Baygreen Properties Limited v Gil

Court of Appeal

Ward and Clarke L.JJ. and Sir Martin Nourse

July 5, 2002

[2002] EWCA Civ 1340; [2003] H.L.R. 12[1]

Introduction

H1 By section 7(1) of the Housing Act 1988 (*Encyclopedia*, para.1–2382), a court may not make an order for possession against an assured tenant except on one of the grounds set out in Schedule 2 to the Act.

H2 It has been held in the context of the analogous provisions of the Rent Acts that the court cannot make an order for possession of premises subject to a regulated tenancy by consent: *R. v Bloomsbury CC Ex p. Blackburne* (1984) 14 H.L.R. 56, QBD; *R. v Newcastle-upon-Tyne CC Ex p. Thompson* (1988) 20 H.L.R. 430, QBD. This is consistent with the general proposition that parties to a tenancy cannot "contract out" of the provisions of the Rent Acts: *Barton v Fincham* [1921] 2 K.B. 291, CA; *R.M.R. Housing Society Ltd v Combs* [1951] 1 K.B. 486, CA.

H3 The courts have applied the same principles to possession orders made against secure tenants under the Housing Act 1985: *Wandsworth LBC v Fadayomi* (1987) 19 H.L.R. 512, CA; *Bruce v Worthing BC* (1993) 26 H.L.R. 223, CA; *Hounslow LBC v McBride* (1999) 31 H.L.R. 143, CA.

H4 This does not prevent the court making a possession order without hearing evidence if the tenant concedes that the landlord has a good claim: *Bruce*. In this situation, the term "consent order" should be avoided: *Thorne v Smith* [1947] 1 K.B. 307, CA. In such circumstances, the tenant should admit the facts which constitute the ground for possession and concede that it is reasonable to make an order. The admissions should be express, and should be recited in the order: *Syed Hussain v A.M. Abdullah Sahib & Co* [1986] 1 W.L.R. 1392, PC. It may be possible, however, to imply from the circumstances that an order expressed to be by way of consent included implied admissions which justified making the order: *Thorne*; *Bruce*.

H5 Part I of Schedule 2 contains mandatory grounds for possession (grounds 1–8); Part II contains discretionary grounds (grounds 9–17). Where an order for possession is sought on discretionary grounds, the court must also be satisfied that it is reasonable to make an order for possession: section 7(4) of the 1988 Act.

H6 Three grounds are concerned with rent arrears. Grounds 10 (rent lawfully due from the tenant) and 11 (persistent delay in paying rent) are both discretionary. Ground 8 affords a mandatory ground for possession where both at the date of the

[1] Paragraph numbers are assigned by the court.

service of the notice of possession proceedings (see section 8) and at the date of the hearing that a specified amount of rent is unpaid which, in the case of a weekly or fortnightly tenancy, is at least eight weeks' rent.

Facts

H7 On November 22, 1996, the defendant was granted an assured tenancy of a flat by the claimant's predecessor in title. In April 2000, the claimant purchased the property. In September 2000, the claimant commenced possession proceedings on the ground of rent arrears, relying on grounds 8 and 10 of Schedule 2 to the Housing Act 1988.

H8 In January 2001, the defendant filed a defence and counterclaim which she subsequently amended on two occasions. In her re-amended defence and counterclaim, she admitted that she had not paid the rent but claimed that the rent was not lawfully due because she was entitled to set off against the arrears her counterclaim for damages for breach of repairing covenant and breach of covenant for quiet enjoyment.

H9 On October 4, 2001, the trial of the action was to be heard. At court, the parties agreed to an order in the following terms:

> "Upon hearing Counsel for the Claimant and the Defendant
>
> And by consent IT IS ORDERED:
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> 1. The Claimant do recover possession of [the flat];
> 2. All further proceedings on the claim and counterclaim herein be stayed on the terms set out in the schedule to this order and agreed between the parties.
> 3. There be liberty to apply as to the implementation of the terms in the schedule.
> 4. There be no order for costs, save that there be a detailed assessment of the Defendant's publicly funded costs."

H10 Under the terms of the schedule to the order, the claimant agreed, among other things, to pay the defendant the sum of £2,500 when she vacated the flat.

H11 Counsel for the claimant handed the order to the judge and explained its terms. He said that the claimant relied on ground 8 of Schedule 2 to the Housing Act 1988. He invited the judge, in the light of the defendant's consent to the terms of the order, to rely on the pleadings as evidence sufficient to justify the order being made. The judge then asked the defendant to confirm her consent to the order. She did so and the judge approved the order and signed it.

