

RELIEF FROM THE FORFEITURE OF A LICENCE

The Manchester Ship Canal Co. Ltd. v Vauxhall Motors Ltd. [2019] UKSC 46

Legal Background

Traditionally it has been supposed that only tenants of leases could obtain relief from forfeiture; Grays' Elements of Land Law 5th Ed. §4.1.69:

Only a tenant – and not a licensee – may ask for relief against forfeiture.

This has just been reversed by the Supreme Court (23rd October 2019).

Relevance

Although the Supreme Court thought that real property licences to which relief from forfeiture might become an issue were rare creatures, I doubt that this is the case. In fact the reason for this view of the SC is probably that:

- (i) Since nobody thought relief was available nobody had ever applied and raised the issue in modern times, and if they did they would have been slapped down at a low level of tribunal.
- (ii) That usually the modest sums required by old licences are wholly immaterial and people are happy to allow rights to trundle on. In contrast where there is a major breach such that an aggrieved licensor thinks it is time to end the licence (e.g. where the result is a major spillage) the licensee may not have thought it worthwhile to try for relief because they would never get relief in equity in any event given the nature of their default.

Now solicitors must have this remedy for licencees very much in mind.

The Facts

In 1962 Vauxhall had a manufacturing base near the Manchester Ship Canal and obtained a licence to create a spillway for surface water and trade effluent over some land owned by MSCC and thence into the canal (after treatment). The rights granted were in perpetuity subject to paying £50 pa and complying with certain conditions.

It was common ground that the licence had all the indicia of a lease but could not have been granted as a lease because it was of indefinite duration – hence the format of a licence.

In 2013 Vauxhall failed to pay the £50. Following notice MSCC terminated the licence. The value by 2018 of the licensed rights were between £300,000 and £440,000 per annum.

Vauxhall applied for relief and obtained it from HHJ Behrens – who was upheld in the C of A and SC.

Forfeiture and Relief

Just to be clear, forfeiture is one of the methods by which landlords bring a lease to an end during the currency of the tenancy. Thus a lease for a year will in any event fall in at the end of the year but if the tenant breaches a term of the lease the landlord may be entitled to forfeit the lease after it has run for just a few months i.e. bringing it to a premature end.

Relief from forfeiture is the process by which the Court can restore the tenancy to the tenant as if nothing had happened albeit it is commonly a condition of relief that the breach is remedied (and costs paid).

In the instant case there was a clear breach of the licence by non payment of the £50 and one can immediately see the advantage to Vauxhall in being restored to a licence obliging it only to pay £50pa as opposed to circa £400,000pa. Equally one can see that MSCC wanted a higher licence fee.

The instant forfeiture clause 5:

If the said yearly rent...shall be in arrear for the space of 21 days...the Canal Company may ...by notice in writing require Vauxhalls to pay the rent in arrear within 28 days ... and if Vauxhalls shall fail to comply...the Canal Company may thereupon by notice in writing determine this licence forthwith and in such event this licence ... shall forthwith absolutely cease and determine...

Forfeiture Clauses by Way of security

Again, just to be clear, a forfeiture clause is commonly put in a lease as a Sword of Damocles over the head of the tenant to ensure he complies with detailed ongoing obligations within the lease (commonly referred to as 'covenants' or 'conditions').

Thus what Clause 5 is saying is:

Unless you pay the £50 annually we can tear up the licence despite it being a perpetual licence...

To which the landlord might add:

With the probable consequence that you, the tenant, will not be able to use the spillway and indeed we may be entitled to rip it out.

The classic exposition of the rationale for giving relief from forfeiture and the main principles behind it are found from Lord Wilberforce in Shiloh Spinners Ltd v Harding [1973] AC 691, 723:

...it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncontracted 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 the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.

Thus in the instant case the primary object of the bargain was payment of the £50 and it was to secure the payment of that money that the right to forfeit the licence was written into it – as the Sword of Damocles in default of payment.

The Argument in the Supreme Court

Before the Court of Appeal there appears to have been an element of common ground to the effect that relief from forfeiture was available where the subject matter was proprietary (as in a lease), but it was not limited to proprietary rights since it could also extend to right which only gave possession. The substantive argument was whether Vauxhall had sufficient possession of the spillway.

In the Supreme Court MSCC took a step back and now sought to say that relief was restricted to proprietary rights and consequently possessory rights (including licences) were no foundation for a claim for relief from forfeiture at all.

The Supreme Court decisively swept this argument aside and thus all licences are, potentially, within the ambit of an application for relief from forfeiture.

However having swept aside the traditional restriction as enunciated by Greys Elements of Land Law *ibid*, we are left in uncharted territory as to which classes or characteristics of 'possession' will allow an applicant to seek relief from forfeiture and which are inadequate.

What is Possession?

The following can only be a thumbnail sketch.

First off one must differentiate between 'occupation' and 'possession'.

Let me give an illustration. I board a central line underground between Oxford Circus and Chancery Lane on a train that is shuttling back and forth between West Ruislip in the west and Loughton in the East. On any one journey by that train on the day I board it my seat may already have been used by 5 people and 4 more may use it after me. I sit down meaning simply to occupy the seat for the duration of my journey. I simply have no thought of any especial rights in it.

