Neutral Citation Number: [2022] EWHC 3018 (Ch)

Claim No: PT-2021-000985

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 01/12/2022

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

HUSH BRASSERIES LIMITED	**Claimant**
- and -	
(1) RLUKREF NOMINEES (UK) ONE LIMITED	
(2) RLUKREF NOMINEES (UK) TWO LIMITED	**Defendants**

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Mark Sefton KC (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Katharine Holland KC (instructed by **DAC Beachcroft LLP**) for the **Defendants**

Hearing date: 16 November 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE KLEIN

HH Judge Klein:

1. This is the judgment following the final hearing of a Part 8 claim in which the principal issue between the parties is a narrow one; namely, whether a clause in an option agreement which permits a grantor (or its successor-in-title) to terminate the option on the grantee's default of its obligations in a related lease is a forfeiture provision in respect of which the court can grant relief from forfeiture.

2. The parties prepared a statement of agreed facts, which also records that there are no facts in dispute between them. By way of introduction, I now set out that agreed statement, virtually verbatim, with a handful of interpolations.

3. The Claimant is the tenant under a lease ("the Lease"), dated 1 October 1999, of premises at 8 Lancashire Court, Mayfair, London, W1 ("the Premises").

4. The Lease is registered at HM Land Registry under title number NGL852023.

5. The Lease was made originally between the Co-operative Insurance Society Ltd as landlord and the Claimant (then known as Steamroller plc) as tenant. It was granted for a term of 25 years, commencing on 27 July 1999 and expiring on 26 July 2024.

6. The Claimant runs a restaurant and hospitality business from the Premises.

7. On 24 March 2011, the Co-operative Insurance Society Ltd granted the Claimant an option ("the Option").

8. The Option was registered, at HM Land Registry, as a unilateral notice against the freehold title number NGL748122.

9. The Option was a call option, by which the Claimant was granted the right to call for its landlord to grant it a new lease, on materially the same terms as the Lease, of the Premises. (The Option also contained an equivalent landlord's put option).

10. The terms of the Option were that it was exercisable by notice given during the last year of the term of the Lease (so between 27 July 2023 and 26 July 2024) and, if exercised, the Claimant was to be granted a new lease for a further term running from 27 July 2024 to 31 December 2030.

11. Clause 14.1 of the Option ("the Operative Provision") provided that:

> "The Landlord may determine this agreement by written notice to the Tenant if:
>
> (a) the Tenant is in breach of any of the provisions of this agreement…
>
> (b) any of the events set out in clause 5.1 of the Lease [(that is, the Lease executed in 1999)] occurs."

12. Clause 11 of the Option had provided that:

> "The Tenant shall not assign or charge or part with or otherwise deal with its interest under this agreement provided that the Tenant may with the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) assign its interest in this agreement provided that the Landlord may withhold consent where:
>
> (a) any of the circumstances specified in clauses 3.15(a) and 5.3(a) *(sic)* of the Lease exists;
>
> (b) the Tenant is not also simultaneously assigning the residue of the term of the Previous Lease to the same assignee,
>
> and provided further that such consent will be deemed to have been granted if consent is given by the Landlord to an assignment of the residue of the term of the Previous Lease to the identical assignee."

13. Clause 5.1 of the Lease is a forfeiture clause. It entitles the landlord to forfeit the Lease on the occurrence of a number of events. One of those events (see clause 5.1.2(a)) is that any rent reserved under the Lease remains unpaid for 21 days after becoming due and payable. Another such event is that the tenant has failed to comply with an obligation under the Lease (see clause 5.1.2(b)). Clause 5.1 provides:

> "5.1.1 If any event specified in sub-clause 5.1.2 occurs the landlord may at any time afterwards re-enter the…Premises, or any part of them in the name of the whole, and this Lease will then immediately determine...
>
> 5.1.2 The events referred to in sub-clause 5.1.1 are as follows:
>
> (a) any rent reserved remains unpaid for twenty-one days after becoming due and payable, and in the case of the rent first reserved this means whether formally demanded or not;
>
> (b) the Tenant fails to comply with any obligation which it has undertaken or any condition to which it is bound under this Lease…"

14. On 9 October 2017, the Defendants acquired the freehold of the Premises.

15. The Defendants acquired the freehold subject to the Lease and subject to the Option. The Defendants thereupon became the Claimant's immediate landlord.

16. In the course of 2020 and 2021, during (and apparently because of) the Covid-19 pandemic, the Claimant fell into arrears of rent under the Lease.

17. On 16 July 2021, the Defendants served notice ("the Notice") on the Claimant to terminate the Option under clause 14.1(b) (that is, under sub-paragraph (b) of the Operative Provision), on the grounds that there was rent reserved under the Lease that was unpaid for more than 21 days, and that the Claimant had failed to comply with the obligation under the Lease to pay rent. The Notice provided as follows:

> "The events set out in clause 5.1 [of the Lease] include the following:
>
> "5.1.2...
>
> (a) any rent reserved remains unpaid for twenty-one days after becoming due and payable, and in the case of the rent reserved this means whether formally demanded or not;
>
> (b) the Tenant fails to comply with any obligation which it has undertaken or any condition to which it is bound under this Lease."
>
> As at today's date, significant arrears of rent reserved remain unpaid under the Lease in the total sum of £426,443.56, set out for illustrative purposes only in the attached Schedule of Arrears. These sums have remained unpaid for over 21 days.
>
> Accordingly, being that rents reserved remain unpaid for substantially more than twenty-one days after becoming due. and being that you have failed to comply with your obligations under the Lease in respect of those rents, we hereby give you notice for and on behalf of our client to determine the Option Agreement pursuant to clause 14.1 thereof.
>
> Pursuant to clause 14.3 of the Option Agreement you must now apply to the Land Registry for removal of all notices relating to the Option Agreement from our client's registered title and we look forward to receiving official copies of the duly amended title from you in due course."

18. It is agreed that, as at the date the Defendants served the Notice, the Claimant was in arrears of rent under the Lease, and that therefore the Notice was effective to terminate the Option. When terminating the Option, the Defendants did not also seek to forfeit the Lease.

