

ENGLAND AND WALES / JUDGMENT

Grimason v Cates

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Neutral Citation Number: [2013] EWHC 2304 (QB) IN THE HIGH COURT OF JUSTICE High Court Appeal Centre Royal Courts of Justice. London On Appeal from The Hastings County Court Orders of His Honour Judge Hollis dated 14 February 2013. Case No: QB/2013/O174 7 0175 Before : THE HONOURABLE MR JUSTICE GRIFFITH WILLIAMS Date: 26/07/13

- ----- Between : County Court Ref: 2YL14217 Grace Winifred Grimason
- and - Jonathan Cates County Court Ref: OHS01346 Jonathan Cates
- and - Grace Winifred Grimason Claimant & Appellant Defendant & Respondent Claimant & Respondent Defendant & Appellant
- ----- Mr B Speller (instructed by Funnel & Perring) for the Appellant Ms Abigail Cohen (instructed by Jeremy Simon & Co) for the Respondent Hearing dates: 27 June 2013
- -----

Judgment

Mr Justice Griffith Williams: 1. 2. 3. 4. 5. 6. These appeals concern a flat in Cornwallis Terrace, Hastings. Jonathan Cates, (“the respondent”) who had developed the property granted Grace Winifred Grimason (“the appellant”) a lease of the flat for a term of 125 years, commencing on 24 June 2006. The lease provided for a ground rent, initially £150 annually and for a service charge. The appellant paid £100,000 in cash for the lease. There was the usual provision for forfeiture of the lease in the event of non-payment of the ground rent and/or the service charge. After payment of the sums due on the signing of the lease, the appellant made no payment in respect of either the ground rent or the service charge. In November 2010, the respondent issued forfeiture proceedings in the Hastings County Court [OHS01346]. The money claimed in respect of ground rent arrears was £450. The money claimed in respect of service charges was £526.18. These proceedings were defective because there were breaches of the provisions of section 166 of the Commonhold and Leasehold Reform Act 2002 and section 146 of the Law of Property Act 1925 relating to the service of prescribed notices in respect of the ground rent and service charges respectively. In due course, a proper section 166 notice was served and the respondent pursued his claim in respect of the service charges by way of a money claim. The amended claim for forfeiture came before the Hastings County Court on 21 June 2011. The appellant was neither present nor represented. An order for forfeiture was made on the grounds of arrears of ground

rent in the amended sum of £600 and there was a money judgment in respect of the service charges in the sum of £691.64 (an amended figure). Subsequently, the respondent entered into the flat on 12 September 2011, pursuant to the Court's order for possession dated 21 June 2011. The appellant's case is that she first knew of these proceedings and their outcome on or about 8 March 2012 when her son called at the flat to find it empty and the locks changed. She then took advice. She believes that it was at about this time that the defendant sold the flat for a sum in the region of £100,000. On 23 July 2012, the appellant issued proceedings in the Hastings County Court [2YL14217], claiming that the forfeiture order had been obtained wrongfully because there had been a failure of service of the forfeiture proceedings; she also claimed damages for unjust enrichment or restitution. Those acting for the respondent then applied to strike out these proceedings under CPR3.4 or in the alternative for summary judgment under CPR 24. In the meantime, on 4 January 2013 in the original forfeiture proceedings [OHSO1346], the appellant applied to have set aside the possession order of 21 June 2011 on the grounds that there had been a failure of service. Alternatively, she claimed, pursuant to Article 1 of the First Protocol to the European Convention of Human Rights that the respondent had received a windfall (£100,000 to recover about £1,000), an unjust enrichment and so there were issues of proportionality. The respondent's application to strike out and the appellant's application to set aside the possession order came before the Court [His Honour Judge Hollis] on 11 February 2013 when the appellant's application to set aside the possession order was dismissed and her claims [2YL14217] were struck out. 7. The appellant applies for permission to appeal against both decisions. Like his Honour Judge Hollis, I will consider the appellant's application to set aside the possession order first although it is second in point of time. The Grounds of Appeal 8. His Honour Judge Hollis who was required by CPR 6.9 to determine whether service of the proceedings was "at the usual or last known residence" of the appellant, erred when he directed himself he had to be satisfied "that the landlord has established that the property... was of the character of being Mrs Grimason's usual last know address". It was submitted he erred also when he made the determination on disputed evidence which should have been resolved at trial and not in proceedings for summary judgement. He erred further when he applied the provisions of CPR 39.3 and section 138 (9A) of the County Court's Act 1984 and failed to deal adequately with the appellant's Article 1 rights and the issue of proportionality. The Respondent's case 9. The time for filing the appellant's notice of application to set aside the order for possession was served out of time. It was submitted that the learned judge directed himself correctly as to the issue of "usual and last known residence" and his conclusions of fact were well supported by the evidence. It was submitted that these issues can be resolved at an interlocutory stage and need not be reserved for a final hearing. It was submitted that authority required that the requirements of CPR.39.3

