

ENGLAND AND WALES / JUDGMENT

Forcelux Ltd v Binnie

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Neutral Citation Number: [2009] EWCA Civ 854 IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM NOTTINGHAM COUNTY COURT HER
HONOUR JUDGE HAMPTON 7LN1909 Before : LORD JUSTICE WARD LORD JUSTICE JACOB and
MR JUSTICE WARREN

- ----- Between : FORCELUX LIMITED
- and - MR MARTYN EWAN BINNIE
- -----
- ----- Case No: B5/2008/2917 Royal Courts of Justice Strand, London,
WC2A 2LL Date: 21/10/2009 Appellant Respondent Mr Richard Hayes (instructed by Messrs
Barnes & Taylor) for the Appellant Mr Mark Diggle (instructed by Messrs Langleys) for the
Respondent Hearing date: Tuesday 14th July 2009
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Judgment

Mr Justice Warren:

Introduction

1. On 11 September 2007, DJ Hudson, sitting in the Lincoln County Court, made an order for possession against the defendant (“Mr Binnie”). Mr Binnie, who had not attended court on 11 September 2007, applied on 25 February 2008 to set aside the order. On 23 July 2008, DJ Hudson made an order setting aside the order for possession and at the same time granted relief from forfeiture of the Lease (as defined below). The claimant (“Forcelux”) appealed, with the permission of the DJ, against the set-aside order. The appeal was heard by HH Judge Hampton who, on 8 December 2008, dismissed the appeal. Forcelux now appeals to this court against her decision, with the permission of Jacob LJ. Mr Richard Hayes appears for Forcelux. Mr Mark Diggle appears for Mr Binnie.

2. Reference in this judgment to a “Part” or “Rule” is to that Part or Rule in the CPR. The first issue is whether, on the facts of the present case, the hearing at which DJ Hudson made the possession order was a “trial” within the meaning of Rule 39.3 (“Failure to attend trial”). Depending on the answer to that issue, the second issue is whether the possession order should be set aside either under Rule 39.3 or under Rule 3.1(2)(m) as the case may be.

Background

3. Forcelux and Mr Binnie are respectively the successor in title as landlord and as tenant to the parties to a lease (“the Lease”) dated 22 December 1983 of a flat known as 30 Atwater Grove, Glebe Park, Lincoln, Lincolnshire, LN2 4SG. The Lease is a long lease at a ground rent with about 94 years left to run. Under the lease, the tenant is obliged to pay not only the ground rent but a contribution (not reserved as rent) to insurance, repair and maintenance costs of the building of which the flat forms part. The Lease contains a forfeiture provision in the case of non-payment or rent or charges.
4. Mr Binnie fell into arrears with payment of ground rent and charges. On 14 November 2006, a default judgment against him was obtained by Forcelux in the Southend County Court in the sum of £893.25 plus costs of £190. Included in that figure was £599.05 in respect of unpaid insurance premiums.
5. No payment was made by Mr Binnie following that judgment. Forcelux then served a notice on Mr Binnie under section 146 Law of Property Act 1925 and section 81 Housing Act 1996. The notice was dated 8 June 2007 and relied on non-payment of insurance premiums in the sum of £599.05 (which were included in the default judgment).
6. There was no response to the notice. On 25 July 2007, Forcelux commenced these proceedings for possession in the Lincoln County Court. By that time, Forcelux had received no payment from Mr Binnie for over 2 years and had heard nothing from him for 12 months. The Claim Form gave an address for Mr Binnie as required by Rule 6.6(2): it was the address of the flat.
7. This being a claim governed by Part 55, a hearing date was fixed, pursuant to Rule 55.5, for 11 September 2007. The Court attempted to serve the proceedings by post but the envelope was returned marked “Gone away”. This was because, for some time past, Mr Binnie had not been living in the flat and, according to evidence which he has given, he did not in fact pick up any documents relating to this case. He was in fact then living with his girlfriend in another flat in the same building.
8. The matter came before DJ Hudson on 11 September 2007. Mr Binnie did not attend – he had no knowledge of the proceedings at all.

