landlord or the licensor or the landlord's or licensor's agent to be signed and dated by the licensor's agent. That is a solicitor'.
>
> Mr Smith: -'Madam with great respect, it was considered by His Honour Judge Saunders…'.
>
> The Deputy District Judge: -'Well you have not got me an authority. It is only a County Court judgment. I am not bound by it'.
>
> Mr Smith: - 'I accept that Madam but he obviously did consider authority'.
>
> Deputy District Judge: -'Well I am considering something else and that is in my judgement number six says that the landlord's agent can sign and date a document on behalf of the landlord and a solicitor is clearly an agent of the landlord, so'…
>
> Mr Smith interrupted her, -'In my submission that would be that the contents of the notice are not an authority itself'.

The transcript then goes off to consider the deposit issue.

What is plain is that the Deputy District Judge considered that an agent is permitted to sign the Section 8 notice. Mr Smith sought to argue that the Section 8 notice was defective because of the Section 47 point and that it was not sufficient for the landlord to use an agent to sign. He cited *Beitov* in support, though it seems that he did not have the authority in court to produce to the Deputy District Judge. He then moved on to the decision of *C Y Properties*. The issue was not addressed in the judgment but it is possible to obtain the reasoning from the interchange to which I have just referred.

32. I have, therefore, to ask myself whether the Deputy District Judge got the issue wrong and fell into error. Of course the first matter I have to consider is whether I am sufficiently bound by the decision in *C Y Properties* so as to depart from it or to refuse to depart from it.

33. I accept Mr Vanhegen's point that there must be powerful reasons before this court departs from a decision of another Circuit Judge. That is plainly in the interests of parties and advisers so that there is a consistency of approach. That confers a degree of predictability, it then enhances the advice that professionals can give in relation to decisions of the court. It is in nobody's interests that there be two conflicting authorities, especially when they emanate, as this would, from the same court. It is plainly not enough for a judge to simply say, 'I disagree with the decision of one of my fellow Judges and feel free to depart from it'. I have to ask myself whether there are powerful reasons.

34. I consider that there are powerful reasons. Plainly this is a matter of some importance. It has arisen twice at appellant level in this court in one year and was used by a duty solicitor in this particular case. I consider that the decision in *C Y Properties* provides little guidance to the parties. Indeed, I go further. It is not clear what was argued before His Honour Judge Saunders in that case, or how controversial the issue was. I have noted from the transcript of his decision that it seems that the matters started life as a non-controversial issue. At paragraph 17 of the judgment he said this;

> 'It is common ground between the parties that given the wording in Section 47(4) a notice under the Housing Act 1988 Section 8, which relies on the ground of rent is a demand for the purposes of Section 47'.

Thus the point starts life as a non-controversial issue.

35. Later, as I have indicated, at paragraph 38, he referred to the fact that further submissions have been filed and he accepted that *Torridge* suggests that a Section 8 notice is a demand for rent. There is no indication whatsoever that in fact there was argument before His Honour Judge Saunders in that respect. I also note that in a subsequent decision at paragraph eight Judge Saunders said this,

> 'It is common ground that the wording of Section 47(4) a notice under the Housing Act Section 8 which relies on the grounds of rent is a demand for the purposes of Section 47'.

Therefore, if the issue became controversial it seems that that matter may have resolved itself without a decision. Those, as far as I can ascertain, are the only references to Section 47 in the *C Y Properties* case.

36. In terms of guidance and explanation, there is little to assist practitioners on a matter which is plainly cropping up before Judges on occasion. It seems to me also that the case before me has been fully argued to an extent that it plainly was not so argued in front of His Honour Judge Saunders and indeed, it is not clear to me what matters were placed before His Honour Judge Saunders. Bearing in mind the extracts which I have referred to, it seems almost inevitable that this matter has been much more fully argued before me than it was before Judge Saunders. Accordingly, I approach the case on the basis that the *C Y Properties* decision is persuasive but not binding upon me.

37. I now turn to consider the form and purpose of the Section 8 notice and whether it can be properly described as a demand. The notice is giving the tenant information that landlord intends to go to court to seek possession. It then gives the tenant precise information on the legal grounds which are said to support the application to the court. This includes the terminology that is found at Schedule Two to the Housing Act of 1988, thus the tenant knows the legal basis for the claim against him or her. The notice then goes on to provide case specific information setting out the facts which are said to support the legal definition. If it is a rent-based case, then this will be information about arrears and, as in this case, a running account of those arrears. It gives helpful information to the tenant on the courts powers and where the tenant may obtain support. It gives further information about timescale and there is then the provision for the landlord information and the signature.

