INTRODUCTION

Jonathan Darby

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Welcome to this week's edition of our Planning, Environment and Property newsletter. This week we feature articles from Simon Edwards (on relief from forfeiture) and Stephen Tromans QC (on UK Energy and the Post-Covid World).

We would also like to draw your attention to our online resource summarising the key documents from the UK's planning and environmental regulators and government agencies regarding their responses to the COVID-19 pandemic, which we launched back in May and have continued to update as lockdown restrictions have begun to ease. We hope that it continues to be useful as a reference resource for those working in the fields as the situation develops. The resource is available here: https://www.39essex.com/response-from-environmental-regulators-and-government-agencies-to-covid-19/

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Further to the above, our "39 from 39" webinar series continues apace. This week's episode was entitled "Building back better: CPO procedure and practice in a brave new world". Keep your eye on our website for future episodes. In addition, Richard Harwood OBE QC's podcast comes highly recommended, with the next episode scheduled for tomorrow (Friday 19 June). Future webinars and podcasts are advertised and can be booked

via the following link: https://www.39essex.com/category/seminars/

Finally, given its success to date, we are also still running our free "Quarantine Queries" initiative, which was launched successfully in April as a means of assisting solicitors, planning consultants, architects and surveyors who were working in isolation. Our established team of silks, senior juniors and juniors remain available for a 15 minute timeslot throughout the day to take any legal query you may have, whether COVID-19 related or simply any planning, environmental or property query you would like to discuss, but do not have your colleague to ask at the coffee machine, to book a slot please contact:

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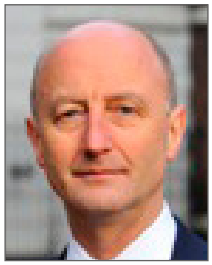

RELIEF FROM FORFEITURE, A NEW APPROACH

Simon Edwards

The Vauxhall Motors plant at Ellesmere Port on the Wirral in Cheshire has been much in the news recently and not for good reasons. Its future is in doubt because of the effect of the coronavirus on the motor industry and the looming possibility of a *"hard Brexit"* at the end of December this year. It has just been announced that it will remain closed until at least the beginning of September. Its viability would have been even more in doubt had it not been for the Supreme Court's decision in *Vauxhall Motors Limited v The Manchester Ship Canal Company Limited* [2019] 3 WLR 852 [2019] UKSC 46. In that case, the Supreme Court upheld the Court of Appeal's and the first instance judge's decision that Vauxhall was entitled to relief from forfeiture in relation to its non-payment of an annual £50 licence fee for its right to discharge waste water from its plant into the Manchester Ship Canal.

Why was it so important to Vauxhall?

When the plant was built in the early 1960s, Vauxhall needed a way to dispose of its waste water. What better than to channel it into the nearby Manchester Ship Canal. For that they needed the permission of the Canal's owners. This Vauxhall secured by a licence which granted Vauxhall the perpetual right to discharge water into the canal and to construct on the Canal Company's land a large concrete structure for the purpose of so doing, such rights to exist in perpetuity upon payment of an annual sum or rent of £50.

It was a term of the licence that the Canal Company could bring the rights to an end if the licence fee was not paid. In 2014, due to an administrative error, the licence fee was not paid and the Canal Company served notice of termination of the licence. This prompted Vauxhall immediately to offer the unpaid sum but the Canal Company refused to accept it stating that the licence was terminated and that if Vauxhall wanted it to discharge its water into the canal, it would need to negotiate a new licence.

Short of a viable alternative, Vauxhall entered into negotiations with the Canal Company for a new licence. You can imagine the consternation at Vauxhall's head office when they learned that the price for a new licence was going to go up from £50 per annum to £400,000 per annum.

At this point, it was decided that it would be best to seek advice from specialist property counsel and the idea was hatched that the limits of the court's jurisdiction to grant relief from forfeiture were flexible enough to apply to a licence as well as to a lease in relation to land and a potential way out of more financial misery for Vauxhall beckoned.

The Proceedings

The Canal Company did not agree with the suggestion that relief from forfeiture was available

and, therefore, proceedings were brought for, amongst other things, such relief. At first instance, HH Judge Behrens, sitting as a judge of the High Court, upheld Vauxhall's case that the court had jurisdiction to grant relief from forfeiture (see: *General Motors UK Limited v Manchester Ship Canal Company Limited* [2016] EWHC 2960 (Ch)).