H12 The defendant appealed on the ground that the judge did not have jurisdiction to make the possession order because she had not admitted the claimant's case.

Held (allowing the appeal):

H13 (1) It depends on the circumstances of the case whether it can be implied that a possession order expressed to be by way of consent included implied admissions which justified the making of an order; for the court to have jurisdiction, the admissions must be clearly shown [49], [65], [70];

H14 (2) If the true explanation for the consent order is that there was a compromise between the parties, it may well be that it will not be possible to imply the relevant admission; in all cases, either the order should spell out the admission, or the court

should ask the tenant what admissions are being made so that there is no room for doubt [49], [65], [70];

H15 (3) In the present case, the effect of the order was that the claimant was to pay the defendant £2,500; in those circumstances, it was impossible to conclude that the defendant had admitted that more than eight weeks' rent was lawfully due to the claimant [60], [66], [68].

H16 (4) In making possession orders, the court should bear in mind the following guidance:

(a) possession orders must make clear what the tenant's rights are in relation to the particular order;
(b) since the ground on which the order is made is an essential element affecting the tenant's rights, it should appear on the face of the order;
(c) if an order for possession is to be granted on one of the mandatory grounds, that should appear on the face of the order; it is not open to a judge subsequently to determine whether the order was made on that ground or on some other ground;
(d) where two grounds are available, especially where the landlord relies on both mandatory and discretionary grounds, it would be wrong in principle for the court not to decide at the hearing of the possession action which of the grounds are being relied on and which is satisfied;
(e) where an appellate court is uncertain as to the ground or grounds on which the judge granted the possession order, it is entitled to proceed on the basis that the order was made on discretionary grounds and it may therefore revisit the exercise of the discretion of the judge [39], [65], [70];

H17 (5) Although it is desirable that the order should record whether the ground for possession is made out and, if the ground is discretionary, whether it is reasonable to make the order, a possession order will not be bad for want of jurisdiction if it fails to do so, provided that the matters were considered by the court when the order was made [40], [65], [70].

H18 *D. Lightman* for the appellant, instructed by Messrs Balsara & Co.

P. J. White for the respondent, instructed by Messrs Rosetta Offonry & Co.

1 WARD L.J.: I will ask Clarke L.J. to give the first judgment.

CLARKE L.J.:

Introduction

2 This is an appeal, brought with the permission of Keene L.J., against an order made by H.H. Judge Cotran in the Shoreditch County Court on October 4, 2001. By paragraph 1 of that order the judge made an order for possession of 85a Burdett Road, London E3, in favour of the respondent, Baygreen Properties Ltd ("Baygreen"). There were other terms of the order to which I shall return in a moment. The order was made by consent.

3 Keene L.J. granted permission to appeal on one ground only, namely whether the court had jurisdiction to make the order. He refused permission on all the other grounds.

4 The appellant, Mrs Chinwe Cordelia Gil (whom I will call "the tenant"), seeks permission to rely upon some further evidence not before the judge which it is said supports her appeal.

The tenancy

5 On November 22, 1996 the tenant entered into an assured shorthold tenancy of one room at 85a Burdett Road with a lady called Mrs L. Michael. The rent was £25 a week and the period of the tenancy was two years. At some stage thereafter Refined Properties Ltd ("Refined") acquired the freehold, although possibly not directly from Mrs Michael but via a Mr Morias. Also at some time a company called Target Corporation Ltd ("Target") assumed responsibility for the management of the flat on behalf of Refined. It is common ground that when the period of two years expired in November 1998 the tenant continued as the assured tenant of Refined but on a periodic weekly basis. After Baygreen acquired the freehold in April 2000, the tenant became its tenant on the same basis.

The disputes

6 There has been a long history of dispute between the tenant and her various landlords to which I should briefly refer, although most of it has little, if any, direct relevance to the issues for determination on this appeal.

7 In January 1998, according to the tenant, the landlords and/or their agents damaged and vandalised the door to her bedroom and her personal belongings were stolen. In April 1999, again according to the tenant, the property was vandalised by Refined and/or Target, who damaged the main door of the property and changed the locks both to the property and to the tenant's bedroom.

8 On April 14, 1999 the tenant issued proceedings against Refined and Target. In those proceedings she sought an injunction and damages for, among other things, breach of the tenancy agreement, vandalism and harassment.

9 In July 1999 Refined brought possession proceedings against the tenant in the High Court, although they were subsequently discontinued. In August 1999 Target was dissolved.

