Case No: HC-2015-000920

Neutral Citation Number: [2016] EWHC 2960 (Ch)
**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

The Rolls Building
7 Rolls Buildings
New Fetter Lane
London EC4 1NL

Date: 30/11/2016

**Before**:

**His Honour Judge Behrens sitting as a Judge of the High Court.**

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**Between:**

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| | **GENERAL MOTORS UK LIMITED** | **Claimant** |
| | **- and -** | |
| | **THE MANCHESTER SHIP CANAL COMPANY LIMITED** | **Defendant** |

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**William Norris QC, Simon Edwards and Daniel Stedman Jones** (instructed by **Duane Morris**) for the **Claimant**
**Katharine Holland QC and Katie Helmore** (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 24 – 28 October 2016

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# Judgment **Judge Behrens:**

## 1. Introduction

1. In 1962, the Manchester Ship Canal Co Ltd ("MSCC") granted Vauxhall Motors Ltd ("GM/ Vauxhalls"), the right to discharge (inter alia) surface water from its plant into the Manchester Ship Canal ("the Canal").

2. MSCC is the owner of the Canal and GM's main manufacturing plant at Ellesmere Port adjoins MSCC's land and drains through it to the Canal.

3. The 1962 document granting the right is described as a Licence. The right was granted in

perpetuity; it required Vauxhalls to pay an annual sum of £50 and contained provisions which entitled MSCC to terminate the right if the £50 was not paid.

4. It is not in dispute that the sum payable in October 2013 was not paid. It is equally not now in dispute that MSCC validly terminated the right in a letter dated 10th March 2014. Although GM subsequently offered to pay the overdue sum MSCC refused to accept it.

5. Following the letter GM and MSCC entered into negotiations for the grant of a temporary new right. In those negotiations MSCC sought a very substantially increased annual sum. The negotiations reached an advanced stage but it is common ground that there was no concluded contract between the parties.

6. Shortly before concluding a contract GM decided to take external legal advice. As a result of that advice in March 2015 GM issued these proceedings in which initially it claimed that the termination was not valid. In the alternative it sought relief from forfeiture.

7. The claim was amended in August 2016. In the Amended Claim GM abandoned the suggestion that the termination was not valid. However, it added a new claim under the provisions of Manchester Ship Canal Act 1885 ("the 1885 Act"). It will, of course, be necessary to consider the 1885 Act in detail later in this judgment. In summary GM contends that it is entitled to the benefit of the 1885 Act as a successor to Richard Christopher Naylor. GM contends that if it is no longer permitted to discharge surface water into the Canal then MSCC will interfere with or prejudicially affect the passage or escape of drainage or floodwater from its land into the River Mersey and, accordingly, MSCC will be under an obligation to restore the discharge or make sufficient provision therefor to GM's reasonable satisfaction

8. MSCC seeks to defend the proceedings on a number of grounds. First, it contends that there is no power to grant relief from forfeiture. If there is power to grant relief it contends that GM is estopped from claiming relief from forfeiture relying on the negotiations as giving rise to an estoppel by representation and/or an estoppel by convention. It contends that, as a matter of discretion, this is not an appropriate case for relief. It denies that the 1885 Act assists GM.

9. If, contrary to its primary submission this is an appropriate case for relief, there are disputes as to the terms upon which relief should be granted. If this is not an appropriate case for relief there are further disputes as to the correct measure of damages payable to MSCC as a result of the acts of trespass.

## 2. The Manchester Ship Canal

10. The Manchester Ship Canal is a 36-mile-long inland waterway linking Manchester to the Irish Sea. Starting at the Mersey Estuary near Liverpool, it generally follows the original routes of the rivers Mersey and Irwell through Cheshire and Lancashire. Five sets of locks lift vessels about 60 feet up to Manchester, where the Canal's terminus was built.

11. The rivers Mersey and Irwell were first made navigable in the early 18th century. By the late 19th century the Mersey and Irwell Navigation had fallen into disrepair and was often unusable. In addition, Manchester's business community viewed the charges imposed by Liverpool's docks and the railway companies as excessive. A ship canal was therefore proposed as a way of giving ocean-going vessels direct access to Manchester. The region was suffering from the effects of the Long Depression and for the Canal's proponents, who argued that the scheme would boost competition and create jobs, the idea of a ship canal made sound economic sense. They initiated a public campaign to enlist support for the scheme, which was first presented to Parliament as a

bill in 1882. Faced with stiff opposition from Liverpool, the Canal's supporters were unable to gain the necessary Act of Parliament to allow the scheme to go ahead until 1885.

12. Construction began in 1887; it took six years and cost £15 million (equivalent to about £1.65 billion in 2011). When the Canal opened in January 1894 it was the largest river navigation canal in the world, and enabled the newly created Port of Manchester to become Britain's third busiest port despite the city being about 40 miles inland. Changes to shipping methods and the growth of containerisation during the 1970s and '80s meant that many ships were now too big to use the Canal and traffic declined, resulting in the closure of the terminal docks at Salford. Although able to accommodate a range of vessels from coastal ships to inter-continental cargo liners, the Canal is not large enough for most modern vessels. By 2011 traffic had decreased from its peak in 1958 of 18 million long tons (20 million short tons) of freight each year to about 7 million long tons (7.8 million short tons).

## 3. Richard Naylor

13. All the necessary land was acquired by negotiation with those who were prepared to sell or otherwise by a process of compulsory purchase where the price paid was set, if not by agreement, then by arbitration and, on a few occasions, in court. A landowner who opposed the scheme was a wealthy local banker, Richard Naylor, the owner of the Hooton, Overpool and Netherpool Estates. This land ran down to the south bank of the river, near Eastham, where the Canal would join the Mersey under the new/revised design which was the basis of the 1885 Act.

14. For those like Mr Naylor, whose land lay to the south of the River Mersey, the Canal created a physical barrier between their land and the river. Amongst other things, that deprived him of the pleasure of mooring his yacht at what was (so to speak) the end of his garden.

15. In 1914, Hooton Hall was requisitioned by the War Office and became a training ground for one of the newly created Liverpool ‘Pals’ battalions and later a military hospital. The house itself was demolished in the 1920s or 1930s and the site was used as a military airfield until the War Office relinquished possession in 1957 (including a period from 1930 to 1933 when it was officially Liverpool Airport).

## 4. Drainage before and after the 1885 Act.

16. At the date of the coming into force of the 1885 Act, Mr Naylor’s ‘estate’ comprised the Hooton, Netherpool and Overpool Estates, upon which there was a country house known as Hooton Hall, a racecourse and a polo field. The escape of drainage or floodwater from that part of ‘the estate’ which now comprises GM’s land has been considered by the hydrological experts. They are agreed that the majority of the rainfall over the site would have been absorbed by the land entering the groundwater, with sporadic ponding during extreme storm events. A small proportion of rainfall over the site would have been converted to flow in the ditch network and stream which discharged directly into the River Mersey via the ravine at the north western corner of Booston Wood. MSCC’s expert, Mr Jones estimates that the peak run off rate in the ravine in 1882 for a 50% (1 in 2 year event) to have been 150 litres/second.

17. The experts have also agreed that when the Manchester Ship Canal was constructed, the water level was lower than the ground level at the end of the ravine and it would therefore have discharged directly to the Canal. The flow of water was not significant enough to warrant any special measures and ground water would have continued to flow towards the Mersey Estuary. The Canal would have intercepted any direct surface runoff from the strip of land adjoining. Furthermore, the drainage regime at the ravine did not change as a result of the Canal

construction.

18. The only mitigating measure which was installed to deal specifically with the effects on drainage of surface water following the construction of the Canal was the construction of the Pool Hall Syphon, which was installed to allow the Rivacre Brook to pass beneath the Manchester Ship Canal and to drain into the River Mersey. The central gully flowed directly into the Manchester Ship Canal at the ravine.

19. Two syphon pipes (the Bankfield and Hooton Syphons) were also provided, one near that part of 'the estate' which now comprises GM's land and the other some 600 metres to the north. These syphon pipes were to deal with sewerage and to comply with the obligation in the 1885 Act to construct

> "at least two outfalls by means of iron pipes not less than three feet in diameter for the purpose of carrying sewage from that portion of the estate which will lie southwards of the canal under the canal into the River Mersey",

20. Both of these pipes are now redundant.

## 5. Acquisition of GM's site

21. Vauxhalls acquired its site at Ellesmere Port from the Secretary of State for Air on 24 July 1961. Prior to that time there had been correspondence in which MSCC had agreed in principle to the discharge of both surface water and treated trade effluent into the Canal subject to the outfall works into the Canal being constructed to MSCC's satisfaction. It is common ground that GM's land is approximately 9% of the Naylor Estate.