38. Can an agent sign? I have considered the issue raised by Mr Zaiwalla, namely that an agent can provide an address and to that extent the notice is divergent from Section 47. Mr Vanhegan has argued that this is a misinterpretation of the notice. He pointed out that at paragraph six there is plainly provision for the name and address of the landlord. The words in italics afterwards relate not to the provision of the name and address of the landlord, but to the signature on the notice, where of course an agent is permitted to sign. He has referred me to the words in italics and to the use of the word signed through out that document. It is also the case that, as I have indicated, there is provision for the agents address to be placed on the form, thus there are two aspects of the form that require an address to be placed upon it.

39. I note also that there is no provision for the landlord's details to appear elsewhere in the Section 8 notice. The provision that the landlord information may be vital, here of course the appellant's case was that the claimant was not the landlord and so the tenant needs to know which landlord is said to be serving the notice so that they can identify, as Miss Prempeh had to, whether or not it was the landlord that she thought related to her tenancy agreement. Bearing in mind that there is a separate provision for producing agent's address it seems to me that it would be otiose to have clause six if all that was required was a signature and an address underneath the signature box. I therefore hold that the completion of paragraph six is an important element of the correctly completed Section 8 notices and that the agent's details are not sufficient. That decision, of course, produces conformity with the approach taken in the *Beitov Properties* decision.

40. That decision does not, of course, answer the question as to whether or not this is a demand. I accept Mr Zaiwalla's approach that there is no element of demand in the notice. There is

no element of requiring rectification of a breach by the tenant on the face of the notice. The focus of the notice is to tell the tenant that the case is going to court. However, it seems to me that *Torridge* takes the matter further and suggests that the purpose of the notices is to clarify to the tenant their default to enable them to make proper restitution and I accept that that is the case. That is not demanding restitution, it is putting the tenant in the position where they know what they can do to mitigate their breach and improve their situation.

41. I consider that there are two reasons for holding that the Section 8 notice is not a demand. First, I cannot accept Mr Vanhegan's approach, which is to say that the notice is designed to have the results that the tenant will either put right the default and challenge the factual basis, which of course is true. However that, it seems to me, muddles the reason for the notice and the intention of the notice on the one hand, and the effect of the notice on the other hand. By a demand the landlord is requiring the tenant to take steps. However in this particular case, as Mr Zaiwalla points out the landlord may not want the tenant to take the steps. The landlord may not want payment of rent because he wants the property back. Thus the purpose of the notice is to tell the tenant that the case is going to court. It is certainly not to demand of the tenant that the arrears are paid because that is not what the landlord wants. It seems to me some support is provided for Mr Zaiwalla's approach by recognition that this is a statutory based procedure, as he pointed out. The landlord is required to serve the notice even when they do not want the rent back. Thus the effect that the rent may be paid does not convert a notice that a party wishes to go to court into a demand for rectification. I accept, of course, that the decision in *Torridge* is right in identifying that this is putting the tenant in a position where they know what they are alleged to have done wrong and giving them an opportunity to rectify it. However that is not authority for the proposition that that is what the landlord wants and that is what the landlord is demanding.

42. It seems to me secondly, that because the notice is the product of statutory procedure, it would produce a number of anomalies and traps if it were to be a demand.

43. First, as Mr Zaiwalla observed, if it were a demand under ground 11, it would have something of a chameleon quality. If there were no arrears at the time that the notice was served, it would be a valid rent based notice that would not and could not demand rent because there would be no arrears at service of the notice. Thus it cannot be a demand. Similarly, if a tenant paid off the arrears between the posting of the notice and the service, the notice would in fact change its quality during the time that it was in transit. I am concerned that if Mr Vanhegan is right in saying that this is demand, it would be a demand for the purposes of ground 8 and 10, possibly a demand for ground 11, depending on the factual circumstances and not a demand at all if grounds other than eight, 10 and 11 were relied upon. That, it seems to me, confers a degree of uncertainty upon the notice in question.