9. The claim was supported by the evidence of Mr Eric Jakob, a director of Forcelux, contained in a witness statement dated 4 September 2007. It set out the history of arrears and the default judgment in the Southend County Court. It referred to the forfeiture provision in the lease, although it did not mention the section 146 Notice. However, that is all dealt with in the Particulars of Claim which are supported by a Statement of Truth given by Forcelux's solicitor.
10. In his witness statement, Mr Jakob explained that he had visited the flat on about 22 August 2007; he took photographs which showed that the flat had been boarded up and appeared to be unoccupied. Although this is not a matter which appears from Mr Jakob's witness statement, it seems that the flat was boarded up by the police on 7 March 2007 after it had been reported that the property was insecure. The witness statement at least confirms what appears in the Particulars of Claim – "... The Property is currently boarded up and appears unoccupied".
11. Counsel appeared on behalf of Forcelux at the hearing on 11 September 2007. DJ Hudson made a possession order on the basis of the material before him. The court then served the order on Mr Binnie by sending it to the flat. As before, the letter was returned marked "Gone away". It is slightly surprising to my mind that the Court should have decided to serve by post in this way when the evidence before it was that the flat was boarded up and unoccupied; however, nothing turns on that for the purposes of this appeal.
12. Mr Binnie first became aware that a possession order had been made on 22 October 2007 when his girlfriend saw two men who were attending at the flat to take possession on behalf of Forcelux. She contacted the Lincoln County Court on his behalf on 24 October 2007; the court sent the papers to Mr Binnie which he received on 29 October 2007. He consulted solicitors on that day.
13. It was only after 3 weeks (a delay for which no reason is given) that those solicitors wrote to Forcelux's solicitors seeking a copy of the Lease. It is not entirely clear when a copy was provided. On 10 December 2007, Mr Binnie or his solicitors sent a cheque to Forcelux's solicitors for the outstanding amount. There was no immediate response; a chasing letter was sent on 21 December 2007. The cheque was subsequently returned in early January 2008.
14. On 25 February 2008, Mr Binnie made an application in the Lincoln County Court (i) to set aside the possession order and (ii) to obtain relief from forfeiture. No reason for the delay from early January to issue of the application is given. That application came before DJ Hudson on 25 April 2008. According to the Judgment of HH Judge Hampton (who no doubt had the court file before her), DJ Hudson made a finding that the Claim Form and Particulars of Claim were deemed served pursuant to Rule 6.5 (the relevant provision at that time; the current Rules are somewhat different) and gave directions for a substantive hearing on 1 July 2008. HH Judge Hampton records that the hearing took place on that day although the order is dated 25 July 2008. There was no appeal from DJ Hudson's conclusion

about service and the point has not featured in any argument addressed to this Court. This is highly relevant because, had service not been effected in accordance with the CPR, the application to set aside the possession order would clearly not fall within CPR 39.3: *Nelson v Clearsprings (Management) Ltd* [2007] 1 WLR 962.