22. It is clear from documents in the bundle that at least from June 1961 there were negotiations for an exchange of lands between Vauxhalls and MSCC and also for the grant of what subsequently became the Licence.Vauxhalls wished to acquire 6.8 acres of land which subsequently became the trade effluent plant and also the ravine which at that stage was on MSCC's land.

23. In the course of Mr Norris QC's opening I was shown some of the correspondence between the parties' legal advisors. However, it is not necessary to set it out in this judgment because, as Ms Holland QC pointed out, those negotiations are not admissible as a guide to the interpretation of the Licence. Equally, the correspondence does not assist in showing what drainage rights were in existence in 1885.

24. It is, however clear that that the Licence was executed contemporaneously with the land exchange. It is common ground that both sides had the benefit of professional legal advice at the time it was executed.

## 6. The Licence

25. The Licence is dated 12 October 1962. On its front cover it is described as a Licence in respect of a spillway at Ellesmere Port. It states the yearly rent is £50.

26. The parties were GM and MSCC. In each case the reference to each party was said to include "their successors and assigns where the context so requires".

27. There are 3 recitals. The first two recitals refer to the land owned by GM and MSCC. The third recital states that the parties have agreed to execute the Licence:

"for the purpose of enabling Vauxhalls to discharge the surface water and trade effluent from their said land and industrial buildings and developments thereon contemplated by Vauxhalls into the Manchester Ship Canal".

28. Clause 1 of the Licence contains the grant in the following terms:

> "In consideration of the rent or annual sum hereinafter made payable and of the covenants on the part of Vauxhalls and the conditions hereinafter contained the Canal Company as BENEFICIAL OWNERS hereby GRANT unto Vauxhalls:
>
> (i) Full right and liberty to discharge all surface water and trade effluent of a purity and quality to comply with the covenants hereinafter contained from the said land shown edged red on the said plan and all buildings now or hereafter to be erected thereon into the Manchester Ship Canal through and over the pipes and spillways next hereinafter mentioned
>
> (ii) The right and liberty in accordance with detailed plans sections and specifications to be previously submitted to and approved in writing by the Chief Engineer for the time being of the Canal Company (hereinafter referred to as "the Engineer") to lay construct maintain repair alter renew and use under and upon the said land shown hatched red on the plan annexed hereto and under the said land shown coloured blue on the said plan pipes of such dimensions and capacity as Vauxhalls may from time to time require and spillway works of such dimensions and capacity as the Canal Company may from time to time require for the purpose of effecting and controlling the said discharge of surface water and trade effluent which said pipes and spillways works and all works in connection therewith are hereinafter collectively referred to as "the Spillway"
>
> (iii) The right and liberty for all or any of the purposes aforesaid to have access to the spillway with all necessary vehicles equipment and materials along the land coloured blue on the said plan or over the adjoining lands of the Canal Company by such other route as may be from time to time prescribed by the Engineer
>
> To hold the said rights and liberties unto Vauxhalls from the twelfth day of October one thousand nine hundred and sixty two in perpetuity subject to the rent or annual sum hereinafter made payable and the covenants on the part of Vauxhalls and the conditions hereinafter contained"

Clause 2 contained the obligation to pay the £50 p.a:

> "Vauxhalls shall during the continuance of this Licence pay to the Canal Company yearly and proportionately for any less period than a year the rent or sum of Fifty pounds on the twelfth day of October in every year the first of such payments to become due on the twelfth day of October one thousand nine hundred and sixty three".

29. Clause 3 contained a number of covenants by GM. They included covenants:

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

(b) 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. (Covenant (c))

(c) Upon the determination of the Licence at their risk and cost in all respects to remove the spillway and reinstate the lands properties and works of the Canal Company to the satisfaction of the Engineer. (Covenant (k)

(d) Not to assign transfer or underlet or part with the benefit of the licence either wholly or in part other than to a subsidiary of Vauxhalls, its holding Company or a subsidiary of that holding Company. (Covenant (l)).

(e) To ensure that the surface water and trade effluent was "of a purity and quality to be approved by the Engineer" (Covenant (m))

(f) On receipt of a notice from the Canal Company that the surface water is not of the

relevant quality or purity to take such steps as may be necessary to improve the purity and quality forthwith (Covenant (n))

(g) To pay the costs incurred by the Canal Company in dredging the fairway of the Canal in the neighbourhood of the spillway. (Covenant (o))

30. Clause 5 contained determination provisions:

> "If the said yearly rent or sum or any part thereof shall at any time be in arrear for the space of Twenty one 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 Twenty eight 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 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"

31. On 26 October 1962 GM's solicitors applied to register the Licence as a Class D(iii) land charge (equitable easement) under the Land Charges Act 1925.

32. On 25 July 1997 the Licence was amended so as to permit the drainage from occupiers from the supplier park to continue to take advantage of the Licence. In particular Covenant (l) was deleted and the parties agreed that the rights would be for the benefit of Vauxhalls' successors in title. Clause 3 provided:

> "For the avoidance of doubt [MSCC] acknowledge that the rights and liberties granted to Vauxhalls by the Licence are exercisable in perpetuity by all or any of Vauxhalls its successors in title the owners tenants and occupiers from time to time of all or any part of the land shown edged pink on the plan annexed to the Licence"

33. Under clause 4 there was a limited right granted to MSCC to discharge water from land shown green on the plan into the pipes and drains on Vauxhalls' land.

34. Some of Vauxhalls's land was sold in or around 1998 to the Urban Regeneration Agency (known as English Partnerships). The land now comprises four distinct units on which individual businesses reside plus some as yet undeveloped land fronting North Road and West Road. This area is referred to as the 'supplier park'.

## *The Drainage*

35. Following the grant of the licence Vauxhalls duly constructed the Spillway and the outlet to the Canal. There is no direct evidence of the cost of the Spillway. However, in the course of the hearing I was directed to the minutes of a meeting between Vauxhalls and MSCC in September 1961 where the proposed cost was estimated to be £90,000 but where Mr Stimson on behalf of Vauxhalls proposed a somewhat cheaper scheme in 3 stages. It is not clear which scheme was adopted.

36. The current drainage system is relatively uncontroversial. It is shown schematically in a plan which I have included as an annex to this judgment. It is also shown in a number of photographs.

37. The plan shows a ravine and a lagoon. The lagoon is essentially a storage pond that was dug out in the sixties, lined with rubber and utilized as fire mains. It has not been used for that purpose for quite some time. It is connected to the basin by a pipe, and so offers GM an attenuation or storage option.

38. Surface water, essentially rain that runs off the roofs, car parks and other non-permeable structures, enters the drains defined in the survey and heads down to the ravine at the lower side of GM's land. Not every drop of rain water enters the system and some is absorbed by permeable land which is undeveloped or otherwise naturally finds its way into the water table.

39. The water which makes it into GM's drainage system, enters the ravine via two inlets. One delivers water from the plant and is approximately 1835 mm in diameter, while the other from the 'supplier park' is slightly smaller with a diameter of 1220mm

40. From there, the water meets a step like structure which acts as a barrier. The water is then fed through a passage located in the base of the upper-most level to an interceptor which filters out contaminants such as oil. In times of heavy rainfall, some of the water can run over the steps and directly into the ravine.

41. The water exits the interceptor through another pipe and flows down to a rocky area which marks the start of the ravine. The ravine is permeable and absorbs some water itself, but anything not absorbed flows down towards the basin.

42. The distance from the step-like structure to the basin is approximately 117m and the depth of the ravine roughly 3m. Thus, it operates as an attenuation facility and can hold a substantial amount of water on its own.

43. At the lower end of the ravine is a basin (shown in photograph C475). This operates on the principle of a dam. Water flows into that basin via a 500mm controlled by a penstock valve. The valve will only open when the water reaches a certain level. Mr Heath's evidence was that throughout his lengthy period of employment the 500mm has always coped with the quantity of water. However, Mr Jones, MSCC's hydrologist was of the opinion that it would not cope with a 1 in 30 year storm where the flow was 4,000 litres per second for a prolonged period. In that event water would overtop the dam.

44. The water is free to exit the basin and into the Canal. The water does this through another gated pipe of approximately 2100mm diameter. The gate on this pipe functions to catch pieces of debris that have not been caught earlier in the system and also acts as a security device to prevent trespassers entering GM's land from the Canal. It then travels over the boundary and onto MSCC's land where it collects in another hexagonal area, before splitting into two other 1675 mm outlets that lead to the Canal.

45. Until some date in the 1960s treated trade effluent was included within the material which flowed into the Canal. However, since that date it has been disposed of via United Utilities.

## 7. The Failure to pay the 2013 "rent".

46. It is not in dispute that the Licence operated without problems between 1962 and 2013. It is equally not in dispute that £50 fell due for payment on October 12 2013 and that it was not paid.