44. I also accept Mr Zaiwalla's argument that if the notice is a demand then that would have a confusing effect upon the tenant. Consider the position where the notice is served and the arrears are paid off. Further arrears then accrue and the landlord, within a period of 12 months, relies upon their first notice and issues proceedings. It would, if Mr Vanhegan is right, have become a demand for rent that was not due at the time of service but subsequently became due. It seems to me therefore that there is a clear distinction between a demand and between a Section 8 notice.

45. I have considered Mr Vanhegen's argument based on the Statement of Rates Act. Again, it seems to me that this muddles the intention of the notice with the effect the notice. The

Statement of Rates Act relates to a document used for notification or collection of rates due. The effect of the Section 8 notice, it seems to me, is to notify the tenant that the matter is going to court as opposed to demanding the rent. I therefore consider that the intention of the notice is an important distinction between Section 8 and the Statement of Rates Act.

46. If I am wrong in all the foregoing then I am still left with something of a quizzical expression, because I am not satisfied that Section 47 operates upon rent as opposed to service charge. At the outset of the appeal I asked Mr Vanhegan to explain to me how a Section 47 could relate to rent and I return to the wording of the section that I referred to earlier. Nowhere in subsection two, which deals with the penalty for failing to include the landlord's address, is there any suggestion that it relates to rent. It refers, in fact, to service charge or administration charge. I contrast that wording with very similar wording that appears in the subsequent section, (section 48) which of course relates to rent, service charge or administration charge.

47. There is no doubt that Section 47 does say it relates to demands for rent. That appears in the headnote and it also appears in subsection four. It certainly requires that a demand contain information about the landlord's address. I accept the decision in *Beitov Properties* means that an agent's details are not sufficient, but what is the sanction? The sanction is that service charge or administration charge is not due. Mr Vanhegan conceded that any reference to rent in subsection two is absent and argued that one had to infer rent into the provision and this was permissible given the headnote and the provisions of subsection four. I have some difficulties with this. Firstly, that is plainly not the wording of the provision. Secondly, Mr Vanhegan's argument loses force when one considers the next section, Section 48, which plainly does address rent. It seems to me therefore that the draftsman did have rent in mind and certainly included it in Section 48 and not Section 47, which would indicate that it was a conscious decision as opposed to an oversight.

48. Some of my unease about the wording of Section 47 and the inclusion of the word rent in it abates slightly with the recognition that many tenancy agreements and leases contain provisions that service charge is to be recovered as additional rent, and so seen in that light, the reference to rent and service charge makes some sense. However even if Section 8 were a demand, it would not affect the rent that was due because there is not sanction in s.47 which relates to rent. Thus I hold that the Section 8 notice is not a demand and although the Deputy District Judge did not address this issue in depth, it would have made no difference to the outcome of the hearing before her.

49. I wish to add one caveat to this finding. The above argument and the decision relates to the issues that were before the Deputy District Judge concerning Section 47. It should not be interpreted as holding that the Section 8 notice in this case is a valid notice. I have already recorded that paragraph six of the notice was not completed. I noted also that the provision of the name of the actual landlord may have been critical in this particular case. I have construed the words in italics under paragraph six as relating to signature and not the provision of the landlord's address. I thus leave open the question of whether this particular Section 8 notice is a valid notice.

50. I turn then to consider grounds one, four, five, and six, and it is convenient, given the concession of Mr Vanhegan, to deal with these matters together. Ground one is that the issue of the tenancy agreement gave rise to an arguable defence, that the Deputy District Judge should not have proceeded to deal with the matter as she did and she should have adjourned with directions, that it was wrong to deal with this without formal pleadings, written evidence

or hearing the oral evidence of the appellant. Ground 4 is that Deputy District Judge's Decision was irrational. Ground five that the Deputy District Judge had pre-determined the issue, although I think the word 'prematurely' might be a better tipification of what happened, given the transcript. Ground six that the Deputy District Judge denied the appellant a fair hearing.

51. Mr Vanhegan submitted to me that the Deputy District Judge was wrong to decide to deal with the matter that afternoon. Relying on the decision of *Forcelux Limited v Binnie* [2009 EWCA Civ 854, he suggested that it was exceptional not to adjourn. At page 19 of his skeleton he set out the following extract from *Forcelux* at paragraph 32:

> 32. 'The judge, in practice, the District Judge has given expressly two options under Rule 55.8.1. He may either decide the claim or he may give case management directions. Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions are to be given, including allocations to track. The aim of such directions must be to bring back final disbursement of the claim, unless allocated by agreement to the small claims track, case allocation would either be to the fast track or the multi-track. In either case, case management directions are to be made with a view to the eventual trial. The words used in both Rules 28.2 and 29.2'.
>
> 33. 'If the first option for deciding the claimant is adopted it can only be because the judge considers that he is able to decide the case on the evidence before him. In an exceptional case it may be that he could then and there conduct a hearing on the merits. Thus suppose his case has collapsed and he has half a day to spare. Suppose both sides are present or represented and suppose both sides have all their evidence available and agree the matter should proceed. In these circumstances the hearing could properly be called to trial. The judge would, in effect, be exercising his case management powers in bringing forward the trial to the date of the hearing'.
>
> 34. 'However that would be an exceptional sort of case. The more usual sort of case in a busy possession of this with perhaps 5 or 10 minutes allowed for each case will be an undefended case where the defendant, if he attends at all, has nothing to say. The judge will look at the evidence from the claimant, probably all the evidence there is and make a determination and a decision and will satisfy himself that the case is made out on the claimant's evidence and satisfy himself that any necessary statutory requirements are fulfilled. He will make a possession order, suspended or not as the case may be'.

52. Drawing from that extract Mr Vanhegan argued that there was a genuine dispute on grounds of substance, further that the identity of the correct tenancy agreement went to the very heart of the case and, because it went to the identity of the claimant, provided a complete defence to the claim. He has submitted that a proper resolution of that matter required disclosure, evidence and a trial. He made the point that of course there was no witness statement before the Deputy District Judge and that she simply heard the evidence of the agent to the effect that the 2016 agreement was the operative one. He, of course, made the point that she heard no evidence from the appellant, even though the appellant was obviously anxious to put her version before the court. Essentially Mr Vanhegan argued that the Deputy District Judge had a preformed notion, which was exhibited by a number of premature attempts to give judgment, that she was not prepared to deal with the matter in a way that permitted the

appellant to advance her case effectively or at all.

53. On behalf of the respondent Mr Zaiwalla has argued that the judge was entitled to approach the matter in the way that she did, that case management decisions afford the court, at first instance, a considerable latitude and, indeed that is recognised by paragraph 33 of *Forcelux* to which I have referred. He has suggested that it is not necessary to put matters going to the credit of a witness to each witness and that not every failure to put a point is terminal to a finding of fact. In his skeleton argument at paragraph 12 he has referred to a lengthy extract from *Chen v Ng* which indeed provides that in certain circumstances, not every point has to be put to a witness during the trial. He has gone on to submit that whilst he has to concede that the appellant did not give evidence at this trial, that is more technical than real. That in fact some of the evidence given by Mr Lakhany was taken from where he was sitting and that is clear from the transcript, but equally it is plain that Miss Prempeh was able to address the court from where she was sitting, and thus to this extent both parties were treated in the same way.

54. He directed me to pages six and seven of the bundle and that there is considerable interchange between the appellant, described as female speaker, and the judge. He made the point that in the exchange Miss Prempeh explained that she had disputed the 2016 tenancy agreement and that that was the operative one. She explained that her co-tenant had left. She explained that she contested the arrears. Thus Mr Zaiwalla he has argued that there was a relatively informal approach to taking evidence but Miss Prempeh was able to get her points across. Further Mr Zaiwalla argued that the judge had the relevant information before her and could come to the decision, which she did.

55. In approaching or considering the Deputy District Judge's approach, it is worth recollecting the circumstances in which this decision was made. It was a PCOL list. As the court observed in *Forcelux* each matter is limited in its listing time. PCOL lists 10 cases per hour so each case is allotted six minutes. I have noted already that the case was called on and after four o'clock. It must have been the last or nearly the last case that the Judge was dealing with. She had a case against tenant where the arrears were over £11,000, which is nearly 8 months due. It seems to me that there was no dispute that this rent had not been paid.

56. The defences that were advanced went to the issues of the identity of the landlord, the accuracy of the notice and the deposit. In those circumstances I consider most Judges would have been astute to ensure that a recalcitrant tenant was not afforded additional rent-free time in the property, that the Judge was facing a somewhat egregious situation and that one of the defences relating to the deposit, did not in fact go to the possession claim at all. It would be obvious to any Judge trying in this matter that it was imperative for the court to deal with the matter as swiftly as possible, bearing in mind the high level of the arrears. Judges are aware that landlords rely upon rent in order to pay mortgage, or as part of their income and their investments and to meet their living expenses. Judges also take into account that the parties have entered into a contractual obligation to pay the rent.