10 In September 1999 the tenant reported problems relating to the property. According to her, Tower Hamlets Council served an abatement notice on the landlords for its repair, but that was not complied with. Also the fire brigade, having inspected the property, served prohibition notices on the tenants or some of them. Nothing was done, she said, to comply with the terms of any of those notices. She said that she herself installed a new heater or boiler in May 2000. In October 1999 Baygreen was incorporated. In December a second abatement notice was served on Refined and, indeed, on Target.

11 On April 11, 2000 the property was transferred by Refined to Baygreen for a price said to be £86,500. It is the tenant's case that the property was transferred by Refined to Baygreen in order to defeat her claim and that no sum was paid for it by Baygreen. It is further her case that there is a close relationship between Refined and Baygreen and those behind them, and she has commenced proceedings in the Chancery Division seeking to set aside the transfer under section 423 of the Insolvency Act 1986. We are not, however, concerned with those events. I therefore return to 2000.

12 During 2000 the tenant's action continued against Refined and Target. On July 14, 2000 Baygreen served a notice under section 8 of the Housing Act 1988 ("the 1988

Act"), as amended by section 151 of the Housing Act 1996, seeking possession of the flat on grounds 8 and 10 in Schedule 2 to the 1988 Act as follows:

> "Ground 8: Both at the date of the service of the notice under section 8 of this Act relating to the proceedings for possession and the date of the hearing the tenant owed at least eight weeks' rent.
> Ground 10: Some rent lawfully due from the tenant was unpaid when possession proceedings were begun and was in arrears at the date the Notice was served by the landlord of intent to bring possession proceedings.
>
> Particulars of the Grounds
> Ground 8: The amount owed by the tenant in rent as at 13th July 2000 is £980.00 which is in excess of eight weeks' rent (the weekly rent is £70.00).
> Ground 10: There has been no payment in the shortfall of rent received from the tenant since 13th April 2000."

13 The particulars of claim in this action were dated September 12, 2000. In them Baygreen claimed possession and rent at £70 a week since April 13, 2000 on the ground that the tenant had paid no rent since Baygreen acquired the freehold. The grounds on which possession was sought were those stated in the notice, namely grounds 8 and 10 in Schedule 2 to the 1988 Act.

14 On January 30, 2001 the tenant served a defence and counterclaim which she had drafted herself in which she set out much of the history to which I have already referred. Subsequently, that defence and counterclaim was replaced by an amended defence and counterclaim dated February 9, 1991 which was settled by solicitors. In that document the counterclaim was much more limited. The special damages were limited to £5,230.20, which either wholly, or very largely, related to events after Baygreen became owner.

15 Baygreen served a reply and defence to the counterclaim dated September 26, 2001, but on September 30, 2001 a yet further amended defence and counterclaim was served, this time again settled by the tenant herself, which was said to be in substitution of any previous defence and counterclaim. In that document the tenant denied that Baygreen was entitled to possession. She admitted the tenancy agreement, but asserted that the rent payable was £25 a week. She denied that any proper notice had been given to her.

16 The defence referred almost in passing to her claim against Refined and Target. In paragraph 6 it was admitted that the total sum "due" at September 7, 2000 was £500, and at September 7, 2001 was some £1,700. However, it is plain that the tenant was not admitting that the rent was "lawfully due" because in paragraph 8 she asserted a right to set off her counterclaim in which she alleged that there was a breach of a number of the landlord's duties, including a breach of the implied term of quiet enjoyment and of the landlord's covenants implied by section 11 of the Landlord and Tenant Act 1985, namely to keep the property in repair and its installations in repair and proper working order. She alleged breaches of those duties. All, or almost all, of the breaches were said to have occurred after Baygreen became the owner. Most of her pleaded particulars of special damage also related to that period. There were five items in all totalling £5,780, although the first two, which amounted to £1,855, appear to relate to the period before Baygreen's time. The others were replacement of the boiler and work necessary to satisfy the notices served in the previous year but said to have been carried out in the relevant period. The tenant also claimed general damages and, indeed, aggravated and exemplary damages arising out of previous events.

17 As stated earlier, the order of H.H. Judge Cotran was made on October 4, 2001. In the meantime, on May 19, 2001 District Judge Mitchell gave judgment in default against Refined with damages to be assessed; and on August 5, 2001 District Judge Wright made a similar order against Target.

18 Subsequently, after the order of Judge Cotran, damages were assessed in the absence of Refined or, indeed, Target in sums which I am bound to say are probably very much greater than they would have been if the defendants in those actions had been represented. On November 20, 2001 District Judge Manners assessed damages against Target for about £22,000 and against Refined for over £44,000. They were apportioned as to nearly £52,000 special damages, £5,000 distress, pain and the like, and £10,000 exemplary damages. Thereafter, Refined ceased trading on November 30, 2001 and was put into liquidation on December 18, 2001.