Late that afternoon after an exhausting day in the Court of Appeal (win or lose they usually are) I reach Paddington and having foreseen the scrum for seats have reserved one for myself. After struggling down the platform with heavy bag, found the carriage, dropped off the bag and woven through the standing passengers along the length of the train I find my seat. Egad somebody is in it! At this moment, after such a day, I want my seat, I want to sink into it and find some rest, I want to possess it against all comers – especially the present incumbent.

No wonder Neuberger LJ said¹:

The difference between possession and occupation is rather technical and even to those experienced in property law, often rather elusive and hard to grasp. None the less, it is very well established, and is particularly important, and, indeed, well known, in the field of landlord and tenant law....

In the instant case the Supreme Court identified once again the well known observations as to the meaning of ‘possession’ drawn from JA Pye (Oxford) Ltd. v Graham [2003] 1 AC 419 (quoted by the SC at §42). This test for possession is a robust and restrictive test and some passing possession akin to sitting down in a game of musical chairs will not do. The test is worth repeating:

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....

Although the test is drawn from a classic case on adverse possession it should be understood that adverse possession involves two distinct elements, (i) possession – identified as above and (ii) that it should be adverse. Consequently the test for possession given is freestanding and, so to speak, universal.

It is also important to differentiate between possession and ownership. A person may have every intention to possess a piece of land for the moment but may give no thought as to seeking to own it. Thus your grandsires may have invested a castle with every intention of taking possession if they could by force of arms. Obtaining a written grant of title to it on vellum to show ownership might not be part of their thinking in the process².

Another important aspect of possession is that it cannot be shared – again not easy to grasp. This is because (as above) possession has to be exclusive. This is easy enough where one thinks of several

¹ Akici v L R Butlin Ltd. [2006] 1 EGLR 24 §23

² I should point out that in English history this method of taking possession was not an exclusively male activity.

people on different days having the use of the village hall. None of them possesses it exclusively - save for a few hours each uses it with the intention of leaving it neat and tidy for the next day.

That said one can jointly possess. So a husband and wife might, together, move onto some land adjoining their home, fence it against all comers and take, jointly, adverse possession of it. They as a body seek to exclude all comers with an intention to possess it for themselves as a body.

Take a cul de sac of 10 houses whose owners are licenced to access their homes across the roadway. As a body they might seek to take possession of the roadway but just the everyday individual use of each can never amount to taking possession because all the other owners are using it as well – there is no exclusivity.

When Relief is not Available

A clear example from the SC (§29) arises when time is of the essence of the relevant obligation that is breached quoting Union Eagle Ltd. v Golden Achievement Ltd. [1997] AC 514 - there the purchase monies on a purchase were tendered 10 minutes late. Thus the importance where notice to complete is served of not waiting to the last day of the notice before making payment; as late is too late!

This is in fact an variation of the well established principle that in certain circumstances the innocent party needs to know what they can do with their property once forfeiture occurs – see Lady Arden in the SC at §§79/80.

On a similar plane if the licence involves the licensor providing services then relief is not available. This is because to give relief is, in effect, forcing the licensor to continue to provide services and specific performance will never be ordered for a contract for services. Thus the person with a licence to run a café at the top of the licensor's ski lift will not obtain relief because it would involve forcing the licensor to continue to run the ski lift against his wishes.

As to the necessary quality of possession - in the instant case Vauxhall initially had the exclusive use and possession of the spillway (MSCC later acquired a right to connect in) although the pipework had become a fixture on being installed (and thus vested in MSCC as landowner). Vauxhall was in a practical sense, in possession of the spillway from the start of the licence in 1962 (see the Court of Appeal decision at §69).

In contrast this will not be the case with many rights akin to an easement. Take for instance a licence to cross the forecourt of one's neighbours house to maintain an overhanging soil pipe. There might be an intention to possess the pipe but there would normally be none as regards the route over the forecourt – just to assert it is likely to provoke the neighbour into terminating the licence. Similarly it would be an extraordinary claim as regards rights of light and air over the land of a neighbour since there is both joint advantage (hence nothing like the exclusivity enjoyed by Vauxhall) and there are none of the first element of possession and how the second would be manifest is not at all obvious –

noting that windows on one's own property are not to point – it is 'possession' upon one's neighbour's property which is in issue.

It is not available for ordinary (and lawful) commercial bargain. For example where payments have to be made to the owner of some property which it is well understood by the parties he needs to have available to fulfil his side of the bargain or related bargains. Thus for instance I agree that somebody can have space within my garden centre with all services found provided he pays the water rates for the whole garden centre. He fails to do so knowing that the garden centre cannot operate if the water rates are not paid and water is cut off.

It is not available where the forfeiture provision is in fact not in place by way of security to enforce compliance with a contractual obligation (the Sword of Damocles) - see Lady Arden at §82

When Relief is Available

Perpetual licences coupled with possession of land are plainly within the purview of the equitable jurisdiction now.

Lord Briggs was careful to emphasise (SC §51) that being perpetual was not necessary a precondition for relief in a land licence case provided there was possession in the classic sense (as above).

Other Aspects

These issues only arise perforce if the licence is forfeited, they have no application where the licence expires through effluxion of time. Equally they do not apply where the licence is 'springing' i.e. that provided one pays the sum of £x a further extension of the licence for a period will arise.

The SC were very careful to point out that although, now, some licences might come within the purview of equity to give relief from forfeiture – that is a wholly different question as to whether in the circumstances of any particular case relief will in fact be granted!

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