The Canal Company appealed and the Court of Appeal dismissed the appeal although upholding the court's jurisdiction to grant relief from forfeiture on somewhat different grounds. In the Court of Appeal, the canal company accepted that the courts could grant relief from forfeiture if a licence granted possessory rights over land but asserted that the licence did not. The Court of Appeal, with the lead judgment given by Lewison LJ, held that the licence did grant possessory rights and, therefore, the courts had jurisdiction to grant relief from forfeiture (see: *Manchester Ship Canal Company Limited v Vauxhall Motors Limited* [2018] EWCA Civ 1100; [2019] Ch 331).

The Canal Company appealed to the Supreme Court. The Supreme Court granted permission. In the Supreme Court, for the first time, the Canal Company sought to argue that relief from forfeiture in relation to land was only available where the rights forfeited were interests or estates in land and did not apply where the right conferred was merely by a licence. In addition, the Canal Company sought to argue that the Court of Appeal was wrong in holding that the rights granted by the licence were possessory.

In response, Vauxhall sought also to take a new point, namely that the jurisdiction to grant relief from forfeiture was not restricted, as the Court of Appeal had found, to rights granted that were proprietary or possessory in nature.

In the result, the Supreme Court dismissed the appeal. Lord Briggs gave the leading judgment, with whom Lord Carnwath, Lady Black and Lord Kitchen agreed, to the effect that the Court of Appeal was right namely that the jurisdiction to grant relief from forfeiture, whatever the nature of the property involved, extended only to proprietary and possessory rights and upheld the Court of Appeal's decision that the rights granted by the licence were, indeed, possessory. Lady Arden in a separate judgment agreed with the result but considered that a somewhat different test was required to delineate the Court's jurisdiction to grant relief from forfeiture (although not the one that Vauxhall in its new case had suggested).

The foundations of the jurisdiction to grant relief from forfeiture

The law in relation to relief from forfeiture has much in common with the law in relation to penalties and, indeed, it has common roots. What made this case particularly interesting, for me, was the fact that, because it dealt with a licence and not a lease, the law was un-tramelled by statutory intervention and, therefore, it was necessary to trace its origins practically to the start. In *Peachy v Duke of Somerset* (1721) Prec Ch 568 Lord Macclesfield LC, in a case about a claim for relief against forfeiture of a copyhold interest, said this:

> *"The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired: but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none."*

Likewise in *Sloman v Walter* (1783) 1 Bro Cc 418, in relation to an action to enforce a bond, Lord Thurlow LC held:

> *"The only question was, whether this was to be considered 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."*

The modern restatement of the law, of course, starts with the well-known passage in the speech of Lord Wilberforce in *Shiloh Spinners Limited v Harding* [1973] AC 691, 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 rights 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."*

Thus the starting point is an enquiry as to whether or not the clause in the agreement which gives rise to the forfeiture or which provides for the penalty is *"to secure a stated result"* or, to put it another way, is security for that result or, as Lord Macclesfield would have it, whether that is the original intent of the case. In this sense it was a classic example of the role of equity in English law as Lady Arden in the Supreme Court put it in paragraph 63 of her judgment:

> *"The doctrine of a 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 a 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."*

That, though, is only the starting point and the effect of the majority decision in the Supreme Court is that there is a clear limit on the courts' jurisdiction to grant relief from forfeiture, as stated by Lord Briggs at paragraphs 47 and 50 of his judgment, that limit is the rights forfeited must be proprietary or possessory rights in property but that the nature of that property is immaterial.

In particular, in paragraph 50, Lord Briggs rejected the case put forward by Vauxhall that it is enough for the limits to be delineated by the original intent of the case or the fact that the clause in question is inserted as security for a stated result for the discretion to grant relief to arise. He said:

> *"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."*

Lady Arden, by contrast, adopted a rather different approach. She did not accede to Vauxhall's submission that the only control should be whether or not the clause in question was intended merely as security but, rather, formulated a different approach.

She acknowledged the need for certainty but stated that wherever equity intervened there would always be an element of uncertainty because equity in general operates by principles rather than rules, see paragraph 64 of her judgment.

