of a public viewing platform. Had these flats had normally sized windows, it would not have been possible to see inside to anything like the same degree from the Tate's platform.

As the judge noted at [203], the "glass wall" architecture of the flats tended to draw the gaze of visitors to the platform. In the end, the claimants (by living in such open flats) made themselves unusually vulnerable to this invasion of their privacy. But the courts had long been wary of granting remedies to protect unusually sensitive uses of land (e.g. *Robinson v Kilvert* (1889) 41 Ch. D. 88 – expressly followed notwithstanding Buxton L.J.'s comments in *Network Rail Infrastructure Ltd. v Morris* [2004] EWCA Civ 172, [2004] Env. L.R. 41). If the claimants objected so much to being viewed they could draw their blinds, install "privacy film" on the glass, or hang net curtains. Of course any of those solutions would interrupt the magnificent views from the flats and/or spoil the modernist architectural effect. But the judge thought that the availability of measures by which the claimants could mitigate the "self-induced incentive to gaze" (at [205]) was an important part of the "give and take" approach to a privacy-related nuisance. (The judge further thought that the "almost identical" analysis of "reasonable expectations of privacy" under the ECHR would lead to "the same result" – and did not undertake any separate inquiry (at [220]). Cf. P. Wragg [2019] C.L.J. 409, 412.)

Conclusions (architectural): media commentators were amused by Mann J.'s suggestion that these achingly modern flats could have (irredeemably suburban) net curtains installed. But glass walls afford both impressive vistas and diminished privacy. Owners have to take the rough with the smooth. Hoi polloi can peer in to admire one's magnificent Arne Jacobsen chairs. Perhaps people who live in glass houses shouldn't stow thrones.

Conclusions (legal): Tort can and does protect human rights – even if the HRA is inapplicable (and even if the planning permission system has failed to balance the competing interests). Nuisance may evolve to protect the expectations of modern living. But in doing so, it still relies centrally on compromise, the spirit of "live and let live" between neighbours that Bramwell B. enunciated in *Bamford v Turnley* (1862) 3 B. & S. 66, 84.

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WHAT DELIMITS EQUITABLE RELIEF FROM FORFEITURE?

SHORT steps in a sequence of cases over just 40 years have changed the dominant English understanding of equitable relief from forfeiture almost entirely. Each step has been volitional, yet taken without the judges

https://doi.org/10.1017/S0008197319000588 Published online by Cambridge University Press

evidently intending such large change or considering whether *stare decisis* permits it. That this has befallen a body of law that acquired its modern form 350 years ago is worrying.

Relief against forfeiture is routinely granted in relation to leases and mortgages. But relief in relation to licences and contractual rights has become controversial through the erroneous belief that equitable relief from forfeiture would disrupt such ordinary – and commercially-important – arrangements. *Vauxhall Motors Ltd. v Manchester Ship Canal Co. Ltd.* [2018] EWCA Civ 1100, [2019] 2 W.L.R. 330 makes clear the issues involved and the legal cul-de-sac to which this misunderstanding leads.

The relief granted in *Vauxhall Motors* concerned a drainage system. Vauxhall manufactures motor cars at a factory in Ellesmere Port, Cheshire, which it has operated since 1964. Drainage is a valuable amenity: the factory produces industrial effluent and much of the rain falls on impermeable surfaces. In 1962, the Manchester Ship Canal Company (MSCC) granted Vauxhall a perpetual licence to discharge all surface water and trade effluent of a sufficient purity through pipes and over spillways from Vauxhall's land into the canal, and to lay, construct and alter the structures required for that purpose. Vauxhall was to pay an annual fee of £50 and to fulfil certain covenants. The licence is currently worth roughly £300,000 to £440,000 to Vauxhall per year. For unknown reasons Vauxhall failed to pay the 2013 fee. It ignored a reminder notice, following which MSCC terminated the licence in March 2014. Vauxhall commenced proceedings a year later and was awarded relief from forfeiture in November 2016 on condition that it pay arrears, interest and costs: [2016] EWHC 2960 (Ch).