The order

19 It is common ground that the order of October 4 was made by consent. It was in these terms:

> "Upon hearing Counsel for the Claimant and the Defendant
>
> And by consent IT IS ORDERED:
>
> 1. The Claimant do recover possession of the premises at 85A Burdett Road, London E3 on 26th November 2001.
> 2. All further proceedings on the claim and counterclaim herein be stayed on the terms set out in the schedule to this order and agreed between the parties.
> 3. There be liberty to apply as to the implementation of the terms in the schedule.
> 4. There be no order for costs, save that there be a detailed assessment of the Defendant's publicly funded costs."

20 The schedule was in these terms:

> "1. The Defendant agrees to provide to the claimant's solicitor, by 4pm on 5th October 2001, a key to the front door at 85 Burdett Road, E3.
> 2. The Claimant agrees to pay to the Defendant, upon her vacating of 85 Burdett Road, on or before 26th November 2001, the sum of £2,500.
> 3. The Claimant agrees that it will not, by itself, its servants or agents, enter or attempt to enter the top floor front room rented by the Defendant, nor interfere with her belongings therein, prior to her vacating the premises on 26th November 2001.
> 4. The Claimant agrees that it will not, by itself, its servants or agents, leave the front door of the property, 85 Burdett Road, unsecured at any time when the property is unattended."

21 Both the order and the schedule, which were in manuscript, were signed by counsel for each party, by the tenant in person, by a representative of Baygreen and, indeed, by the judge. It thus appears clear, and is not in dispute, that the order in fact made by the judge was in those terms. The typed order subsequently drawn up by the Shoreditch County Court does not include a reference to consent in relation to the order for possession. It appears that that was an error. I shall return in a moment to the scope of the order and what occurred before the judge.

22 Mr Lightman submits on behalf of the tenant that the judge had no jurisdiction to make the order for possession. His submissions depend upon the provisions of the 1988 Act. The relevant legal principles are not, I think, significantly in dispute. Section 7 of the 1988 Act provides, so far as relevant, as follows:

> "(1) The court shall not make an order for possession of a dwelling-house let on an assured tenancy except on one or more of the grounds set out in Schedule 2 to this Act;
>
> [. . .]
>
> (3) If the court is satisfied that any of the grounds in Part I of Schedule 2 to this Act is established, then . . . the court shall make an order for possession.
>
> (4) If the court is satisfied that any of the grounds in Part II of Schedule 2 to this Act is established, then . . . the court may make an order for possession if it considers it reasonable to do so."

23 Ground 8 in Part I of Schedule 2 applies where both (1) at the date of the service of the notice under section 8 of the 1988 Act and (2) at the date of the hearing, at least eight weeks' rent is unpaid which is lawfully due from the tenant. Ground 10 in Part II of Schedule 2 applies where some rent lawfully due from the tenant is unpaid on the date on which the proceedings for possession are begun and was in arrears at the date of service of the notice under section 8 relating to those proceedings.

24 Section 8 provides that a notice in prescribed form must be served by a landlord seeking possession of property let on an assured tenancy.

25 Where there has been a breach by a landlord of repairing obligations, any damages awarded for the breach may be set off against the arrears of rent by way of equitable set-off: see, for example, *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] Q.B. 137 and *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 W.L.R. 501.

26 It is, I think, common ground that where a tenant asserts an arguable breach of such obligations the court must investigate them and the rent "lawfully due" from the tenant is the rent after deduction of the amount of any equitable set-off. In any event I would so hold because the basis of an equitable set-off is that it impeaches the title to the legal demand.

27 It follows from section 7 of the 1988 Act that the jurisdiction of the court to make an order for possession is limited. If the court is not satisfied that the relevant grounds are established, it has no jurisdiction to make the order. The court is under a duty to investigate whether the grounds are in fact established independently of whether either party puts that question in issue.