15. As appears from paragraph 1 above, DJ Hudson set aside the possession order and granted relief from forfeiture. He did so upon terms as to payment of outstanding monies. HH Judge Hampton dismissed Forcelux's appeal. The CPR
16. A number of provisions of the CPR are relevant to this appeal. The most important are Parts 39 and 55, and in particular Rules 39.3 and 55.5.
17. Part 39 sweeps up various provisions concerning hearings which are not dealt with elsewhere in the CPR. In Part 39, references to "a hearing" includes a reference to "the trial": Rule 39.1. There is no further definition, whether in Part 39 or elsewhere, of what a hearing is. It does not matter for present purposes because, on any view, the occasion on which DJ Hudson made the possession order was a hearing within Part 39 and, indeed, within Part 55.
18. Rule 39.3 is concerned with trials; "trial" is not a word which is defined for the purposes of the Rule. It must accordingly take its meaning from its context in Rule 39.3 and in the context of the role of Rule 39.3 in the CPR as a whole. Rule 39.3(1) makes provision for the court to "proceed with a trial in the absence of a party". But it also provides in Rule 39.3(3) for a non-attending party against whom judgment is given or an order is made to apply for the judgment or order to be set aside. However, the court may grant the application only if the applicant acted promptly when he found out that the court had "(a) exercised its power to.....enter judgment or make an order against him; (b) (c) had a good reason for not attending the trial; and has a reasonable prospect of success at trial."
19. Part 55 is a code dealing with possession claims. It was introduced into the CPR in 2001 by the Civil Procedure (Amendment) Rules 2001. The use of the Rules in Section 1 of Part 55 is mandatory in the case of a possession claim by a landlord or a claim seeking relief from forfeiture by a tenant: Rule 55.2(1) (subject to the exceptions set out in Rule 55.2(2)). The code is not exhaustive. Other provisions of the CPR clearly apply but subject to the provisions of Part 55 itself.
20. Such a claim must ordinarily be started in the county court for the district in which the land is situated: Rule 55.3(1). The claim form and the defence must be in the forms set out in the relevant PD. The particulars of claim must be served with the claim form: Rule 55.4.
21. When the court issues the claim form, it is to "fix a date for the hearing": Rule 55.5(1). In a case such as the present, the defendant must be served with the claim form and particulars of claim not less than 21 days before the hearing date: Rule 55.5(3). An acknowledgment of service is not required and Part 10 does not apply: Rule 55.7(1). But Rule 15.4 (time for defence) does apply. A defendant who does not file a defence within that time limit may nonetheless "take part in any hearing": Rule 55.7(3). Default judgment under Part 12 is not

available: Rule 55.7(4). Summary judgment under Part 24 is available unless the proceedings are for possession of residential premises against a tenant, a mortgagor or a person holding over after the end of his tenancy: Rule 24.3. Summary judgment would not therefore have been available against Mr Binnie.

22. Rule 55.8 is headed “The hearing”. I need to set out paragraphs (1) to (4): “(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may
- (a) decide the claim; or
 - (b) give case management directions.
- (2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)
- (b) will include the allocation of the claim to a track or directions to enable it to be allocated.
- (3) Except where –
- (a) the claim is allocated to the fast track or the multi-track; or
 - (b) the court orders otherwise, any fact that needs to be proved by the evidence of witnesses at a hearing referred to in paragraph (1) may be proved by evidence in writing. (Rule 32.2(1) sets out the general rule about evidence. Rule 32.2(2) provides that rule 32.2(1) is subject to any provision to the contrary)
- (4) Subject to paragraph (5), all witness statements must be filed and served at least 2 days before the hearing.”
23. Rule 55.8(3) carries the reference to Rule 32.2. Since the presence of this reference is of some importance, I set it out at this stage for completeness: “32.2 proved by the evidence of witnesses is to be proved –
- (1) The general rule is that any fact which needs to be
 - (a) at trial, by their oral evidence given in public; and
 - (b) at any other hearing, by their evidence in writing.
- (2) This is subject –
- (a) to any provision to the contrary contained in these Rules or elsewhere; or
 - (b) to any order of the court”
24. Along with Rule 32.2 goes Rule 32.6 which is concerned with evidence at hearings other than a trial. The general rule is that evidence is to be by witness statement, but a party may rely on a statement of case or application notice if supported by a statement of truth.