- (5) have to be considered by analogy when a court is asked to set aside a possession order under CPR.3.1. It was submitted that section 138(9)(A) of the 1984 Act sets out the right to claim relief from forfeiture and so is relevant to the determination of an application to set aside. Finally it was submitted that the learned judge dealt with the Article 1 and the proportionality issues in his judgment and his conclusions were, contrary to the appellant's submissions, Wednesbury reasonable. 10. The Law Civil Procedure Rules Service of the

claim form when the defendant does not give an address at which the defendant may be served... 6.9-(2) subject to paragraphs (3) and (6), the claim form must be served on the defendant at the place shown in the following table ...

1. Individual Usual or last known residence ...
- (3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1... in the table in paragraph (2) is an address at which the defendant no longer resides..., the claimant must take reasonable steps to ascertain the address of the defendant's current residence ...
- (4) Where, having taken the reasonable steps required by paragraph (3), the claimant- a) ascertains the defendant's current address, the claim form must be served at that address; or b) is unable to ascertain the defendant's current address, the claimant must consider whether there is – i) ii) an alternative place where; or an alternative method by which, service may be effected If, under paragraph (4)(b) there is such a place where or a method by which (5) service may be effected, the claimant must make an application under rule 6.15.
- (6) Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant –
 - a) cannot ascertain the defendant's current residence or place of business; and
 - b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b)
- (3) Failure to attend trial 39 (3)-
- (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
- (4) An application under paragraph... (3) must be supported by evidence.
- (5) Where an application is made under paragraph ... (3) by a party that failed to attend the trial, the court may grant the application only if the applicant – (a) to strike out or to enter judgment or to make an order against him; acted promptly when he found out the court had exercised its power (b) (c) had a good reason for not attending the trial; and has a reasonable prospect of success at the trial” County Court’s Act 1984. Section 138 “Provisions as to forfeiture for non-payment of rent ...
- (3) If - ...
- (b) the court at the trial is satisfied that the lessor is entitled to enforce the right of free entry or forfeiture: The court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor or the rent in arrear and the costs of the action ... (9A) Where the lessor recovers possession of the land to any time after the making of the order under sub-section (3)... the lessee may, at any

time within 6 months from the date on which the lessor recovers possession, apply to the court for relief, and on any such application the court may, if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit Service of the Possession proceedings 11. CPR 6.9 provides for service at the tenant's "usual or last known residence. There is no issue that all notices and applications were sent by post to the flat at Cornwallis Villa. The Evidence 12. The appellant's case was that her usual or last known residence was, at all material times, 12 The Hawthorns, Portadown, County Armagh and so service under CPR Part 6 had to be effected upon her at that address. The evidence she relied upon was the witness statement dated 15 December 2012 of her son Philip, the truth of the contents of which she confirmed in her witness statement of 21 December 2012. Philip Grimson stated that they are a family from Northern Ireland. His mother bought the flat to have a property by the sea in England. It was never her intention that it would become her house. She took no interest in the property and visited it only about twice a year with any stay being "more or less overnight". In that regard, he exhibited an email dated 28 September 2009, sent by another tenant (Heather Fletcher) to the respondent's solicitors. Mrs Fletcher wrote: "Mrs Grimason (Flat 1) has been back over from Ireland a couple of times but only for a few days each time and although I have seen her I do not know what she is doing about leasehold and other payments".¹