47. An invoice was sent to GM at Ellesmere Port in August 2013 for £50 plus VAT (£10). It was seen by Ms Gregory. The precise sequence of events after that is not clear and does not matter. Ms Gregory believes she attempted to organise payment, discussed it with Mr Heath but the

system in place was such that she did not succeed. Mr Heath's recollection of events is different. The £60 was not paid.

48. On 22 January 2014 Mr Sharpe (an employee at Peel Investments, the ultimate owners of MSCC) wrote to Mr Heath at Ellesmere Port asking him to phone. The letter gave no details but did refer to the "Agreement for Spillway". Mr Heath returned from honeymoon at the end of January 2014 and accepted in evidence that he probably did not respond to the letter.

49. On 6 February 2014 Mr Davies an asset manager for Peel Water Services Ltd sent a letter addressed to the Company Secretary of Vauxhalls at its registered office in Luton which drew attention to the outstanding rent in relation to the agreement and gave notice requiring it to be paid within 28 days. No copy of the letter was sent to Ellesmere Port. Mr Norris QC was critical of MSCC for not sending a copy to Ellesmere Port. In my view the criticism is not well founded. It was Vauxhalls' obligation to pay the £50. They had been sent an invoice and a (somewhat obscure) chasing letter. The Licence Agreement only required service at Vauxhalls's registered office. In my view MSCC cannot be criticised for following the procedure agreed by the parties in the Licence.

50. The letter was duly delivered on 7 February 2014. It is not clear what happened to the letter. In any event the payment was not made.

51. On 10 March 2014 Mr Hayes (the in house Solicitor for MSCC) sent a letter to Vauxhalls at its registered office and at Ellesmere Port formally giving notice of termination of the Licence.

52. On receipt of the letter GM made an immediate offer to pay the outstanding sum but it was not accepted.

## 8. Negotiations for a new Agreement.

53. In the light of the allegations of estoppel and delay it is necessary to set out the negotiations between the parties in a little detail.

54. On 11 March 2014 Mr Moseley (GM's in house counsel) contacted Mr Hayes requesting

> "documentation, unpaid invoices etc. so that we can investigate precisely what has happened in respect of any non-payment of licence fees as alleged"

55. He suggested that there might have been an administrative error and requested that

> "whilst we investigate in good faith, we continue to have access to the canal which is indeed vital to the operation of the GMM Ellesmere Port Plant."

56. On the same day Mr Davies wrote to Mr Lyon (GM's European Manager for European Real Estate) explaining that the Licence had been determined, late payment could not now be accepted and negotiations should commence for a new agreement. He enclosed a set of heads of terms for a revised agreement. The agreement comprised a 25 year term at a rent to be agreed with annual reviews. The reviewed rent was to be the higher of the previous rent, the initial rent adjusted in accordance with the RPI and the local water and waste water undertaker's charges or equivalent to open market rent.

57. On 17 March 2014 Mr Lyons sent an internal email to a number of colleagues including Mr Moseley in which he referred the fact that

> "Peel have cancelled the 1962 Agreement and we will need to enter into a new one …"

58. On 31 March 2014 Mr Davies sent an email to Mr Lyons stating that the initial rent based on 2013/2014 schedule of charges would be £583,462. Mr Davies accepted that there were alternative means of draining the site and thus he proposed a meeting to discuss commercials.

59. Meetings between representatives of GM and MSCC to negotiate for the grant of a new agreement to permit GM to discharge into the Manchester Ship Canal were held on 29 April 2014, 22 July 2014 and at a site visit to the GM's plant on 21 May 2014.

60. At these meetings the Claimant did not challenge the validity of the termination of the Licence. There is some dispute as to attitude of the parties in the meetings. Mr Lyons' evidence was that the representatives of GM felt and made it clear that they felt that they were being held to ransom. Mr Dolan, however, who gave evidence on behalf MSCC described the start of the meeting as being "a little hostile" but then said that the negotiations were productive and cordial.

61. One of the matters discussed at the meeting on 29 April 2014 was the need to put in place a temporary arrangement to allow the continued discharge in the Canal whilst GM explored the options available. This was expressly referred to in a letter from Mr Davies to Mr Moseley on 1 May 2014 and which was headed "Without prejudice and Subject to Contract."

62. On 25 July 2014 the basic terms were agreed as a 12 month term with a licence fee of £440,578. A draft agreement was prepared and amended by GM's external property solicitors on 24 September 2014. One of the amendments referred to the fact that the licence was

> "In temporary replacement for a previous agreement dating from 1962 which has since been terminated by the Licensor …"

63. On 30 October 2014, 4 November 2014 and 24 November 2014 Mr Moseley informed Mr Dolan that GM was checking the licence. On 5 December 2014 Mr Moseley stated that he had referred the matter for review to external solicitors.

64. On 30 January 2015 Duane Morris on behalf of GM wrote a long letter setting out the grounds upon which it claimed that GM was entitled to apply for relief from forfeiture and intended to apply for such relief. It gave MSCC 14 days to respond.

65. These proceedings were issued on 5 March 2015. As already noted GM initially claimed that the original licence had not been validly determined and only claimed relief from forfeiture in the alternative. However, the claim was amended pursuant to the order of Master Clark in August 2016 so as to abandon the challenge to the validity of the termination though not, of course, the claim to relief and to allow the addition of the claim under the 1885 Act.

# 9. Relief from forfeiture.

### Jurisdiction.

66. To my mind the question whether the Court has jurisdiction to grant relief from forfeiture is the most difficult question that arises in this case. Although there is no authority directly in point I have been referred to a number of authorities on the general jurisdiction to grant relief and on the nature of GM's rights under the licence agreement.

### *Authorities in relation to the right to grant relief.*

67. In *Shiloh Spinners Ltd v. Harding (HL)* [1973] AC 691 at p722B, 723G Lord Wilberforce set

out the conditions necessary for relief to be granted.

> 1. "it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money"; and/or
>
> 2. "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."

68. In *The Scaptrade* [1983] AC 694 the House of Lords made it clear that relief against forfeiture is generally limited to contracts which involve the transfer of proprietary or possessory rights – see the judgment Lord Diplock at p702C. That was a major reason why the House of Lords held that the jurisdiction did not arise in respect of a contract of services such as a time charter. However at p 703E Lord Diplock held there were practical reasons of legal policy for declining to create any such jurisdiction. Lord Diplock at p704G expressly reserved his view on charters by demise.

69. In *Transag Haulage Ltd v Leyland DAF Finance plc [1994] 2 BCLC 88* the dispute concerned three hire purchase agreements each for a single vehicle. There was a right to buy each vehicle for £5 at the end of the intended 3 year period of the agreement. When the administrative receivers were appointed in November 1993 the lorries were together valued at between £65,000 and £72,500. The amount of remaining future instalments was then just over £14,000. Under cl. 13(f) of the agreements, they were terminable on appointment of the receivers and on termination by virtue of cl. 14 the owner could retake possession of the vehicles. Knox J held that the right to grant relief was not limited to the loss of interests in land. In so doing he followed observations of Dillon LJ in *BICC plc v Burndy Corporation & Anor* [1985] Ch 232 at p251F

70. He held that there was jurisdiction relief from forfeiture on the ground (at p 99 e – h) that the loss of the option to purchase was a forfeiture of a proprietary or possessory right and not merely a contractual right

71. Knox J's decision was considered by the Court of Appeal in *On Demand Information plc v Michael Gerson (Finance) plc* [2001] 1 WLR 155. In the course of his judgment at pp 170 – 171 Robert Walker LJ said:

> "I think that Knox J could have based his decision on Transag's possessory rights during the currency of each of the hire-purchase agreements, as well as on its option to purchase under clause 24 once the agreement had run its course.
>
> Those possessory rights arose under contracts but I cannot accept the submission that those rights, or the rights of On Demand under the finance leases, were purely contractual rights if that intensitive implies that they had insufficient possessory character to meet the principles which emerge from the authorities considered above.
>
> What was said in Whiteley Ltd v Hilt seems to me to be well in line with those principles. Whiteleys and Miss Nolan entered into a hire-purchase agreement for the hire of a piano, which Miss Nolan purported to sell to the defendant. Whiteleys sued the defendant for detinue or conversion, and the real issue was as to the measure of damages. Warrington LJ said [1918] 2 KB 308 , 819–820:
>
> > "The nature of the interest taken by the hirer under the agreement appears to me to be this: First, a right to retain possession of the chattel so long as she performed the conditions of the agreement. Secondly, an option to purchase the chattel exercisable by payment of the instalments provided for by the contract."—The third right was a right of reinstatement after default under a special provision of the contract— "That, in my opinion, was the interest of

> the hirer. The general property in the chattel no doubt remained in the plaintiffs, but that general property in it was qualified and limited by the contractual interest conferred by the agreement upon the hirer. Now, was that interest assignable? In my opinion it clearly was."
>
> 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."