19. On 12 August 2021, after a period of negotiations, the Claimant and the Defendants entered into a settlement in relation to certain of the rent arrears then outstanding under the Lease (being rents due for the September 2020 and December 2020 quarters), by which a proportion of those rent arrears was waived and the Claimant agreed to pay various sums on various dates ("the Rent Concession Agreement"). The Claimant has now discharged those arrears in accordance with the terms of the Rent Concession Agreement. The Claimant's arrears in respect of March 2021 quarter were not compromised by the Rent Concession Agreement but were paid separately on or about the time of its completion.

20. Accordingly: (i) the Claimant has discharged the September 2020 and December 2020 rent arrears which the Rent Concession Agreement covered; and (ii) by about 12 August 2021, the Claimant had paid the Defendants the additional arrears then outstanding under the Lease as set out on the Schedule to the Rent Concession Agreement.

21. Following the Defendants' service of the Notice, the parties' solicitors corresponded. By the correspondence, the parties' solicitors took the positions which, broadly, the parties now take. Because the parties remained in dispute, the Claimant began the claim on 16 November 2021, by which it seeks relief from forfeiture of the Option, either unconditionally (because all the rent arrears in issue were paid as contemplated in the Rent Concession Agreement), or conditionally.

22. During the course of the claim, the Defendants have publicly consulted about a redevelopment scheme, to be completed by July 2025, which will involve the demolition and rebuilding of the Premises.

23. At the final hearing, the Claimant was represented by Mark Sefton KC and the Defendants were represented by Katharine Holland KC. I am grateful to both counsel for their clear, focused and insightful submissions. Before reaching my decision, I considered all of the documents and other evidence to which I was referred (but I have attached no weight to the Defendants' redevelopment proposals, because they are not referred to in the parties' witness statements or in the statement of agreed facts) and all of counsels' submissions, both written and oral. In this judgment, I set out the reasons for my decision.

24. Counsel agreed that, for the court to have jurisdiction, in this case, to grant relief from forfeiture, the Claimant must establish that at least two pre-conditions have been satisfied; namely, that:

    i) by the Option, it obtained a, or, as the Defendants contend, a sufficient, proprietary interest in the Premises. I will refer to this as "the first pre-condition";

    ii) the Operative Provision secured the performance of the tenant covenants in the Lease, in particular the rent payment obligation. I will refer to this as "the second pre-condition".

    Counsel also agreed that, if the Claimant proves that at least these two pre-conditions have been met, the court retains a discretion whether or not to grant relief from forfeiture.

25. I should note though, at this point, that, as I have touched on, there was a significant dispute between counsel, in relation to the first pre-condition, about the quality of the proprietary interest the Claimant had to have by virtue of the Option (or, to put it another way, about the quality of the proprietary interest the Claimant had in the Premises by virtue of the Option immediately before the Option was terminated). Mr Sefton argued that any proprietary interest would do (and that the proprietary interest which the Claimant actually had was sufficient). Ms Holland argued that only a sufficient proprietary interest could satisfy the first pre-condition and that the Claimant did not have that quality of interest in any event.

26. Ms Holland also explained that a third pre-condition for the court to have jurisdiction to grant relief from forfeiture to be satisfied by the Claimant in this case may be that it was unconscionable for the Defendants to rely on the Operative Provision. She freely acknowledged, however, that, in the circumstances of this case, whether any question of unconscionability is treated as a third pre-condition or as part and parcel of the

exercise of any discretion once jurisdiction is established does not matter and she was content for me to approach this case on the basis that there are two pre-conditions for the court to have jurisdiction to grant relief from forfeiture as I have identified, and that the court retains a discretion whether to grant relief from forfeiture even if it is established that the court has the necessary jurisdiction to do so, which discretion involves a consideration of whether it would be unconscionable for the forfeiting party to rely on its strict legal rights. I will proceed on the basis that there are two, rather than three, pre-conditions for the court to have jurisdiction to grant relief from forfeiture as I have identified, because that seems to me to be most consistent with authority.

27. The parties were agreed, however, that, if the Claimant proves that the two pre-conditions have been met, and the court is otherwise minded to grant the Claimant relief from forfeiture in exercise of its discretion, relief should be granted unconditionally.

28. That there are two pre-conditions, and the nature of those pre-conditions, was recently considered by the Supreme Court in *Vauxhall Motors Ltd v. Manchester Ship Canal Co Ltd* [2020] AC 1161. The principal issues in that case were (i) whether it is a pre-condition for the court to have jurisdiction that the grantee must have a possessory right or proprietary interest in the target (in this case, the Premises) of the forfeiture or other exercise of the termination right in issue (or to put it another way, effectively, whether the first pre-condition is in fact a pre-condition) and (ii) whether, if the first pre-condition is a pre-condition, a possessory right can satisfy it, or nothing less than a proprietary interest will do.

29. In *Manchester Ship Canal*, Lord Briggs (with whom Lord Carnwath, Lady Black and Lord Kitchin agreed) introduced the case before the Supreme Court thus, at [2]:

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

30. Lord Briggs then explained, at [4]:

> "It has always been a condition for equitable relief from forfeiture that the forfeiture provision in question should have been conferred by way of security for the enforcement of some lesser primary obligation such as, but not limited to, the payment of money…"

31. At [5], Lord Briggs acknowledged that issues relating to the court's exercise of its discretion only arise after the court's jurisdiction is established.

32. Lord Briggs continued:

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

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

18. That passage contains a trenchant restatement of the central rationale and condition for the exercise of the remedy, namely that the primary object of the bargain should be the securing of a stated result, for which the forfeiture provision is added by way of security…

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

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

30. This decision is not of significant assistance for present purposes. It was a case in which a contract for the purchase of

> legal title to land was found to have been repudiated by the failure by the purchaser to comply with a time of the essence provision. Thus the property the subject matter of the contract never became subject to the vendor's obligation to convey. While it may be said that the purchaser had a species of equitable interest pending completion, the facts were far removed from cases such as the present, where the rights subject to forfeiture are perpetual in nature and have already been conferred and enjoyed for many years prior to the event giving rise to termination."