The now-dominant English understanding of relief from forfeiture is captured by the Court of Appeal's decision. Lewison L.J. (Floyd and David Richards L.JJ. concurring) dismissed an appeal after disagreeing with the judge's delineation of equitable relief from forfeiture. They redrew the judge's account, holding that the required equitable jurisdiction only arose if:

(1) the licence granted Vauxhall "proprietary or possessory rights"; and
(2) MSCC's right to terminate the licence was "intended to secure the payment of money or the performance of other obligations".

The latter requirement was found established in a few words. Much more was said of the former requirement. The court considered that unless the jurisdiction was limited to apply only to proprietary or possessory rights, nothing would prevent courts granting equitable relief from forfeiture of contractual licences, contracts for services or, indeed, contracts full stop. The judge at first instance overstretched, the court held, in ruling it sufficient that Vauxhall's licence granted it rights that were close to possessory but not possessory. On appeal, Vauxhall conceded its lack of "proprietary" rights: the drainage infrastructure became fixtures and part of the land. But Vauxhall's exclusive rights (as against MSCC) to use the

https://doi.org/10.1017/S0008197319000588 Published online by Cambridge University Press

drainage infrastructure, together with the infrastructure's physical characteristics and the parties' clear intention that Vauxhall should be the only entity allowed to use it, meant Vauxhall had both factual possession of the space occupied by the infrastructure and intention to possess that space. "[T]he way to the exercise of the equitable jurisdiction to grant relief against forfeiture" thus opened (at [68], [70]).

The clarity of the Court of Appeal's judgment enables one to notice difficulties in how the understanding of equitable relief from forfeiture has shifted. On its own terms, the court's conclusion that Vauxhall held these possessory rights is unproblematic. Licences vary. Some do confer possessory entitlements. But does a criterion of possession truly limit relief from forfeiture? It is telling that the court adopted the common law definition of "possession" drawn from possessory claims over chattels and land. They did not seek their definition in cases on relief from forfeiture of interests in land, especially leases – presumably because no such definition can be found. There is no established doctrine of equity that a claimant seeking relief from forfeiture must show a title to property or a possessory interest thereto. What the claimant must show, the House of Lords held in *Shiloh Spinners Ltd. v Harding* [1973] A.C. 691, 722, is that:

(1) "the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money" or
(2) the forfeiture was caused by "fraud, accident, mistake, or surprise, always a ground for equity's intervention".

Then the claimant must be able to make good the loss caused by his or her default (see M. Pawlowski, *The Forfeiture of Leases* (London 1993), ch. 7). Relief thereafter will ordinarily follow subject to discretionary considerations, such as third-party interests. *Particular* claimants who seek relief to restore a proprietary interest must indeed demonstrate that they had a proprietary interest earlier that they were deprived of. But as the *general* requirements in *Shiloh Spinners* show, no property or possession criterion is universally needed. Hence a legatee who forfeits a legacy of any kind can be relieved from the forfeiture, even though the legatee held no title to or possessory interest in the testator's property: *Leong v Chye* [1955] A.C. 648 (PC). Likewise, whether relief from the forfeiture of a licence is available has not traditionally depended on a search for a title to or possessory interest over property: *Elliott v Turner* (1843) 13 Sim. 477 (patent for invention). These principles are traceable, without much change, from the 1660s onwards and are living principles today.

What, then, disables courts from re-opening every forfeiture and every exercise of a contractual right of termination, including for repudiatory breach? What defines "relief from forfeiture"? And why has the traditional understanding of equitable relief from forfeiture become a lost friend?

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Forfeitures and terminations in general are not subject to equitable relief under the principles in *Shiloh Spinners* because it is really quite difficult to establish the required facts. No party who defaulted by inadvertence or wilfully can establish that the forfeiture suffered was caused by fraud, accident, mistake or surprise. The one precludes the other: *Shiloh Spinners* (p. 722). The security principle discussed in *Shiloh Spinners* is no flimsier. *Vauxhall Motors* states (at [70]) that the clause providing for the forfeiture must be intended to secure the payment of money or the performance of other obligations, but much more is required. Old cases say that that must be the parties' "only" intention – meaning, in modern terms, the essence thereof, their *primary* or *dominant* purpose: *Peachy v Somerset* (1720) 1 Str. 447, 453. (The facts at trial in *Vauxhall Motors* reached that threshold.) Outside security transactions and leases, parties seldom *predominantly* intend a termination clause to secure payment or performance: *Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694, 702 (time charterparty withdrawal clause). Equity will only relieve where the security purpose stands ahead of any other.