25. Allocation is one of the matters mentioned in Rule 55.8(2). There is no automatic allocation to a track. Allocation is a matter of judicial decision; it will be to one of the tracks specified in Part 26, each track being dealt with in Part 27 (small claims track), Part 28 (Fast Track) or Part 29 (Multi-track) that the court can allocate a case when exercising its case management functions under Rule 55.8(1)(b) and (2). The court will have regard, in deciding on allocation to a track, to the matters set on in Rule 55.9(1).
26. I should mention a few other provisions of the CPR which may throw some light on what is meant by “trial”.
27. The first is Rule 1.4(2)(c). The court has active case management duties. This includes “deciding promptly which issues need full investigation and trial and accordingly, disposing summarily of others”. Perhaps as an express manifestation of the policy behind that Rule, Part 24 deals with the summary disposal of claims, describing this in Rule 24.1(1) as a “procedure by which the court may decide a claim without a trial”. In a summary judgment application the court does not, of course, try out the issues in the sense of carrying out a full investigation of the facts or law. It simply decides that the case of one side or the other is so weak that there is no real prospect of success.
28. Part 26 deals with various aspects of case management, including allocation to a track. Paragraph 12 of the PD to Part 26 is concerned with the determination of the amount to be paid under a judgment or order. It defines the term “disposal hearing” by reference to paragraph 12.4. It is a hearing which should not normally last more than 30 minutes and at which oral evidence will not normally be heard. At the disposal hearing, the court may
 - (a) decide the amount payable or (b) give directions for the further conduct of the proceedings. The structure is thus very similar to Rule 55.8(1). Paragraph 12.4(4) of the PD states that Rule 32.6 applies to evidence at the hearing unless the court orders otherwise, that Rule providing for evidence to be given by witness statement at hearings other than the trial. Clearly the draftsman of the PD did not consider a disposal hearing to be a trial albeit that it will resolve issues between the parties on the basis of evidence presented to the court.
29. Part 27 deals with claims allocated to the Small Claims Track. It sets out a procedure leading up to a “final hearing” rather than a “trial”. When it comes to the final hearing, if the defendant does not appear and has not served a notice asking the court to decide the claim in his absence, but the claimant does appear, the court may decide the claim on the basis of the evidence of the claimant alone: Rule 27.9(2). And under Rule 29.10, the court may deal with the claim without a hearing if all the parties agree.
30. In contrast with Part 27, Parts 28 and 29 are concerned with the management of a case up to trial: see in particular Rules 28.2 and 29.2. In this context, the trial is clearly the hearing which takes place at the end of the process and is the occasion on which the disputes of fact and law are adjudicated on by the judge in the light of the evidence (whether written or oral and perhaps tested by cross-examination). In this context, it is quite possible that a defendant, properly served, decides not to attend trial. The fact that he does not do so does

not make the hearing any less a trial than if he had attended.

31. The court has been referred to a few provisions of the CPR which do define “trial” for the purpose of a particular Rule: see for instance Rules 45.15 and 46.1(2)(c). I have not found these provisions of any assistance in dealing with the issues raised on this appeal. The first issue – “trial”
32. The judge (in practice the district judge) is 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 allocation to a track. The aim of such directions must be to bring about a final disposal of the claim. Unless allocated, by agreement, to the small claims track, case allocation will be either to the fast track or the multi-track. In either case, case management directions are made with a view to an eventual “trial” – the word used in both Rules 28.2 and 29.2.
33. If the first option – deciding the claim – 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 list has collapsed and he has half a day spare; suppose both sides are present and represented; and suppose that both sides have all their evidence available and agree that the matter should proceed. In these circumstances, the hearing could properly be called a trial. The judge would in effect be exercising his case management powers and bringing forward the trial to the date of the hearing.
34. But that would be an exceptional sort of case. The more usual sort of case, in a busy possession list with perhaps 5 to 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 decision: he 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).
35. The defendant might not appear at the hearing. This might be because he simply decides not to do so, knowing he has no defence; or he may, as in the present case, not know of the proceedings at all even though he has been served in accordance with the Rules. Where a defendant does not appear at all, the task of the judge is entirely straightforward and routine once he is satisfied that service has been properly effected. He looks at the evidence and, having no material which would suggest that the defendant has a case at all, let alone one which is genuinely disputed on grounds which appear to be substantial, he makes an order for possession.
36. I do not consider that such a process of determination and decision can sensibly be called a trial as a matter of the ordinary use of the word. Nor do I consider that it is been seen as a trial within Rule 39.3; the word is not to be given some special and wider meaning in the

context of that Rule. Rather, it can be seen more as a summary procedure in the sense of a procedure carried out rapidly with the omission of most of the steps which in an ordinary case lead to trial. It also has a lot in common with a disposal hearing as referred to in the PD to Part 26, which I have already described, and which is clearly not a trial either in the ordinary sense of the word or in the context of the CPR.