33. At [47], when considering whether a possessory, rather than a proprietary, right might be a sufficient to satisfy the first pre-condition, Lord Briggs said:

> "…while it is essential for the certainty of the law that the scope for equitable intervention on grounds of unconscionability should be delimited by reference to reasonably clear boundaries, they should be identified by reference to a principled understanding of the nature and purpose of the relevant equity, rather than be merely arbitrary…"

34. In reference, however, to Lord Wilberforce's focus, in *Shiloh Spinners*, on the purpose of the operative provision (that is, a forfeiture clause) as security, Lord Briggs said, at [49]-[51]:

> "It is necessary next to address Vauxhall's submission that a better boundary than one which merely accommodated possessory rights would be one which extended the equitable jurisdiction in relation to all forms of right to use property, provided only that the right of termination is intended to secure the payment of money for the performance of other obligations. I would reject this submission as well. It was heavily based upon an over-literal reading of Lord Wilberforce's speech in *Shiloh Spinners Ltd v. Harding* [1973] AC 691 which, as noted above, did not include as a condition of the existence of the jurisdiction any requirement as to the nature or quality of the rights liable to forfeiture. But he had no reason to do so, since the rights liable to forfeiture in that case amounted to a proprietary interest in land, and the question whether the jurisdiction might extend to any right to the use of property never arose for argument, let alone decision.
>
> To expand the ambit of the equitable jurisdiction in that way, leaving all control upon its use as a matter of discretion, would offend against the well-recognised need to ensure that equity does not undermine the certainty of the law. Furthermore it would set at nought the careful development of the principled limitation of the jurisdiction to the forfeiture of proprietary or possessory rights, worked out over many years in a succession of broadly coherent authorities.

> I would however wish to sound one note of caution against the slavish application of the whole of that jurisprudence to land. The requirement, developed in the *On Demand* case [2003] 1 AC 368 and *Celestial Aviation Trading 71 Ltd v. Paramount Airways Private Ltd* [2011] 1 All ER (Comm) 259 that the possessory right should be one which is indefinite, rather than time limited to a period shorter than the full economic life of the chattel or other species of personal property, may have unintended consequences in relation to land. Chattels by their nature are of limited economic life, and most intellectual property rights, and patents in particular, have their own inherent time limitations. By contrast, land is a form of perpetual property, and I can well conceive of forms of possessory rights in relation to land which are not perpetual, but which might nonetheless qualify for equitable relief from forfeiture. The point need not be decided in this case since, most unusually, this licence was indeed granted in perpetuity. It is to be noted that the acknowledgment in *The Scaptrade* [1983] 2 AC 694 that equity might relieve from the forfeiture of a demise charter (which is typically for much less than the economic life of the ship) suggests that even in relation to chattels a rule that the possessory right should be indefinite may go too far."

35. In the same case, Lady Arden (who delivered the only other reasoned decision, but with whom none of the other Justices agreed) commented, at [63]-[66]:

> "The doctrine of relief from forfeiture is an equitable doctrine. I would approach it from the standpoint of equity rather than through the prism of property law. Equity is a body of principles which alleviates the strict application of rules of law in appropriate cases. In this case, the relevant rule of law is that the court will enforce the terms of the parties' agreement because there is no reason in law why it should not be enforced. Equity serves to finesse rules of law in deserving cases. It thus makes the system of law in England and Wales one which is more likely to produce a fair result than would be possible if equity did not exist. This must surely be one of the reasons why the law of England and Wales is held in high regard in the world.
>
> Some element of uncertainty in the application of the doctrine of relief from forfeiture is inevitable…
>
> Another element of inherent uncertainty arises from the fact that the doctrine of relief from forfeiture is a general doctrine and will apply to new circumstances, such as where the court has to deal with a particular form of property, or (as here) interest in or in relation to property, for the first time. The most obvious new circumstances are the creation of new forms of property or interest in property…

> It inevitably follows that there will be respects in which the equitable doctrine of relief from forfeiture will be "unfenced". So, while I agree with Lord Briggs JSC that there is a need for there to be certainty in this area of the law, especially in the commercial field, I would go further and conclude that certainty for the purposes of a general doctrine of equity differs from that which results from a hard-edged rule of law. As Sir Richard Arden MR explained in *Eaton v. Lyon* (1798) 3 Ves 689, 692: "At Law a covenant must be strictly and literally performed: in Equity it must be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit …""

36. Lady Arden continued, at [70] (in a passage relied on by Ms Holland):

> "What then is the principle on which equity acts when it grants relief from forfeiture? The fundamental principle was, as Lord Briggs JSC has said, that equity intervenes to restrain forfeiture where (1) the right had been conferred to secure the performance of some other covenant and (2) although the covenantor had breached his covenant, he was now in a position to perform it and to pay any compensation that might be appropriate: see *Peachy v. Duke of Somerset* (1721) Fin PR 568. These are the preconditions to relief from forfeiture in the sense that they must be present, but they are not necessarily sufficient of themselves to justify the intervention of equity, even putting on one side the exercise of the judge's discretion. In the striking phrase of Dr P G Turner in his valuable case note on the decision of the Court of Appeal in this case (entitled "What Delimits Equitable Relief from Forfeiture?" [2019] CLJ 276, 279): "Equity will only relieve where the security purpose stands ahead of any other.""

37. Unusually, I have quoted at length from *Manchester Ship Canal*. I have done so, because, in the context of the decision I have to make, principally to resolve the dispute between the parties about the nature of the first pre-condition, the quotations are relevant.

38. Returning to the present case, Ms Holland argued that, by the Option, the Claimant did not obtain a, or a sufficient, proprietary interest in the Premises because "prior to the forfeiture, the right [granted to the Claimant by the Option] did not have any proprietary consequences for the Claimant. The Claimant was a long, long way from being able to call for any lease of the [Premises] when the forfeiture occurred."

