

# Housing Team Legal Bulletin

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## First Possession Hearings are NOT subject to CPR 39.3 when setting aside is sought

### [Forcelux Ltd-v-Binnie \[2009\] EWCA Civ 854](#)

This case concerned a long lease of a flat. Forcelux obtained a money judgment for non-payment of ground rent and other charges by Mr Binnie. A default judgment was obtained for the sum of £893.25 and costs. Mr Binnie did not pay and a forfeiture notice was served under Section 146 Law of Property Act 1925 and Section 81 Housing Act 1996.

Forcelux having received no response commenced possession proceedings. Service was effected on the flat but Mr Binnie was not living there and did not become aware of the proceedings as the flat was empty. On 11 Sept 2007 the possession claim was listed in a possessions list and Mr Binnie did not attend accordingly DJ Hudson

Mr Binnie only became aware of the possession order when his girlfriend with whom he lived in the same block saw the locks being changed. He instructed solicitors on the same day, 22<sup>nd</sup> October 2007, but there was then delay of some four months during which he attempted to pay the outstanding sums but his cheque was returned but not until 25<sup>th</sup> February 2008 was application made to set the possession order aside.

It was found that the proceedings were properly served, thus [Nelson-v- Clearsprings\[2007\] 1 WLR 962](#) which held that a judgment obtained at a trial after irregular service did not fall within CPR 39.3, did not apply.

On 1 September 2008 DJ Hudson set the order for possession aside and granted relief from forfeiture on the basis of payment of the outstanding sums and HHJ Hampton dismissed an appeal. A second appeal was entertained by the Court of Appeal on the basis that it was an important point of principle.

The Court of Appeal dismissed Forcelux's appeal and held

(1) A first hearing of a possession claim listed on a fixed date under CPR Part 55 is not a trial unless the case is "tried" that day i.e. the court can only decide the claim on the evidence before it – if both parties are there and represented, there is sufficient time and the issues can be tried then that might result in a trial. The usual short first hearing at which the court decides a possession claim is a summary procedure which does not fall to be considered as a

trial (see paras 34-47) it is akin to a disposal hearing or an application for summary judgment.

- (2) The fact that in a similar case of [Estates Acquisition and Development Ltd-v-Wiltshire \[2006\] EWCA Civ 533](#) the Court of Appeal had proceeded as if CPR 39.3 did apply was not binding as the point that a first possession hearing under CPR Part 55 was not a trial was not taken
- (3) The correct power of the court to invoke when seeking to set aside such a possession order is the court's general power of case management under CPR 3.1.2(m) in combination with the power to revoke or vary an order under CPR 3.1.7
- (4) That it was relevant in considering any such application to set aside to have regard to the relief from sanctions provisions in CPR 3.9
- (5) That although in principle a party has to take responsibility for the failures of his legal advisers the fact that the failure to make earlier application is the fault of a representative should be taken into account in the exercise of discretion whether to set aside
- (6) That it was doubtful that Mr Binnie had acted promptly but that was simply a factor to be taken into account in the exercise of the discretion under CPR 3.1.2(m) and not a pre-condition as under CPR 39.3
- (7) Considering the CPR 3.9 checklist that although there was no good explanation for the delay in making the application to set aside the fault appeared to be that of Mr Binnie's solicitors, that the effect of not granting relief would be that Mr Binnie would lose a valuable asset for the failure to pay a relatively modest sum which he had obtained to pay in January 2008 but his cheque had been returned. The effect on Forcelux would be that they would lose a "windfall"

As the district judge had purported to exercise the wrong power and HHJ Hampton had simply declined to interfere with his exercise of discretion the Court of Appeal had the power to exercise the discretion itself and found in favour of Mr Binnie as he had a compelling case for relief from forfeiture and there would be no injustice to Forcelux so long as the monies outstanding were paid and costs up to and including the set aside hearing before the District Judge.

## COMMENT

Although this is a case of a long lease it is of immense importance to housing practitioners who will commonly have clients who failed to attend a first hearing and against whom possession orders have been made.