37. Moreover, Rules 55.8(1) and (2) have something in common with Part 24 (summary judgment). A claimant applying for summary judgment under Part 24 will produce evidence which, if it is not disputed, is sufficient to establish his case; the defendant can produce his own evidence in response but, unless the court considers that the defendant has a reasonable prospect of defending the claim, the claimant will ordinarily obtain his judgment. Similarly, a claimant seeking possession under Part 55 will produce evidence at the first hearing which, if it is not disputed, should entitle him to an order for possession; the defendant can produce his own evidence in response which, if it is sufficient to show that he has a case which is genuinely disputed on grounds which appear to be substantial, will result in allocation to a track and case management directions for dealing with the case. In neither case does the court try-out the issues on contested evidence with cross-examination to test each side's case. Indeed, a defendant may simply have no hint of a defence at all so that the court can deal with the matter in a way which can perfectly be properly be described as summary and as not involving a trial.
38. That conclusion is supported, I consider, by Rule 1.4(2)(c) which contrasts issues which need full investigation and trial with those which can be disposed of summarily. A process of determination and decision such as I have been considering falls clearly, in my view, on the summary disposal, rather than full investigation and trial, side of the line.
39. The conclusion is also supported if one considers how the judge might deal with a possession claim at the first hearing. It cannot be the case that, when the first appointment is made, anyone can know for sure that the case will be decided at that hearing. It may be that the judge has read the papers before the hearing commences and that he has formed a preliminary view about whether he will make a decision in favour of the landlord or allocate the case to a track and make directions. But it is only when the case opens that he will know for sure that the defendant is in fact not appearing in a case where he does not appear; and in a case where the defendant does appear, it will only be during the course of the hearing that the judge will be able actually to conclude that he should make a decision rather than case management directions.
40. It follows that it cannot be known before a case begins whether it will result in a decision or in directions. It is difficult, if Forcelux is correct, to see how, before the hearing begins, either party or the judge will know whether he is attending or conducting, on the one hand, a trial or, on the other hand, a hearing which is not a trial. The hearing cannot commence as a trial: it is only during the course of the hearing that it can change its status from that of a hearing to that of a trial. Such a possibility cannot, I accept, be ruled out: the parties may agree to this course in the exceptional sort of circumstances described in paragraph 33

above. It strikes me as a very odd result, however, in the typical sorts of case described in paragraphs 34 and 35 above.

