

# Application to licences

## Alexandra Herbert reviews the case of *The Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd [2018]*



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**'The court has a wide discretion when deciding whether to grant forfeiture. One of the considerations taken into account when considering an application is the possibility of the landlord receiving a disproportionate windfall if the agreement was to be forfeited.'**

The ability to forfeit a lease allows a landlord to re-enter the premises following a breach of the lease by the tenant, consequently terminating the lease. The right to forfeit is usually granted to a landlord within the lease, should the tenant fail to comply with specific covenants. Under certain circumstances, landlords can exercise the right to forfeit where the right of re-entry is not reserved within the lease, but this should be approached with caution for fear of unlawful forfeiture and any recourse the tenant may have as a result of this.

### **Claiming relief from forfeiture: non-payment of rent**

Where the breach of lease arises from non-payment of rent by the tenant/licensee, there is no prerequisite to first serve a section 146 notice (as is the case with other breaches of an agreement).

Ordinarily, the terms on which a court may grant relief are that payment of the arrears is made in full, and the tenant must pay the costs of the proceedings.

### **Claiming relief from forfeiture: breach of other covenants**

If the landlord exercises the right to forfeit for any reason other than non-payment of rent, the landlord must first serve a notice under s146 of the Law of Property Act. The section 146 notice states the landlord's intention to forfeit the lease, specifies the breach and requires the tenant to remedy this breach within a reasonable period of time, or else the landlord will become entitled to exercise forfeiture of the lease.

To apply for relief from forfeiture where the landlord has issued possession proceedings, the tenant/licensee must bring a counterclaim, or their own application for relief from forfeiture before the landlord

has entered into possession of the property following a possession order by the court.

Where the landlord has exercised peaceable re-entry, relief can still be sought by the tenant/licensee after the landlord has taken physical possession, as long as the landlord is without a judgment from the court granting possession. This is because the landlord is still considered to be 'proceeding' to enforce their right under the lease, but does not have a court order dictating such rights.

### **Seeking relief from forfeiture**

Under ss138 and 139 of the County Court Act 1984, a tenant must make an application for relief from forfeiture in the County Court within six months from the date of the court order for possession. Conversely, there is no set time limit in which a tenant or licensee can bring proceedings in the High Court, but case law discourages one from doing so unless exceptional circumstances apply. This is the case for forfeiture exercised through both peaceable re-entry and the issuing of possession proceedings.

The court has a wide discretion when deciding whether to grant forfeiture. One of the considerations the court takes into account when considering an application is the possibility of the landlord receiving a disproportionate windfall if the agreement was to be forfeited. In *The Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd [2018]*, the court considered this point, which appeared to be a key factor in granting relief from forfeiture to Vauxhall. The case is discussed further below.

### **Background**

There have been a number of recent cases invoking relief from forfeiture

suggesting a developing trend in favour of tenants. In the case of *Magnic Ltd v Ul-Hassan* [2015], the landlord issued possession proceedings on account of the tenant breaching planning permission consent and breaching the terms of the lease. The landlord obtained an order for possession in the first instance, but with a proviso that if the tenants ceased trading by a certain date (and therefore were no longer breaching the terms of their planning permission or the lease), relief from forfeiture would be granted. The possession proceedings were stayed, but unbeknownst to the tenants, the date in which they were required to cease trading was not stayed and the tenants continued to trade past the specified date. In the first instance, the County Court found that the tenants were not entitled to relief as they had not complied with the terms of the possession order. The tenants appealed to the Court of Appeal for relief from forfeiture, and the court found that there was a genuine and honest mistake by the tenants in believing the deadline for ceasing trading had also been extended, and that the lease was of such valuable commercial premises that in not granting relief, a windfall would be accorded to the landlord, which the County Court had not previously taken into consideration. Relief from forfeiture was therefore granted to the tenants.