72. The actual decision of the Court of Appeal was reversed by the House of Lords [2003] 1 AC 368. However, the views of Robert Walker LJ on jurisdiction were approved in para 29 of the speech of Lord Millett:

> "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."

73. In *On Demand* the defendants granted to the claimants four finance leases of video and editing equipment. Each lease was for a primary period of 36 months during which the claimants paid a substantial rent, so that by the end of that period the defendants had recouped the cost of the equipment with interest, costs and profit.

74. Thereafter the claimants could continue the lease for one or more periods of 12 months for a single modest payment on the first day of the period. After the primary period the Claimants could sell the equipment and retain 95% of the proceeds of sale. The leases contained a clause permitting determination on the appointment of a receiver.

75. It was held that there was power to grant relief from forfeiture.

76. In *Celestial Aviation 71 Ltd v Paramount Airways Pte Ltd* [2010] EWHC 185 (Comm) Hamblen J had to consider an application for relief in the case of 3 Aircraft leases. The leases were for an 8 year term and subject to the Aircraft Lease Common Terms Agreement. There were arrears of rent which entitled Celestial to terminate the Agreement. Hamblen J held that there was no power to grant relief. In summary he distinguished *On Demand* because

> "Paramount only has a right to possess the Aircraft for a proportion of its economic life. As such Celestial retains a very real interest in the Aircraft themselves, including their proper maintenance, the extent of their use, their condition, and their rental and resale value. Possession of the Aircraft will revert to it at a time when the bulk of their economic life is still to run, and there are detailed terms addressing the return of the Aircraft and their required redelivery condition. Celestial therefore retains many of the risks and rewards of ownership. Moreover, Rent was not calculated on the basis of recouping the cost of the Aircraft together with interest and profit. In such circumstances Celestial's general property in the Aircraft was not qualified or limited in the way in which it was in the On Demand case."

77. He also considered that there were policy reasons why there was no jurisdiction. In his view the need for commercial certainty overrode the need for the relief jurisdiction. He cited from Lord Hoffman's judgment in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 518H-519E and at 519F:

> "The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see per Lord Radcliffe in

> *Campbell Discount Co. Ltd. v. Bridge [1962] A.C. 600* , 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.

78. In *Çukurova Finance Ltd v Alfa Telecom Ltd* [2015] 2 WLR 875 the Privy Council had to consider the jurisdiction to grant relief in relation to a complex factual situation in relation to the mortgage of shares. Paragraphs 86 to 97 of the judgment considered the jurisdiction to grant relief. In its judgment the Privy Council cited the decision of Dillon LJ in *BICC* and continued:

> "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. See also *Jobson v Johnson [1989] 1 WLR 1026* and *On Demand Information plc v Michael Gerson (Finance) plc [2003] 1 AC 368* , where it was held that there was jurisdiction to grant relief in respect of a commercial agreement for the purchase of shares and in respect of a finance lease respectively. However, as already stated, the commonest such case is that of a mortgage or charge where the mortgagor or chargor retains the equity of redemption. In our opinion this is such a case.
>
> 95 As Dillon LJ observed in BICC , the mere fact that the transaction is commercial in nature does not preclude the jurisdiction to grant relief from forfeiture, provided that the forfeiture is of possessory or proprietary rights and not of purely contractual rights. There are many cases in which relief has been granted in the context of mortgages of land in which the underlying transaction is a commercial transaction. Lord Hoffmann said much the same in giving the judgment of the Board in *Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514* , 519, where he observed that it is necessary to look more closely at the nature of the transaction than its subject matter."

***Nature of the rights under the Licence.***

79. In her very full and helpful submissions Ms Holland QC submitted that the 1962 Licence (as amended in 1997) did not create any proprietary or possessory rights in favour of GM. It was a mere contractual licence.

80. She drew to my attention a number of well-known rules of construction. She reminded me that the pre-contract negotiations or preparatory drafts are not admissible as an aid to construction [See *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 WLR 3251 per Lord Steyn (HL)].

81. She made the point that the conduct of a party after the making of the contract does not provide relevant factual context to explicate the meaning with which the parties used the words at the time they made the contract. [ See *Sattar v Sattar* [2009] EWHC 289 (Ch) per Sales J at [36].]

82. The interpretation of contracts is the identification of the intention of the parties by reference to what a reasonable person with all the background knowledge available to the parties would have understood the language used by them to mean. This exercise is to be conducted by:

> 'focusing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective

evidence of any party's intentions'

*See Arnold v Britton* [2015] AC 1619 per Lord Neuberger at [15]

83. Ms Holland QC drew to my attention the importance of the word "Licence" which appears no fewer than 9 times in the document. She referred me to *IDC v Clark* (1993) 65 P & C R 179 where Nourse LJ said at p 183:

> "Although the 1969 deed is not in all respects elegantly drawn, it is clear and accepted on both sides that it was professionally drawn. In deciding what this professional draftsman intended in 1969 by the use of the expression "grant licence" we must start from the position that for over 300 years it had been well known to lawyers in general and to conveyancers in particular that a licence properly so called is a permission to do something on or over land which creates no interest in it. Thus in Thomas v. Sorrell (1674) Vaughan 351 Chief Justice Vaughan said:
>
> > "A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful."

84. Ms Holland QC accordingly submitted that I must approach the construction of the 1962 deed in the expectation that when the draftsmen used the expression "grant licence" they intended to grant a licence properly so called and no more.

85. In the course of her submissions Ms Holland QC carried out a detailed analysis of the Licence. The points she made included:

1. Recital 3 indicated that the commercial objective of the Licence was for the purposes of Vauxhall's own business, thereby supporting the point that the Licence was a purely contractual right for the purposes of Vauxhall's operations. It may however be thought that the force of this point is weakened by the amendments in 1997 Deed.

2. The right in Clause 1(ii) to construct the Spillway was ancillary to the right to discharge surface water into the Canal. That right did not amount to a possessory right in relation to the Spillway as it was a right of usage only.

3. The reference to the rights being granted "in perpetuity" is inconsistent with the grant of a lease. Thus references to rent do not assist.

4. The payment of an annual sum is more consistent with a licence than the grant of an easement.

5. Clause 3(l) is strongly supportive of the grant being a licence by virtue of the fact that there was a restriction upon an assignment except to related companies. If it had been intended that a freehold easement was being granted, then no question of an assignment could have arisen and it would have been unnecessary and inappropriate to include a prohibition on assignment or specify exceptions. If an easement had been granted, then it would simply have passed with the land – and only passed with the land. Again this point is somewhat weakened by the amendment in the 1997 Deed.

6. Clause 5 is wholly consistent with the document conferring a merely contractual licence which was terminable upon implementation of the notice procedure set out. If a fee simple had been intended then it would have been a determinable fee which would have meant that no question of relief from forfeiture could arise. I have to confess that I have some doubts about this submission. It is not clear to me why it would not be a conditional fee.

7. Clause 5 just does not bear the characteristics of a normal re-entry provision. There is

not even any reference to it being a right of 're-entry' nor any reference to the word 'forfeiture'. It is purely a provision about the implementation of notice procedures.

***Discussion***

86. I agree with Ms Holland QC that the 1962 Licence created a licence. Whilst I do not agree with her analysis in its entirety I do agree with most of it. I accept, in the light of *Clarke,* that the use of the word Licence is of considerable importance and that it is for GM to establish that some other interest was intended. I also accept that the other terms of the Licence are consistent with a licence though some of them are also consistent with the grant of other interests. I also accept that clause 3(l) would not be appropriate for the grant of an easement.

87. Ultimately I find myself in a similar position to the Vice - Chancellor in *Clarke* who said:

> "The indications being far from clear as to what the parties intended, I think that one has to take this as being a professionally drawn deed in which the draftsman has deliberately chosen to use the word 'licence' and not the ordinary words associated with the grant of an easement. Therefore, since there is nothing sufficiently clearly pointing in any other direction, I reach the conclusion that the deed did only create a personal licence."

88. It follows that I agree with Ms Holland QC that the Licence did not create any proprietary rights.

89. The matter does not end there because the authorities make it clear that relief is not confined to cases where there is an interest in land. It can arise where there are sufficient possessory rights.

90. In support of the contention that there were sufficient possessory rights Mr Edwards, Junior Counsel for GM who argued the point, relied on a number of points which include:

1. It is a perpetual licence at a rent of only £50 per annum.

2. Under the terms of the licence it was for Vauxhalls to construct the Spillway in accordance with plans approved by MSCC, and to maintain it.

3. Vauxhalls did construct the Spillway at substantial cost. and Vauxhalls/GM have discharged surface water through it since 1962.

4. No one else has discharged water through the Spillway. Thus Vauxhalls/GM have had exclusive use of the Spillway since 1962. It is true that since 1997 (under clause 4 of the July 1997 Licence) MSCC has had a limited right to connect to the pipes on GM's land. MSCC has not availed itself of this right.

