IN THE HIGH COURT OF JUSTICE **[2019] EWHC 1396 (Ch)**
Claim No. PT-2018-000581

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
THE PROPERTY, TRUSTS AND PROBATE LIST

Rolls Building
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Fetter Lane
London EC4A 1NL

Friday, 3 May 2019

BEFORE:

MASTER SHUMAN

BETWEEN:

MARTHA TIMBO

Claimant

- and -

THE MAYOR AND BURGESS OF THE LONDON BOROUGH OF LAMBETH

Defendant

JENNIFER CAMPBELL (instructed via Direct Access) appeared on behalf of the Claimant
RICHARD GRANBY (instructed by Judge & Priestley LLP) appeared on behalf of the Defendants
Hearing dates: 13 March 2019 and 3 May 2019

JUDGMENT

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MASTER SHUMAN:

1. This is a claim for relief against forfeiture for non-payment of rent, more specifically service charges reserved as rent. The lease was forfeited by service of forfeiture proceedings in the County Court on a date shortly after 24 May 2017.

2. The claimant's claim for relief was issued in the High Court on 26 July 2018, some 14 months after the lease was forfeited and nearly 12 months after a possession order was made in the County Court. The trial before me took place on 13 March 2019 and 3 May 2019, counsel on behalf of the parties made submissions on the written evidence and did not call any oral evidence.

3. There is a strict six month time limit in which to bring claims for relief in the County Court, the claimant therefore had to issue in the High Court. Ms Campbell, counsel for the claimant, submits that this claim is brought under section 38 of the Senior Courts Act 1981. There was no claim for forfeiture in the High Court; that was made in the County Court. Therefore this is not a claim under section 38.This is also not a claim under section 146(2) of the Law of Property Act 1925, Ms Campbell's alternative submission. Save for under-lessees under section 146(4), this section does not apply to forfeiture in the case of non-payment of rent; section 146(11). In fact what I am being asked to exercise is an equitable jurisdiction in the High Court to grant relief from forfeiture.

4. This claim concerns the long lease of a residential flat at 28 Swanage House, Dorset Road, London SW8 1AF ("the flat"). I do not know if the claimant and her husband ever occupied the flat. In 2010 the claimant and her husband moved permanently to Sierra Leone and a man called Geoffrey (surname unknown) was left to manage it. This claim is pursued by Mr Timbo on behalf of the claimant, and I am told that he holds a general power of attorney on her behalf.

5. The claimant relies on a witness statement with a statement of truth signed by Mr Timbo on 9 March 2019. A signed copy was provided to me at the hearing on 13 March 2019 and today I have been handed a photocopy of Mr Timbo's Barclays Bank statement showing that, as at 29 March 2019, so that is just over a month ago, there

was a balance in that account of £22,204.18. The claimant's position is that this sum, held in Mr Timbo's bank account, will meet the sums outstanding in this case and therefore would be sufficient to meet any terms that I might impose as a condition of relief.

6. I will go on to deal with the procedural background in more detail, but the defendant initially did not oppose relief being granted but that was in the County Court and that was last year. Since then, there has been a hardening of attitudes and the defendant defends this claim. The defendant relies on a witness statement from its employee, Mr Brutton, and has included evidence filed in the County Court in the bundle. The warrant of possession was executed by a court bailiff on 27 October 2017. The flat is used to provide short term occupation and temporary housing pursuant to the defendant's statutory duties under Part 7 of the Housing Act 1996.

THE FACTUAL BACKGROUND

7. This case has some procedural history to it and it would have been helpful to have been provided with a chronology.

8. On 14 May 1990 the defendant granted James Bennett, Margaret Bennett and Bernard Bennett a lease of the flat for a premium of £24,643 pursuant to the right to buy scheme ("the lease"). The lease was for a term of 125 years commencing on 22 August 1988 and included the usual provisions about a relevant disposal. On 13 August 2009 the claimant and her husband, Siray Timbo, purchased the leasehold interest in the flat for the premium of £175,000. They were registered as the leasehold owners of the flat on 12 October 2009.