She formulated her views at paragraphs 77 and 78 of the judgment. At paragraph 77 she said:

> *"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."*

At paragraph 78 she considered the circumstances where equity would not grant relief referring to:

> *"ordinary and lawful commercial bargain(s) inconsistent with equity granting relief from forfeiture (unless of course the right involved a penalty)."*

Thus it appears that she considered that where the first requirement, namely that the clause in question is there to secure the stated result is fulfilled, there is a further requirement that the circumstances are such that equity should intervene or, rather, the circumstances are not *"ordinary and lawful commercial bargain(s) inconsistent with equity granting…..relief."*

At paragraph 88 she stated her view that there would, thereby, be no unacceptable loss of certainty and went on to agree that in the instant case the circumstances were such that point clearly towards relief being available notwithstanding the fact that the right was granted by licence only.

That, however, was a minority view and it is clear that the views of the majority will henceforth prevail so that the *"acid test"* is whether or not the licence grants a possessory right. If it does and it is clear that the clause in question is truly a forfeiture clause, then it seems that the jurisdiction to grant relief from forfeiture would arise whatever the circumstances whether commercial, whether the agreement is for a long or a short period and whatever the nature of the property the subject of the licence. Thus, it could be said that although the Supreme Court was anxious to say that this was an incremental development of the doctrine and that the circumstances of the case were very unusual, it may well be that it will be more widely applied than at first thought. That is because of the way the majority defined the circumstances in which the right arises in such precise terms.

Is exclusive possession necessary?

None of the judgments addresses this issue directly. In the Court of Appeal the nature of possession required was stated to be that which came from *JA Pye (Oxford) Limited v Graham* [2003] 1 AC 419 namely:

> *"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."* See paragraph 59 of the judgment of Lewison LJ.

Then Lewison LJ went on to analyse the rights granted by the licence and at paragraph 68 stated:

> *"Those rights over the physical property, coupled with its physical characteristics and the clear intention that Vauxhall will be the only entity able to use and maintain it, amount, in my judgment, to a sufficient degree of physical custody and control of the infrastructure (although not of the soil in which it was placed), having regard to the nature of the property and the manner in which property of that character is commonly enjoyed. Vauxhall plainly intended to exercise those rights (and fulfil those responsibilities) on its own behalf and for its own benefit. The combination of those elements means that the rights granted by the licence were possessory in nature and thus opened the way to the exercise of the equitable jurisdiction to grant relief against forfeiture."*

Lord Briggs in the Supreme Court adopted that analysis.

It, may, therefore, be argued hereafter that exclusive possession is necessary and that the only reason why, in this case, the licence was not interpreted as a lease was because the right given was perpetual and, therefore, could not be a term of years. That would, indeed, limit the extension of the principle to a relatively small number of cases. Equally, however, it could be argued that although, in this case, the fact that the possession was, as found, exclusive was but one factor which

persuaded the courts that the rights granted were sufficiently possessory in character to allow for the jurisdiction to operate. The final expression of the principle seems to favour the latter interpretation, especially the words of Lewison LJ in the last sentence of paragraph 68 where he said:

> *"The combination of those elements means that the rights granted by the licence were possessory in nature and thus opened the way to the exercise of the equitable jurisdiction to grant relief against forfeiture."*

As with all incremental developments of this nature, the way in which the increment is worked out will only be seen by the examples of subsequent cases. It is to be hoped that the broader interpretation will prevail.

UK ENERGY AND THE POST-COVID WORLD

Stephen Tromans QC

A great deal has been made in the press of a long run of days when the UK has not depended on coal for its energy needs. There has been an unprecedented coal-free run. As of mid-June there have been two full months of zero coal, the last usage of coal by the National Grid being on 10 April 2020. This seems to be due to two factors, which keen eyed readers will have noticed. The first is the massive drop in demand for electricity caused by the closure of offices, shops, leisure facilities, pubs, restaurants and schools. Demand for energy dropped by at least 20%. Secondly, the weather has been rather good in April and May, with record output from solar farms. This means that power sources have had to be taken off-line, the first among these being the few remaining coal fired stations. Coal as a source of electricity should have passed into the history in the UK by 2024.