41. There are a number of arguments against the conclusion that the decision of DJ Hudson to make a possession order was not made at a trial within Rule 39.3. The first relates to the reference within Rule 55.8(3) to Rule 32.2. The argument runs like this: Rule 55.8(3) provides that evidence at the hearing may be proved by evidence in writing. But that is already the general rule at hearings other than a trial: Rule 32.2(1). Accordingly, the hearing must be a trial otherwise there would be no need to refer to the whole of Rule 32.2 at all. In other words, the draftsman is drawing attention to the fact that, without the express provision for written evidence, evidence would have to be given orally so that the hearing must be a trial.
42. This view is reinforced by the fact that Rule 55.8(3) does not give permission to use written evidence where the claim is allocated to the fast track or the multi-track. In theory, although it is unlikely in practice, a claim could be allocated to a track before the first hearing or any adjourned hearing. The argument then proceeds in this way. If the hearing is, as Forcelux contends, a trial, the normal rule would require evidence to be given orally. As a matter of policy, this normal requirement is relaxed in cases which have not been allocated to a track; but once the case has been allocated to a track, the normal rule applies. However, if the hearing is not a trial in first place, there is no need to distinguish, for the purposes of Rule 55.8(1), between a hearing which takes place before allocation or one which takes place after allocation and the reference to the whole of Rule 32.2 is unnecessary.
43. I do not accept these arguments. An assertion that a hearing under Rule 55.8(1) is always a trial is obviously too wide: if the judge simply makes case management directions and allocates the case to a track, there is clearly no trial. At most, these arguments would establish that some hearings could amount to a trial. That is true, as the example which I have given in paragraph 33 above shows. But that does not help in establishing what sort of hearing is or is not a trial. In particular, it does not support the argument that all hearings at which a decision is made must necessarily be a trial. Indeed, the fact that it would be possible to have a hearing which is a trial shows the wisdom of the reference, in Rule 55.8(3), to the whole of Rule 32.2.
44. Another argument is based on section 138 County Court Act 1984. Subsection (9A) (which was inserted by Administration of Justice Act 1985) applies to a tenant whose lease has been forfeited for non-payment of rent and where possession has been recovered under sub-section (3). The tenant may apply to the court for relief from forfeiture at any time within 6 months from the date on which the lessor recovers possession. One of the requirements for a possession order under sub-section (3) is that “the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture”. It is said that, in the case of a possession order based on forfeiture in respect of rent arrears, if the hearing is not a trial then there is no power for the court to give relief under sub-section (9A). Accordingly, unless a decision under Rule 55.8(1) is a trial, there is no power to grant relief from forfeiture under section 138, a quite extraordinary result.

45. Now it may be correct – I do not decide the point – that relief could not be given under subsection (9A) unless there is a “trial” within the meaning of subsection (3). But the point which is being made only creates a problem if “trial” is to be given the same meaning in section 138 as it is given in Rule 39.3.
46. I do not see why that word should carry the same meaning in section 138 as it has in Rule 39.3. Consider the example of the hearing of a summary judgment application under Part 24.
24. Such a hearing is not a trial: see Rule 24.1. Before the introduction of Part 55, a claim for possession could have been the subject matter of a summary judgment application with certain exceptions set out in Rule 24.3(2); that remains the case today albeit that a Part 24 is not likely to be invoked since the Part 55 procedure in effect provides, as I see it, a similar summary remedy. The judge at the first hearing will be able to decide the case just as speedily and effectively as he would on a Part 24 application. It seems to me unlikely that Parliament can have intended that relief under section 138(9A) should be available where the possession order was obtained at trial but not on a summary judgment application. So one can see that “trial” does not need to have the same meaning in both contexts.
47. I should add that I have not overlooked the fact that DJ Hudson, when it came to exercising his discretion, considered that he was exercising the discretion given to him by Rule 39.3(3). However, the point that there had been no trial was not argued before him. That point was argued before HH Judge Hampton who decided that the hearing was not a trial. I agree with her.
48. I should also add that in the case of *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533, the Court of Appeal dealt with an application to set aside a possession order obtained on the first hearing in the absence of the defendant by applying Rule 39.3. It does not appear to have been suggested by the defendant that the hearing was not a trial at all. The point not having been taken, it is entirely unsurprising that the Court proceeded as it did and on a basis which it was not suggested by the tenant was incorrect. It is not an authority against the conclusion which I have reached. Conclusion on the first issue
49. In my judgment, the hearing before DJ Hudson on 11 September 2007 was not a trial. The second issue – discretion
50. Forcelux’s arguments on the exercise of discretion were directed primarily at Rule 39.3(5)(a): it is submitted that Mr Binnie did not “act promptly” once he had discovered that the possession order had been made. Since, in my judgment, the hearing was not a trial, Rule 39.3 is not directly in point. Accordingly, the need to “act promptly” has a rather different significance since it is not an absolute requirement but simply a factor to be taken into account, as will be seen in a moment.