13. Mr Grimason said his mother was last in England in April 2011 when she visited her brother in Birmingham. He said in the light of that evidence, it is idle for the respondent to claim that neither he or his solicitors were not on notice, if not fully aware, that the appellant's home was in Northern Ireland and her visits to the flat were "at the most occasional" and so the flat was neither her usual or last known residence. 1 It is apparent from the evidence that this email was sent at a time when the respondent's solicitors were trying to obtain payment of the ground rent and service charges from the appellant. In their letters dated 9 April and 29 September 2010, they wrote of not having received responses to their earlier requests for payment.
14. Mr Speller applied for leave to rely on two letters not relied upon in the Court below – a letter dated 15 April 2013, from Santander which confirms that the Appellant has an account with that bank and has made monthly withdrawals since 2006 on that account in Northern Ireland, most of which have been carried out at the Lurgan Branch and a letter dated 30 May 2013 from Power NI confirming that the Appellant has been registered for electrical supplies at her Portadown address since March 1994. Ms Cohen while accepting that the letters are genuine, objected to their receipt. She drew the court's attention to CPR 52.11(2) and to the principles to be supplied when fresh evidence is sought to be introduced: see *Ladd v Marshall* [1954] 1 WLR 1489 at 1491. I accept that the preconditions for the receipt of this fresh evidence have not been met but I have nonetheless considered it. In my judgment it neither advances the appellant's case nor undermines the respondent's case. As Mr Speller rightly conceded, there is no reason why a person should not have more than one residence. On the facts of this case, the important finding of fact (see below) was that the appellant had told both the respondent and the respondent's solicitors that she was to be served at the flat

and so the respondent would have had no reason to believe that that address was an address at which she no longer resided [CPR6.9(3)]. 15. 16. The respondent's case was as follows. By Clause 6 (d) (1) of the Lease, any notice in writing, certificate or other documents required to be served under the lease were to be served at the last known place of abode of the tenant or served or affixed or left on the demised premises. The appellant had made no application to the respondent for permission to assign the lease or part with possession of the property and so the assumption had to be that she regarded the flat as her residence. When the appellant or those acting for her registered her purchase of the flat with the Land Registry, she gave the flat as her address for service even though there was space for her to give her Northern Ireland address. On 5 March 2010 there was one telephone call at 1350 hours and a number of text messages timed between 1315-1403 hours between the respondent or his wife and the appellant, during which the appellant confirmed that all correspondence was to be sent to her at the flat and she was to be served at that address. On 6 April 2010, Mr Jeremy Ottman, of the respondent's solicitors Jeremy Simon & Co, spoke to the appellant on the telephone; during that call, she said that the flat had not been rented out, that she did go to the property and would be there in a week or so. Three days later, on 9 April 2010, Mr Ottman sent a letter to the Appellant at the flat. He wrote "I'm sending this letter following our telephone conversation of a few days ago where you confirmed that all correspondence should be addressed to you at the property address". There was evidence of matters which occurred after the making of the possession order. First, when the possession order was executed on 12 September 2011, the property bore all the signs of being occupied; the respondent took a number of photographs which showed that the flat had been furnished and equipped and that there were significant quantities of clothes; although not shown in any photograph, the respondent's evidence was that there was a bottle of milk in the flat. Secondly, the respondent relied upon a letter dated 28 March 2012 from a community interest company called Revival, who were then acting for the appellant; they wrote to the respondent's solicitors on her behalf and inferentially on her instructions "I am not accusing you of anything but Mrs Grimason does not have all the information and does not understand why her home of over 4 years was taken". 17. Philip Grimason took issue with the evidence about the text messages, saying his mother is unable to text. 18. In his judgment², His Honour Judge Hollis said:- "8... I have to consider as a first point (is) whether or not there was good service of the forfeiture proceedings.