Another case which considered windfall to the landlord was *Freifeld v West Kensington Court Ltd* [2015], where although the tenant acknowledged they had purposefully breached their lease by sub-leasing the premises without prior consent, the Court of Appeal stated that the commercial advantage the landlord would receive from forfeiture significantly affected the decision to grant relief. The tenant had negotiated a surrender of the sub-lease, effectively rectifying the breach, and so the Court of Appeal allowed the relief, meaning the landlord did not benefit from any windfall.

### Effect of relief from forfeiture

Where relief is granted by a court, it effectively restores the lease for the remainder of the term, with all covenants and obligations under the agreement continuing. The relief will date back to the date of the forfeiture, and so for the interim period before

relief is granted, the landlord and tenant are in a state of uncertainty, where the landlord cannot enforce any covenants within the lease and cannot recover rent. In a case where forfeiture proceedings have been issued, the landlord will usually demand mesne profits up until the date where the court grants relief.

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In addition, any derivative rights under the lease, such as an underlease, are automatically restored when relief is granted to the head tenant.

### Manchester Ship Canal

Up until fairly recently, the law on relief from forfeiture has been fairly clear; limited to cases where parties benefited from leases or contracts granting 'proprietary' or 'possessory' rights over land, and being entirely at the court's discretion. However in the recent decision in *Manchester Ship Canal* in the Court of Appeal, Lewison LJ confirmed the ruling of HHJ Behrens at the hearing of 2016 which allowed a claimant relief from forfeiture in the case of a licence.

Vauxhall Motors (previously General Motors UK) owned an assembly plant in Ellesmere Port, Cheshire, which was located near to the Manchester Ship Canal. In 1962, the Manchester Ship Canal Company (MSCC) granted Vauxhall a licence to discharge surface rainwater and trade effluent into the canal through a purpose-built drainage system, which Vauxhall was required to build itself (the Spillway), to run through MSCC's land. Following the grant of the licence, Vauxhall arranged for the construction of the drainage system, costing in the region of £90,000.

The licence was granted in perpetuity, and attracted an annual 'rent' of £50. The licence granted various rights to Vauxhall, in that it was able:

... to lay construct maintain repair alter renew and use... pipes of such

dimensions and capacity as Vauxhalls may from time to time require.

The licence also contained various covenants by Vauxhall including:

To pay the said yearly rent or sum on the days and in the manner aforesaid...

To lay and construct the Spillway only in accordance with plans approved in writing by the Engineer and under his supervision and to his satisfaction...

To do as little damage as possible to the land etc. of MSCC and upon every repair renewal alteration or diversion to restore the lands properties and works so disturbed or interfered with.

MSCC maintained the right to terminate the licence if payment of the annual rent was not made, so long as the payment 'be in arrear for the space of 21 days (whether legally demanded or not)'.

The licence was varied in 1997 and Lewison LJ noted that within the variation Vauxhall sought to grant MSCC the right to connect into the pipework and drain through the Spillway. This point was later argued by MSCC to vary the licence so as to negate any possessory rights on the part of Vauxhall (on account of it sharing the system); an argument that was rejected by the Court of Appeal.

In 2013, Vauxhall missed the annual payment of the licence fee. Despite MSCC issuing a reminder notice, the sum remained unpaid, and so on 10 March 2014, MSCC forfeited the licence. On termination, Vauxhall made an immediate offer to make payment in full, which was rejected by MSCC.

In the following months, terms were negotiated between Vauxhall and MSCC for a new agreement, but were never concluded. In January 2015, Vauxhall communicated to MSCC that

it was intending to apply for relief from forfeiture and in March 2015 issued proceedings.

In the 2016 hearing, HHJ Behrens decided he had jurisdiction to grant relief from forfeiture, and exercised his discretion in awarding the same to Vauxhall. MSCC appealed against this decision, and argued that relief from forfeiture should only apply

right was granted by the licence: namely factual possession and intention to possess.

While MSCC correctly stated that the licence being granted in perpetuity meant it could not lawfully be construed as a lease (as it did not have a defined term), it was not the case that it was impossible for the licence to give possessory rights. While HHJ Behrens

any shortfall of its own legal costs, will amount to significantly more than the £50 annual rent which caused the initial dispute.