It has sometimes been possible to appeal such orders despite the strictures of CPR 39.3 if for example it is plain that the landlord was not entitled to possession e.g. an alleged introductory tenancy where in fact the 12 months had expired before possession proceedings were begun or a purported assured shorthold tenancy which in fact is assured but generally in cases where evidence was required to be put by the defendant it was very difficult although some judges on such appeals, aware of the harshness of CPR 39.3 have been lenient in allowing fresh evidence on the appeal under CPR 52.11(2)

In short, however the effect of this decision is that in seeking to set aside a possession order made at a first hearing the test now is whether it is in accordance with the overriding objective to do so having regard to the relief from sanction criteria in CPR 3.9. The issues of whether the Defendant had a good reason for not attending the hearing and acted promptly are therefore relevant but evidently of much less importance than whether the defendant has a good defence to the claim. Although the court referred to this being a case of a long lease rather than a periodic tenancy at a rack rent that simply went to the question of windfall, in this case it was not Mr Binnie's home and that would have to be a very weighty factor, not least because of Article 8 ECHR in the exercise of the discretion.

Thus applications to set aside an order made at a possession hearing which was not a trial heard as such after case management directions to a trial were made should now be made under CPR 3.1.2(m) and whilst properly referring to the relevant matters under CPR 3.9 should concentrate on the merits of the defence.

In particular, this case reopens the possibility together with the changes to the law made under the Housing and Regeneration Act 2008 under which the status of tolerated trespassers was abolished to seek to set aside a possession order made for rent arrears some time before on the basis that the defendant has a counterclaim for disrepair, rather than adopting the cumbersome mechanism of obtaining a money judgment in the disrepair claim and then seeking to discharge the order.

The proper question is whether the defendant would have reasonable prospects of defending the claim for possession at trial. This question needs to be answered as at the date of the application to set aside not as at the date of the summary possession order hence for example worsening disrepair between the date of the order and the application to set aside might turn a

disrepair counterclaim from one reducing the arrears to one capable at trial of extinguishing them altogether.

This is unlikely to assist however in the case of a defendant who does not turn up to the first hearing of a claim under Ground 8 Schedule 2 Housing Act 1988 as there the court has to assess whether there are more than two months of arrears at the hearing not at a trial though of course it should always be remembered that a counterclaim that might reduce a claim for arrears to below two months is good grounds for adjourning such a claim with case management directions.

This decision is very good news for tenants who miss that first hearing whether due to fear, being told not to bother by a housing officer or otherwise and returns the position to the pre CPR position where the question is whether it is in the interests of justice to set the order aside

## UPDATES

- (1) The Supreme Court has refused permission to appeal in **R (o/a Weaver-v- London and Quadrant Housing Trust)**. Practitioners should generally accordingly treat registered social landlords<sup>1</sup> as public authorities and as amenable to judicial review. If they allege that they fall outside Weaver, they should be required to plead in any defence or reply with particularity why they are not a public authority and disclosure should be sought of the relevant material required to assess whether they do fall within Weaver namely (a) the extent to which the RSL is publicly funded (b) is exercising statutory powers (c) is taking the place of local government or is closely associated with it in the provision of social housing and (d) is providing a public service. Although the CA was concerned to stress that whether an RSL was a public authority was fact specific it will be difficult for most to escape a finding that they are.
- (2) The law with regard to public law defences remains in flux. The ECtHR has issued two further decisions reinforcing its judgment in McCann-v-UK see Zehentner –v- Austria and Paulic – Croatia. An application to the Supreme Court for permission to appeal in **Manchester City Council v-Pinnock (news story)** has been lodged and the Court of Appeal has removed all appeals possibly affected by an appeal to the Supreme Court in **Pinnock** from its list. Practitioners should consider the guidance of the Court of Appeal in **Kingcastle-v- Owen-Owen (1999) the Times 18 March 1999** (transcript available on Lawtel and Casetrack) and seek to adjourn any such proceedings until the Supreme Court has decided whether to grant permission to appeal.

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<sup>1</sup> Or registered providers as they are now to be known.