28 Mr Lightman relies upon the statement of Denning J. in *Smith v Poulter* [1947] K.B. 340, where he said, at 341, that where statute limits the jurisdiction of the court,

> " . . . it is the duty of the court to see whether the conditions required by the Acts are satisfied, even though no such point is pleaded or raised by the tenant . . . "

29 He further relies upon the statement of Tucker L.J. in *Selwyn v Hamill* [1948] 1 All E.R. 70 at 72, as follows:

> "The fact that this point was not taken in the court below, does not preclude the tenant from relying on it in this court . . . In cases under the Rent Acts it is the duty of the court to be satisfied that all the requirements of the Acts have been fulfilled before an order for possession is made. If they have not been satisfied, the court has no jurisdiction to make the order . . . Therefore, we are bound to take notice of this point . . . "

30 See also *Barton v Fincham* [1921] 2 K.B. 291, especially *per* Bankes L.J. at 297.

31 Accordingly, where the court lacks jurisdiction, jurisdiction cannot be conferred merely by the consent of the parties: *Barton v Fincham*; see also, for example, *R. v Newcastle-Upon-Tyne CC Ex p. Thompson* (1988) 20 H.L.R. 430, where McNeill J. described, at the end of his judgment at 438,

> " . . . the well known principle that parties under this statute cannot confer by consent jurisdiction on the court which the court does not otherwise have."

32 It is common ground that the same general principles apply to the Housing Act as have been applied to the Rent Acts.

33 While the tenant's agreement to an order for possession may indicate an admission that there are grounds for it and that the making of an order is reasonable, it may simply constitute a submission to the giving up of her possession, or it may merely be evidence of a compromise. So, for example, in the *Ex p. Thompson* case Mr McNeill J. concluded, at 437, that:

> " . . . the material before the court points to no conclusion other than that this was a compromise made without admissions on either side."

34 In those circumstances he held that there were no relevant admissions and that the court had no jurisdiction to make an order for possession merely on the basis of consent.

35 The key question is whether there is an appropriate admission of the relevant factors. Atkin L.J. put the distinction neatly in *Barton v Fincham* at 299 as follows:

> " . . . but apart from such an admission the Court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act."

36 The relevant factors depend, of course, upon the particular statutory provisions. In the present context there is an important difference between grounds 8 and 10. Ground 8 is in Part I of Schedule 2. As already indicated, Schedule 2 sets out "Grounds for possession of dwelling-houses let on assured tenancies". Part I contains "Grounds on which court must order possession". By contrast, ground 10 is in Part II, which sets out "Grounds on which court *may* order possession" (my emphasis). In the former case the court's power to postpone the giving up of possession is much restricted by section 89(1) of the Housing Act 1980, which provides:

> "(1) Where a court makes an order for the possession of any land in a case not falling within the exceptions mentioned in subsection (2) below, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order."

37 Thus the absolute maximum period of postponement in a ground 8 case is six weeks. There is no such restriction in a ground 10 case because, by section 89(2):

> "The restrictions in subsection (1) above do not apply if—
> [. . .]
> (c) the court had power to make the order only if it considered it reasonable to make it . . . "

38 I note in passing that in the instant case the effect of the order of October 4 was to postpone the giving up of possession for seven weeks and four days, which might lead to the inference that this was treated as a ground 10 case.

39 Mr Lightman submits that it is the duty of the judge in every case to consider on which ground he is making the order. For my part I would entirely accept that submission and would endorse the principles set out by Pumfrey J. in *Diab v Countryside Rentals plc*, unreported, July 10, 2001, namely:

(1) Where possession orders are made it must be remembered that they involve eviction and accordingly it must be quite clear what the tenant's rights are in relation to the particular order.
(2) Since the ground upon which the order is made is an essential element affecting the tenant's rights, it should appear upon the face of the order.
(3) If an order for possession is to be an order for possession on one of the mandatory grounds, that fact should appear on the face of the order. It is not open to a judge at a later time to determine whether the order was made on that ground or on some other ground.
(4) Where two grounds are available, especially where the landlord relies on both mandatory and discretionary grounds, it would be wrong in principle for the court not to decide at the hearing of the possession application which of the grounds, or whether both, are being relied upon for the order for possession, and which is satisfied.
(5) Where the appellate court is uncertain as to the ground or grounds on which the judge granted the order for possession, it is entitled to proceed on the basis that the order was made on discretionary grounds and so to revisit the exercise of the discretion by the judge.

40 I agree with those conclusions, subject only to this. While, in a discretionary case, an order will be bad for want of jurisdiction if the judge does not consider whether it was reasonable when he made the order (see *Hounslow LBC v McBride* (1999) 31 H.L.R. 143) and while I agree that it is desirable that the ground should appear on the face of the order, I do not think that the order would be bad for want of jurisdiction if it did not, provided that it was shown that the matter was in fact considered by the court when the order was made.

41 As I have indicated earlier, the jurisdiction of the court to order possession under the 1988 Act is parallel to that conferred by the Rent Acts, which also contain a requirement of reasonableness. When considering reasonableness, it is the duty of the judge to take into account all relevant circumstances as they exist at the date of the hearing in a "broad, common-sense way as a man of the world . . . giving . . . weight as he thinks fit to the various factors in the situation": see *London Borough of Haringey v Stewart & Stewart* (1991) 23 H.L.R. 557, *per* Waite J. at 562 and *per* Mustill L.J. at 563, following the statement of Lord Greene M.R. in *Cumming v Danson* [1942] 2 All E.R. 653 at 655.

