Michaelmas Term
[2019] UKSC 46
On appeal from: [2018] EWCA Civ 1100

JUDGMENT

The Manchester Ship Canal Company Ltd (Appellant) *v* Vauxhall Motors Ltd (formerly General Motors UK Ltd) (Respondent)

before

Lord Carnwath
Lady Black
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

23 October 2019

Heard on 9 and 10 July 2019

Appellant
Katharine Holland QC
Galina Ward
Yaaser Vanderman
(Instructed by Hill Dickinson LLP (Manchester))

Respondent
William Norris QC
Simon Edwards
Daniel Stedman Jones
(Instructed by Duane Morris LLP)

LORD BRIGGS: (with whom Lord Carnwath, Lady Black and Lord Kitchin agree)

Introduction

1. This appeal is about equitable relief from forfeiture. Specifically, the question is whether the court has jurisdiction to grant such relief from the loss (to use a neutral word) of rights to make specified use of neighbouring land granted in a perpetual licence, where that loss of use is occasioned by the exercise of a right of termination for breach of an obligation to pay a sum due under the licence. In the present case the sum due was £50, whereas the annual value of the rights which would be lost upon termination is agreed to be in excess of £300,000.

2. Relief from forfeiture is one of those equitable remedies which plays a valuable role in preventing the unconscionable abuse of strict legal rights for purposes other than those for which they were conferred. But it needs to be constrained with principled boundaries, so that the admirable certainty of English law in the fields of business and property is not undermined by an uncontrolled intervention of equity in any situation regarded by a judge as unconscionable.

3. As will appear, the delineation of these principled boundaries has undergone significant development by the appellate courts during the last 45 years, but mainly in relation to relief from the forfeiture of rights in relation to chattels and other forms of personalty. This case has provided the courts with the opportunity to re-examine those boundaries in relation to the forfeiture of rights in relation to land and in particular to consider the extent to which, if at all, those recent developments in relation to relief from forfeiture of rights over personalty have consequences for the boundaries of that jurisdiction in relation to rights over land.

4. It has always been a condition for equitable relief from forfeiture that the forfeiture provision in question should have been conferred by way of security for the enforcement of some lesser primary obligation such as, but not limited to, the payment of money. It is common ground, at least in this court, that this requirement is satisfied on the facts of the case. The issues on this appeal relate to the second main condition going to jurisdiction to relieve from forfeiture which may loosely be described as turning upon the nature of the subject matter of the forfeiture, that is the rights which will be lost if the forfeiture is not relieved. The appellants say that, in relation to rights over land, nothing less than a proprietary interest will be sufficient to engage the jurisdiction to grant relief. The respondents

say that the authorities establish that possessory rights, falling short of a proprietary interest in the land, are sufficient. But they invite this court to go one step further and declare that any right to use property (whether real or personal) sufficiently engages the jurisdiction to grant equitable relief from its forfeiture, if the first condition, described above, is satisfied.

5. The trial judge, HHJ Behrens QC decided that the rights conferred by the licence in this case were, if not strictly possessory, sufficiently analogous to possessory rights to engage the jurisdiction, and he granted relief. The Court of Appeal decided that this went too far, but that the relevant rights were in any event possessory, so that they engaged the jurisdiction. Although the question whether, assuming jurisdiction, the court ought to have granted relief in its discretion was contested both before the judge and the Court of Appeal, it is only the threshold question of jurisdiction which remains live in this court.

The Facts

6. The appellant Manchester Ship Canal Co Ltd ("MSCC") is the owner of the Manchester Ship Canal ("the Canal") and adjacent riparian land, in particular on the south west side of it, in the vicinity of Ellesmere Port.

7. To the south west of MSCC's riparian land there was a substantial block of land, formerly in mainly military use, including an airfield, which was acquired in July 1961 by the respondent Vauxhall Motors Ltd (formerly General Motors UK Ltd) ("Vauxhall") for the purpose of being developed as a substantial vehicle manufacturing plant, now generally well known as Vauxhall's Ellesmere Port factory. Recognising that the construction of large buildings and hard surfaces on the newly acquired site would reduce its capacity for the absorption of surface water, Vauxhall sought to make arrangements with MSCC sufficient to enable it to discharge surface water and treated industrial effluent from the planned manufacturing complex into the Canal. For this purpose, Vauxhall acquired from MSCC a small rectangular part of MSCC's riparian land between the factory site and the Canal, for the construction of a water collection and effluent treatment plant, by a land exchange dated 12 October 1962. But this still left a small strip of riparian land owned by MSCC between the treatment plant and the Canal, across which Vauxhall needed to acquire a right to discharge surface water and treated effluent from the treatment plant into the Canal. Vauxhall acquired these rights by means of a licence ("the Licence") made on the same date as the land exchange. Subject to the provision for early termination referred to below, the rights were granted in perpetuity, in exchange for payment of the "rent or annual sum" of £50 per annum and the performance of certain covenants and conditions undertaken by Vauxhall.

8. The rights granted were set out in three parts, within clause 1 of the Licence. The first was a right to discharge surface water and suitably treated trade effluent from Vauxhall's treatment plant into the Canal, across a specified part of MSCC's land identified on plans annexed to the Licence. The second was a right to construct, maintain, alter and renew under and upon the same parts of MSCC's land pipes and other works (called "the Spillway") sufficient to effect and control the discharge of surface water and treated effluent into the Canal, subject to plans and specifications to be approved by MSCC's Engineer. The third was a right of access to the Spillway along specified parts of MSCC's land for the purpose of exercising the infrastructure rights, along a specified route or other route as prescribed by the Engineer.

9. Clause 2 of the Licence provided for payment of the annual rent of £50 as already described. Clause 3 contained covenants by Vauxhall relating, among other things, to the construction and maintenance of the Spillway, providing for it to be rerouted in the event (which did not occur) that MSCC wished to construct a wharf at the point of its discharge into the Canal. Clause 3(k) required Vauxhall to remove the Spillway and reinstate the locus in quo upon determination of the Licence. Clause 3(l) prohibited the assignment, transfer, underletting or other alienation of the benefit of the Licence by Vauxhall other than to a connected company. Clause 3(m) limited the use of the Spillway to the discharge of surface water and treated trade effluent from Vauxhall's factory site. Clause 3 also contained miscellaneous indemnities and an obligation on Vauxhall to pay for any dredging of the Canal necessitated by the construction and use of the Spillway.

10. Clause 4 of the Licence reserved rights to MSCC to construct and use over, under, along or across the Spillway pipes, railway lines, cables, roads, tramways, bridges, subways and wharves, but not so as materially to interfere with the discharge through the Spillway of surface water and treated trade effluent without providing Vauxhall alternative means of effecting and controlling discharge.