39. Ms Holland argued that the Operative Provision did not secure the performance of the tenant covenants in the Lease because:

    i) the Lease has its own security provisions (that is, its own forfeiture clause), to which the Operative Provision added nothing;

ii) the Option was separate from the Lease, so that, for example, the exercise of the Operative Provision did not automatically terminate the Lease, which would have require the Defendants to operate the forfeiture clause in the Lease;

iii) the Operative Provision did not "purely" secure the performance of the tenant covenants in the Lease;

iv) when exercising an option, the grantee has to strictly comply with the terms of the option agreement. To allow a grantee to obtain relief from forfeiture, when a grantor terminates an option before it is exercised, would be "in stark contrast" to that.

40. On the question of the court's discretion to grant relief, Ms Holland explained, in paragraph 30 of her skeleton argument:

> "The consequence of termination is that the Claimant merely loses the privilege of the option under which it might, one day, have been able to seek a new term. There is no particular unfairness in this respect…[T]he Claimant now accepts that there was a contractual right to terminate and there is no question of the Defendants having done anything to abuse their rights. Accordingly,…the Court should be cautious before granting equitable relief in the circumstances of this case."

41. Ms Holland's oral submissions on this point were similarly moderate. The basis for those submissions was that "the jurisdiction to grant relief from forfeiture ultimately depends on unconscionability on the basis that that equity will not permit one contracting party to abuse his rights unconscionably", in which context Ms Holland also referred to an extract from Snell's Equity (34th ed), at paragraph 13-033, where the authors, citing *Else (1982) Ltd v. Parkland Holding* [1994] 1 BCLC 130, 145, say:

> "Although this [(that is, the right to grant relief from forfeiture)] confers an apparently broad discretion, it has been emphasised that a court should exercise caution before preventing A from enforcing a term that is, ex hypothesi, contractually valid: as the jurisdiction ultimately depends on unconscionability, it should be seen as exceptional."

<u>By the Option, did the Claimant obtain a, or a sufficient, proprietary or possessory interest in the Premises? Has it met the first pre-condition?</u>

42. In this context, Mr Sefton referred me to Barnsley's Land Options (7th ed), in which the authors note:

> "2-007 Because it vests in the grantee a right to call for a transfer of the land, thereby taking away from the grantor its estate or interest without its consent (at the time of exercise as opposed to grant), an option to purchase land creates an immediate equitable interest in the land…However, the grantor does not become a trustee for the grantee following the mere

grant of an option. Until the option is exercised and an ordinary contract for a sale and purchase arises, the grantee, though having an equitable interest in the land, does not have equitable ownership of the land. The exercise of the option changes the relationship between the parties in a fundamental way, because the option holder as purchaser becomes, in equity the owner of the property…

2-059 As was said in the leading case:

> "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

Accordingly, an option to purchase land (unless personal to the contracting parties) is not merely a contractual obligation. A call option creates in favour of the option holder an equitable interest in that land. An enforceable option creates an immediate equitable interest in land, even before the option holder exercises it. The basis of the principle is equity's ability to enforce a conveyance of the land by a decree of specific performance…

2-061 In the leading case the exercise of the option to repurchase was dependent purely on the volition of the grantee, as is often the case with such rights. However, whether it is correct to regard an option as creating an immediate interest in land in a case where the grantee's ability to exercise the option is itself conditional on other matters merits consideration.

A typical instance is where the option is exercisable (although being an option it need never be exercised) by the grantee only if planning permission is granted for specified development of the subject land. Such a condition is particularly common in options granted to developers. Whether or not planning consent is forthcoming is not something within the control of the grantee, being a matter for the relevant planning authority. Nonetheless, it is considered that the better view is that this does not alter the fundamental nature and status of the right created by the option. "It makes no difference whether or not the contingency is within the sole power of the purchaser. The important point is that his [i.e. the grantor's] estate or interest is taken away from him without his consent."

> That being so, it is considered that an option does give rise to an immediate equitable interest from the date of its creation, notwithstanding that there remain conditions required to be fulfilled before the option becomes exercisable..."

43. Mr Sefton also referred me to *First National Securities Ltd v. Chiltern DC* [1975] 1 WLR 1075, where Goulding J said, at page 1079H:

> "An option to buy land is a different sort of contract. The landowner is only bound to sell if and when the grantee of the option calls on him to do so. None the less, the grantee of the option has an interest in the land even before he exercises his right: see the passage, already referred to, from *London and South Western Railway Co. v. Gomm*."

44. Mr Sefton also referred me to *Gomm* itself (1882) 20 ChD 562. In that case, the railway company plaintiff had been granted an option to re-purchase land "at any time…whenever the land might be required for the railway" and on condition that the plaintiff gave 6 months' notice and paid £100 as a re-purchase price. The Court of Appeal held that, by the option, the plaintiff obtained an interest in the land. In the course of his judgment, Sir George Jessel MR said, at page 581 of the report (as Barnsley quotes):

> "…The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.
>
> It appears to me therefore that this covenant plainly gives the company an interest in the land…"

45. It is difficult to see a point of distinction of substance between the option in *Gomm* and the Option. In the former case, the option could not be exercised until the plaintiff might require the land in issue for a railway. In this case, the Claimant could not immediately exercise the Option on its grant, but had to wait until an event occurred; namely, the last year of the Lease term.

46. Ms Holland argued that, immediately before the Option was terminated, the Claimant did not have an interest in land, by virtue of the Option, in the Premises ("a relevant land interest"); in particular because the Claimant could not then obtain specific performance of any contract for the grant of a new lease, which contract would only come into existence when the Option was exercised. To similar effect, as I have noted, she contended that the termination of the Option occurred at a time which was a long, long way off from the Option having "proprietary consequences for the Claimant", by which, she explained in her oral submissions, she meant that,

immediately before the Option was terminated, the Claimant was a long, long way off from obtaining a new lease of the Premises, or from obtaining a specifically performable contact.