42 Thus in a ground 10 case the judge must expressly consider the reasonableness of the order. In a ground 8 case the judge must expressly consider whether the rent was lawfully due for more than eight weeks.

43 As stated above, where the landlord relies upon the consent of the tenant, he must persuade the court that the tenant made the relevant admission; here, that she admitted that the rent was lawfully due to the landlord for more than eight weeks.

44 Mr White submits, on behalf of the landlord, that the judge considered that question; that it was open to him to hold that the tenant made that admission and that she did indeed make that admission. He also submits that the court should not shrink from holding that a tenant impliedly agreed that all relevant admissions were made. He relies upon part of the judgment of Simon Brown L.J. in *Hounslow L.B.C. v McBride* at 153 and upon parts of the judgment of Staughton L.J. in *Bruce v Worthing B.C.* (1993) 26 H.L.R. 223.

45 Both those statements must, however, be seen in their context. Simon Brown L.J. said this at 153:

> "Whilst acknowledging that the case falls close to the border line, it seems to me in the end that there really never was here any admission of any sort, implied or otherwise, with regard to the reasonableness of making an order on the nuisance and annoyance ground. Both parties agree that that, rather than the (already diminishing) rent arrears ground, was the important one, and that if the order was made the respondent and her family would be at clear risk of later being dispossessed. In my judgment the reasonableness of an order on that ground really was something about which the district judge ought specifically to have sought assurance. The particulars of claim had been served as long ago as December 1993. Although some of the appellants' witness statements spoke of incidents after that time, there is no good reason to suppose that the district judge had read them. Still less can it be regarded as necessarily implicit in the fact that the respondent was prepared on advice to submit to the 'consent' order that she in fact admitted sufficient in the way of recent incidents of nuisance and annoyance to justify making the order.
>
> There was not in the present case, unlike the position in *Syed Hussain*, any recital in the order indicating that the respondent admitted the appellants' claim. Nor, of course, unlike the position in *Bruce v Worthing BC*, had the district judge already heard evidence and nor was the order made one which necessarily implied that the tenant had enjoyed no statutory protection in the first place. In the final analysis Mr Stephenson's argument appears to come down to this: that the very fact that a defendant on legal advice is prepared to submit to a possession order may of itself indicate and establish the reasonableness of making such an order. That argument I cannot accept. There may not be a great difference between a tenant by her legal representative on the one hand admitting the reasonableness of the order and on the other hand simply consenting to it: the admission may be thought to come close to a mere incantation. The existence of such a dividing line, however, is to my mind plain on the authorities even following this court's decision in *Bruce v Worthing BC*. The difficulty, of course, is in determining which side of the line any given case falls. Here on the nuisance and annoyance ground the respondent's solicitor said no more than that his client agreed to the order and recognised its effect. In those circumstances, in common with the judge below, I conclude that the district judge on this particular occasion slipped up. Ready though no doubt the court will be to imply all relevant admissions whenever 'consent' orders are placed before it, there really here was not the material upon which to do so."

46 In *Bruce v Worthing B.C.* Staughton L.J. said this, in the passage relied upon by Mr White, at 230:

> "I take the law now to be that there can, in a draft consent order, be found an implied admission of the facts which justify the judge in making it. Whether there is depends on the terms of the order construed in the light of the surrounding circumstances, including the issues in the case. For my part, I would not be at all reluctant to imply such an admission. I would certainly do

> so in this case. If a tenant has been persuaded by duress to agree to an order, he has other remedies. If, on the other hand, he has voluntarily agreed to it, perhaps with legal advice, consumer protection does not require us to ignore an implied admission if common sense suggests that there is one."

47 However, a little earlier in his judgment Staughton L.J. quoted the following passage from the judgment of Sir John Donaldson M.R. in *R. v Bloomsbury and Marylebone C.C. Ex p. Blackburne* [1985] 2 E.G.L.R. 157, which related to section 98(1) of the Rent Act 1987, at 158, where he said this:

> "The question which then arises is whether the learned county court judge could have been satisfied that the requirements of section 98(1) were met. There was no express admission to this effect. The appellants, however, submit that such an admission was implicit in the consent to judgment. Mr Bartlett, on their behalf, submits that this consent is explicable only on the basis that Mr Blackburne recognised that (a) he was unable to claim the protection of the 1977 Act because he had never been or had ceased to be a statutory tenant, or (b) although he was a statutory tenant, he fell within case 1 of Schedule 15 and it was reasonable to make an order for possession. I disagree. There is a third possibility, namely (c) Mr B, although a statutory tenant whose arrears in rent, if any, were distinguished by his counterclaim, nevertheless thought the sum offered by the landlords was so attractive that he should surrender his rights or at least thought that any doubt which he had upon the score should be resolved by a compromise involving his acceptance of a large lump sum. Inference (c) would not have entitled the learned judge to make the order."