11. Clause 5 provided as follows:

> "If the said yearly rent or sum or any part thereof shall at any time be in arrear for the space of 21 days after the same shall have accrued due (whether legally demanded or not) or if and whenever Vauxhalls shall make default in the performance and observance of any of the covenants conditions and provisions herein contained and on their part to be performed and observed the Canal Company may (but without prejudice to any right of action available to them by way of injunction or otherwise) by notice in writing require Vauxhalls to pay the rent in arrear within 28 days or (as the case may be) to pay reasonable compensation for the said default and remedy the

> same (if capable of being remedied) within a reasonable time and if Vauxhalls shall fail to comply with such notice the Canal Company may thereupon by notice in writing determine this Licence forthwith and in such event this Licence and every clause matter and thing herein contained shall forthwith absolutely cease and determine but without prejudice to any claim by either party against the other in respect of any antecedent breach of any covenant condition or provision herein contained."

12. The Spillway was duly constructed by Vauxhall following the grant of the Licence. The infrastructure erected on MSCC's land consists of an underground pipe of about approximately 2,100mm diameter feeding into a partly underground hexagonal distribution centre, before splitting into two 1,675mm underground pipes leading to an outfall on the bank of the Canal. Following construction, the Spillway was brought into use for discharge of surface water and treated effluent, and has performed that function ever since.

13. By a deed of variation dated 25 July 1997 the Licence was varied in the following material respects. First, clause 3(1), restricting assignment and alienation, was deleted and replaced by a provision "for the avoidance of doubt" whereby MSCC acknowledged that the rights granted to Vauxhall by the Licence were to be exercisable in perpetuity by all or any of Vauxhall, its successors in title, the owners, tenants and occupiers from time to time of any part of Vauxhall's factory site. Secondly, by clause 4, Vauxhall granted MSCC a right to connect into Vauxhall's treatment plant a pipe discharging surface water from neighbouring land of MSCC, for the duration of the Licence.

14. In the meantime Vauxhall transferred part of its factory site to the Urban Regeneration Agency, upon terms that the land transferred would continue to have the benefit of the drainage system constituted by the Spillway and confirmed by the Licence.

15. The Licence was terminated in the following circumstances. Vauxhall failed to pay its annual rent of £50 due on 12 October 2013. MSCC served notice pursuant to clause 5 of the Licence on 6 February 2014. Vauxhall continued in its failure to pay the £50 due and, on 10 March 2014, MSCC served notice to terminate the Licence under clause 5.

16. After inconclusive negotiations for a new licence at market rates, Vauxhall claimed relief from forfeiture, initially by correspondence and then by these proceedings which were issued on 6 March 2015. As already noted the judge

granted relief from forfeiture and the Court of Appeal affirmed his decision, albeit on slightly narrower grounds.

The Law

17. Equitable relief from forfeiture is a remedy of ancient origin. Prior to the conveyancing and property legislation consolidated in 1925, its main spheres of activity lay in relation to leases and mortgages of land, but those are now statutory. For present purposes, it is unnecessary to trace its antecedents back before 1972, when the rationale for and main principles regulating the remedy were restated in this well-known passage in the speech of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, at 723-724:

> "… it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

18. That passage contains a trenchant restatement of the central rationale and condition for the exercise of the remedy, namely that the primary object of the bargain should be the securing of a stated result, for which the forfeiture provision is added by way of security. Lord Wilberforce did not however state any second condition for the exercise of the jurisdiction to grant relief, relating to the nature of the rights liable to be forfeited. Earlier, at p 722 he said:

> "There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copy holds, or where

> the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power."

19. The property liable to forfeiture in that case was a lease but, since the right of re-entry was reserved by an assignee of the lease rather than by the lessor upon its grant, the statutory regime for relief from forfeiture did not apply. Nonetheless, since the proprietary interest in land constituted by a lease had always been fairly and squarely within the types of property liable to forfeiture within the reach of equity's remedy of relief, the issue as to the nature of the property to which the remedy might extend simply did not arise.

20. That question did arise for decision in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694. The rights in issue consisted of the charterer's rights under a time charter of a ship, which entitled the owners to withdraw the vessel from the service of the charterers if specified monthly payments due in advance were not made on time. Having failed to make timely payment and received a telex from the owners withdrawing the vessel, the charterers claimed that withdrawal amounted to a forfeiture and sought equitable relief, including an injunction restraining the owners from withdrawing the vessel from service. Affirming the Court of Appeal, the House of Lords held that the court had no jurisdiction to grant relief in such a case.

21. Giving the leading judgment, Lord Diplock identified two reasons for that conclusion, in relation to time charters. The first was that a time charter conferred upon the charterer no interest in or right to possession of the vessel. He said, at pp 700-701:

> "A time charter, unless it is a charter by demise, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; it is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give to them. Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity a court would never grant specific performance: *Clarke v Price* (1819) 2 Wils 157; *Lumley v Wagner* (1852) 1 De G M & G 604. … To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer,

> though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy that English courts have always disclaimed any jurisdiction to grant. This is, in my view, sufficient reason in itself to compel rejection of the suggestion that the equitable principle of relief from forfeiture is juristically capable of extension so as to grant to the court a discretion to prevent a shipowner from exercising his strict contractual rights under a withdrawal clause in a time charter which is not a charter by demise."

22. At p 702, referring to the dicta of Lord Wilberforce in the *Shiloh Spinners* case, he said:

> "That this mainly historical statement was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights, but providing for a right to determine the contract in default of punctual payment of a sum of money payable under it, is clear enough from Lord Wilberforce's speech in *The Laconia* [1977] AC 850. Speaking of a time charter he said, at p 870: 'It must be obvious that this is a very different type of creature from a lease of land.'"

23. Lord Diplock's second reason was that, in any event, the provision that the owner could withdraw the vessel upon failure by the charterer to make payment in advance was not a mere security, since timely payment was needed to fund the wages and victualling of the master and crew together with the insurance and maintenance of the vessel sufficient to enable her to perform the contracted services.

24. For present purposes, the key phrases which stand out from Lord Diplock's speech are, "no interest in or right to possession of the vessel", on p 700 and "proprietary or possessory rights" on p 702. He used the concepts of proprietary and possessory rights as a *sine qua non* in relation to the rights liable to be forfeited, in the absence of which equity could not intervene. The sharp distinction in his mind between a time charter, which did not confer those rights, and a charter by demise, which did, may be illuminated by the following explanation from Evans LJ in *Bridge Oil Ltd v Owners and/or demise charterers of the ship 'The Guiseppe di Vittorio'* [1998] 1 Lloyd's Rep 136, at 156:

> "What then is a demise charter? Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting - a lease, or demise, in real property terms - of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew."