91. In answer to these submissions Ms Holland QC made the point that there is no authority where it has been argued there could be relief from forfeiture in relation to a Licence in relation to land. She further submitted that the rights in relation to the Spillway were ancillary to the right to discharge water. The right to discharge water did not give rise to any possessory rights to any part of the Spillway,

92. She drew my attention to the well-known proposition that a possessory right cannot be an easement. Thus she submitted that there was no possessory right here with the result that there was no jurisdiction to grant relief.

93. I see the force of Ms Holland QC's powerful submissions but, in the end I cannot accept

them. The words "contracts involving the transfer of proprietary or possessory rights" are not contained in an Act of Parliament. I note that in paragraph 48 of *Celestial* Hamblen J was careful to qualify those words with the word "generally". It seems to me that there may be exceptional cases that do not fall strictly within that definition. As has been noted the court is here dealing with an equitable jurisdiction. Furthermore, I note that in the current (23rd) edition of Snell's Equity, Ben McFarlane (Professor of Law at London University and the Contributor to Chapter 13) says at paragraph 13-023:

> It is nonetheless submitted that the conventional formulation, that relief against forfeiture is available only in respect of a proprietary or possessory right, must be treated with some caution. If, for example, B has a purely contractual right against X then mortgages that right to A as security for a loan, it is submitted that, in line with the approach of the Privy Council in [C*ukurova]* there is no reason in principle why B could not seek relief from forfeiture if A attempted to retain the contractual right.

94. Assuming, without deciding, that the right of passage of water through the Spillway does not amount to a possessory right it comes about as close to a possessory right as it is possible to imagine. GM/Vauxhalls have had exclusive use of the pipes for over 50 years.

95. To adapt the words of Robert Walker LJ in *on Demand*:

> Contractual rights which entitle Vauxhalls to indefinite and exclusive use of the Spillway so long as the annual payments are duly made, and which qualify and limit MSCC's general rights in the Spillway cannot aptly be described as purely contractual rights.

96. In this case the licence was "in perpetuity". It is thus not like the position in *Celestial* where the possessory rights were only for a limited time. In my view the termination clause 5 of the Licence was inserted primarily to secure compliance with the covenants in the Licence. Furthermore, this is not a case like *Celestial* and *The Scaptrade* where there were commercial policy reasons militating against the jurisdiction to grant relief.

97. With some hesitation, therefore, I have come to the conclusion that there is jurisdiction to grant relief.

**Estoppel**

98. Ms Holland QC submits that the events between the termination of the Licence and the date of the application for relief give rise to an estoppel so that GM is estopped from claiming relief from forfeiture.

99. She submits that the negotiations between the parties were carried on the shared common assumption that the licence was terminated "for good". She relies on the documentary evidence from the negotiations that I have set out above. She referred me to the evidence of Mr Dolan (Day 2/309/16-23) that:

> 'It was effectively on the basis of the agreement has been terminated, we need a new agreement in place and we will work towards putting one together. So, the relief from forfeiture arguments […] never came up'

100. She also referred me to the amendment inserted by GM's solicitors into the draft temporary licence.

101. Mr Norris QC answered the submissions in two ways. First, he accepted that the negotiations were carried out on the assumption that the licence had been terminated. However,

he did not accept that that there was any assumption that the termination was irrevocable. The question of whether relief from forfeiture was available was simply not considered by either party. Second, he submitted that it was not unjust to permit GM to apply for relief against forfeiture.

102. The law relating to estoppel by convention has been authoritatively stated by Lord Steyn in his speech in *The Indian Endurance* [1998] AC 878 at 913 – 914.

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: *K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd. [1985] 2 Lloyd's Rep. 28* ; *Norwegian American Cruises A/S v. Paul Mundy Ltd. [1988] 2 Lloyd's Rep. 343* ; *Treitel, The Law of Contract* , 9th ed. (1995), pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

103. I prefer the submissions of Mr Norris QC. I am not satisfied that there was ever an assumption that the termination was irrevocable. If there was such an assumption it was not communicated between MSCC and GM. More importantly, I am not satisfied that it would be unjust to allow GM to go back on the assumption. The only prejudice suffered by MSCC as a result of its reliance on the common assumption are the time spent and associated costs by the team in negotiating the temporary licence and/or (possibly) a delay in negotiating other profitable contracts. Whilst the costs are not trivial and could run into tens of thousands of pounds they are small when compared with the loss which would be suffered by GM if denied an effective claim to relief from forfeiture. I shall consider the expert valuation evidence below. For the moment it is sufficient to note that Ms Holland QC submits that the current commercial value of the right to discharge GM's surface water into the Canal is £450,000 p.a. Thus GM's losses will run into many millions of pounds. Furthermore, it was in my view rightly conceded by Mr Norris QC that if relief from forfeiture is granted it could be granted on terms that GM compensate MSCC for the costs incurred in the negotiations and/or the loss of business opportunities.

104. Ms Holland QC put forward an alternative case based on estoppel by representation. To my mind that claim faces the same difficulties as the claim based on estoppel by convention. There was no clear enough representation by GM that the termination of the Licence was irrevocable. The representation in the amendment to the draft licence was not to my mind sufficiently clear. It was made in the context of without prejudice, subject to contract negotiations and would have only come into force if the draft licence had been executed. At that stage no doubt it would have been too late to claim relief from forfeiture. For the reasons set out above it would not have been unjust to allow GM to go back on the representation.

## Discretion to grant relief

### *Submissions*

105. In his submissions Mr Edwards drew my attention to the recent decision of Chief Master Marsh in *Pineport Limited v. Grangeglen Limited* [2016] EWHC 1318 (Ch) which contains a review of the authorities in relation to the equitable jurisdiction to grant relief from forfeiture for non-payment of rent. In para 22 of his decision the Master cited a well-known passage from the judgment of Jenkins LJ in *Gill v Lewis* [1956] 2 QB 1 at 13 – 14:

> "… save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant.
>
> But there may be very exceptional cases in which the conduct of the tenant has been such as, in effect, to disqualify them from coming to the court and claiming any relief or assistance whatever. The kind of case I have in mind is that of a tenant falling into arrear with the rent of premises which he was notoriously using as a disorderly house: it seems to me that in a case of that sort …. the court, on being apprised that the premises were being consistently used for immoral purposes, would decline to give the tenant any relief or assistance which would in any way further his use or allow the continuance of his use of the house for those immoral purposes. In a case of that sort it seems to me that it might well be going too far to say that the court must disregard the immoral user of the premises and assist the guilty tenant by granting him relief.

106. The Master also referred to a passage from the decision of Arden J said in *Inntrepreneur Pub Co (CPC) Ltd v. Langton* [2000] 1 EGLR 34*:*

> "The principle which underlies the exercise of the court's discretion is that provided the lessor can be put in the same position as before, the lessee is entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the lessor has been put, p*rima facie* the lessor is entitled to be put into the position he would have been in if the forfeiture had not occurred. This principle has often been endorsed by the Court of Appeal."

107. In the light of those authorities Mr Edwards submitted that relief against forfeiture should be granted on payment of (1) the arrears of rent up to the date of the grant of relief, (2) interest, (3) a sum to reflect the losses suffered by MSCC in the negotiations (to be assessed if not agreed by a Master) and (4) the costs incurred by MSCC in forfeiting the Licence and MSCC's costs (on an indemnity basis) of the application for relief up to the date of the filing of the Defence.

108. Ms Holland QC submitted that relief against forfeiture should be refused. She relied on the delay in making the application, the conduct of GM in the period before the application for relief, the conduct of GM in failing to pay the £50 annual fee despite the invoice, the letter from Mr Sharpe and the formal letter addressed to GM's registered office, and the prejudice to MSCC if relief is granted.

109. In relation to delay Ms Holland QC referred me to three authorities:

110. In his judgment in the Court of Appeal in *Billson v Residential Apartments Ltd* [1992] 1 A.C 494, Nicholls LJ said at 529:

> "Equity follows the law, but not slavishly nor always… On this we have the benefit of guidance elsewhere in the field of relief from forfeiture. Section 210 of the Common Law Procedure Act 1852, which is still in force, limited to six months after judgment the period within which a tenant could apply for relief in the non-payment of rent cases to which that statute applied, viz. where the rent was six months in arrears. Courts of equity have due regard to this statutory limitation in non-payment of rent cases where the statute does not apply: in cases of forfeiture by peaceable re-entry, and in cases where possession has been taken under a court order where less than six months' rent was in arrears….
>
> …. The concurrent equitable jurisdiction can be invoked by those who apply with reasonable promptitude. What is reasonable will depend on all the circumstances, having due regard to the statutory time limits. In the exercise of its jurisdiction courts of equity should apply, by analogy, the statutory time limits …. But not with a strictness which in all the circumstances would lead to a result Parliament could never have intended"

111. In *Thatcher v C.H Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748, 756, Sir Jocelyn

Simon P said:

> 'I think that a court of equity- and it is such jurisdiction that I am exercising now- would look at the situation of the plaintiff to see whether in all the circumstances he acted with reasonable promptitude. Naturally it would also have to look at the situation of the defendants to see if anything has happened, particularly by way of delay, on the part of the plaintiff , which would cause a greater hardship to them by the extension of the relief sought than by its denial to the plaintiff'

112. Lewison J said much the same in *Vision Golf Ltd v Weightmans* [2005] EWHC 1675 (Ch). It is not necessary to set out the quotation extensively.