57. Certainly the Deputy District Judge would have realised that time was limited but it seems that she was prepared to sit late to finish her list and to dispose of the matter. Of concern to me is the statement at page two of the transcript that she had no papers, not an uncommon situation in the County Court, but it seems to me that she made her decision to proceed with the matter without any background information. That point really explains much of what happened thereafter. This is not a case where she was presented at the outset with the various

issues. It is one which unfolded, and I may say perhaps unravelled, before her as the case went on. Initially she took the usual information, looking at the tenancy agreement, the Section 8 notice, hearing about the arrears of rent and the monthly rent of £1,500. At that stage she was doing no more than any District Judge would do in any court on this sort of hearing.

58. She was then told that the identity of the tenancy was in dispute. She looked at the agreement and noticed that there were differences, that the landlord was different, that the 2016 agreement had two tenants, whereas the 2017 did not, and that the deposit went from £1,500 to £2,000. She was told that the appellant agreed that there was a £1,500 deposit thus there was a tension between that concession and the £2,000 deposit contained in the 2017 agreement. She seems to have formed the view that the signatures on the two documents were different.

59. There are indications that from the very outset the Deputy District Judge was sceptical. When she was told of the increased deposit on the 2017 agreement she commented, 'Well fancy that'. She described the 2017 agreement as a 'fit-up'. During the course of the agent's evidence in chief she denied that the issue of the property agreement was a triable issue when Mr Smith sought to suggest that it was. The Deputy District Judge clearly and correctly identified that she should hear evidence and evidence from the managing agent and heard that evidence from the managing agent who alleged the 2017 document as a forgery.

60. It is plain to me that Mr Smith pressed the judge to permit his client to be cross-examined on the number of occasions. The following interchange occurred between Mr Smith and the Deputy District Judge. He said:

> "My client will need to be cross-examined if she is deemed to have forged this document',
>
> and the Deputy District Judge agrees.
>
> Mr Smith says, 'She has not forged it'.

At that stage no opportunity was given to the appellant to give evidence. Later, the matter is taken up again and the following exchange occurs.

> The Deputy District Judge: 'You are here as duty solicitor to advise. You can do what you can. I understand the points you make, but there is no point in (a) labouring bad points and I have told you this before, or (b) going outside what is really proper for you to be doing'.
>
> Mr Smith: 'Madam my submission is that it'...
>
> Deputy District Judge: 'I have heard your submissions'.
>
> Mr Smith: 'You are finding it that it is a forgery effectively'...
>
> Deputy District Judge: 'It is. Yours is. I am going to find that'.
>
> Mr. Smith: 'My client has not been cross-examined on that',

Deputy District Judge: 'All right you have now cross-examined so I am going to continue with the judgment and I have been presented'.

Mr Smith: 'Madam should my client not be cross-examined?'

Counsel for the claimant, 'I do not want to cross examine your client'.

Mr Smith: 'Could I'...

Deputy District Judge, 'No', and she proceeded to give judgment.

There we have a situation where Mr Smith is valiantly seeking to place before the Deputy District Judge his client's evidence. It is, I think, unfortunate that he describes it as cross-examination because, in reality of course, there were no pleadings before the court, no witness evidence before the court and he would have wished to have called some evidence in chief. Therefore, whilst Mr Smith was able to cross-examine the agent, no other evidence was heard, and that is really what occurred during the course of the trial.

61. I turn then to consider two separate, and to my mind, distinct issues. The first whether the case management decision to continue with the hearing was correct and secondly the conduct of what became the trial.

62. Considering then the decision to hold the trial, I have already referred to the circumstances of the case and it is, in my judgement, important that it was in the PCOL list, that it was late in the day so the Deputy District Judge had time to deal with the matter as she wished, that she had no papers and so the initial decision to deal with the matter was not based on any pre-reading, that she was aware that this had the hallmarks of an egregious breach of the tenancy agreement and that it required swift resolution.

63. Her initial decision to proceed was made in the ignorance of any of the matters relied upon by the defendant and it seems cannot be faulted at all. It was the typical decision that any District Judge would have made dealing with a matter in a short and uncontested list. It seems to me that much of the problem arises because she did not have any papers and thus she started the case conventionally simply calling the evidence that would be required in order to make an uncontroversial possession order. At this stage I do not consider that she was really making a decision to continue with a trial.