51. The Rule which is of relevance in the present case is Rule 3.1(2). This Rule provides a list of case-management powers. Paragraph (m) is a sweeping-up provisions which gives the court power to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.”
52. In my view, this provision is amply wide enough to give the court power to set aside the possession order if, in its discretion, it considers that the interests of justice demand it.
53. Mr Diggle has disavowed any reliance on Rule 3.1(7) which provides: “A power of the court under these Rules to make an order includes a power to vary or revoke the order.”
54. He does so in the sense that he does not assert a free-standing power to revoke the possession order. But if it is right to set aside the possession order pursuant to Rule 3.1(2) (m), then I consider that Rule 3.1(7) would provide an answer to any suggestion that there is no power to do.
55. DJ Hudson did not consider Rule 3.1(2)(m); he addressed the case on the basis that he was exercising a power under Rule 39.3(5). An objective test must, I think, he applied to what is or is not prompt action for this purpose. No doubt this is a matter of judgement: there may be a range within which different minds may take different views about whether a person has acted promptly and the decision of a judge at first instance will not lightly be set aside. But that is not to say that DJ Hudson had any sort of discretion to exercise in deciding whether Mr Binnie had acted promptly. His discretion, under Rule 39.3 as he saw it, was exercisable only if Mr Binnie passed the test of having acted promptly.
56. DJ Hudson’s decision cannot be taken as an exercise of the court’s discretion under Rule 3.1(2)(m) power, he simply did not have that discretion in mind. However, it is reasonably certain that he would have exercised that discretion in the same way as he in fact exercised the discretion under Rule 39.3.
57. Nonetheless, what he had to say about the merits of the case are entitled to the greatest respect. He said that Mr Binnie had a real prospect of successfully defending the claim were the possession order to be set aside. I agree. The claim for relief from forfeiture was, I consider, compelling given the comparatively small amount of money outstanding (which Mr Binnie was able and willing to pay) and the consequence of forfeiture for Mr Binnie, namely the loss of the Lease, a valuable lease at a ground rent with 94 years then left to run.
58. HH Judge Hampton addressed the exercise of the discretion under Rule 3.1(2)(m). She found it helpful, as do I, to consider the checklist in Rule 3.9 even though not directly applicable. She observed that not only in a case where a party is seeking relief under Part 3 but also where he is doing so under Part 13 there is a requirement that he should act promptly. To be more precise, Rule 13.3 does not require an applicant to act promptly in the way that Rule 39.3(5) does. Rather, in considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment has made an application to do so promptly. Similarly, promptness

is one of the factors to be taken into account in relation to relief from sanctions under Rule 3.9: see paragraph (1)(b).

59. We have been referred by Mr Hayes to a number of cases which have some bearing on the meaning of the requirement to “act promptly”. HH Judge Hampton considered them in her judgment.
60. The first case is *Regency Rolls v Carnell* [2000] EWCA Civ 379 where the Court of Appeal considered Rule 39.3. Dictionary definitions were considered by both Arden LJ and Simon Brown LJ – “with alacrity” or “all reasonable celerity in the circumstances”. In all the circumstances, 4 weeks was held to be too long by Simon Brown LJ and Rix LJ, Arden LJ expressing grave doubt but finding it unnecessary to decide the point).
61. In *Harrison v Hockey* [2007] All ER (D) 336, Mann J refused to set aside judgment under Rule 39.3 after a delay of 4½ months, saying that such a period would normally be regarded as too long. The Judge observed: “Once judgment had been obtained in his absence, it would have been obvious to any competent solicitor that CPR 39.3(5) might be engaged. It had not been necessary to get to grips with the whole of the case in order to decide whether to make an application.”
62. Although in principle an applicant for relief must take responsibility for the inaction of his legal advisers (see *Training in Compliance Ltd v Dewse* [2001] CP Rep 46 at paragraph 46 per Peter Gibson LJ) it should be noted that Rule 3.9(1)(f) expressly includes, as a factor in the exercise of the discretion to grant relief from sanctions, whether the failure to comply was caused by the party or his legal representative. The same must, I think, apply to a failure to apply promptly when considering a discretion to set aside an order under Rule 3.1(2)(m).
63. In the present case, I have serious doubts that Mr Binnie can be said to have acted promptly in seeking to set aside the possession order. The delay between the date when he received the papers from Lincoln County Court, on 29 October 2007, and the return of his cheque in early January 2008 might be excusable. But there is no reason for him to have delayed in seeking to set aside the possession order after that. But he did not do so until 25 February 2008. That delay is surprising coming as it did after an earlier period during which Mr Binnie knew of the possession order. HH Judge Hampton shared those doubts. Mr Hayes suggests that she thought that DJ Hudson was exercising a discretion in deciding whether Mr Binnie had acted promptly. I do not think that is a fair reading of what she said. Rather, she was saying that it was a matter of judgment whether the delay was reasonable or not and thus whether Mr Binnie had acted promptly. As I say, I am doubtful that it can be said that he did act promptly and I propose to proceed on the basis that he did not.
64. Returning to the checklist under Rule 3.9(1) so far as relevant by way of analogy: a. the interests of the administration of justice; there is nothing which suggests that the interest of the administration of justice would be prejudiced or compromised if the application for relief were granted;