48 Staughton L.J. added:

> "It is to be noticed that the consent order in that case provided for a substantial payment to the tenant, who was claiming damages for failure to maintain the premises in good repair. This may have been thought difficult to reconcile with an admission by the tenant through the consent order that he was not a statutory tenant. If that be right, one can understand why there was held to be no implied admission that the landlord was entitled to possession under the section. I do not regard that case as having decided that one can never imply such an admission from the terms of an order construed in the light of the issues in the case."

49 Those cases to my mind show that, as ever, all depends upon the circumstances. The crucial point is that, in order for the court to have jurisdiction in a case where there is a consent order, the relevant admission, whether express or implied, must be clearly shown. If the true explanation for the consent order may simply be that there was a compromise between the parties, it may well be that it will not be possible to imply the relevant admission. The moral of the story is perhaps that in all these cases it is desirable that the consent order should spell out in express terms the admission or, where for some reason that does not happen, the court should ask the tenant what admissions are being made, so that there is no room for confusion or doubt in the future.

50 The question for decision here is whether the tenant impliedly admitted that rent was lawfully due for more than eight weeks. Mr White submits both that that inference could properly be drawn by the judge and, on the balance of probabilities, that it was in fact drawn by the judge.

51 We have two accounts of what occurred on October 4. One is from the tenant and one, I am bound to say much clearer account, from Mr White himself, who has very helpfully set out in a letter dated March 14, 2002 his recollection of what occurred.

For my part I am entirely happy to treat that as accurate and I am much obliged to him for his assistance because, without it, it would have been very difficult to know what had happened.

52 The trial was due to begin on that day and was, I think, fixed to last for two days. The judge indicated at the outset that he had not read the trial bundle. Indeed, it is clear that when he came subsequently to make the order he had still not read the trial bundle, not surprisingly; nor had he heard any evidence; nor, indeed, did he deliver any judgment. At the outset the case was opened by Mr White, who drew the judge's attention to the defence and counterclaim. The tenant was represented by Mr Joseph of, I think, counsel. The judge expressed the view to counsel that if the tenant paid no rent at all she could expect a possession order to be made, saying that if she had other claims they could be looked at later. It is properly conceded by Mr White that that view was not correct because, if the tenant had a good counterclaim which amounted to a good equitable set-off, the tenant would have a good defence to the claim for rent. However that may be, in response, Mr Joseph reiterated that there was a counterclaim upon which he relied.

53 The Court then adjourned and there were a considerable number of discussions between the parties. Some account of the discussions is given in Mr White's letter, and it appears to me to be plain that there was much to-ing and fro-ing and that compromise was in the air. At one stage during the day the tenant herself left the building to go for a walk. She did, however, subsequently return and an agreement was reached which formed the basis of the written agreement and consent order which I have already read.

54 Mr White says in his letter that the form of the order was at his suggestion because he needed to found a possession order on ground 8 and did not therefore wish to have the money claim dismissed. He formed the view that a Tomlin order staying the claim would avoid that result. That was the subject, he says, of discussion and agreement. He asked Mr Joseph if the tenant was content for the possession order to be by consent, and he indicated that she was.

55 Mr White's account of what then happened before the judge was as follows:

> "His Honour then returned to Court. I handed up the drafts and explained the outline of the agreement. I said that the possession claim relied on Ground 8, and invited him, since the Defendant consented, and the money claim was in any case stayed, to rely on the statement of case, if necessary, as sufficient evidence. His Honour then asked Mrs Gil to stand up, and asked her whether she did consent to this Order being made. She said that she did. He then said that he approved the Order, and signed it. After obtaining copies from the Clerk we all left the building."

56 Mr White continued:

> "It will be apparent from this that there was no formal hearing, save to the extent that I started to outline the case, that then turning into a more general discussion. There was no judgment."

57 As I have indicated, Mr White submits that there was there sufficient material to enable the judge to infer that the tenant did indeed admit that at least eight weeks' rent was lawfully due. He further submits that the judge did in fact draw that inference.