64. The question then becomes whether there came a time when the Deputy District Judge should have reconsidered the decision to press ahead the trial. *Forcelux* it seems to me provide some indications of important matters which a judge ought to bear in mind in deciding to go through with the trial. Those are set out at paragraph 33. The judge has to consider that he or she has the material upon which they can properly make the decision. The judge has to have sufficient time to spare. Both parties should be present and represented and both parties should have their evidence available. That list of course is indicative and not definitive. It is perfectly understandable, in my judgement, that the Deputy District Judge would want to deal with the case. But she would have in mind the above matters and balance them against the overriding objective and the need to deal with matters expeditiously and at proportionate cost, (Rule 3.17). It is plain that a judge with those matters in mind should keep under review the initial decision to proceed.

65. I have asked myself whether there came a time when there was reason to question her decision to proceed. That moment, in my judgement, arose when she was told that there was an issue over the correct defendant by the duty solicitor. At that point she would know a number of relevant factors. That there was an issue, that if the appellant was correct then she had a full defence, that there was a serious allegation of forgery which went to the heart of the case and that there was potentially further evidence available in the form of the witness to the second tenancy agreement. Further she would have appreciated that Miss Prempeh was advised by the duty solicitor, who by the very nature of his job would have had limited time to take instructions, that there was no written defence and that the parties did not know the full extent of the case. There were no witness statements and thus neither party had a full opportunity of understanding the other's case.

66. At that point there must have been questions about whether a fair trial could have been achieved and it would only be in the clearest of cases that a trial on the day could achieve justice. In my judgement the transcript displays that the Deputy District Judge did not give herself opportunity to pause or reflect on whether to go to directions for trial or whether to continue the hearing on a contentious issue. She was certainly being urged by Mr Smith to stop and consider whether there was a triable issue. Her immediate response was to deny that this was the case. As I have indicated, Mr Smith returned to the point asking for a fair trial and for his client to be cross-examined. It seems to me that at that point the judge had closed her eyes to the issues that I have just identified and in doing so she fell into error. This is the point at which the case management decision to continue the trial was being made. In my judgment that decision was beyond the generous ambit of discretion and a simple, robust decision.

67. If I am wrong in saying that the judge fell into error when Mr Smith raised the issue of the defendant then I consider that Deputy District Judge should have further reflected when additional issues came to light. These included the deposit argument raised by Mr Smith when he felt that the Deputy District Judge was not receptive to his first argument. Further, the Section 47 point. While I have found against Mr Vanhegan, in this respect, the fact that the Deputy District Judge would simply not engage with the points that Mr Smith was persistently trying to put to her, supported by authority, is indicative of a judge who has closed her eyes to the possibility of adjourning, and I have to say, to potential defences. Once these matters were raised it should have been clear to the judge that a fair trial required detailed consideration of the Section 8 notice. It required consideration of the Circuit Judge authority directly on the point, consideration of further authority not in court, largely because Mr Smith was the duty solicitor and not prepared for a trial. A fair trial required clarification of the issues by pleading and witness statements, consideration as to whether there was a further witness, consideration of the Section 213, deposit, situation, including the documents arising which were not before the court.

68. All those points went to the heart of both the possession and the money judgment. The judge's decision to proceed was in the face of the above and, as I have indicated, beyond the generous ambit of a robust case management decision. I would therefore find that she fell into error in deciding to continue with the trial.

69. I turn then to consider the second aspect that I have identified namely the trial itself. It is plain to me that the Deputy District Judge began to deliver a judgment before Mr Smith had had an opportunity to cross-examine Mr Lakhany. It is plain also that Mr Smith was being placed under pressure in terms of his cross-examination. Whilst the Deputy District Judge