9. If there was good service then the order that was made on the 21 June 2011 in Mrs Grimason's absence was a good order as an order and the provisions of part 39 (3)(5) take effect. If there had not been good service, then I would be considering the position under the Court's discretion to set aside the Forfeiture Order contained in CPR Part 3.

10. It is Mrs Grimason's case that service was not made at her usual or last known residence which is an address in Northern Ireland and as such service under part 6 has not been affected. I have to be satisfied that the landlord has established that the property at Cornwallis Villa was of the character of being Mrs Grimason's usual or last known address. The evidence on which the landlord was acting in the service both of the notices under the Commonhold Act and in the service of the proceedings what, in my view overwhelming
11. First of all the lease itself provided for service of documents on the tenant of the property. Secondly there was no obvious evidence that the property was not, if not occupied day in day out, at least frequently visited by or on behalf of Mrs Grimason there being no application for permission to assign or part with the possession of the property. At the Land Registry Mrs Grimason's address was given as Cornwallis Villa.
12. There is evidence too from Mr Cates that in March 2010 Mrs Grimason confirmed that address (sic) was to be sent to her at the property. And in April 2010 there is evidence to that effect that a conversation between Mrs Grimason and Mr Cates solicitor when she confirmed that the property had never been rented out and she had visited there and was about to visit and that correspondence should be addressed to her there. And indeed when at the end of the day on 12 September 2011, possession was eventually taken, quite clearly from the photographs I have seen the property was indeed occupied. There was clothes, milk and post which had been sorted. "
13. An organisation called Revival attempted to assist Mrs Grimason in the situation that she found herself in an in correspondence they refer to the property as being her home of over 4 years. There has been no evidence produced from Mrs Grimason as to the nature of her accommodation, apparently in Northern Ireland and the extent to which she was living there.
14. I am satisfied that, as indeed was the District Judge at the time, that Mrs Grimason was properly served pursuant to part 6 with the forfeiture proceedings. That being the case, I have to consider her application under CPR 39(3)(5)." 19. On behalf of the appellant, Mr Speller submitted the learned judge fell into error when he directed himself that the landlord had to establish that the flat was "of the character" of being Mrs Grimason's usual or last known address. He submitted rightly whilst service of notices under the lease could be effected by leaving them at the address, CPR6.9 requires service "at the usual or last known residence". He submitted that if there is evidence that the tenant was "not resident at any material 2 The Court has been provided with an unapproved draft. time" then there cannot have been service and it is immaterial that the landlord was unaware that the flat was not the tenant's usual or last known residence. He submitted also that the learned judge erred in determining the issue of residence; he submitted that as there were disputed issues of fact, they should have been resolved at trial. 20. On behalf of the respondent, Ms Cohen submitted that in the above passage cited from the learned judge's judgment, he set out the evidence which led him to conclude that the property was either the address where the appellant resided and which she had given for the purpose of being served with the

proceedings [CPR 6.8 (a)] or was her usual and last known residence and accordingly there had been proper Part 6 service.