47. Ms Holland also pointed out that, in *UBS Global Management (UK) Ltd v. Crown Estate Commissioners* [2011] EWHC 3368 (Ch), Roth J explained, at [15]-[16]:

> "There is…no authority to support the proposition that the mere grant of an option to purchase makes the grant or trustee for the grantee. I assume if it is a trustee, the trust would be in the nature of a constructive trust. Even on a contract for the sale of land where it is recognised that the vendor is in a sense the trustee for the purchaser because the contract is specifically enforceable that is a curious kind of trust which does not have all the attributes of a normal trust…[I]n the House of Lords case of *Jerome v. Kelly* [2004] 1 WLR 1409, Lord Walker of Gestingthorpe with whose speech Lords Nichol, Scott and Brown agreed, observed at paragraph 32:
>
> > "It would...be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate irrevocable declaration of trust or assignment of beneficial interest in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provision or assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provision or assumptions may be falsified by events such as rescission of the contract either under contractual term or in breach. If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages as title is made and accepted and as the purchase price is paid in full."
>
> If that is the position on a contract of sale, the grant of a mere option to purchase that might never be exercised is still further removed from the ordinary concept of a trust with all the attendant obligations on a trustee…"

48. In neither *Gomm* nor *First National Securities* did the court suggest that an option holder has an interest in the land subject to their option only when a specifically performable contract has come into existence, or only when they obtain a decree for specific performance. To the contrary, those cases show that an option is capable of giving the option holder an interest in the land subject to their option from the grant of the option. Nor is this conclusion affected by the fact that such an interest in land does not constitute the option holder a beneficiary, or the landowner a trustee. As Lord Walker explained in *Jerome*, it is not always correct to consider whether a party has an interest in land through the lens of a trust relationship. Further, Lord Briggs explained in *Manchester Ship Canal*, at [30], that, pending completion, even in the

case where a land sale contract is not completed, the purchaser has "a species of equitable interest" (see also, to similar effect, per Lord Hoffmann in *Union Eagle* below).

49. Ms Holland also argued that it would not be unconscionable for the Claimant not to have acquired any relevant land interest, because the Defendants have been entitled to certainty about whether the Option came to an end by their service of the Notice. She drew my attention to *Di Luca v. Juraise (Spring) Ltd* [2000] 79 P & CR 193. In that case, the question for the court was whether the grantee could obtain specific performance of the land sale contract it contended had arisen when it had served notice to exercise its option not strictly in accordance with the terms of the option but, rather, late. In that case, the court refused specific performance because, as the headnote explains, "time was of the essence in relation to options to purchase, both at common law and in equity, except where the language of the option demonstrated the contrary" and the grantee had not served notice in time. Nourse LJ explained, at pages 195-197:

> "The question is a short one. A useful introduction to it will be found in the judgment of Danckwerts LJ in *Hare v. Nicoll* [1966] 2 QB 130. At page 145F, he said that the law was correctly stated in Halsbury's Laws of England, (3rd ed., 1954) vol.8, page 165:
>
> > "An option for the renewal of a lease, or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse."
>
> I entirely agree that that is a correct statement of the law…
>
> …A…practical business explanation why a stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed, is that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end.
>
> Those observations clearly affirm a settled and invariable rule in relation to options to purchase. However, Mr Stockill has relied on them as a basis for submitting that the rule does not apply where it can be shown that the grantor does not reasonably need to know with certainty the date when the option period has come to an end…
>
> I have no hesitation in rejecting Mr Stockill's submission. The rule is a universal one and, except where the language of the option demonstrates the contrary, it applies irrespective of what

> may or may not be reasonably thought to have been the needs of the grantor…"

50. I derive no assistance from this case. I do not understand how a party can acquire an interest in land only if it is not unconscionable for it to do so. In any event, in *Di Luca*, the court was being asked to grant specific performance by a plaintiff who had not performed his contractual obligations when strict compliance with those obligations had been essential. In the present case, if the second pre-condition is satisfied, the right of the Defendants to contend that the Option is at an end is qualified, unlike in *Di Luca* where that right was unqualified. If, on its proper construction, the Operative Provision was in the nature of a security interest, "by the language of the option" the grantor forewent the right to know with certainty the moment the Option ended.

51. I have therefore concluded that, immediately before the Option was terminated by the Notice, the Claimant had a relevant land interest.

52. This conclusion may be supported by the fact that the Claimant could, and in fact did, cause the Option to be noted against the registered title of the freehold interest in the Premises. As section 32(1) of the Land Registration Act 2002 explains:

> "A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge."

53. Having reached this conclusion, I turn to consider the dispute of principle between the parties about whether, to satisfy the first pre-condition, the claimant's proprietary interest must have a particular quality.

54. Mr Sefton argued that, to satisfy the first pre-condition, the grantee has to establish only that it has a proprietary interest in the target of the forfeiture or other exercise of a termination right, so that the Claimant's relevant land interest satisfied the first pre-condition.

55. He pointed out that, in previous cases, the court spoke of a claimant having "a" proprietary interest in the target and did not suggest that that proprietary interest had to have a particular quality. He referred me, in particular, to *Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694, 702C, *BICC plc v. Burndy Corpn* [1985] Ch 232, 252A (where, in the case of land, Dillon LJ equated an interest in land with a proprietary interest for present purposes), *Cavendish Square Holding BV v. Makdessi* [2016] AC 1172 at [17] and *Cukurova Finance International Ltd v. Alfa Telecom Turkey Ltd (Nos. 3 to 5)* [2016] AC 923 at [94]-[95].

56. These cases do not provide a strong basis, though, for concluding that any proprietary interest in the target is enough to satisfy the first pre-condition, because, as Mr Sefton fairly acknowledged, in none of the cases was the court being invited to consider whether a proprietary interest has to have a particular quality to satisfy the first pre-condition.

57. Mr Sefton was on stronger ground when he relied on Lord Brigg's admonition that the relief from forfeiture principle must "be delimited by reference to reasonably clear

boundaries". Mr Sefton argued, with force, that, if the first pre-condition is only satisfied if the grantee's proprietary interest has a particular quality, or is "sufficient", the boundaries of the principle would not be reasonably clear but might have to be worked out on a case-by-case basis, initially by County Court and High Court judges, then probably at appellate level. On the other hand, he argued, if all that is required to satisfy the first precondition is that the grantee has a proprietary interest in the target, that could be easily determined in most cases.