25. The condition for jurisdiction to grant equitable relief from forfeiture, that the rights subject to forfeiture should be proprietary or possessory in nature first enunciated, in a negative sense, in *The Scaptrade*, have been followed in a series of later cases, mainly about chattels and other forms of personal property, rather than rights in relation to land. S*port International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 was a case about an exclusive right to purchase sports shoes and resell them in specified territories contained in an agreement settling litigation which included a provision for termination upon (inter alia) the buyer's failure to provide a security guarantee on time. Giving the judgment of the Court of Appeal, after a review of the *Shiloh Spinners* case and *The Scaptrade*, Oliver LJ said, at p 787B that:

> "… historically, the availability of equitable relief from forfeiture has been confined to cases where the subject matter of the forfeiture is an interest in land."

At p 788C he continued:

> "The fact remains that the jurisdiction never was, and never has been up to now, extended to ordinary commercial contracts unconnected with interests in land and, though it may be that there is no logical reason why, by analogy with contracts creating interests in land, the jurisdiction should not be extended to contracts creating interests in other property, corporeal or incorporeal, there is, at the same time, no compelling reason of policy that we can see why it should be. And the fact is that the defendant in this case is seeking an extension by analogy, and an extension not based on any pressing consideration of legal policy but simply on an appeal to sympathy for what is considered to be a hardship arising from strict adherence to a bargain which is concluded with its eyes open."

26. In the House of Lords, Lord Templeman noted at p 794 that Lord Diplock had, in *The Scaptrade*, confined the power to relieve from forfeiture to contracts concerning the transfer of proprietary or possessory rights. He continued:

> "I do not believe that the present is a suitable case in which to define the boundaries of the equitable doctrine of relief against forfeiture. It is sufficient that the appellants cannot bring themselves within the recognised boundaries and cannot establish an arguable case for the intervention of equity. The recognised boundaries do not include mere contractual licences and I can see no reason for the intervention of equity. Your Lordships are concerned with an unusual contract bringing hostile litigation to an end and including a number of provisions which cannot be dissected so as to attribute different degrees of importance to different rights and obligations."

27. Ms Katharine Holland QC for MSCC drew attention, correctly, to the fact that Oliver LJ referred only to proprietary, rather than possessory, rights as sufficient to attract equitable relief from forfeiture. This was part of his description of the history of the remedy. It was not endorsed by the House of Lords, although other parts of Oliver LJ's analysis were. Nor has it stood the test of time, as appears below.

28. *BICC plc v Burndy Corpn* [1985] Ch 232 was about the forfeiture of patent rights conferred under a commercial agreement. Dillon LJ (with whom Kerr and Ackner LJJ agreed) said this, at p 252:

> "There is no clear authority, but for my part I find it difficult to see why the jurisdiction of equity to grant relief against forfeiture should only be available where what is liable to forfeiture is an interest in land and not an interest in personal property. Relief is only available where what is in question is forfeiture of proprietary or possessory rights, but I see no reason in principle for drawing a distinction as to the type of property in which the rights subsist. The fact that the right to forfeiture arises under a commercial agreement is highly relevant to the question whether relief against forfeiture should be granted, but I do not see that it can preclude the existence of the jurisdiction to grant relief, if forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, is in question."

29. Ms Holland QC drew the court's attention to *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, a vendor and purchaser case in which the purchaser was ten minutes late in tendering the purchase price under a contract which made time for completion of the essence. Giving the judgment of the Privy Council on an appeal from Hong Kong, Lord Hoffmann rejected a claim for relief from forfeiture, concluding at p 523 as follows:

> "In his dissenting judgment, Godfrey JA said that the case 'cries out for the intervention of equity'. Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene."

30. This decision is not of significant assistance for present purposes. It was a case in which a contract for the purchase of legal title to land was found to have been repudiated by the failure by the purchaser to comply with a time of the essence provision. Thus the property the subject matter of the contract never became subject to the vendor's obligation to convey. While it may be said that the purchaser had a species of equitable interest pending completion, the facts were far removed from cases such as the present, where the rights subject to forfeiture are perpetual in nature and have already been conferred and enjoyed for many years prior to the event giving rise to termination.

31. Most of the cases about relief from the forfeiture of possessory (rather than proprietary) rights concern personalty. Nonetheless, some slight indication that possessory rights in relation to land may also qualify for relief from forfeiture is to be found in the judgment of Nourse LJ in *Bland v Ingrams Estates Ltd* [2001] Ch 767. The plaintiff had a charging order (creating an equitable charge) over a lease of land. The landlord forfeited the lease and the lessees did not apply for relief. On application for relief from forfeiture under the court's inherent jurisdiction, the Court of Appeal held that, in an area so heavily regulated by statute, equity ought not to intervene. Nonetheless the plaintiff was able to stand in the shoes of the lessees so as to assert their statutory right to relief, as if he was a beneficiary under a trust. In reviewing the inherent equitable jurisdiction Nourse LJ said this, at p 780 (para 31):

> "A jurisdiction does not become discretionary just because it is both inherent and equitable. The authorities show that the cases in which the inherent jurisdiction to grant relief against forfeiture for non-payment of rent has been exercised have been restricted to those in which the person claiming relief is entitled to possession of the land or at any rate, which is not necessarily the same thing, has a legal estate or equitable

> interest in it. Now that so much of the jurisdiction has been overtaken by statute, any legitimate basis for its extension has disappeared. Admittedly and notoriously, there are gaps and anomalies in the statutory framework. But it is not for the courts to fill the gaps and cure the anomalies in purported reliance on a jurisdiction which has never existed."

Nourse LJ appears to have regarded a right to possession of land as having qualified, historically, for equitable relief from forfeiture. Nonetheless it is slender authority for the resolution of the present issue. It deserves mention only because all of the other relevant cases are about rights in relation to chattels or other personalty, rather than land.

32. *On Demand Information plc v Michael Gerson (Finance) plc* [2003] 1 AC 368 was about forfeiture of rights in relation to video and editing equipment granted under finance leases. The leases provided a three-year period for use by the lessee at a substantial rent, provision for yearly extensions for modest payments and provision that, upon termination (if they had performed their obligations) the lessees could sell the equipment and retain 95% of the proceeds. For present purposes the relevant issue was whether the equitable jurisdiction was restricted to cases of forfeiture of proprietary rights. At p 379 (para 29) Lord Millett said this:

> "The Court of Appeal (Pill and Robert Walker LJJ, Sir Murray Stuart-Smith dissenting) [2001] 1 WLR 155 dismissed the lessee's appeal. The court unanimously upheld the deputy judge's ruling that the criteria for the exercise of the equitable jurisdiction were present at the date of the application. They rejected the lessor's objection that the leases were purely contractual in nature, and that the jurisdiction to grant relief from forfeiture was restricted to cases where the forfeiture of proprietary rights strictly so-called was in question. As Robert Walker LJ put it, contractual rights which entitle the hirer to indefinite possession of chattels so long as the hire payments are duly made, and which qualify and limit the owner's general property in the chattels, cannot aptly be described as purely contractual rights. For my own part, I regard this conclusion as in accordance with principle; any other would restrict the exercise of a beneficent jurisdiction without any rational justification."