- b. whether the application for relief has been made promptly; I doubt very much that it was and proceed on the footing that it was not;
 - c. whether there is a good explanation for the failure; none has been provided. HH Judge Hampton herself observed that there was no explanation (but see paragraph 65 below);
 - d. whether the failure was caused by the party or his legal representative; the failure appears to have been entirely that of Mr Binnie's solicitors; e. the effect which the failure to comply had on each party; Mr Binnie will lose a valuable asset for want of payment of a comparatively modest sum which he attempted to pay by cheque in December 2007, his cheque being returned. f. the effect which the granting of relief would have on each party; the Lease would be reinstated. Forcelux would lose what I think can fairly be described as a windfall.
65. An application is made to admit further evidence from Mr Binnie's solicitor, Mr Stenson, which goes partly to explain what was taking place from the time when he instructed solicitors to the date of issue of proceedings. I do not consider that this additional evidence should be admitted on this appeal. It could easily have been produced at the hearing of the set-aside application before DJ Hudson. It was not produced then and was not even produced on the appeal before HH Judge Hampton. The Ladd v Marshal criteria are not satisfied.
66. DJ Hudson did not exercise the court's discretion under Rule 3.1(2)(m); nor, I consider, can his exercise of the power which he purported to exercise under Rule 39.3(5) be taken as an exercise of the former power, even though one might consider it obvious how he would have exercised the power. HHJ Hampton did not herself purport to exercise any power. Her decision was that DJ Hudson did not err in principle. She declined to disturb his decision whilst acknowledging that other judges might have made a decision different from his. In these circumstances it is open to this court to exercise the discretion itself.
67. In my judgment, this is a case for the exercise of the discretion in favour of Mr Binnie. Although, as I assume for the purposes of this appeal, that he had not acted promptly, his delay was not so long as to disentitle him from relief. The main factor in favour of granting relief is very strong, namely that Mr Binnie has a compelling case for relief from forfeiture and it is only because possession has been taken pursuant to the possession order that it can be said that he has lost his right to relief. The consequences of refusing to set aside the possession order would be that Mr Binnie would lose not a periodic tenancy at a rack rent, but a long lease at a ground rent. It would be no injustice to Forcelux to be deprived of the windfall that would otherwise accrue to it provided it received what it is entitled to under the Lease and its costs at least up to the end of the set-aside hearing before DJ Hudson. I call it a windfall because, although Forcelux has a right under the Lease to forfeit it, the law regards that right as security for the observance of the covenants contained in it. Mr Binnie's default was a failure to pay a comparatively modest sum of money. Forcelux has been offered all that is necessary to compensate it for the breach of covenant which gave rise to the forfeiture.

68. I would accordingly dismiss this appeal. Lord Justice Jacob:

69. I agree. Lord Justice Ward:

70. I also agree.

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Prepared on 28 October 2026 · Esheria