9. On the limited evidence before me, the claimant says that in 2010 Geoffrey was left to manage the flat because the claimant and her husband had returned to live in Sierra Leone. I do not know who Geoffrey is, indeed, the claimant does not know who Geoffrey is. He has played no part in these proceedings or as far as I am aware the proceedings in the County Court.

10. Thereafter, there was a series of judgments obtained against the claimant for failure to pay service charges. On 22 February 2012, the defendant was granted judgment in default in respect of service charge arrears and obtained a final charging order. That was for a sum in total of £1,168.17. On 19 March 2015, the defendant was granted judgment in default in respect of service charge arrears and obtained a final charging order. In total, the sum was for £4,235.83.

11. On 11 January 2017 or thereabouts, there is a record of a home visit by Brit Point Letting Agents. When they visited the flat, they found tenants living there, so certainly at that stage, it was still in occupation. There has been no evidence from the claimant about the amount of the rent, where it was paid and when she received it.

12. On 15 March 2017, the defendants obtained judgment in default, again for service charge arrears and the total including costs amounted to £3,567.02. By this stage, there had been no payments of any of the sums due to the defendant under the lease and the defendant took a different approach. On 5 April 2017, they served a section 146 notice and there is a certificate of service which shows that it was served at the flat. I am told by Mr Granby, counsel for the defendant, that that was necessary notwithstanding that the service charge was reserved as rent because of the application of section 81(1) of the Housing Act 1996, which makes specific provision in respect of forfeiture for failure to pay service charge, even though the service charge is reserved as rent under the lease.

13. On 18 April 2017, Siray Timbo died. The defendant had no knowledge of this for some time. On 24 May 2017, the defendant issued a claim form. They sought forfeiture of the lease and a possession order. On 3 August 2017, District Judge Desai granted the defendant a possession order. Some points were taken by Ms Campbell about the wording of that order, but I am satisfied by Mr Granby's submissions that it was in a standard form and contained the relevant information that it had to for the purposes of the County Court.

14. Going back in the chronology, the claim form was issued on 24 May 2017. When it was served, forfeiture was effected; it being a claim for forfeiture. That occurred on a date after 24 May 2017 and clearly before 3 August 2017 when District Judge Desai

made the possession order. On 27 October 2017 a warrant of possession was executed by the court bailiff. Ms Campbell says it is really only at that stage that the relevant clock, at the worst for her case, started ticking.

15. On 31 January 2018, a further 3 months on, the claimant says that she applied for relief. She says that she did so then because she had become aware that there had been enforcement of the warrant of possession. That application was returned by the court on 16 February 2018 because the incorrect fee was included. Rather than apply for relief or pay the relevant fee, the claimant then elected on 7 February 2018 to make an application to set aside the possession order, she says on the basis that she was unaware of the court proceedings. That came before the court on 27 April 2018 and District Judge Stone dismissed that application: the claimant did not attend. However the court had not served a notice of the hearing on the claimant and so the hearing was relisted on 26 June 2018.

16. Then, oddly, the claimant elected to serve a notice of discontinuance of the County Court proceedings. That is dated 21 June 2018. On 26 June 2018, there was a hearing before District Judge Hayes, who dismissed the claimant's application; the claimant did not attend the relisted hearing.

17. There is very little information from the claimant as to why this approach was taken and why she did not seek to take positive steps at a much earlier stage to apply for relief. What is said in Mr Timbo's witness statement, which is all that I have before me, at paragraphs 1.16 and 1.17, is:

> "1.16 Upon receipt of the order and due to the claimant's expectation of amicable resolution with the defendant respondent without reverting to court, the claimant attempted to file a notice of discontinuance. This was done by the incorrect form and therefore was ineffective.
>
> 1.17 In reliance upon its attempt to file the notice of discontinuance, the claimant did not attend the hearing of 26 June 2018."