21. Ms Cohen submitted that the issue of residence is one which is often determined at an interlocutory stage.
22. Mr Speller cited no authority for the proposition that the disputed issue as to whether the flat was the appellant's "usual or last known residence" was an issue for trial and not for summary judgment. I cannot agree. The learned judge was considering an application to set aside the possession order on the ground of non-service; that required a determination of the issue of whether the Appellant had a good arguable case that the flat was not her usual or last known residence; see *Varsani v. Relfo Limited (in liquidation)* [2010] EWCA Civ 560, at paragraph 16 and 21. That issue could only be resolved by consideration of the evidence. 23. 24. 25. 26. The circuit judge was in a position to read a conclusion on the evidence because there was, in effect, little challenge to the landlord's claim – the only specific challenge was to the evidence about the text messaging (see paragraph 18). There was no express challenge to the critical evidence of the appellant's instruction to the landlord and his solicitors that she was to be served at the flat's address. There was confirmation of the landlord's evidence from the telephone records, the letter from Revival and the appearance of the flat on 12 September 2011 (see paragraph 16 above). The issue of whether a person's use of a property characterises it as his or her "residence", that is to say that he or she can fairly be described as residing there, is a question of fact and degree and the critical test is his or her pattern of life; see *Varsani* above at paragraphs 27 and 29. The resolution of that issue was a matter for the learned judge and his assessment of the evidence. I am not persuaded there are any grounds for concluding that his conclusions were not supported by the evidence or unreasonable. While it is by no means determinative, it is a curious feature of the evidence that the appellant herself made no assertion in her statement that the flat was not her usual residence. There is force in Mr Speller's criticism of some parts of the learned judge's reasoning but it is clear on a reading of the judgment as a whole that the learned judge both had in mind and applied the provisions of CPR 6.9 (2). I am not persuaded there are any grounds for criticising the learned judge's conclusions and I am satisfied that there was valid service of the application for forfeiture and valid service of the subsequent application for a possession order. The application to set aside the possession order 27. In his judgment His Honour Judge Hollis said: "14... I have to consider her application under CPR 39(3)(5).
15. The defence that Mrs Grimason would have had to the proceedings would have been the relief from forfeiture which she would have been entitled to apply for within 6 months. She needed to satisfy 3 requirements.
16. Did she act promptly when the order was made in June 2011? Possession was taken in September. The application to set aside the order was not made until 4 January 2013, although it is dated a few days earlier, that was the date it arrived at the court.

17. Much of that time Mrs Grimason had had the benefit of advice too, not only from her present solicitors, who were clearly involved, certainly since July 2012 when they issued the other set of proceedings, but also from the organisation that had been assisting her, Rivival, who were certainly involved in March 2012”
18. She cannot be said to have acted promptly in any way, particularly in the light of the 6 month period which she has applied for relief from forfeiture, an aspect that relinquishes this case from the Forcelux case that counsel have referred to today.
19. Did Mrs Grimason have good reason not attend a trial? Well I am satisfied that she was served in accordance with the rules. As well as that, she was well aware that she had never troubled herself to pay her ground rent and she must have been aware in 2010 of the likelihood of proceedings. She had never, apparently, there is certainly no evidence produced by her, made any arrangement for ensuring that communications were brought to her attention if she was to be absent for any period from Cornwallis Villa. It would appear that she either ignored the litigation or buried her head in the sand in some way.
20. Finally, I have to consider whether she has reasonable prospects of success in defence of the forfeiture proceedings. There is no defence. She was served with the notices, the dates are good, that is clear. It was properly established by the Court at the time. What she could have claimed for was relief from forfeiture, a claim that is no longer available to her. She could not have had a reasonable prospect of success. And under those circumstances her application to set aside must fail.”
28. Mr Speller submitted that CPR39(3) applies only where a party does not attend at trial and so should not apply in this case for two reasons: first, there was the failure to serve and not merely a failure to attend on the part of the appellant, and secondly, even if there was proper service, there had been no trial. It follows that the less restricted discretionary approach in CPR 3.1 and 3.9. should have applied. As to his first submission he relied upon dictum in *Nelson & Hanley v. Clear Springs (Management)Limited* [2006] EWCA Civ 1252, at paragraphs 35 & 39 (Sir Anthony Clarke MR): 35... The essential question is whether this is a situation to which CPR39(3) applies. So far as we are aware there is no case in which the rule has been held to apply where the defendant has not been served with proceedings in accordance with the CPR and is ignorant of them... 29. 30. 39... We do not think that the draftsman of the CPR can have intended to introduce what the editors call the more stringent requirements of rule 39(3)
- (5) into applications to set aside judgments irregularly obtained, in the sense of being obtained without service of the claim form in accordance with the rules. In our judgment the whole of rule 39(3) contemplates a trial in the absence of a party who has been served under the rules or in respect of whom service has been dispensed with”. The facts in *Nelson and Hanley* above, were markedly different to the facts in the present case. In that case the evidence was that the claim form for possession of residential property was served on the defendants at an address which the claimants knew was not their address because they had previously