33. This is the first occasion upon which a perception that possessory rights of an indefinite duration could qualify for equitable relief from forfeiture was enunciated. Although not apparent from *The Scaptrade*, the relevance of the

indefinite duration of the possessory right was reinforced by Hamblen J in *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd* [2011] 1 All ER (Comm) 259, a case about rights of limited duration under operating leases of aircraft. By contrast with the typical finance lease considered in the *On Demand* case, the operating leases for eight years conferred no rights upon the lessee to extend or to acquire the aircraft on termination. The aircraft had a substantial expected operational life after termination so that the interest of the lessor was not merely financial or economic. Hamblen J held that there was no jurisdiction to grant relief from the forfeiture of an operating lease of this kind. At para 57 he said:

> "In summary, whilst I accept that the ASLAs transfer possessory rights to Paramount, for the relief jurisdiction to apply to contracts transferring a bare possessory right for only a proportion of the economic life of the chattel would represent a major extension of existing authority."

He also concluded that the forfeiture provision was not merely by way of security, and that there were strong policy reasons why relief should not be available for operating leases of this type.

34. Finally, the extent of the equitable jurisdiction was thoroughly reviewed by the Privy Council in *Çukurova Finance International Ltd v Alpha Telecom Turkey Ltd (Nos 3-5)* [2016] AC 923, a case about a contractual power to appropriate shares, charged by way of equitable mortgage to secure repayment of a loan. For present purposes the importance of the decision lies in the Board's treatment of the submission that equitable relief from forfeiture was limited, in the context of mortgages, to mortgages of real property rather than personalty. After citing the passage from the judgment of Dillon LJ in the *BICC* case (quoted above) the Board continued, at para 94:

> "That reasoning, with which the Board agrees, supports the conclusion that relief from forfeiture is available in principle where what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, regardless of the type of property concerned."

Analysis

35. The issues as to the extent of the jurisdiction to grant equitable relief from forfeiture have, if anything, widened since the hearing in the Court of Appeal. At that stage it appears to have been common ground that the jurisdiction did extend

to relief against the forfeiture of possessory rights in relation to land. MSCC did not submit that the jurisdiction was limited to proprietary rights (as it does before this court) and Vauxhall did not submit that the jurisdiction extended to any rights to use property, regardless whether they were strictly possessory, as it now does before this court. Rather the issue was whether the rights granted by the Licence were truly possessory in the relevant sense. There were also issues about whether the termination right in clause 5 was by way of security, and issues about discretion, but they have fallen by the wayside.

36. It is convenient to begin by addressing MSCC's main submission that the jurisdiction to grant equitable relief from the forfeiture of rights relating to the land is limited to rights which, on settled principles, amount to a proprietary interest, so that merely possessory rights, and therefore all rights conferred by licences, are insufficient.

37. Ms Holland advanced a series of interconnected arguments about why this should be so. Her main point was that there had always existed a fundamental, well-settled and clearly understood distinction between proprietary interests in land and other rights relating to land, encapsulated in the distinction between a lease, which did confer a proprietary interest and a licence, which did not. Thus the boundary between a lease and a licence has traditionally been assumed also to be a boundary for the jurisdiction from relief from forfeiture, as is apparent from para 4.1.69 of Gray and Gray's Elements of Land Law, 5th ed (2008):

> "… Only a tenant - and not licensee - may ask for relief against forfeiture."

Any other boundary for the intervention of equity into contractual arrangements conferring rights over land, and in particular which admitted possessory rights in addition to proprietary interests, would be causative of damaging uncertainty in an area of the law in which certainty commands a premium.

38. Secondly, she submitted that although the concept of a possessory right appeared to have become entrenched in defining the boundary of equitable relief from the forfeiture of rights in relation to chattels and other personalty, this should not be transplanted so as to move the boundary line in connection with rights over land. This was first because the concept of possession as used in the authorities about chattels was different from the concept of possession in relation to land, and more akin to a form of ownership.

39. Thirdly, because possession in the context of land had no single clear or settled meaning, its use for the identification of the boundary of equity's intervention would be a recipe for confusion and uncertainty.

40. These are formidable submissions. It is undoubtedly true that certainty is, or should be, an important element of land law. As Fox LJ said in *Ashburn Anstalt v Arnold* [1989] Ch 1, at p 26:

> "In matters relating to the title to land, certainty is of prime importance."

41. But certainty is equally important in the law of commerce, and one of the reasons why English commercial law is chosen around the world by commercial counterparties to govern their contracts, even when neither they nor the subject matter have any connection with England. The authorities summarised above, beginning with *The Scaptrade*, demonstrate that English commercial law has accommodated the concept of possessory rights in relation to personalty as sufficiently defining the boundary of equity's intervention by way of relief from forfeiture, over a wide range of different types of subject matter, including ships and (potentially) aircraft, trademarks and patents, video equipment and shares. If the concept of possessory rights as part of the relevant boundary causes no damaging uncertainty in those widely varied commercial contexts, there is no immediately obvious reason why it should do so in relation to rights over land.

42. The Court of Appeal had no difficulty in identifying a sufficiently certain concept behind the phrase possessory rights in relation to land. Basing himself on *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, Lewison LJ said, at para 59:

> "There are two elements to the concept of possession: (1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess'). What amounts to a sufficient degree of physical custody and control will depend on the nature of the relevant subject matter and the manner in which that subject matter is commonly enjoyed. The existence of the intention to possess is to be objectively ascertained and will usually be deduced from the acts carried out by the putative possessor …"

While that concept is drawn from a case about adverse possession, it is a practical and workable concept which, although necessarily fact-based, involves no inherent uncertainty.

43. I do not accept Ms Holland's submission that the use of the concept of possessory rights in relation to chattels and other personalty in the decided cases equates to something more akin to ownership, and therefore a proprietary interest, in relation to land. As is apparent from the citation from *The Scaptrade* and *Guiseppe di Vittorio* cases, the essence of a demise charter which sets it apart from a pure time charter is that it gives the charterer not ownership of the vessel, but possession and control of it. I consider that the frequent use in the decided cases of the words proprietary or possessory as alternatives in relation to rights over personalty clearly points to a recognition that a purely possessory right is something falling short of ownership, or of a proprietary interest.