113. In relation to conduct Ms Holland QC referred me to the nine-month period during which negotiations took place on the assumption that the licence had been terminated. She also drew to my attention the number of errors that must have been made by GM in failing to pay. Whilst she did not allege that the failure was deliberate she suggested that a high degree of negligence was involved.

114. She suggested that MSCC is prejudiced by the commercial disadvantage it would suffer if relief were granted. She referred me to the financial liability involved in the maintenance of the Canal and to the very different rents that are now available for discharging into the Canal from those that were available in 1962.

115. She submitted that relief should only be granted on terms that require GM to pay an annual sum of between £400,000 and £500,000 per annum.

***Discussion***

116. I agree with Ms Holland QC that no possible criticism can be levelled at MSCC in relation to the procedure adopted in terminating the licence. It gave GM ample time to pay. It sent an invoice, provided documents requested by Ms Gregory and even sent a letter to Mr Heath. The formal notice was not sent until the payment was 4 months overdue. The termination letter was not sent immediately the 28 day period expired. The suggestion that MSCC should, in addition, have sent a copy of the formal notice to Ellesmere Port is to my mind farfetched.

117. It is not alleged that this was a deliberate breach. However, I agree that there was significant carelessness both at Ellesmere Port and at Luton.

118. The period of delay in this case is just under 12 months. However, at all times during that period GM continued to discharge surface water into the Canal. Furthermore, MSCC did not take any steps to stop this. Rather it entered into negotiations for the new temporary licence. Thus, in so far as there is an analogy with s 210 of the Common Law Procedure Act 1852 the 6 month period would not have begun to run. There was no judgment in favour of MSCC.

119. Immediately GM discovered the error it offered to pay the £50.

120. It may be thought that there was some delay between the end of September 2014 and the 30 January 2015 when Duane Morris first made the claim for relief. It was in my view reasonable for Duane Morris to give MSCC 14 days to consider the claim for relief. These proceedings were commenced promptly after that.

121. GM is, of course, a large multinational company well able to afford the best legal advice and I accept that it could have taken advice on the question of termination earlier than it eventually did. The fact, however, remains that it was not in fact aware of its right to apply for

relief until the end of January 2015.

122. In the end when I take all these factors into account I would not refuse GM relief from forfeiture on the ground of delay. To my mind the most important factor is that throughout the period GM continued to discharge water through the Spillway and no proceedings were taken to prevent it.

123. For the reasons set out in the section on estoppel I would not refuse relief as a result of the negotiations between the parties. However, I agree with Mr Edwards that the appropriate course is for MSCC to be compensated for the time wasted in the negotiations.

124. I do not accept Ms Holland QC's submission that the grant of relief would result in a windfall for GM. Rather, I consider that the refusal of relief would be a considerable windfall for MSCC. Ms Holland QC's submission ignores the fact that under the terms of the Licence GM was entitled to discharge surface water into the Canal in perpetuity for £50 per annum. Under the terms of the new licence MSCC seek £450,000 p.a. The windfall is obvious. It may be that commercial conditions have changed. That is hardly surprising in a perpetual licence. It has to be remembered that the Licence was granted as part of a larger transaction involving the exchange of land so it cannot be said that the Licence was favourable to Vauxhalls. In any event such considerations are not really relevant to the question of relief.

125. I do not accept that the discretion to grant relief in what is, in effect, a non-payment of rent case is as broad as that suggested by Ms Holland QC. Rather, I think it is in accordance with the judgment of Jenkins LJ in *Gill* as set out above.

126. The effect of a grant of relief would be to restore the parties to the position they were in if the Licence had not been terminated. That would mean that GM could continue to discharge surface water into the Canal via the Spillway at a rent of £50 per annum. I do not accept that the Court can, as a term of granting relief, rewrite the Licence so as to provide for a rent of £450,000 per annum. If, contrary to my view, the Court has such a power I would not, as a matter of discretion, do so.

127. I would exercise my discretion and grant relief substantially on the terms suggested by Mr Edwards. My only reservation relates to the extent of the costs payable by GM. Ms Holland QC expressly reserved her position on costs until after this judgment had been delivered and thus I have not had the benefit of full argument on it. Furthermore, it is not clear how far or when GM may have offered to compensate MSCC for its losses and this may have a bearing on any costs order. It may also be said that my views on the jurisdiction to grant relief do not accord precisely with the way the matter was pleaded by GM.

## 10. Other Matters

128. In the light of my views on relief against forfeiture it is not strictly necessary to deal with the many other matters that were argued before me. However, as this case may go further and as the other matters were fully argued I propose to deal with them albeit at somewhat lesser length than might otherwise have been the case.

## 11. The 1885 Act

129. The 1885 Act was a local act of Parliament to facilitate the construction of the Canal in accordance with the usual practice for large infrastructure projects in the 19$^{th}$ century. It contained provisions to protect the rights of owners of affected land. The specific provision

designed to protect Mr Naylor was section 63 which provided:

> ’63. Notwithstanding anything in this Act contained or shown on the deposited plans to the contrary the following provisions shall apply for the protection of Richard Christopher Naylor and his heirs or assigns or other owner or owners for the time being of the estate known as “the Hooton Overpool and Netherpool Estates” in the parish of Eastham in the county of Chester (and in this section referred to as “the estate”) now belonging or reputed to belong to him (all of whom are included under the expression “the owner” when used in this section) save so far as may be otherwise from time to time agreed in writing between the owner and the Company that is to say:-
>
> 1. The plan signed in duplicate by Edward Leader Williams on behalf of the Company and by David Walker on behalf of the owner is in this section referred to as “the plan”;
>
> 2. The bottom width of the canal shall not exceed four hundred feet at the point marked “A” on the plan and shall diminish gradually from that point so that it shall not exceed three hundred and fifty feet at the point marked “B” on the plan and shall thence diminish gradually so as to be at the point marked “C” on the plan of the width of the canal as shown thereon at that point;
>
> 3. The Company shall not without the written consent of the owner construct any wharf or landing-place nor moor or permit to be moored any vessel on the south side of the canal between the entrance thereto at Eastham and the point marked “D” on the plan;
>
> 4. The Company shall construct along the foreshore at the line of high-water mark of ordinary spring tides (or at some other line approved by the Mersey Commissioners) between the points marked “X” and “C” on the plan a pitched stone-faced embankment having an inclination mark of ordinary spring tides (or at some other line approved by the Mersey Commissioners) between the points marked “X” and “C” on the plan a pitched stone-faced embankment having an inclination towards the canal of less than one and a half feet in width for every foot in height and having a vertical height of not less than six feet above the level of high-water ordinary spring tides;
>
> 5. The Company shall erect upon and along the top edge of the slope of the said embankment throughout its whole length an unclimbable iron fence not less than five feet in height with such proper iron gates not exceeding six in number at such points as the owner may reasonably require;
>
> 6. From the said point C to the said point D shown on the plan the Company shall construct on and along the northern boundary of the owner’s land and as close to that boundary as is reasonably practicable an unclimbable iron fence not less than five feet high with such doors or gates not exceeding three in number at such points therein as the owner may reasonably require. The said embankment and iron fences shall be completed before the commencement of any of the Company’s other works on or adjoining the owner’s lands (except cutting excavation and dredging);
>
> 7. The Company shall not acquire or take under their compulsory purchase powers any lands of the owner lying southward of the canal except such (if any) as may be required for the construction of works under this section;
>
> 8. The Company shall if and when required by written notice under the hand of the owner or may if they think fit purchase so much of the owner’s land in the parish of Eastham as will lie to the north or river side of the canal as soon as the Company begin to interfere with the access to any part of those lands from the other portions of the estate;
>
> 9. In the event of any works or operations of the Company under this Act or the exercise of any of the powers in this Act contained interfering with or prejudicially affecting the present arterial or other drainage or sewerage or the passage or escape of drainage or sewage or flood-water from the estate as freely as at present the Company shall at their own expense restore and make good such drainage and sewerage and outfalls and provide for the passage or escape of such drainage or sewerage as freely as at present to the reasonable satisfaction of the owner. In addition to executing any works that may be required under the foregoing provision the Company shall construct at such points as the owner shall indicate at least two outfalls by means of iron pipes not less than three feet in diameter for the purpose of carrying sewage from that portion of the

state which will lie southwards of the canal into the River Mersey;