58 I am unable to accept either of those submissions. It does not appear to me, on the basis of that material, that the judge was clearly told that the tenant had admitted that

at least eight weeks' rent was due. Moreover, I can see nothing in the account of the discussions which is available, either from Mr White or from the tenant herself, to suggest that this was other than a compromise for good or ill. It is not easy to know why the tenant should have wanted to compromise on the terms that she did, but to my mind this was a compromise (very much as McNeill J. held that there was a compromise in the case to which I referred earlier).

59 But even if that were wrong, it appears to me that the judge did not apply his mind to the key question, namely whether the tenant did admit that more than eight weeks' rent was lawfully due. He did not ask her whether she made that admission. He asked her, according to Mr White's account, which I accept as entirely accurate, whether she consented to the order being made, which, as the cases show, is by no means the same thing. Indeed, this case highlights the importance of the correct question being asked.

60 Moreover, I am far from persuaded that if she had been asked the correct question she would have said yes. Mr White himself, in the course of his submissions, said that it was speculative what answer she would have given. For my part, it seems to me to be most unlikely that she was agreeing to make that admission. After all, the effect of the order was that she was to be paid £2,500 by the landlord and was not to have to pay any rent, so that she was leaving the agreement with money in her pocket. In these circumstances it is far from clear to me that she was admitting that more than eight weeks' rent was lawfully due to the landlord, but at best it is purely speculative what she would have said if she had been asked the correct question.

61 There is no other indication that the judge gave any independent consideration to whether ground 8 was satisfied. As to ground 10, it was not suggested to the judge that the agreement had been made on a ground 10 basis; so that it follows that the judge gave no consideration to the question of reasonableness.

62 I can quite understand how in a busy county court, once an agreement has been made between a landlord and tenant, both represented by solicitors and counsel, it is tempting for the judge simply to accept the position, as he would in very many other classes of case. The authorities, however, show that this class of case, like the Rent Acts, is different and that if the correct questions are not asked then there is a serious risk of an order being made without jurisdiction. I regret to say that that is what, to my mind, happened in this case.

63 For those reasons I would allow the appeal and set aside the order for possession.

64 Finally, I would only add that in these circumstances it does not appear to me to be necessary for us to consider the application for permission to rely upon further evidence.

65 SIR MARTIN NOURSE: I agree.

66 In my view it is clear that the consent order of October 4, 2001 did not contain any express or implied admission by the tenant that at least eight weeks' rent (meaning rent lawfully due from the tenant) was unpaid. Mr White has appealed to the common-sense approach recommended by Staughton L.J. in *Bruce v Worthing BC* (1993) 26 H.L.R. 223, to which my Lord has referred. In my view the common sense of the present case is against the landlord and in favour of the tenant. It would indeed be strange if, in the absence of other indications, a compromise order under which the tenant received a sizable lump sum could be regarded as containing an implied admission by the tenant that at least eight weeks' rent, or indeed any rent, was unpaid.

67 For these reasons, as well as for those given by Clarke L.J., I too would allow the appeal and set aside the order for possession.

68 WARD L.J.: Where the result of the compromise was that money was being paid to the tenant and no arrears of rent were to be paid by her, both the landlord's money claim and her counterclaim being stayed, it seems to me to be impossible to conclude that the tenant's consent to the order for possession was an express or even an implied admission that rent was lawfully due from her. Looked at from her point of view, to be released from a liability to pay nearly £2,000 of rent which would have been owing at the date possession was to be given and to receive £2,500 in her hand on leaving what was apparently a dilapidated flat unfit for human habitation, in which she must have lived unhappily for a long time, may well have been a sufficient inducement to surrender her tenancy.

69 In those circumstances the judge is not likely testily to have suppressed counsel applying for the order, or submitting to it, by declaring:

> "Of course I am satisfied that more than eight weeks' rent is lawfully due for the purposes of ground 8; and even if I am wrong about that, I am equally satisfied that some rent is lawfully due and it is reasonable to make the order on ground 10."

Unless he was so satisfied, he had no jurisdiction to make the order he did.

70 As I listened to my Lords, it suddenly occurred to me that I recently received a CD-ROM from the Judicial Studies Board telling me what every judge needs to know about the Housing Acts and when and when not to make an order for possession. I confess to my shame that I have not listened to it. But lest it does not contain the guidance to judges which has been set out in the judgments of my Lords, with which I agree, I must remind myself to send a copy of my Lords' judgments to the Judicial Studies Board, so that judges do not unwittingly fall into the trap that Judge Cotran did on this occasion.

71 I would therefore allow the appeal, set the possession order aside and remit the matter back to the County Court.