44. There are to be weighed against MSCC's submission powerful reasons why, now that it is settled that equitable relief may apply to forfeiture of possessory rights in relation to a wide range of chattels and other personalty, it should also do so in relation to possessory rights over land. First, the original proving ground for equitable relief from forfeiture consisted of rights in relation to land, originally, but not only, leases and mortgages. It would be strange indeed if equity's reach was wider in relation to rights over chattels and other forms of personalty than over rights in relation to land.

45. Secondly, as was noted by Robert Walker LJ and Lord Millett in the *On-Demand* case, and by Dillon LJ in *BICC plc v Burndy Corpn*, there is simply no logic or reason in principle for drawing a distinction as to the type of property in which the rights subsist, when considering the extent of equity's jurisdiction to relieve from forfeiture. If therefore it is the nature of the right rather than the identity of the property over which it may be exercised that matters, then there must be every good reason to apply a jurisdiction applicable to possessory rights as much to rights over land as to rights over other forms of property.

46. I would acknowledge that a recognition that equity may relieve against the forfeiture of possessory rights over real property, falling short of a proprietary interest, means that the simple assumption of the editors of *Gray and Gray* that relief may never be granted from the forfeiture of a licence calls for re-examination. There will be many licences which only grant rights falling short of possession, for which that simple proposition will still hold good. As will appear, the Licence granted in the present case was a very unusual one, both because it granted an element of virtually exclusive possession, coupled with a high degree of control over the locus in quo, and because it was granted in perpetuity. It by no means follows from a conclusion that the rights conferred by this Licence are

within equity's jurisdiction to relieve from forfeiture, that licences in relation to land will fall generally within that same boundary.

47. Finally in relation to this issue, while it is essential for the certainty of the law that the scope for equitable intervention on grounds of unconscionability should be delimited by reference to reasonably clear boundaries, they should be identified by reference to a principled understanding of the nature and purpose of the relevant equity, rather than be merely arbitrary. The careful examination and development of the reasons why that boundary should accommodate relief from the forfeiture of possessory rights in the authorities cited above seems to me to be clearly in accordance with that principled approach. By contrast, the slavish adoption of a rule that nothing other than a proprietary interest will do, in relation to land, does nothing of the kind.

48. This may be illustrated in this case by the fact that the Licence granted rights over MSCC's land very similar to, and indeed more extensive than, rights in the nature of an easement. It is common ground that an easement creates an interest in land, so that its forfeiture may be relieved against. There is no principled reason why the perpetual rights granted by the Licence should not do.

49. It is necessary next to address Vauxhall's submission that a better boundary than one which merely accommodated possessory rights would be one which extended the equitable jurisdiction in relation to all forms of right to use property, provided only that the right of termination is intended to secure the payment of money for the performance of other obligations. I would reject this submission as well. It was heavily based upon an over-literal reading of Lord Wilberforce's speech in *Shiloh Spinners Ltd v Harding* which, as noted above, did not include as a condition of the existence of the jurisdiction any requirement as to the nature or quality of the rights liable to forfeiture. But he had no reason to do so, since the rights liable to forfeiture in that case amounted to a proprietary interest in land, and the question whether the jurisdiction might extend to any right to the use of property never arose for argument, let alone decision.

50. To expand the ambit of the equitable jurisdiction in that way, leaving all control upon its use as a matter of discretion, would offend against the well-recognised need to ensure that equity does not undermine the certainty of the law. Furthermore it would set at nought the careful development of the principled limitation of the jurisdiction to the forfeiture of proprietary or possessory rights, worked out over many years in a succession of broadly coherent authorities.

51. I would however wish to sound one note of caution against the slavish application of the whole of that jurisprudence to land. The requirement, developed in the *On Demand* and *Celestial* cases that the possessory right should be one

which is indefinite, rather than time-limited to a period shorter than the full economic life of the chattel or other species of personal property, may have unintended consequences in relation to land. Chattels by their nature are of limited economic life, and most intellectual property rights, and patents in particular, have their own inherent time-limitations. By contrast, land is a form of perpetual property, and I can well conceive of forms of possessory rights in relation to land which are not perpetual, but which might nonetheless qualify for equitable relief from forfeiture. The point need not be decided in this case since, most unusually, this Licence was indeed granted in perpetuity. It is to be noted that the acknowledgment in *The Scaptrade* that equity might relieve from the forfeiture of a demise charter (which is typically for much less than the economic life of the ship) suggests that even in relation to chattels a rule that the possessory right should be indefinite may go too far.

52. It remains to consider whether the Court of Appeal was right to conclude that the rights granted by the Licence fell within that possessory class to which the jurisdiction to grant relief from forfeiture extends. It is common ground that they conferred no proprietary interest in favour of Vauxhall over MSCC's adjacent land. Ms Holland submitted that the rights also fell short of granting the requisite degree of possession and control over MSCC's land, lying between Vauxhall's treatment works and the Canal itself, to be regarded as possessory in the relevant sense. She emphasised, with force, that this question depended upon the nature of the rights granted, rather than merely upon the extent to which, following the grant of the Licence, Vauxhall rather than MSCC occupied or controlled the Spillway for the purpose of its construction, maintenance and operation. Her main point was that the essence of the right granted by the Licence was that of discharge of surface water and treated effluent, and that the rights to construct, maintain and operate the Spillway were strictly ancillary. The mere right of discharge did not involve possession, let alone exclusive possession, and in any event the terms of the Licence reserved to MSCC a substantial degree of control, over both the construction and maintenance of the Spillway, including a right to have the infrastructure enlarged or rerouted in stated circumstances.

53. Finally, even if the court were to find that Vauxhall had possessory rights in relation to the infrastructure constituting the Spillway, Ms Holland submitted that there was no forfeiture of that right, because Vauxhall was both entitled and indeed obliged to remove and recover the infrastructure on termination of the Licence.

54. These submissions were advanced with equal force before the Court of Appeal, where they constituted the central part of MSCC's case. Giving the leading judgment, Lewison LJ dealt with them with conspicuous care and detail before concluding that the Licence did indeed confer the requisite possessory rights.

55. I have already concluded that the Court of Appeal applied the correct legal test to this question. Beyond that the issue turned on the application of that test to detailed facts, from which this court would be slow to depart from the Court of Appeal unless it was clearly wrong.

56. It is sufficient for the disposal of this last issue for me to say that nothing in Ms Holland's submissions on this point came near to persuading me that Lewison LJ's analysis was wrong. On the contrary, if it were necessary to conduct that analysis afresh, I would find it difficult to improve upon his, in particular at paras 66-69 of the judgment. Nonetheless out of respect for Ms Holland's careful submissions, I will provide the following summary of my own reasoning.