### How will this affect how cases are decided going forward?

In light of this decision, it is likely that more cases will be brought to test what could be included under a 'possessory' right. This could potentially include easements, and could see further case law determining the difference between licences relating to service media, or telecoms equipment and those granting occupation of land.

Another issue raised in this case is the time limit in which Vauxhall applied for relief from forfeiture, which was brought in the County Court; technically it was out of time. This begs the question of whether or not the courts will be more relaxed towards tenants, and indeed licensees, who file their relief from forfeiture claims outside the specified six months' time limit. It seems this will very much be decided on a case-by-case basis, with the court analysing the circumstances that prevented the tenant or licensee from applying for relief from forfeiture. In this case, it seems that as the parties were in the process of negotiating a new agreement the licensee did not initially anticipate they would require relief from forfeiture and so the six-month deadline lapsed.

Lastly, in light of the MSCC case, as well as *Freifeld* and *Magnic*, it would appear the courts are becoming more sympathetic to defaulting tenants in relief applications, particularly where denying such relief would result in a significant windfall to the benefit of the landlord. No doubt future cases will test the extent such sympathy can have on the discretion of the court to grant relief. ■

## *The Court of Appeal said that unless the variation had the effect that Vauxhall ceased its possession of the infrastructure, possessory rights were still maintained.*

to leases or contracts which grant proprietary or possessory rights over land. Its argument was that this licence simply did not confer such rights. Vauxhall conversely argued that while the licence did not appear to grant proprietary rights, possessory rights were established within the licence sufficient to enable a court to exercise its discretion to grant relief from forfeiture. The Court of Appeal therefore had to decide whether such rights were established by the licence, but noted that the court could only comment on the trial judge's use of his discretion if it has been 'wrong in principle'.

In quoting *The Scaptrade* (*Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983]), Lewison LJ stated that the availability of equitable relief from forfeiture was confined solely to cases concerning the transfer of proprietary or possessory rights of land. In deciphering whether or not this may include the licence, the Court of Appeal considered whether or not proprietary or possessory rights were granted.

### Proprietary rights

Vauxhall did not dispute that once the pipes were installed to MSCC's land, the chattels became fixtures and therefore become part of the land and owned by MSCC. Vauxhall conceded that it did not therefore benefit from any proprietary rights pursuant to the licence.

### Possessory rights

The Court of Appeal considered two elements as to whether a possessory

ruled that relief could be granted as the rights given were 'close to possessory', the Court of Appeal decided that by the covenants and rights granted within the licence, a full possessory right was conferred to Vauxhall. In particular the right to 'construct' and later to 'maintain repair alter renew' the infrastructure, the court argued, envisaged that Vauxhall would be permitted to break the surface of the land to carry out its obligations.

MSCC argued that the variation to allow others to use the infrastructure negated any possessory right previously held by Vauxhall. The Court of Appeal dismissed this point and said that unless the variation had the effect that Vauxhall ceased its possession of the infrastructure, possessory rights were still maintained. Lewison LJ observed this was the case and that Vauxhall retained control over the physical infrastructure for the length of the licence.

The Court of Appeal therefore held that possessory rights were granted to Vauxhall by way of the licence, meaning that relief from forfeiture was an available remedy. In using his discretion, the trial judge had therefore not been wrong in granting the relief, and the Court of Appeal upheld the original decision. The County Court, it has been confirmed, has unlimited jurisdiction to grant relief of forfeiture for non-payment of rent.

Despite Vauxhall winning the appeal, it will still be required to pay some of MSCC's costs as a condition of the court granting the relief from forfeiture. This, coupled with paying

*Freifeld & anor v West Kensington Court Ltd*  
[2015] EWCA Civ 806  
*Magnic Ltd v Ul-Hassan & anor*  
[2015] EWCA Civ 224  
*Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana*  
[1983] 2 AC 694  
*The Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd*  
[2018] EWCA Civ 1100