10. The present system of the drainage of the state and of the sewerage of the buildings thereon shall not be interfered with by the Company until other sufficient provisions have been made therefor by syphons of sufficient capacity or other means and be in operation to the reasonable satisfaction of the owner;

11. The Company shall construct suitable wharves or landing places not more than one hundred feet in length and not exceeding three in number on the south side of an adjoining the canal with suitable and convenient approaches at points on the estate to be hereafter fixed by the owner at which the owner and his tenants servants and workmen and all other persons authorised by him shall be at liberty to embark and land on and from any vessel in the canal free from payment of any canal tolls ship dies charges or wharfage rates to the Company and at which they or any of them shall be at liberty to embark and land on or from any such vessel free from the like payment and manures or farm produce building and road making materials arising from or for use on the state but the user of such wharves or landing places shall be subject to any reasonable byelaws from time to time in force. Nothing in this sub section shall be construed as requiring the Company to provide any land for any of the purposes thereof;

12. In addition and without prejudice to any other compensation payable by the Company to the owner under this Act or any Act incorporated therewith the Company shall pay to the owner full compensation for any depreciation in value caused to Eastham Ferry or the hotel adjoining by reason of the construction of the canal works or the user or working of the canal or by reason of any interference with the access of vessels to the landing stage at Eastham Ferry caused by the vessels using the canal;

A claim for compensation under this subsection may be served on the Company at any time within three years after the opening for traffic of the canal. Provided that the Company shall have the option of purchasing the said ferry and hotel together with the lands shown in the margin of the plan and thereon coloured red instead of paying compensation as aforesaid if within the period of one month after service on them of the claim for compensation they declare such option by notice served on the owner and in the event of such option being so declared the owner shall sell and the Company shall purchase the said ferry and hotel and all the said lands coloured red at such price as shall be agreed or in default of agreement shall be settled in like manner provided by the Lands Clauses Consolidation Act 1845 as amended by any subsequent Act Provided that all periods within which any proceeding is by that Act prescribed to be taken for the purpose of settling a claim for compensation after notice given of such claim under this sub-section shall be enlarged by the period of one month;

13. If during the construction of the canal works or any any time within two years after the completion thereof the Eastham Ferry piled pier landing stage and moorings shall be in any way damaged by reason of or in consequence of such construction the Company shall forthwith and at their own expense well and effectually repair and make good such damages;

14. The powers of the Company for the compulsory purchase of lands forming part of the estate shall not be exercised after the expiration of three years from the passing of this Act;

15. The embankment aforesaid and all other works and things in this section directed to be made or done for the protection of the owner shall be executed maintained and repaired at all times by and at the cost of the Company in a proper and workmanlike manner to the reasonable satisfaction of the owner. The owner and those in his employ may from time to time on his behalf inspect any works in this section directed to be constructed on the property of the Company either during or after construction to ascertain the mode of construction or the state of repair thereof;

16. The Company shall during the progress of the works take all reasonable precautions for preventing trespass on the lands of the owner and any nuisance or annoyance to him or his tenants;

17. The owner shall have a right of pre-emption over all lands taken or purchased from him by the Company (other than any lands on the north side of the canal which the owner shall under the powers of this section have required the Company to purchase) which are not required by the Company for the purpose of the canal works or to enable the Company to comply with the

provisions of this Act;

18. If any difference the settlement of which is not otherwise herein-before provided for shall arise between the Company and the owner as to anything to be done or not to be done under this section such differences shall be determined by an engineer to be appointed unless otherwise agreed on on the application of the Company or the owner by the Board of Trade and his decision shall be final and binding on both parties and the costs of the reference shall be borne as he shall direct;

19. Nothing in this section contained shall prejudice abridge or defeat the rights of the owner or his tenants to compensation in respect of any lands acquired by the Company from him or them or of any damage or injury arising to him or them for or in consequence of the works or operations of the Company'.

130. As already noted GM rely on ss63(9) and (10).

131. Mr Norris QC submits that GM is an owner for the time being of the estate known as the "Hooton Overpool and Netherpool Estates". He contends that the construction of the Canal did have the effect of

> interfering with or prejudicially affecting the then arterial or other drainage or sewerage of the estate or of any outfall for drainage or sewage of or the passage or escape of drainage or sewage or floodwater from the estate as freely as at present.

132. He submits that MSCC were accordingly under an obligation to

> provide for the passage or escape of such drainage or sewage and floodwater as freely as at present to the reasonable satisfaction of the owner.

133. He submits that as a result GM has a continuing right to discharge surface water into the Canal as part of those obligations.

134. In answer to these submissions Ms Holland QC makes a number of points:

1. The protection of section 63 was only afforded to 'the estate' as a whole. It was not afforded to a successor in title in respect of part only of 'the estate'. The section includes no wording to achieve such a result. It did not refer to successors in title of part. She submitted that ss 63(11), (12), and (17) are inconsistent with the owner being an owner of part of the estate. It is common ground that GM are only the owner of about 9% of the estate.

2. The obligations under s 63 only arise:

> "in the event of any works or operations of the Company under this Act or the exercise of any of the powers in this Act contained interfering with or prejudicially affecting the present arterial …. drainage …"

Thus the cause of the interference had to be works or operations under the Act. The provision did not mean that when a totally different causal event occurred – such as the development of the part of the land for the Vauxhall site in 1966 or the termination of the Licence in 2014 - that the obligation arose afresh.

3. Ss 63(9) refers to the "present" drainage of the estate and the escape of drainage "as freely as at present". Ss 63(10) refers to "the present system of the drainage of the estate". Neither section 63(9) nor section 63(10) conferred any right to different or more extensive facilities than those existing prior to the coming into force of the 1885 Act. The provisions of the 1885 Act did not impose responsibility upon MSCC to provide such drainage

facilities as the owners or occupiers of 'the estate' might seek in respect of subsequent land uses in future years. In support of this submission Ms Holland QC pointed to wording elsewhere in the Act.

4. The hydrology experts have agreed that when the Manchester Ship Canal was constructed in 1885, the water level was lower than the ground level at the end of the ravine and it would therefore have discharged directly to the Canal. The flow of water was not significant enough to warrant any special measures and ground water would have continued to flow towards the Mersey Estuary. The Canal would have intercepted any direct surface runoff from the strip of land adjoining. Furthermore, the drainage regime at the ravine did not change as a result of the Canal construction. The only mitigating measure which was installed to deal specifically with the effects on drainage of surface water following the construction of the Canal was the construction of the Pool Hall Syphon, which was installed to allow the Rivacre Brook to pass beneath the Manchester Ship Canal and to drain into the River Mersey. The central gully flowed directly into the Manchester Ship Canal at the ravine.

5. Vauxhalls' development in 1961 required substantially greater drainage facilities, particularly given that the development was to involve large buildings and extensive areas of hard standing which would produce much greater intensities and volumes of storm water. Accordingly, Vauxhalls sought the permission of MSCC in respect of the creation and use of new facilities for the discharge of surface water and trade effluent from the land and the industrial buildings thereon.

6. The Licence was entered into because Vauxhalls had a need for different and more substantial facilities in respect of the drainage of surface water and trade effluent from its land. As has been agreed between the experts, the present drainage system as put in place specifically to address the fact that significantly more water was to enter the ravine i.e. to control the flow of water from Vauxhall's land into the Ship Canal. The experts are agreed that *"significantly more water*" enters the ravine than it did in 1882 and even 1960. The recent addition of the supplier park on the land has further extended the impermeable area, with the consequence that the run-off from the land has been the subject of a further increase.

7. Accordingly, a statutory right which was imposed to protect a drainage system as it existed in 1885 is not enforceable for the purposes of requiring MSCC to provide such drainage facilities as were the subject of a commercial contractual negotiation in 1962 specifically to cater for the very different and more extensive drainage facilities required in connection with a new and substantial industrial development.

135. In general, I prefer the submissions of Ms Holland QC. It is not necessary for me to decide whether the rights under s 63 extended to owners of part of the estate and I prefer to express no views on the point. However, Ms Holland QC's other points seem to me unanswerable. In particular, I agree with her overall submission in point 7 above.

136. It follows that I reject the claim under the 1885 Act.

## 12. Damages for trespass

137. If I am wrong in granting relief from forfeiture it is not in dispute that the Licence was terminated with effect from 10 March 2014. It follows that GM's continued discharge of surface water into the Canal since that date has been a trespass. There is no significant difference

between the parties as to the legal basis for the assessment of the damages for trespass. In Annex 3 to his opening submissions Mr Norris QC refers to it as being based on a notional licence fee. Ms Holland QC suggests that it is to be assessed by reference to such sum as would be arrived at in a hypothetical negotiation between the parties in seeking to agree a sum for such use.