58. Ms Holland argued in paragraph 30.2 of her skeleton argument, and in her oral submissions, that:

> "The really important point, however, is that whether or not a conditional option to renew a lease in the future is to be regarded as an "interest in land" is not the relevant question for present purposes. The relevant question for present purposes is whether the right of the grantee is sufficiently "proprietary" to come within the jurisdiction for relief from forfeiture…"

59. What gives me considerable pause for thought is Lord Brigg's consideration of *Union Eagle*, in *Manchester Ship Canal* at [30], where the Judge said (as I have quoted):

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

60. It may be said, and, indeed, Ms Holland did say, that, if what Lord Briggs decided was that a proprietary interest under a specifically performable land sale contract is not a sufficient interest to satisfy the first pre-condition, then a proprietary interest arising under an option, which is one stage removed from a specifically performable land sale contract, is even less a sufficient proprietary interest, so that the Claimant has never had a sufficient proprietary interest to satisfy the first pre-condition.

61. On reflection, I have concluded that, in [30], Lord Briggs did not determine that the proprietary interest necessary to satisfy the first pre-condition has to have a particular quality. Rather, the Judge was pointing out (i) that *Union Eagle* did not help to answer the questions which the Supreme Court had to determine ("the decision is not of significant assistance for present purposes") and (ii) the facts of *Union Eagle* were very different to the facts of the case before the Court ("the facts were far removed from cases such as the present").

62. To be clear, I do not think that Lord Briggs decided that, to be a proprietary interest for the purposes of the first pre-condition, the interest (or rights) must be perpetual

and/or have been enjoyed for many years. As to the former point in particular, Lord Briggs himself, later in his decision, called into question whether only perpetual rights could be the subject of relief from forfeiture. In any event, Lord Briggs explained that "land is a form of perpetual property".

63. My conclusion, that Lord Briggs did not determine that the proprietary interest necessary to satisfy the first pre-condition has to have a particular quality, is supported (or, at least, not undermined) by a consideration of *Union Eagle* itself, particularly because, in *Manchester Ship Canal*, Lord Briggs did not qualify the Privy Council's analysis in the earlier case or seek to reframe that analysis.

64. In *Union Eagle*¸ Lord Hoffmann explained, at page 520, why the court responds as it does to the exercise, by a vendor of land, of its right to rescind for non-payment, by the purchaser, of the price when time has been made of the essence:

> "When a vendor exercises his right to rescind, he terminates the contract. The purchaser's loss of the right to specific performance may be said to amount to a forfeiture of the equitable interest which the contract gave him in the land…But the right to rescind the contract, though it involves termination of the purchaser's equitable interest, stands upon a rather different footing. Its purpose is, upon breach of an essential term, to restore to the vendor his freedom to deal with his land as he pleases. In a rising market, such a right may be valuable but volatile. Their Lordships think that in such circumstances a vendor should be able to know with reasonable certainty whether he may resell the land or not.
>
> It is for this reason that, for the past 80 years, the courts in England, although ready to grant restitutionary relief against penalties, have been unwilling to grant relief by way of specific performance against breach of an essential condition as to time…"

65. Two points emerge from what Lord Hoffmann said.

66. First, the Privy Council did take the view that a purchaser of land under a specifically performable contract does have an equitable interest in land before completion which restricts the vendor's freedom to deal with the land as it pleases. In this respect, there a clear parallels with what Sir George Jessel MR said in *Gomm*.

67. Secondly, what (or part of what) prevented the purchaser in *Union Eagle* from obtaining specific performance of the sale contract (or, perhaps to put it another way, what prevented the purchaser from obtaining relief from the forfeiture effected by the vendor's rescission of the sale contract) was that time for the purchaser's performance had been of the essence. In that case, the right to rescind was not merely in the nature of security, securing performance, albeit late performance, of the purchaser's primary obligation to pay the price. Rather, the right to rescind was intended to allow the vendor to bring the contract to an end once and for all.

68. *Union Eagle* does not support the proposition that, to satisfy the first pre-condition, the claimant's proprietary interest must have a particular quality. Rather, it is consistent with the conclusion (i) that the first pre-condition is satisfied if the claimant has a proprietary interest in the target and (ii) that it is the second pre-condition which distinguishes cases in which the court has jurisdiction to grant relief from forfeiture from cases such as *Union Eagle*.

69. In deciding whether a proprietary interest has to have a particular quality before it can fall within the "reasonably clear boundaries" of the relief from forfeiture principle, I have to consider the "nature and purpose" of the principle, as Lord Briggs explained in *Manchester Ship Canal* at [47]. As Lord Wilberforce explained in *Shiloh Spinners*, the principal purpose of the principle is to ensure that there is given due, and only due, weight to a forfeiture provision which is in the nature of security.

70. For all these reasons, I have concluded that:

    i) to satisfy the first pre-condition, the Claimant only needs to establish that, immediately before the service of the Notice, it had a proprietary interest in the Premises, by virtue of the Option;

    ii) the Claimant's relevant land interest was such a proprietary interest;

    iii) so that the Claimant has established the first pre-condition.

71. These conclusions are only reinforced if I am allowed to take into account those parts of Lady Arden's decision in *Manchester Ship Canal* which I have quoted.

<u>Did the Operative Provision secure the performance of the tenant covenants in the Lease? Has it met the second pre-condition?</u>

72. At the time the Option was granted, the parties to it were landlord and tenant under the Lease. The purpose of the Option was to permit the parties to call for, in the case of the tenant, and to put to the tenant, in the case of the landlord, a further lease of the Premises.

73. The parties to the Option intended that the Option and the Lease would go hand-in-hand in practice. This ought to be inferred, not only from the context in which the Option was granted, but also from the terms of the Option itself. The Operative Provision permits the Option to be terminated if the conditions for the landlord to forfeit the Lease exist. In the context in which the Option was granted, it ought to be inferred that, in practice, the parties expected that, if the Lease was forfeited, so the Option was, or was likely, to be brought to an end. Additionally, clause 11 of the Option reflects an expectation of the parties, which I infer, that any assignment of the Lease would be accompanied by an assignment of the Option.