The ambition of National Grid is to achieve gas free days by 2025.[1] This will obviously be much more challenging given the important role of gas in providing the base load capacity needed: however, it is plainly necessary if we are going to have any chance of attaining the statutory goal of zero carbon by 2050.

The will be some serious questions to be addressed. We are moving to the end game with most of the UK's existing nuclear power stations, which have provided non-carbon based energy for many decades. Aside from Hinkley Point C, and the future possibility of small modular reactors, the UK's prospects for major expansion in nuclear power seem now tied, unhappily, to China. It remains to be seen how that relationship is going to play out. What might have seen as quick and easy fixes, such as large power stations burning biomass, are being demonstrated to be very expensive and probably incapable of delivering carbon reductions by the necessary urgent timescales.[2] At the same time, households feeling economic hardship are likely to be generating pressure to keep energy bills low, and may have very limited enthusiasm for expenditure on relatively expensive electric vehicles and home energy efficiency projects. The Grenfell fire has probably also deterred enthusiasm for the use of cladding on buildings for energy efficiency reasons.

At present, the Government seems rather coy about its real plans for post-Covid economic stimulus, and we may have to wait for an Autumn budget to see what this really looks like, once the agonising over one or two metre distancing has ceased to preoccupy the Prime Minister, his advisers and Cabinet. As I pointed out in the very first article I wrote in this Bulletin, in the early days of lockdown, the pandemic has presented opportunities to accelerate movement towards a zero-carbon economy, with very great possible synergies with investment in infrastructure and employment creation. Three months on, and there has been little or no progress that I can discern. There has been some vague rhetoric, and a

1 https://www.nationalgrideso.com/

2 https://ember-climate.org/project/the-burning-question/. See The Times June 15 2020, *"Dirty Secret of Subsidised Wood-Fired Power Stations."*

promised Prime Ministerial address in late June.[3] We shall see what emerges.

Canada offers some important examples in this regard,[4] with a blueprint for a green recovery forming one of the three prongs to the government's response, with support from the Prime Minister, and with strong Ministerial champions in the Environment Minister Jonathan Wilkinson Women and Gender Equality Minister Maryam Monsef and Infrastructure Minister Catherine McKenna. Perhaps if we had a few more really capable women in positions of authority in the UK we might do better? The Canadian response seems likely to include very significant investment in remediation of old oil-wells, large interest free loans to householders to carry out energy efficiency improvements, clean energy and clean technology.

Naturally there is a preference for programmes which can be implemented quickly and will create jobs and economic liquidity, but longer term investment is also critically needed. In the UK, there is a great need for investment in decarbonising transport and heating, in charging infrastructure to support electric vehicles, in broadband capacity to support home working particularly in rural areas, in infrastructure for safe cycling, in making the UK more secure in terms of food and other essential supplies, and in bringing forward the much needed technologies of hydrogen power, battery storage and carbon capture and storage. There is also surely a huge need to invest in rail and other mass transit systems to increase capacity, reduce passenger overcrowding and instil the necessary confidence to avoid a massive increase in private car use, in particular in the north, south west and other regions where links are poor.

This calls for a concerted long term effort, bringing together the brightest and best minds in science, technology, commerce, industry and indeed the law. It is not something that can be done by a "fag packet" mix of the tired old cronies and political colleagues who tend now to staff Government commissions and advisory groups. Does this Government have the spirit, intelligence and integrity to pursue it with vigour? Again, we'll have to see.

3 https://www.edie.net/news/11/Race-to-Zero--What-s-set-to-be-included-in-the-UK-s-green-Covid-19-recovery-package-/

4 See e.g. https://nationalpost.com/pmn/news-pmn/canada-news-pmn/climate-clean-tech-could-take-centre-stage-in-federal-economic-recovery-plans

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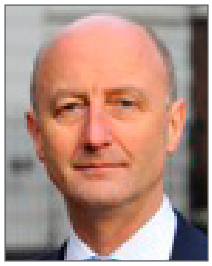
Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.



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Simon's property work ranges from contentious 1954 Act matters, through the interpretation of clauses in leases, restrictive covenants, rights of way and general property dispute resolution. Most recently, he has successfully argued at first instance and in the Court of Appeal for the extension of the right to relief from forfeiture to licences of land. He will be the lead advocate for the respondents when the Supreme Court hears the appeal. To view full CV click here.

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Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.