18. So the explanation offered by the claimant is that there was an expectation on her part that there would be an amicable resolution. I am told by Mr Granby that the defendant did not at that juncture oppose relief being granted, but there was an issue about the

terms on which it would be made, specifically the amount that the defendant required the claimant to pay.

19. Around the time that District Judge Hayes dismissed the claimant's application, the claimant's solicitors who, I am told, did not go on the record but were instructed to enter into negotiation settlements on the claimant's behalf, made a number of offers to settle matters on the basis that the lease was reinstated. The offers are dated 3 July 2018, 12 July 2018 and 18 July 2018. On 26 July 2018, the claimant finally brought a claim for relief from forfeiture, in the High Court, and on 10 August 2018, the defendant filed their defence opposing the grant of relief.

THE LEASE

20. The material parts of the lease are as follows, in the definition section under (h) the expression "the expenses and outgoings incurred by the council" includes anticipated expenditure not simply incurred expenditure and outgoings in respect of the property in which the flat was situated.

21. Under the lease the tenant covenanted with the defendant at clause 2 (1) "to pay the reserved rent at the times and in the manner aforesaid without any deduction whatsoever". Clause 2 (2) provided that, by way of further and additional rent, "a rateable and proportionate part of the reasonable expenses and outgoings incurred by the defendant in the repair, maintenance, renewal and insurance of the building and the provision of services therein and the other heads of expenditure as are set out in the fourth schedule hereto", and subject to the terms and provisions in the fifth schedule. The proviso is that the tenant is not required to contribute to the repair of any structural defect. So the effect of that covenant is that the tenant is obliged to pay service charges in accordance with the mechanism set out in the fourth and fifth schedule of the lease, and that they are reserved as further and additional rent.

22. Clause 3.2.3 provides that if any rent or service charge should become due and remain unpaid for 14 days, then the defendant has a right to charge interest on that sum at the rate of 4 per cent above the base rate for the time being of the defendant's bankers. Clause 2.7 provides that the tenant should pay "all costs, charges and expenses,

including legal costs and fees payable to a surveyor which may be incurred incidental to the preparation and service of a notice under section 146".

23. Clause 4 of the lease is a forfeiture clause which provides:

> "If said rents or any part thereof shall be unpaid for 21 days next after becoming payable, whether the same shall have been formally demanded or not, or if the tenant shall not perform or observe all the covenants and provisions hereby on the part of the tenant, to be performed or observed then and in any of the cases thenceforth, it shall be lawful for the council or any person or persons duly authorised by the council on their behalf to re-enter into or upon the flat or any parts thereof to repossess and enjoy the same as if this lease had not been made but without any prejudice to any right of action or remedy of the council in respect of any antecedent breach of any of the covenants by the tenant."

24. As I have indicated, schedule 4 to the lease deals with service charge and the defendant's expenses and outgoings and the fifth schedule provides terms and provisions relating to the service charge and the recovery of those. It also provides at paragraph 4(e) a right to pay sums in advance on account of the service charge as specified by the defendant.

THE CLAIM FOR RELIEF

25. Turning then to the issues before me, there were extremely wide-ranging submissions by Ms Campbell but the issues raised by her can be summarised into 6.

26. (1) "What are the actual sums properly before the court for consideration in respect of the relief from forfeiture sought by the claimant under its application dated 31 January 2018?" Of course, the claim before me was issued in July 2018. This seems to refer back to an application for relief that was never pursued by the claimant in the County Court. What she did, as I have set out in the chronology, was elect not to pursue that application but to pursue an application to set aside the possession order. Although the defendants, to their credit, approached it as if it was an application for relief.