written to them at their then present address and so the address on the claim form was a mistake. No such consideration applies in the present case because the proceedings were properly served and service cannot be impugned by showing that the claim form did not come to the appellant's notice. In support of his alternative submission, Mr Speller relied upon *Forcelux Limited v. Binnie* [2009] EWCA. Civ 854. The facts of that case were as follows: Forcelux and Mr Binnie were the landlord and tenant of a flat in Lincoln. Under the lease, the tenant was obliged to pay ground rent and other charges. The lease contained a forfeiture provision in the event of non-payment of rent or charges. Mr Binnie fell into arrears and Forcelux obtained a default judgment against him. No payment was made following the judgment and so Forcelux served a notice on Mr Binnie under section 146 of the Law of Property Act 1925 and section 81 of the Housing Act 1996. There was no response to that notice and so Forcelux commenced proceedings for possession. 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. When the hearing date was fixed, the court attempted to serve the proceeding by post but the envelope was returned "Gone Away". This was because, for some time passed, Mr Binnie had not been living in the flat. He was in fact then living with his girlfriend in another flat in the same building and had not collected any documents relating to the case from the flat.

31. When the claim for possession came before a district judge, Mr Binnie who had no knowledge of the proceedings, did not attend. The district judge, who had the evidence of a director of Forcelux, made a possession order. 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 was a month or so after the possession order had been made that Mr Binnie became aware of it – this was when his girlfriend saw two men in the process of taking possession of the flat. Mr Binnie sent a cheque for the amount owing but that was returned to him. In due course he applied to set aside the possession order and to obtain relief from forfeiture. When the application came before a district judge, he made a finding that the particulars of the claim were deemed to have been served pursuant to the rules then in force. At a subsequent hearing, the district judge made an order setting aside the order for possession and granted relief from forfeiture. Forcelux's appeal was dismissed by a circuit judge, a decision upheld by the Court of Appeal. 32. On these facts, the Court of Appeal held (paragraphs 51&52) that where the court makes a possession order in the absence of the tenant, following forfeiture of a lease for non payment of the ground rent, and the tenant subsequently applies to have the order set aside, the rule which is of relevance is CPR 3.1 (2). This is because, when the tenant does not appear at the hearing, there is no trial: "35... Where a defendant does not appear at all, the test of the judge is entirely straight forward 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 being 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 the procedure being 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 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” (per Warren J with whose judgment Ward and Jacob LJ J agreed). 33. It follows, Mr Speller submitted, that the provisions of CPR39.3 cannot apply. On behalf of the respondent Ms Cohen relied upon the subsequent decision of the Court of Appeal in *London Borough of Hackney v. Findlay* [2011] EWCA Civ.8. That case concerned an application to set aside a possession order obtained by a social landlord and determined by a district judge who applied CPR3.1 (7), when setting the possession order aside. By the time the landlord’s appeal against that decision was heard, the decision in *Forcelux* was available and the circuit judge held that while it was a matter for the discretion of the court whether to apply the requirements of CPR 39.3 to an application under CPR 3.9, the district judge was not required to take into account whether Mr Findlay had acted promptly or had a good explanation for not attending the hearing or had a reasonable prospect of success at trial. In the Court of Appeal, it was submitted on behalf of the Respondent that *Forcelux* was decided *per incuriam* and cannot be reconciled with the line of authorities on the application of CPR.3.1(7). The Court of Appeal in the judgment of Arden LJ, with whom Wilson and Toulson LJ, J agreed concluded: “24. Thus in my judgment, in the absence of some unusual and high compelling factor as in *Forcelux* a court that is asked to set aside a possession order under CPR.3.1 should in general apply the requirements of CPR 39.3 (5) by analogy. This is in addition to, and not in derogation of, applying CPR.3.9 by analogy, as this court did in *Forcelux* as that provision requires the court to have regard to all the circumstances in any event. However, in my judgment, for the reasons given above, in the absence of the unusual and compelling circumstances of a case such as *Forcelux* this court should give precedence to the provisions of CPR39.3(5) above those enumerated in CPR.3.9.” 34. On analysis of both decisions, I have concluded the approach which a court should adopt when asked to set aside a possession order is that stated in *London Borough of Hackney v. Findlay*. It is important to bear in mind that the decision in *Forcelux* was founded on unusual facts – the tenant had not been served, the court which was responsible for effecting service was on notice that he was not living at that address, the tenant had offered to pay the outstanding rents and had a defence to the claim for possession and so he had a compelling claim for relief as he was willing and able to pay the amount outstanding and was still in time to claim relief from forfeiture: see paragraphs 57 and 67 of the judgment in *Forcelux*.