57. The starting point is that, as is common ground, the infrastructure works carried out entirely by Vauxhall for the purpose of creating the Spillway became, upon their completion, part of MSCC's land, because they were fixtures. The question therefore is whether Vauxhall had the requisite degree of possession and control of the Spillway itself. In my view it clearly did. The infrastructure consisted largely of underground pipes and chambers which were, in practice, only or at least mainly accessible from Vauxhall's treatment plant. The practical reality was that the Spillway formed an integral part of the infrastructure for the transmission of surface water and treated effluent from Vauxhall's factory site, the remainder of which, including further retaining structures, pipes and a substantial ravine all lay on Vauxhall's land. Although MSCC had certain default rights to intervene if Vauxhall failed adequately to maintain and operate the Spillway, and a right to re-route it if it caused difficulties at its point of discharge into the Canal, none of these significantly impacted upon the reality that Vauxhall would be the dominant player in the maintenance and operation of the Spillway once constructed. Of course, the whole of the construction itself was Vauxhall's undertaking. Using the chartering analogy derived from *The Scaptrade*, far from MSCC providing a service to Vauxhall for the discharge of its surface water and treated effluent, Vauxhall built, operated and maintained that infrastructure, and had exclusive perpetual use of it, subject only to MSCC's right of termination for breach of covenant in clause 5. It is in that context nothing to the point that, by later transactions, Vauxhall permitted MSCC to discharge water from its own land into Vauxhall's treatment works for onward transmission along the Spillway into the Canal. That additional flow became Vauxhall's discharge once it left the treatment works, and in no way detracted from Vauxhall having exclusive use of the Spillway.

58. Finally, there is nothing in Ms Holland's point that, upon termination, Vauxhall was obliged to remove and recover the infrastructure which constituted the Spillway, so that there was no forfeiture. All Vauxhall would recover by the performance of that expensive obligation would be a collection of useless debris. The notion that nothing was thereby forfeited has no foundation in reality.

Conclusion

59. For those reasons, I would dismiss this appeal.

LADY ARDEN:

Issues covered by this judgment

60. I agree with Lord Briggs that relief from forfeiture can be given where the rights in land are possessory only, which was a new point taken in this Court, and that the conclusion of the Court of Appeal that the rights were possessory is unassailable. This judgment considers whether to hold that there is jurisdiction to grant relief from forfeiture in the case of a licence of land where the rights are possessory only introduces an unacceptable element of uncertainty into the law.

61. As to the question of certainty in the law, the present case is relatively unusual because it involves relief from forfeiture in relation to a licence over land, and not a lease where the lessee will have a proprietary interest in the land. However, this licence was not a lease by reason only that it operates in perpetuity and not for a certain time as required at common law.

62. Where in any case relief from forfeiture is given, the party seeking forfeiture will not be able to use the property in the way in which he expected to do in the event of breach, and this may reduce the value and marketability of his asset. The operation of the agreement according to its express terms will be rendered uncertain if the licensee can apply for relief. Thus, it might be said that by allowing relief from forfeiture in respect of rights acquired under a mere licence, which moreover applies a test of possession for that purpose which depends on the successful party establishing a particular state of fact (involving no doubt the consideration of the totality of the relevant facts), the court has produced a situation in which an unacceptable element of certainty has been introduced. In my judgment, this is an important issue with which the court must grapple. It can only be resolved by looking at the loss of certainty resulting from this decision in the wider context of the operation of the doctrine.

Standpoint for analysing the relief from forfeiture and the role of equity

63. The doctrine of relief from forfeiture is an equitable doctrine. I would approach it from the standpoint of equity rather than through the prism of property law. Equity is a body of principles which alleviates the strict application of rules of law in appropriate cases. In this case, the relevant rule of law is that the court will

enforce the terms of the parties' agreement because there is no reason in law why it should not be enforced. Equity serves to finesse rules of law in deserving cases. It thus makes the system of law in England and Wales one which is more likely to produce a fair result than would be possible if equity did not exist. This must surely be one of the reasons why the law of England and Wales is held in high regard in the world.

Some uncertainty is inevitable

64. Some element of uncertainty in the application of the doctrine of relief from forfeiture is inevitable. Equity in general operates by principles rather than by rules. That means that relief from forfeiture is not an automatic consequence if particular conditions are fulfilled but instead is given in appropriate cases. It is not a foregone conclusion that once the conditions for relief are shown relief will necessarily be granted and that inevitably means an element of uncertainty about its availability.

65. Another element of inherent uncertainty arises from the fact that the doctrine of relief from forfeiture is a general doctrine and will apply to new circumstances, such as where the court has to deal with a particular form of property, or (as here) interest in or in relation to property, for the first time. The most obvious new circumstances are the creation of new forms of property or interest in property, such as shares in a registered company or aircraft. Thinking ahead, it may be applied in the future to forms of property which only exist in the cybersphere, or to rights which are treated as to all intents and purposes as rights to property (see eg M Solinas *Bitcoiners in Wonderland: Lessons from the Cheshire Cat* (2019) LMCLQ 433). I note that the view that the law of forfeiture may yet expand in this general area is supported by Professor Ben McFarlane in *Snell's Equity*, 33rd ed (2015), para 13-023, cited by Lewison LJ in his judgment in this case ([2018] EWCA Civ 1100; [2019] Ch 331, paras 50-51).

66. It inevitably follows that there will be respects in which the equitable doctrine of relief from forfeiture will be "unfenced". So, while I agree with Lord Briggs that there is a need for there to be certainty in this area of the law, especially in the commercial field, I would go further and conclude that certainty for the purposes of a general doctrine of equity differs from that which results from a hard-edged rule of law. As Sir Richard Arden MR explained in *Eaton v Lyon* (1798) 3 Ves 689, 693, 30 ER 1223:

> "At Law a covenant must be strictly and literally performed: in Equity it must be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit."

Types of rights or types of cases?

67. Lord Briggs points out that a mere contractual licence alone would not be enough to give rise to relief from forfeiture. There would typically be an exclusive licence (above, para 46). I agree that it is likely to be necessary to establish possessory rights, but I would go further and hold that the law recognises that there are cases in which equitable relief will not be given even if there is an interest in property of a proprietary or possessory kind. But before I reach that stage, I must retrace my steps and travel over a little of the history of relief from forfeiture.

68. As Lord Briggs explains, equitable relief from forfeiture is a remedy of ancient origin. It is inevitably difficult, given the long history of equity, to say that the doctrine was ever finally constituted in a particular form. Rather it kept evolving as the social and economic life of the nation changed: the law of equity developed and keeps on developing. Questions such as this case raises as to whether particular forms of property interest are or are not within the reach of the doctrine would have no meaning in a society which did not discover the utility of them until later in its history.