74. It is not disputed that the forfeiture provision in the Lease is intended to secure, and is in the nature of security for, the performance of the tenant covenants in the Lease.

75. In *Makdessi*, Lord Neuberger and Lord Sumption explained, at [17]:

> "…Where a proprietary interest or a "proprietary or possessory right" (such as a patent or a lease) is granted or transferred

> **subject to revocation or determination on breach**, the clause providing for determination or revocation is a forfeiture…" (emphasis added).

76. Further, in the Court of Appeal in *Manchester Ship Canal* [2019] Ch 331, Lewison LJ explained, at [70]:

> "There is, however, a second condition that must be satisfied in order to engage the jurisdiction to grant relief. That is that the right of termination must have been intended to secure the payment of money or the performance of other obligations. I have no doubt that that was the case as regards clause 5. The rights granted were rights granted "in perpetuity subject to the rent or annual sum hereinafter made payable and the covenants on the part of Vauxhall and the conditions hereinafter contained". Clearly then, payment of the annual sum and performance of the covenants were the substratum on which the grant depended. **Clause 5 is exercisable only if there is a default in performance by Vauxhall. It is the sanction for non-performance; and it is applicable whether the breach of obligation in question is serious or trivial. Its form of drafting mirrors that of a forfeiture clause in a lease**, save only that it inserts the stage of a preliminary notice…" (emphasis added).

77. It seems to me therefore, in agreement with Mr Sefton, that Lord Neuberger, Lord Sumption and Lewison LJ viewed a termination provision as being in the nature of security where it operates on a breach of a primary obligation, particularly, in the case of Lewison LJ, where the termination provision can operate indiscriminately and mirrors a forfeiture clause in a lease. The Operative Provision has all those qualities.

78. For all these reasons, I am satisfied that the Operative Provision was intended to secure, and was security for, the performance of the tenant covenants in the Lease, so that the second pre-condition has been established.

79. To the extent that it can do so, the Notice reinforces this conclusion. The Notice set out the relevant provisions of the forfeiture clause in the Lease. It effectively asserted that the conditions for forfeiting the Lease existed and then concluded by asserting that, for that reason, the Defendants gave notice to terminate the Option.

80. Before concluding that the second pre-condition has been established, I considered Ms Holland's arguments in opposition (which I introduced in paragraph 39 above).

81. She argued, first, that the Lease has its own security provisions (that is, its own forfeiture clause), to which the Operative Provision added nothing. She is right that the Lease does have its own security provision which is capable of working perfectly well without the Operative Provision. However, it does not follow from that that the Operative Provision could not be, or was not, additional security for the performance of the tenant covenants in the Lease.

82. She argued, secondly, that Option was separate from the Lease, so that, for example, an exercise of the Operative Provision did not automatically terminate the Lease, which would have required the Defendants to operate the forfeiture clause in the Lease. If she meant that the Option and the Lease were separate documents, I agree with her of course. However, as I have explained, in the context in which the Option was granted, it is not right to view them as wholly unrelated. She is also right that an exercise of the Operative Provision did not automatically terminate the Lease, but that does not mean that it could not be additional security for the performance of the tenant covenants in the Lease.

83. She argued, next, that the Operative Provision did not "purely" secure the performance of the tenant covenants in the Lease. Again, she is right about that, but I repeat that that does not mean that it could not be additional security for the performance of those tenant covenants.

84. She argued, finally, that, when exercising an option, the grantee has to strictly comply with the terms of the option. To allow a grantee to obtain relief from forfeiture when a grantor terminates an option before it is exercised, would be "in stark contrast" to that she argued. However, in my view, the fact that a grantee may never be able to own the property over which it has an option because it does not comply with the option agreement terms is little guide to whether the court has the jurisdiction to intervene in quite different circumstances where a grantor terminates an option early on the ground that the grantee has not complied with its obligations under a separate agreement and where, putting this argument aside, the provision used by the grantor is found to be a forfeiture clause.

85. Ms Holland's arguments do not outweigh the reasons, which I have set out, for my conclusion that the second pre-condition has been established.

Should the discretion to grant relief from forfeiture be exercised in the Claimant's favour?

86. As I have noted, Ms Holland drew my attention to *Else*.

87. In *Else*, a counterclaim for relief from forfeiture was not before the Court of Appeal. So what the court said may strictly be obiter. Nevertheless, the following should be noted. At page 135 of the report, Evans LJ said:

> "There is likewise an equitable remedy of great (sixteenth century) antiquity whereby the court grants relief against forfeiture when a strict and literal construction of the contractual terms would permit the plaintiff to retain or recover property by reason of the defendant's default in performance of the contract, but the court regards it as unconscionable to do so. The classic example is the landlord's contractual right to recover the leased property upon any default, however minor, of the tenant's obligation to pay the agreed rent…"

Evans LJ continued, at page 140, in relation to the case before the court:

> "…the breaches which have occurred and the losses which the plaintiffs have suffered, together with the advantages which the

> defendants have gained for Mr Woolhouse [(the defending counterclaimant's director)], are clear evidence that substantial compensation is due to the plaintiffs, and that the equitable balance is weighted heavily in their favour when the defendants claim that the clause should not be enforced according to its terms.
>
> For these reasons, and others stated by the learned judge, the defendants in my judgment should not be granted relief."

88. Hoffmann LJ said, at pages 144-5:

> "…The forfeiture rule looks at the position after the breach when the innocent party is enforcing the forfeiture. It asks whether in all the circumstances it would be unconscionable to allow the forfeiture to take effect. This is an exercise of discretion to grant equitable relief…
>
> The circumstances in which the court will exercise this jurisdiction have been the subject of some debate in Australia. In *Legione* it was said that the jurisdiction was exceptional and that relief would be granted only in cases in which it was unconscionable of the vendor to rescind the contract. The subsequent majority decision in *Stern v. MacArthur* (1988) 165 CLR 489 appears to inject elements of the mechanical penalty rule into the question of whether rescission would be unconscionable and to hold that it is unconscionable to exercise a right of rescission which would produce penal consequences if the right was intended to be security for performance of the contract.
>
> Speaking for myself, I have some sympathy with the view of Mason CJ that this is "to eviscerate unconscionability of meaning", and with the observations of Deane and Dawson JJ that the law in this field in England and Australia appears to be developing on divergent lines. But I need not pursue these questions, because Miss Heilbron does not suggest that Mr Woolhouse should have been given more time to find the money. This is because he plainly had no prospect of finding it and this remains the position today."