27. (2) Does the court have jurisdiction to grant relief where forfeiture was as a result of unpaid rent more than six months after the execution of the judgment for possession? (3) Should the application be refused as being too late? (4) Should the court refuse relief on the basis of the claimant's poor payment history, inability to pay the sums due under the terms of the forfeited lease, failure to pay council tax and the defendant's use of the flat. (5) "Should a lessor gain a windfall from forfeiting a lease?" (6) Whether this was a case in which relief should be granted and, if so, on what terms?

28. Turning to the law, as I have already indicated, Ms Campbell sought to advance this case on the basis of section 38 of the Senior Courts Act 1981. Her premise was, in essence, that if a tenant is willing to pay all the arrears and costs, then the court should simply grant relief by inference no matter when relief is sought; although that section does not apply.

29. In an argument which I struggled to understand, Ms Campbell sought to argue that, if there was any time constraint in relation to this application, as it would be in the County Court where six months was applicable, then this claim was brought in time. She sought to argue that time did not start running for the purposes of seeking relief until the claimant's application in the County Court had been finally determined, which she says was 26 June 2018. On that analysis, of course, the claim would have been brought in time. But despite some questioning by me, counsel was unable to advance any credible legal analysis to support that submission.

30. If one looks, for example, at section 210 of the Common Law Procedure Act 1852, that, in slightly older language, provides as follows:

> "In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, which service shall stand in the place and stead of a demand and re-entry..."

It goes on to say what happens to the lease:

> "... shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, [and

> importantly] without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity..."

31. I set that out by way of illustration because it is quite clear in relation to section 210 that the relevant date is execution not the final determination of court proceedings.

32. Mr Granby specifically referred me to the Court of Appeal decision in *Gibbs v Lakeside Developments Limited* [2018] EWCA Civ 2874, particularly the judgment of Lewison LJ. At paragraph 13 of his skeleton argument Mr Granby submitted,

> "While the High Court's equitable jurisdiction is not strictly restricted by the restriction on granting relief to applications made within 6 months of the order for possession contained in section 210 of the Common Law Procedure Act 1852, the equitable jurisdiction must be exercised with due regard to that restriction."

33. It is useful at this point to look at the judgment of Lewison LJ, whilst the part relied on by Mr Granby is obiter, nonetheless it is a very powerful analysis of the principles that I should consider.

34. The Lord Justice having analysed the position in relation to the County Court and specifically the position under section 138 of the County Court Acts 1984, which provides a guillotine of six months to seek relief, said at paragraph 43:

> "Would the position have been any different in the High Court? The High Court inherited the ancient jurisdiction of the Court of Chancery which claimed power to relieve against forfeiture without limit of time. In *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 511 the point that arose for decision was whether the court had any power to grant relief against forfeiture under section 146 of the Law of Property Act 1925 once the landlord had re-entered by taking physical possession. The landlord had in fact only been in possession for a few hours; and the breach relied on was not a failure to pay rent. So the court's equitable jurisdiction to grant relief for non-payment of rent was not in issue."

35. He went on to consider whether the equitable jurisdiction was "without limit of time", as suggested by Vice-Chancellor Browne-Wilkinson in *Billson*. He set out the facts from a number of cases including *Howard v Fanshawe [1895] 2 Ch 581*. Stirling J said at pages 588-589,

> "The statute[1] fixes a period of six months only from recovery in ejectment within which an application for relief may be made, and it is said that the whole evil which the Act was passed to remove would be re-introduced if it were to be held that the jurisdiction to give relief were to be applied in a case where peaceable possession had been taken. Upon that two observations may be made: first, that if the landlord desires to limit the time within which the tenant can apply for relief, he can avail himself of legal process to recover possession and so get the benefit of the statute; and, secondly, that it does not follow that a Court of Equity would now grant relief at any distance of time from the happening of the event which gave rise to it. It appears to me that, inasmuch as the inconvenience of so doing has been recognised by the legislature, and a time has been fixed after which, in a case of ejectment, no proceedings for relief can be taken, a similar period might well be fixed, by analogy, within which an application for general relief in Equity must be made. A Court of Equity might possibly say that the action for relief must be brought within six months from the resumption of possession by the lessor."