35. Mr Speller submitted that the learned judge was wrong to apply the provisions of Section 138 (9A) of the County Court’s Act 1984: see paragraph 18 of his judgment in paragraph 27 above. He submitted it was irrelevant and the appellant had not sought to rely on it. Ms Cohen submitted, in my judgment correctly, that the section was relevant because it provides that a

tenant may apply to the court for relief at any time within 6 months of the date on which the landlord recovers possession. The failure to apply within that six month period must be a relevant consideration when applying CPR39.3(5). 36. 37. For the above reasons, I am not persuaded the learned judge erred in applying CPR39.3 or in having regard to the provision of section 138 (9A) of the 1984 Act. Finally, there is Mr Speller's submission that the learned judge erred in that he failed to deal adequately with the issue of proportionality. Mr Speller submitted that by reason of the Human Rights Act 1998 and by the application of the Wednesbury principles, no reasonable tribunal could have come to the conclusion that the result in this case was other than disproportionate and so the landlord's claim "had to be set aside". Article 1 of the First Protocol provides that every legal person is entitled to the peaceful enjoyment of his possessions and that no-one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of International Law, but those provisions shall not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest... .

38. Mr Speller submitted that the respondent, by obtaining possession of the flat worth some £100,000 to satisfy a debt of some £1,000 obtained a windfall. He submitted the landlord would not be disadvantaged if the possession order was set aside on terms that he should be paid the monies owing under the lease and his costs. He submitted that proportionality is a fundamental principle of European Law which by reason of the provisions of the Human Rights Act 1998, is now part of the law of England and Wales and so the position of a landlord exercising a right of forfeiture under a residential lease should no longer be any different from the position of a mortgagee who can only take from the security the amount of the mortgage debt. He submitted that the court, as a public authority, can only make an order which was proportionate.
39. Ms Cohen submitted that the learned judge addressed the issue of proportionality and in particular the protections afforded by statute and by the CPR to lessees in the Appellant's position. She submitted further that in so far as the argument appeared to raise questions of compatibility of the statutory provisions which provide for forfeiture and the Human Rights Act 1998, no application for a declaration of incompatibility has been made. 40. 41. 42. In my judgment, there is no merit in this ground of appeal. For all the above reasons, these appeals are dismissed. The parties are agreed there should be an order that the appellant pay the costs of the respondent in the total sum of £4,212.60, inclusive of VAT and I so order.

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