indicated that he should cross-examine, she expressed that he should do so quickly, which is perhaps indicative of the pressure of time and that that was beginning to affect the fairness of the trial. I consider therefore that undue pressure was being put on Mr Smith and it is not an isolated example. At page nine of the transcript, he is told to, 'Get on with it then', and I do have concerns that the time and the limited time available was increasing the pressure upon the judge, and the judge increasing the pressure on Mr Smith. I consider that the failure to permit the appellant to give evidence was a serious procedural error. I do not accept that the disjointed conversation between the judge and the appellant was an equivalent of giving evidence. Mr Smith was present in court. He was entitled to call evidence as he considered appropriate. The appellant is not a lawyer and would not necessarily be able to identify relevant evidence and the order in which it should appear. The effect of the exchange was that the appellant was essentially involved in a dialogue with the judge and Mr Smith, who ought to be the centre of the appellant's case was effectively side-lined by that. I consider that there are significant differences between what occurred in this case and what occurred in *Chen* and I note that even *Chen* identified that ultimately it must turn on the question of whether the trial viewed overall was fair, bearing in mind the relevant issue was decided on the basis that the witness was disbelieved on grounds that were not put to him. In this particular case the issue went right to the heart of the case. This was not a situation where the appellant had had an opportunity to put her case or to be cross-examined on that case. She should, in my judgement, have been given permission to give evidence. It seems possible to me that the Deputy District Judge was misled by Mr Smith referring it to cross-examination, when as I have already indicated, it would be examination in chief, followed by cross examination.

70. I have considerable sympathy with the Deputy District Judge; she was faced with a difficult situation. She had no papers and it was a case which gradually unfolded. It was a stark case where there were significant arrears and a natural desire on her behalf to try and resolve the matter as quickly as possible. This is not so much a case of the Deputy District Judge making a wrong decision but more a case of failing to make a right decision at a time when she should have drawn breath.

71. I factor in my concerns about the deposit issue and the way in which she dealt with the Section 8 notice, to which I have referred. Those matters were not given adequate consideration and do not feature in the decision. The stark fact is that there was an issue of substance in this case. There were two potential further witnesses. There was simply not sufficient information available to permit either party to put their case effectively. Whilst this may have been a commendable attempt to bring resolution, it was not the one which was possible given the dictates of justice. It would have been better for the Deputy District Judge to have adjourned to an early date with directions.

72. For those reasons I have concluded that the defects in the trial mean that the decision is unsustainable and cannot be allowed to stand and did not represent a fair trial.

73. For all of those collective reasons I therefore allow the appeal on grounds one, five, and six and do not have to consider ground four.

74. I deal with ground three relatively quickly. It was agreed that a deposit of £1,500 was paid. The issue is whether the information was given in accordance with Section 213. The defendant said it was not and potentially she would have had an award of £6,000. Mr Vanhegan has argued that this went to the core of the money judgment. He agrees that it

does not affect the decision on possession and that it would not be enough to disturb the statutory criteria. However the point he makes is a simple one. This was not a counterclaim; it was setoff. As such it goes to the quantum of the money that was owed and that it is not a claim that exists independently of the claim. Mr Zaiwalla has argued that it is capable of existing as an independent claim and that it was open to the Deputy District Judge to permit this to operate as an independent claim.

75. The way in which the Deputy District Judge dealt with the matter is found at page 12 of the transcript where she says this,

> 'I am not, in this case, going to set anything off because it is a different sort of… It can be done separately. If your client wants to claim separately, that is fine. I am satisfied. Upon the claimant hearing evidence from the managing agent and being satisfied on the evidence provided, possession 14 days. That does not stop your client. Money judgment for £11,173.54. If I had heard any valid points here', and
>
> Mr Smith interrupts, 'Sorry Madam just before',
>
> Miss Magdelaney said, 'I also asked for a daily rate'.
>
> The Deputy District Judge responds, 'I am giving a judgment, if you want to appeal what I am saying, do it later, this is my judgment'.
>
> Therefore effectively Mr Smith is cut off at that point.

76. In my judgement the answer to this issue lies in the fact that this was a setoff. It is important to understand that a setoff of this nature may in fact affect the possession order made. For example where an award under Section 24, or alternatively an award for housing disrepair reduces the arrears of rent below that required by Section 8, thus it may not be possible to decide any issue until the setoff is decided. It is wrong, in principle, that the setoff should be decided in separate proceedings. This was an issue that went to the very heart of the amount of the money judgment and the proper course, it seems to me, would be to make a possession order if that was possible and to adjourn off the money claim with directions for a proper quantification of the money claim could have been arrived at. The flaw in this respect, it seems to me, goes to the heart of the money judgment and again that judgment must fall.

77. Therefore for those collective reasons I allow the appeal.

End of Judgment

Approved
Chris Lethem

JUDICIARY OF ENGLAND AND WALES

His Honour Judge Lethem, Circuit Judge, **County Court at Central London**
Thomas More Building | Royal Courts of Justice | Strand | London WC2A 2LL

19th February 2020

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Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This transcript has been approved by the judge.