36. At paragraph 45 Lord Justice Lewison says, "Thus *Howard v Fanshawe* is not authority for the wide proposition." That is because *Howard v Fanshawe* was a case where the application for relief was made within the six months. Further he says,

> "In *Thatcher v CH Pearce & Sons Ltd* [1968] 1 WLR 748 the forfeiture by peaceable re-entry took place on 4 July 1964 and the application for relief was made on 8 January 1965: 6 months and 4 days later. Sir Jocelyn Simon P rightly described the final sentence I have quoted from *Howard v Fanshawe* as "guarded wording" and went on to say:
>
> 'As I understand the old equitable doctrine, the court would not give relief in respect of stale claims. Furthermore, if there were a statute of limitation applying at common law, equity followed the law and applied the statute to strictly analogous proceedings in Chancery. But there is no question in the instant case of a Limitation Act applying to the present situation; and it seems to me to be contrary to the whole

[1] Common Law Procedure Act 1852

> spirit of equity to boggle at a matter of days, which is all that we are concerned with here, when justice indicates relief.' "

37. The facts in *Billson*, *Howard v Fanshawe* and *Thatcher* (a few hours, within 6 months and 6 months 4 days) are very different to the position that I am presented with by the claimant where 14 months elapsed between forfeiture and the claim for relief.

38. Lord Justice Lewison's analysis concludes that the width of the equitable jurisdiction is much narrower. In *Gibbs* he considered that by the time that Ms Gibbs had issued her application to set aside judgment, 18 months later, "the elasticity of reasonable promptitude had snapped[2]."

39. So this analysis, coupled with the majority view of the width of the equitable jurisdiction in *Bilson*, leads me to conclude that I should have regard to the time limit and that time limit is six months. This is not a strict guillotine, because, after all, I am exercising an equitable jurisdiction. But I should have regard to this time limit when considering whether the application for relief was made promptly and it is a fundamental part of that to look at the reason proffered by the claimant as to why the application for relief was made so late.

40. I raised with both counsel when time started to run for these purposes. In *Gibbs*, Lewison LJ had analysed it to start running from the date that there was physical re-entry. Here, though, the case is different. It was not an option for the defendant because, unlike in *Gibbs*, the flat presumably by the claimant's tenants who were continuing to pay rent. So the defendant had to serve forfeiture proceedings; they could not simply re-enter. I consider that time therefore started to run from the date when the proceedings for forfeiture were served. I do not know when that date is with precision, because I am told that the County Court serves the process, but it is reasonable to infer that the claim was served shortly after 24 May 2017.

[2] Paragraph 58

41. Ms Campbell sought to argue in the alternative that the claimant did not know about the possession claim because they had not received it. I asked her to take me to the service provisions within the lease and, having reconsidered that submission, she withdrew it and accepted that service had been effected in accordance with the lease.

42. Ms Campbell also sought to rely on a decision of Chief Master Marsh, *Pineport Limited v Grangeglen Limited* [2016] EWHC 1318. She submitted that it supported her case that what is reasonable depends on the circumstances and in this case the claimant had acted reasonably. As an abstract statement and given that I am exercising an equitable jurisdiction that is correct, but what her submission does not do is undermine the import of Lewison LJ's obiter comments. Indeed, if one looks at the facts in *Pineport*, that was a highly unusual case. It involved a commercial tenant and the Chief Master heard evidence from the parties. It involved exceptional human factors that led to him deciding to grant relief after a period of 14 months. That is a case that is very much dependent on its own facts and that case does not assist me in terms of my determination on the facts before me.