69. As time went on, the doctrine applied to both real and personal property and to intangible as well as tangible property, as need arose. I would prefer to express no view on the wider definition of an interest in property involved in the respondents' alternative argument since it does not need to be decided on this appeal and has not been fully argued. There is a degree of uncertainty in the concept of possessory rights in relation to land, and it may be that an extension to rights to use property may not involve any significant further degree of uncertainty.

The fundamental principle giving rise to relief from forfeiture

70. What then is the principle on which equity acts when it grants relief from forfeiture? The fundamental principle was, as Lord Briggs has said, that equity intervenes to restrain forfeiture where (1) the right had been conferred to secure the performance of some other covenant and (2) although the covenantor had breached his covenant, he was now in a position to perform it and to pay any compensation that might be appropriate: see *Peachy v Duke of Somerset* (1721) Prec Ch 568; 24 ER 255. These are the preconditions to relief from forfeiture in the sense that they must be present, but they are not necessarily sufficient of themselves to justify the intervention of equity, even putting on one side the exercise of the judge's discretion. In the striking phrase of Dr P G Turner in his valuable case note on the decision of the Court of Appeal in this case (entitled *What delimits equitable relief from forfeiture?)*:

> "Equity will only relieve where the security purpose stands ahead of any other." ((2019) 78(2) CLJ 276, 279)

71. Moreover, this was a statement of general principle, not limited to any particular sort of property.

Forfeiture and penalties

72. Forfeiture and penalties are often coupled together, and forfeiture and penalties often operated within the same legal and factual space. In *Sloman v Walter* (1784) 1 Bro Ch C 418, the parties were partners in a coffee house. The plaintiff conducted the business of the coffee house but he agreed with the defendant that the defendant should have the use of a particular room in the coffee house when he required it. This promise was secured by a bond for £500. On one occasion he asked to use it and was refused. The defendant then sued to enforce the bond. Lord Thurlow LC held:

> "the only question was, whether this was to be considered as a penalty, or as assessed damages. The rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and, therefore, only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light …"

73. There is no reason to think that the kindred doctrine of forfeiture was restricted to covenants to secure the payment of money any more than penalties.

Fluctuations in the doctrine of relief from forfeiture

74. Sometimes the law has developed, and then retraced its steps. Thus, in several cases, the courts decided in favour of granting relief to a tenant who had committed a breach of covenant which did not involve the payment of money, such as cutting timber when he should not have done so. The courts were prepared to grant relief against these breaches just as they did against the payment of rent. But then Lord Eldon LC in *Hill v Barclay* (1811) 18 Ves Jun 56, 64; 34 ER 238 firmly held that the breach had to be of a covenant to pay money. He held that:

> "The distinction has been taken, that relief may be had against the breach of a covenant to pay money at a given day; but,

> not, where any thing else is to be done. … In all these cases the law having ascertained the contract, and the rights of the contracting parties, a Court of Equity ought not to interfere."

75. This meant that Parliament had in due course to provide by statute for relief against forfeiture for lessees of land, including those who were in breach of a covenant other than a covenant to pay rent, where the lessor was seeking to exercise a right of re-entry or forfeiture: see now section 146 of the Law of Property Act 1925. The legislature intervened in relation to leases but its intervention did not mean that relief from forfeiture was not capable of being invoked in cases not covered by legislation, as Lord Wilberforce (with whom the other members of the House agreed) explained in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 725. There was an inconclusive discussion at the hearing of this appeal as to whether parties could contract out of forfeiture relief under the general law. In this connection, I note that section 146(12) expressly rules this out in relation to relief under that section.

Issue is whether the circumstances satisfy the doctrine not the type of interest

76. Where the conditions described by Lord Briggs (above, para 17) were fulfilled, and assuming that the complainant had some relevant form of entitlement to property which would be affected by the forfeiture, the doctrine of forfeiture applied unless there was some good reason why it should not do so, such as where relief from forfeiture was inconsistent with some statutory right, or the case fell within a class of case where relief was not given. Equity did not, therefore, ask whether the forfeiture would be of a particular type of interest in property. Nor, as far as I can see from the case law, did equity, in the case of tangible movable property, draw arbitrary distinctions between movable and immovable property such as whether the period for which the applicant had any right in the property was for the whole or substantially the whole of its economic life: there can be no doubt that in theory a lease of land in respect of which forfeiture might be given may be for a short period, say a month.

No relief from forfeiture for termination under ordinary and lawful commercial bargain

77. So, as it seems to me, the primary question that has to be resolved in relation to the doctrine of relief from forfeiture outside leases of land and mortgages is not what relationships to property it covers but whether the circumstances in which it is sought to be invoked are those in which equity would grant relief.

78. There is no exhaustive list of those cases, but one of them is where the bargain giving rise to the forfeiture is an ordinary and lawful commercial bargain inconsistent with equity granting such relief from forfeiture (unless of course the right involved a penalty). Lord Briggs has already given an example of this namely *The Scaptrade*. On my approach this does not critically turn on the difference between charters by demise and time charters. The commercial bargain in that case required the time charterer to make his payments timeously and it was well understood between commercial people that the ship would be withdrawn if that did not happen because the shipowner needed the payments to be made timeously in order to provide a fully-equipped ship.

79. An earlier case in this field is *Sparks v The Company of Proprietors of Liverpool Water-works* (1807) 13 Ves Jun 428; 33 ER 354, which concerns intangible property, namely the rights conferred by a share. In this case, the plaintiff was a shareholder in a statutory company formed to supply water to Liverpool. The company had issued shares, which were partly paid. Under its articles, calls could be made by notice which was to be a maximum of 21 days. The plaintiff was absent from his address and did not receive notice of the call in question. As he had failed to pay the call, the company could and did exercise an express power in its constitution to forfeit his shares, which was undoubtedly given to secure members' obligation to pay calls. The plaintiff brought proceedings claiming that his failure to pay the call had been accidental due to his absence from his home. Sir William Grant MR refused to give relief from forfeiture. He held that if relief from forfeiture was given in such a situation, the company could not carry on its business. He held, at p 434:

> "It is essential, that the money should be paid, and that they should know, what is their situation. Interest is not an adequate compensation, even among individuals; much less in these undertakings."

80. If the company could not forfeit the shares, it would not know whether it could cause the shares to be transferred to anyone else and make calls on them, and it would not have the capital the call was supposed to raise.

81. *Sparks v Liverpool Waterworks* may also be compared with *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, which Lord Briggs summarises at para 29 of his judgment. Lord Hoffmann summed up the point in that case in the final sentence of the advice of the Privy Council by saying that the case showed:

> "the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure

> to comply with an essential condition as to time, equity will not intervene."