89. Ms Holland explained in her oral submissions that she was not suggesting that the jurisdiction to grant relief from forfeiture is aimed only at counteracting an "unconscionable abuse", by the non-defaulting party, of its contractual rights. (Such an argument too may be said to "eviscerate unconscionability of meaning", or at least to limit the circumstances in which the court might otherwise exercise its discretion as the majority of the court may have done in *Stern*). Indeed, just before the passage cited by Ms Holland, the authors of Snell say, at paragraph 13-031:

> "Relief can therefore be granted even in the absence of such bad faith or improper purpose. Equally, the mere fact that A

> may have some additional, collateral motivation for enforcing a security right by means of a forfeiture clause does not, of itself, provide any grounds for relief against forfeiture. It has been stated that "the paradigm case for relief", in the classic case of relief for a mortgagor or lessee, is "where the primary object of the bargain is to secure a stated result which can be effectively attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of the result". So if, for example, the provision operates where B has failed to pay, the general approach of the court is to grant relief on terms that B "pays what is due plus the costs of the other party." It is submitted that the central question is whether B can show that it would be unconscionable for A to insist on enforcing a clause designed as security for a primary stipulation. This depends on whether the clause would impose a burden on B, or give A a benefit, that is excessive when compared to that which would arise through performance of the secured duty."

In short, the court apparently exercises its discretion to grant relief from forfeiture when, on all the evidence before it, it concludes that it would be unconscionable for the non-defaulting party to rely on its contractual termination right.

90. It is right that, by way of general introduction, in [2] in *Manchester Ship Canal*, as I have noted Lord Briggs referred to relief from forfeiture as being "one of those equitable remedies which pays a valuable role in preventing the unconscionable abuse of strict legal rights for purposes other than those for which they were conferred" but I do not understand Lord Briggs to be saying, and Ms Holland did not suggest (and, indeed, positively did not contend), that a grantee can only obtain relief from forfeiture if it establishes that its grantor has in fact exercised a right to forfeit for an ulterior purpose (cf. also Lord Brigg's reference, quoted above, to what Lord Wilberforce said in *Shiloh Spinners*).

91. I have come to the conclusion that it would be unconscionable for the Defendants to retain the benefit of their termination of the Option and that I should exercise my discretion in the Claimant's favour.

92. Had the Defendants forfeited the Lease, rather than the Option, because of the rent arrears in this case, it is very likely that the Claimant would have been granted relief from forfeiture.

93. Consistent with authority, the editors of Woodfall on Landlord and Tenant explain, at paragraph 17.181:

> In the eyes of equity, the proviso for re-entry was merely a "security" for the rent. Equity is in the "constant course" of relieving against forfeiture where the tenant pays the rent and all expenses. Thus save in exceptional circumstances the function of the court is to grant relief when all that is due for rent and costs has been paid up. The same applies where the breach for which forfeiture has occurred is non-payment of

> sums analogous to rent such as service charges…However, where the tenant "plays the system" taking advantage of procedural points to delay payment, the court may exercise its discretion against him…"

94. More generally, Lord Wilberforce explained in *Shiloh Spinners* (above):

> "The word "appropriate" involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

95. The Operative Provision provided additional security for performance of the same primary obligations as the forfeiture clause in the Lease; namely, in this case, the tenant's rent payment obligation. By the Notice, the Defendants explained that they were terminating the Option because of the rent arrears; that is, because the Claimant breached the rent payment obligation in the Lease. It would be odd, therefore, if there was a difference in approach, in this case, from the much more common case where a lease is forfeited for non-payment of rent.

96. Further, in this case, within a matter of weeks of service of the Notice, the parties negotiated a settlement in relation to the rent arrears in issue, which is reflected in the Rent Concession Agreement, with which the Claimant has fully complied, including by paying about £100,000 on the date the Rent Concession Agreement was concluded.

97. Had the rent arrears never occurred, from July 2021 (when the Option was terminated) the Defendants would have expected to continue to receive the rent due under the Lease for 3-4 years, and would have expected to be obliged to grant the Claimant a new lease of the Premises for a 5½ year term and not be able to re-take possession of the Premises in the meantime. If the Claimant is not granted relief from forfeiture, the Defendants can continue to receive the rent due under the Lease for the next 3-4 years, but they cannot be contractually obliged to grant the Claimant a new lease even though they have been reimbursed all the rent arrears which they did not voluntarily give up by the Rent Concession Agreement (which rent arrears were apparently the very cause of the service of the Notice). It would be particularly unfair in this case for the Claimant not to be granted relief from forfeiture because, by not forfeiting the Lease at the same time as they terminated the Option, the Defendants created a situation in which, whatever the outcome of a relief from forfeiture application, they still have a source of rent, and can expect to benefit from the Claimant's primary obligation to pay rent (which the Operative Provision secured), for the remaining term of the Lease. In short, the Defendants, by their conduct, have deployed their security but have retained the benefit of the Claimant's primary obligation nevertheless.

98. In this case, the Claimant's default was not wilful. It fell into rent arrears because of the Covid-19 pandemic and the resulting restrictions on trade, and there is no evidence that it has otherwise been in breach of the Lease.

99. As I have said, for all these reasons I have come to the conclusion that it would be unconscionable for the Defendants to retain the benefit of their termination of the Option and that I should exercise my discretion in the Claimant's favour.

Disposal

100. For the reasons I have given, I will grant the Claimant unconditional relief from forfeiture in relation to the Defendants' termination of the Option by the Notice. I will hear further from counsel on all costs and consequential matters.