43. So I turn to the claim and pose the question: was the claim made promptly? The simple answer to that question is no. The claim was made on 26 July 2018, some 14 months after forfeiture. As I am having regard to the time limit that would operate in the county court of six months, although I am not bound by it, that is some eight months after the period. So I then pose the question: what is the reason given for this? I have already referred to it, but I shall refer to it again for completeness. That is set out in Mr Timbo's witness statement at page 18, subparagraph 1.16, which is, "Due to the claimant's expectation of amicable resolution with the defendant..." Having been taken through the correspondence by both counsel it is clear that whilst the parties did correspond and the claimant's solicitors sought to agree a payment by instalments there remained a fundamental issue between them as to the amount to be paid. I also note that the defendant had filed evidence in the county court treating the claimant's application as one for relief and not opposing it in principle; again the issue being the amount to be paid by the claimant. In those circumstances the claimant's hope that matters might be resolved was not a good reason for delay in this case.

44. There is a dearth of evidence as to why the claimant having made an application for relief elected not to pursue it by paying the correct fee and instead sought to apply to set aside the possession order, but then not pursue that application. The defendant quite fairly and properly treated the application as if it were an application for relief. Rather than protect and preserve her position the claimant decided to serve a notice of discontinuance, albeit ineffective in form, and not attend a subsequent hearing. She then decided to issue a claim in the High Court.

45. In my view, not only was the application for relief not made promptly, but there has been no adequate explanation given for the delay. So using the words of Lewison LJ, the elasticity of reasonable promptitude has been snapped. I should and do have regard to the six month time period as a guide. I accept Mr Granby's submissions that the claim should fail on that basis. However if I am wrong I have gone on to consider the other factors that have been raised by the parties.

46. Turning to the question of what amounts are due from the claimant, there was a significant amount of time taken up by Ms Campbell seeking to undermine the figures advanced by the defendant. Of the sums in issue the defendant identified eight categories of amounts the payment of which should be a condition of the grant of relief, although their primary position was that I should not grant relief. (1) 22 February 2012 judgment in default for service charge arrears in the sum of £1,168.17. I am told that if updated to the date of the defendant's witness statement that sum is £1,487.87. (2) 19 March 2015 judgment in default for service charge arrears, which was a figure of £4,235.83, but is now £4,389.19. (3) 15 March 2017 judgment in default for service charge arrears which was a figure of £3,567.02 and updated amounts to £3,862.41.

47. I am not entirely clear what Ms Campbell was seeking to do in her submissions. She appeared to be trying to go behind those judgments in default and suggest that they were in effect trumped by the possession order. She relied on the fact that the possession order set out at paragraph 2, "The defendant pay the claimant £8,004.22 for service charge arrears and judgment debt and £1.75 per day from the date of this order until possession is given up to the claimant or payment is made under paragraph 5 below." When one looks at the possession claim, it was based on the last judgment in default, that is the sum of £3,567.02. I am told and I accept the submissions by

defendant's counsel that this is in a standard form produced in the County Court. It is a form N26 order for possession, and I accept that the figures set out therein are the figures that are required to be set out in an order for possession in the County Court. What it does not do is to expunge the amounts due under the two previous judgments in default, so I am satisfied that there is a sum due to the defendant in the sum of £10,189.47.

48. Mr Granby also submitted that service charges are now due, number (4) of the amounts in issue. I have seen underlying documentation relating to this and that is for a sum of £2,750.41. I also accept that that figure would have been due from the claimant. In relation to the next three items, (5) to (7), they relate to costs. There are costs of forfeiture proceedings. They have been assessed by the court in the sum of £3,785.90 and Ms Campbell did not seek to go behind that figure. In addition, there have been the costs of dealing with the claimant's applications, which she elected not to pursue in the county court. They were assessed in the sum of £2,932.40, and again Ms Campbell did not seek to go behind that figure. There is then the costs of the High Court claim and I am told in relation to those that the sum claimed is the figure of £13,762.20. That is the total amount claimed. Ms Campbell in trying to reduce the overall amount due from the claimant sought to argue that that was an extremely high figure for costs. She submitted that it was disproportionate to the amount set out in the possession order and it would be an amount that would be heavily reduced on assessment. This is a claim for relief from forfeiture and although the claimant has not felt it necessary to adduce any valuation evidence before me I do note that in 2009, the lease was purchased for £175,000. So what is in issue in this case is whether I should grant relief and effectively reinstate the lease that has been forfeited. So to suggest that the costs are disproportionate by reference to the possession order, is to entirely miss the point.