The proposition that "relief from forfeiture" must be defined with reference to property is sound subject to a proviso, viz. that for the purpose of equitable relief "forfeiture" is somewhat loosely defined. "Forfeiture" describes no uniform legal operation: in a proper case equitable relief will go against forfeitures of money in which title has passed or, again, of legacies conferring no title or possession, or of titles to and possessory entitlements over property. The various forfeitures reflect a simple lay idea: a forfeiture consists of being deprived in another's favour of something that was one's own as the cost of one's default or misconduct. Analysts suspicious of extra-legal concepts may be disconcerted, but one should not regret that a lay concept, rather than a technical legal concept of "property" or "possession", defines relief from forfeiture. What this also implies, however, is that the definition of relief from forfeiture is not a simple tool to delimit equity's application: that work is instead done by the principles in *Shiloh Spinners* outlined above.

Why is the traditional face of the doctrine now unrecognisable to some? Essentially because of how judges have thought they must temper the risk that equity might cancel every forfeiture and contractual termination. In refusing relief from forfeiture of a services contract – a time charterparty – Lord Diplock said in *The Scaptrade* (pp. 700G, 702B–C) that the contract transferred to the charterer "no interest in or right to possession of the vessel", and that the traditional principles of relief were "never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights". In the following year, Lord Templeman grasped that dictum to justify refusing relief from the forfeiture of a trademark licence. He said Lord Diplock "confined that power" of equity "to contracts concerning the transfer of proprietary or possessory rights": *Sport*

https://doi.org/10.1017/S0008197319000588 Published online by Cambridge University Press

Internationaal Bussum B.V. v Inter-Footwear Ltd. [1984] 1 W.L.R. 776, 794. Both cases were decided correctly on traditional principles: in neither case did the parties *predominantly* intend the termination right merely to secure performance and in neither was the claimant a victim of fraud, accident, mistake or surprise. But the anxiety in each case over equity's reach was misplaced. Trial judges should be trusted to appreciate the forensic difficulty a claimant faces in seeking relief from forfeiture, and the difference between what parties intended and what they might have *predominantly* intended. The Diplock-Templeman dicta have become a distraction.

It is hoped that the appeal to the Supreme Court in *Vauxhall Motors* will walk conventional lines.

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CAKES IN THE SUPREME COURT

MR. and Mrs. McArthur have run Ashers Baking Company Ltd. ("Ashers") since 1992. They are orthodox Christians. Mr. Lee ordered a cake from Ashers for a QueerSpace event. The cake was to be iced with a picture of children's TV characters Bert and Ernie, the QueerSpace logo, and the words "Support Gay Marriage". The order was accepted, but over the weekend, the McArthurs decided that they could not in conscience produce a cake with that message. Consequently, Mrs. McArthur telephoned Mr. Lee and explained that they could not produce the cake. She apologised and gave a full refund. Mr. Lee claimed that he had been discriminated against on grounds of sexual orientation, religious belief and/or political opinion.

At first instance, his claims were upheld. The Court of Appeal upheld his claim of associative direct discrimination on grounds of sexual orientation but did not have to decide the questions arising under political and religious discrimination. So the Supreme Court came to consider cake, with Baroness Hale giving the leading judgment: *Lee v Ashers Baking Company Ltd. and Others* [2018] UKSC 49. She left important questions about references, made by the Attorney General for Northern Ireland, to Lord Mance to give the lead judgment. In the same fashion, these matters are not addressed in this note.

At first instance, the judge found that Ashers had not cancelled the order because of Mr. Lee's actual or perceived sexual orientation but because of the message that he wanted to be iced on to the cake. Ashers would have supplied the cake to him without that message, and they would have refused to supply the cake with that message to a heterosexual customer: "the

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