138. I have been assisted by expert evidence from Nigel Billingsley of Bruton Knowles Chartered Surveyors for GM and Colin Cottage of Glenny LLP for MSCC. I do not intend to lengthen this judgment with a detailed analysis of the views of the two experts.

139. The starting point is the amount that MSCC would charge. As explained in the Peel Water Charging Scheme the amount charged depends on a number of factors. One of these is the size of the discharge pipe; the other is the area to be drained. The higher of the two charges resulting from these considerations is taken as starting point. Another important factor is the amount that would be charged for an equivalent service by (in this case) United Utilities Ltd ("UU"). The charge would not exceed that figure as otherwise MSCC would be uncompetitive.

140. In this case the two discharge pipes have a diameter of 1,675 mm. According to the table in the Charging Scheme this would lead to a figure of £331,936 (2 x £165,968). GM point to the fact that all of its water in fact passes through the 500mm penstock valve into the distribution centre. Thus it contends it is wholly inappropriate to base the charge on the 1,675 mm diameter discharge pipes.

141. However, a charge based on area yields a significantly higher figure. Based on an impermeable area of 101.7 hectares the charge would have been approximately £670,000.

142. In an email dated 31 March 2014 Mr Davies suggested that the figure based on the Schedule of Charges would amount to £583,462.

143. At paragraph 8.13 of his report (which I accept) Mr Cottage has set out the UU Charges for draining the surface water from GM's site and the supplier park:

| | |
|---|---|
| 2013/2014 | £200,708 |
| 2014/2015 | £211,457 |
| 2015/2016 | £272,401 |
| 2016/2017 | £319,822 |

144. It is, however, accepted that a substantial capital investment would be involved in connecting to UU. The table provided by UU (at C132) suggests that the cost could be anything between £865,000 and £2,995,000 depending on the scheme and whether the spoil could be re-used on site. In his report Mr Billingsley suggested the figure could be £1,500,000. There is a dispute between the experts as to how to discount these figures on an annual basis. Mr Billingsley amortises the costs over 30 years whereas Mr Cottage applies a discount rate of only 10%.

145. In addition, there would be annual power costs of approximately £10,000.

146. I have to confess that I find it difficult to arrive at a figure for the costs involved in connecting to UU. The range of figures is so wide that any estimate is little more than a guess. Doing the best I can I propose to add £110,000 to the UU charge for each year.

147. As this figure is still less than the figure based on the Schedule of Charges I would assess damages for trespass at the following rates:

| | |
|---|---|
| 2013/2014 | £311,000 |

| | |
|---|---|
| 2014/2015 | £321,000 |
| 2015/2016 | £382,000 |
| 2016/2017 | £430,000 |

148. In addition, MSCC would be entitled to interest. Argument on interest has been reserved.

## 13. Injunction

149. If I had refused relief from forfeiture I would have acceded to MSCC's request for an injunction. It would not have been appropriate for the court in effect to grant GM the permanent right to trespass. I would, however, have deferred the operation of the injunction for a further 12 months so as to give GM the right to make alternative arrangements or make a fresh agreement with MSCC. GM would, of course, have had to pay damages for any trespass during this period which I would have assessed at the rate of £430,000 per annum until the date when the trespass ceased.

## 14. Damages for breach of clause 3(k)of the Licence

150. Under clause 3(k) on termination of the Licence Vauxhalls were obliged to remove the spillway and reinstate the lands to the satisfaction of MSCC's Engineer. GM has not removed the spillway or reinstated the land. If, therefore, I am wrong in granting relief from forfeiture it is not in dispute that GM is in breach of clause 3(k).

151. There is a dispute between the quantity surveying experts in the cost of removing the spillway. Mr Johnson for GM initially suggested a figure of £131,243 whereas Mr Sayer estimated the cost at £365,185.02. The main (but not the only) difference between them related to the method of removing the spillway. Mr Johnson assumed that it could be removed from the canal bank whereas Mr Sayer assumed it would have to be removed from the Canal itself. In the course of his evidence Mr Johnson produced a second estimate in the sum of £251,504 based on similar assumptions to those made by Mr Sayer.

152. I indicated in the course of their evidence that I proposed to take a robust view as I did not find their evidence very helpful. I had no way of knowing which of their assumptions were correct and they were not engineers.

153. As I indicated in the course of the hearing I propose to assess the cost of complying with clause 3(k) as £250,000.

154. Even though Mr Glover told me that he believed that MSCC would remove the spillway I do not accept on balance of probabilities that it would. First, it would not remove the spillway whilst there is any possibility of negotiating a contract with GM. In view of the substantial costs involved in alternative means of discharging surface water there is a real likelihood that it would. Even if GM do not enter into an immediate agreement with UU there is always the possibility that a future agreement will be with MSCC. If for some reason GM decide to sell the site there is the possibility of a contract with its successor. Thus in my view the overwhelming likelihood is that the spillway will not be removed. It does not reduce the value of MSCC's land. Because of its potential in relation to future contracts it probably enhances it.

155. Ms Holland QC submitted that MSCC was entitled to the cost of removal even if MSCC did not intend to remove the spillway. She referred me to *Joyner v Weeks* [1891] 2 QB 31. However that case was distinguished in *James v Hutton [1949] 1 KB 9* in the following passage

> "To apply the rule as to the measure of damage for a breach of contract to deliver up a house in

> repair to this case is, in our opinion, wrong, for there is no true analogy between the two cases. If a tenant fails to deliver up a house in repair, the landlord must suffer some damage, at least so long as the house remains in existence. Instead of getting a house in a perfect state of repair he gets one which is dilapidated. It is true that he may be able to let the dilapidated house for the same or even a higher rent than he was hitherto getting, but that may be due to market conditions and more especially to the demand for a certain class of premises. A dilapidated house must be worth less than a house in a proper state of repair. Presumably, if the house is sold, if in good repair, it would fetch more than a house which is out of repair. If a house can be let in good repair, it would ordinarily fetch a higher rent than one that is out of repair. Damage is therefore suffered. The measure of damage to be applied was laid down in *Joyner v. Weeks* (1). In that case the Divisional Court had applied the same rule as is applicable to a case where the lessee has failed to keep the house in repair during the term and ordered the damages to be assessed according to the injury done to the reversion. The Court of Appeal held that in these cases there was a well-defined rule which had become a rule of law that, on a failure to deliver up a house in good repair, the damage was the cost of the work necessary to put it into repair. Lord Esher M.R., in giving the judgment referred to the large number of cases in which this rule had been adopted, and said that such an inveterate practice amounted to a rule of law. He said it was a highly convenient rule, avoiding all the subtle refinements with which the court had been indulged and the extensive and costly inquiries which they would involve. It was a simple and business-like rule, and he was very much inclined to think it was an absolute rule.
>
> But, as we have already said, that case must be regarded as proceeding on the footing that the plaintiff must have suffered damage by the tenant yielding up the house out of repair. We see no ground here for assuming that the plaintiff in this case has suffered any damage at all. She has got back a shop, or would have done, if the premises had not been requisitioned, provided with a modern and convenient front, and there was no suggestion that the work had not been carried out properly."

156. I see no ground here for assuming that MSCC has suffered any damage at all. Furthermore, as noted in the passage in McGregor on Damages (paragraph 26-057 footnote 268) it is by no means clear that it would be followed today in the light of *Ruxley v Forsyth* [1996] AC 344.

157. I would have awarded nominal damages, assessed at £5, for breach of clause 3(k).

## 15. Acknowledgement of Assistance

158. I cannot leave this case without acknowledging the enormous assistance that I have had from the parties' legal advisors. I was greatly assisted by the detailed written submissions from both sides and having the bulk of the material in electronic format. It has substantially reduced the time it has taken to produce this judgment.

159. I am very grateful to the parties and their advisors.

## 16. Conclusion

160. I would grant relief from forfeiture substantially on the terms suggested by Mr Edwards. I would reserve to the Master the assessment of the losses suffered by MSCC by the negotiations. Further argument is needed on the extent of the costs payable by GM.

161. I would have rejected the claim under the 1885 Act.

162. If (contrary to my view) I had rejected the claim for relief from forfeiture I would have assessed damages for trespass in accordance with the table set out above and would have awarded nominal damages for breach of the covenant in clause 3(k) of the Licence. I would have granted MSCC an injunction but deferred its operation for 12 months.

163. As this is a case which bristles with points of law I would provisionally be willing grant

permission to appeal to either side on the points of law if it is requested. I would, however, be less happy to grant permission on the factual findings such as the assessment of the damages for trespass or the cost of removing the spillway.

# Appendix