49. There is at number (8), a suggestion (I put it no higher than that) that any order for relief should include a condition that the claimant pays council tax arrears. That was certainly a surprising submission to be advanced and the defendant's counsel did not pursue that with much vigour. I did ask him for the basis for that submission and he was unable to assist me. It seems to me that it would be entirely wrong had I decided to grant relief from forfeiture for the council tax arrears of £11,808.58 to form a condition of that order.

50. However I accept the submissions of Mr Granby in respect of the other categories. If I were to grant relief and order payments of those sums as a condition then the amount due would be no more than £34,522.87.

51. In conclusion I look at the factors that Ms Campbell specifically took me to. Delay. As I have already said there has been a dilatory approach to seeking relief from this court, without any adequate excuse or explanation for that delay.

52. Poor payment history. Defendant's counsel accepted that not much weight should be attached to this. I accept that proposition, but it does seem to me that that is something that falls within my consideration. I do note that the claimant elected, through her husband, to leave management of the flat and collection of rent to somebody called Geoffrey. But the claimant, as she well knew, had purchased a leasehold interest. She was a tenant under the lease. She had obligations to discharge in relation to the lease. So it does seem to me that there has been a significant poor payment history in this case, certainly since 2012 when the first judgment in default in respect of service charge arrears was entered. I do note that the claimant and her husband were only registered as the owners of the flat on 12 October 2009 and sometime in 2010, they returned to Sierra Leone. So within a relatively short time the claimant and her husband fell into service charge arrears.

53. Inability to pay sums due under the forfeited lease. As I have already indicated, after significant argument on this point in submissions, I am satisfied that the amount that would be due is £34,522.87 but from that there could be a deduction because it includes the costs of these proceedings claimed in the sum of £13,762.20. I was shown today by Ms Campbell a photocopy of Mr Timbo's bank statement showing a balance in that account as of 29 March 2019 of £22,204.18. That statement was not exhibited to a witness statement. There is no statement of truth attached to the copy. I am asked presumably to infer that that is the sum that remains in that account, over a month later. Even if, I say, assess the costs down for the sake of argument to, say, £10,000, that would leave a shortfall of £9,000, again assuming that fund is still available.

54. Defendant's counsel submits that I must consider the ability to pay at today's date. I should not be drawn into the potential attraction of making a tight time limit as a

condition for relief, say in seven days' time. I am not satisfied on the evidence before me that the defendant has the ability to pay the amount outstanding.

55. I asked Mr Granby about the prejudice to the defendant should I grant relief from forfeiture. I am told by the defendant that the flat is currently providing temporary housing and that the defendant is exercising its statutory duty to provide housing for homeless applicants. Counsel for the defendant candidly accepts that the prejudice would not be significant.

56. Ms Campbell, aside from her submissions in relation to timing which I have not accepted and her analysis of the law which I have not accepted, also emphasised that the defendant will receive a windfall. But that of itself cannot tip the balance in a case where the claimant herself is to blame. She has failed to bring a claim promptly. She has failed to provide any adequate explanation as to why she did not bring the claim earlier. Even today she has not demonstrated that she has the financial means to pay any sum ordered by way of a condition of granting relief. So it is an inevitable consequence that if I refuse relief the defendant will receive a windfall. However that is at the doors of the claimant herself, because that is where the fault rests. That fact alone and in light of the other matters that I have considered does not tilt the balance and persuade me that I should exercise my equitable jurisdiction and grant relief from forfeiture.

57. For those reasons I dismiss the claim.

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