82. I would put *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd* [2011] 1 All ER (Comm) 259 (discussed by Lord Briggs at paras 33 and 51 above) into this category. Hamblen J there held that the grant of relief from forfeiture of a lease of a chattel which would have significant economic life after the expiry of the lease was outside existing authorities dealing with chattels. He did not consider whether to extend authority because he went on to hold that there was no jurisdiction to grant relief anyway because the termination provision sought to be relieved was not for the purposes of security for non-payment of rent and because time for payment was of the essence of the agreement and the owner of the aircraft, which in that case had a residual economic life, had a considerable interest in the timeous performance of obligations and because the grant of relief would cause considerable uncertainty generally (see judgment of Hamblen J at paras 72 to 80). Hamblen J distinguished the earlier case of *On Demand Information plc v Michael Gerson (Finance) plc* [2003] 1 AC 368 (discussed by Lord Briggs at para 32 above) on the basis that the lessee would retain the goods indefinitely. The point in the *On Demand* case was that the lessees had sold without giving the requisite notice and in those circumstances they were required to pay to the hirer some 95% of the proceeds of sale which they had obtained for the hired goods on a sale for which they had been unable to complete the approval processes required under the contract. That was clearly a situation in which equity had to intervene.

Approach is consistent with Shiloh Spinners

83. The approach explained above is consistent with the law as authoritatively laid down in the *Shiloh Spinners* case [1973] AC 691 by Lord Wilberforce, with whom the other members of the House agreed. The particular facts are not important. In a magisterial analysis, Lord Wilberforce saw the doctrine as a principle of general application. He held, at p 722:

> "There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copy holds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power."

84. Lord Wilberforce's speech went on to describe the debates that had taken place in the early 19th century on different issues. These differences of view as to when equity should or should not grant relief show that the doctrine of relief from forfeiture was not based on some generalised concept of unconscionability but on a detailed and, as Lord Briggs describes it, principled distinction between the different situations which might bring it into contention:

> "Yet even this head of relief has not been uncontested: Lord Eldon LC in his well-known judgment in *Hill v Barclay* (1811) 18 Ves Jun 56 expressed his suspicion of it as a valid principle, pointing out, in an argument which surely has much force, that there may be cases where to oblige acceptance of a stipulated sum of money even with interest, at a date when receipt had lost its usefulness, might represent an unjust variation of what had been contracted for: see also *Reynolds v Pitt* (1812) 19 Ves Jun 140. Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults.
>
> Outside of these there remained a debatable area in which were included obligations in leases such as to repair and analogous obligations concerning the condition of property, and covenants to insure or not to assign. As to covenants to repair and cases of waste, cases can be quoted before the 19th century in which relief was granted: see *Webber v Smith* (1689) 2 Vern 103 and *Nash v Earl of Derby* (1705) 2 Vern 537. There were hostile pronouncements. In *Wadman v Calcroft* (1804) 10 Ves Jun 67 both Sir William Grant MR and Lord Eldon LC are found stating it to be clear that relief cannot be given against the breach of other covenants - ie than covenants to pay rent.
>
> It was soon after that the critical divide or supposed divide occurred, between the liberal view of Lord Erskine LC in *Sanders v Pope* (1806) 12 Ves Jun 282 and the strict view of Lord Eldon LC in *Hill v Barclay*. The latter case came to be followed as the true canon; the former was poorly regarded in Lincoln's Inn, but it is important to observe where the difference lay. This was not, as I understand it, in any disagreement as to the field in which relief might be granted, for both cases seem to have accepted that, in principle, relief from forfeiture might be granted when the covenant was to

> lay out a sum of money on property: but rather on whether equity would relieve against a wilful breach."

85. Lord Wilberforce continued, at pp 723-724:

> "[N]o decision in the present case involves the establishment or recognition directly or by implication of any general power - that is to say, apart from the special heads of fraud, accident, mistake or surprise in courts exercising equitable jurisdiction to relieve against men's bargains. Lord Eldon LC's firm denial of any such power in *Hill v Barclay* does not call for any revision or review in this case. Equally there is no need to qualify Kay LJ's proposition in *Barrow v Isaacs & Son* [[1891] 1 QB 417]. I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity *in appropriate and limited cases* to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach." (Emphasis added)

86. So, significantly, equity did not mend or relieve against people's bargains, and there were categories of cases in which equity did not grant relief, not just individual cases where the discretion was exercised against the grant of relief.

87. As I have explained, those appropriate and limited cases do not include cases such as *The Scaptrade* [1983] 2 AC 694, *Union Eagle* and *Sparks* where (outside leases of land and mortgages) it was inconsistent with the terms of the parties' bargain that there should be any relief from strict performance of the contract if the other party chose to enforce his rights (always provided that those terms were not unlawful, or for example unenforceable as penalties). This is a basic principle of equity for several reasons, and a key element of equity's role in economically significant cases.

No unacceptable loss of certainty

88. I have raised the question whether there is an unacceptable loss of certainty involved in applying the doctrine of relief from forfeiture where rights were the subject of a licence. I answer that concern as follows. This case does not alter the underlying approach of equity to claims for relief from forfeiture. Even where the preconditions for forfeiture have been met, relief will not be given if the case falls within one of the categories of case in which equity does not intervene. The inappropriateness of relief from forfeiture is most likely in "inconsistent with ordinary and lawful commercial bargain" cases, in which the approach of the courts is clear. It is, furthermore, not every type of licence which will be productive of rights in respect of property, as in this case. Further, in this case, the licence was prevented from being a lease only because it was perpetual and if it had been a lease there is no doubt that there would have been jurisdiction to grant relief from forfeiture. Moreover, the extension of the law in this case is a logical development conducive of a coherent legal principle on the basis that the gap between relief in relation to realty and relief in relation to personalty should, as Lord Briggs has explained, be closed so far as possible. In summary, the application of the doctrine to a right arising under a licence is a small step, and it is, as I see it, unlikely to be the case that this development of the law will turn out to involve any significant loss of certainty in what the principle of relief from forfeiture stands for.

The circumstances of the present case

89. Passing to the present case, the right given by clause 5 of the licence, which appears to be an adaptation of the right of re-entry in a lease, was intended to be a security for the payment of an annual sum of £50. Like Lord Briggs, I consider that the judgment of Lewison LJ contained a most careful analysis of the question whether the licence conferred a possessory right and that there is no basis on which this court should interfere with that conclusion.

90. There is no appeal in this case against the exercise by HHJ Behrens of his discretion to grant relief from forfeiture. Accordingly, on this appeal we have not been concerned with the additional range of factors which the court considers when exercising its discretion to grant relief from forfeiture. This is a large subject and it should not be thought that, since these judgments do not deal with it, it is not also an area of law in which there is a body of authority.

91. I would therefore also dismiss this appeal.