confirms that the second element in this test is to be treated as settled by the Supreme Court in *Ivey* to be an objective test.

The first step in this test is now likely to be the main focus for future cases on dishonest assistance. In fraud cases it is rarely possible to discover explicit evidence as to the state of mind of the parties. In *Edgington v Fitzmaurice* (1885) 29 Ch.D. 459, 483, Bowen L.J. famously declared that "the state of a man's mind is as much a fact as the state of his digestion". Maybe so. But it is easier to read a stomach than a mind. What is dishonest is seldom made explicit, for dishonest people are usually conscious of the need to hide their behaviour, or to cloak it in the raiment of equivocation. The explicit evidence as to knowledge at any particular time may appear quite meagre. The true state of the assistant's mind may only become apparent as an inference from the conduct of the assistant, viewed in total, forming a pattern over time, in light of the likely motives of the parties: *Mortgage Agency Services Number One Ltd. v Cripps Harries L.L.P.* [2016] EWHC 2483 (Ch), at [88]. So in making the factual findings for the first step of the test in *Ivey*, a court may need to thread the individual findings on the assistant's state of mind together by making a single broad finding of fact about the assistant's knowledge of the breach. *Group Seven* shows that a finding of "blind eye knowledge" will indicate dishonesty. Since dishonesty is an objective test, it is also arguable that when an assistant knows facts from which an honest person would have inferred that there was a breach of trust or fiduciary duty, but the fiduciary failed to draw that inference, a finding of dishonesty might also be made.

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THE FORFEITURE OF CONTRACTUAL RIGHTS

A RECENT decision of the Supreme Court of the United Kingdom adds to a list of areas in which English and Australian courts are developing distinct strands of equity jurisprudence. In *Manchester Ship Canal Company Ltd. v Vauxhall Motors Ltd. (formerly General Motors UK Ltd.)* [2019] UKSC 46, [2019] 3 W.L.R. 852, the Supreme Court decided the question whether a claimant must forfeit a proprietary or possessory right on default in order to seek relief against forfeiture. The majority held that the forfeiture of a proprietary or possessory right must have occurred in order for jurisdiction to grant relief to exist (at [35]–[47]). The majority was reluctant to interfere with what it saw as the "careful development" of a "principled limitation" on the doctrine of relief against forfeiture (at [50]), referring to recent decisions stemming from Lord Diplock's speech in *The Scaptrade* [1983] 2 A.

C. 694 (but see Turner [2019] C.L.J. 276). In a concurring judgment, Lady Arden was less sanguine about limiting relief according to the type of right the claimant held. Her Ladyship's approach resembles the approach of Australian courts, which are willing to afford relief against the forfeiture of contractual rights: see *Mineralogy P/L v Sino Iron P/L (No 6)* (2015) 329 A.L.R. 1, at [981]. Indeed, Edelman J. in *Mineralogy* (at [983]) asked whether there is any rational basis for limiting the doctrine by reference to the type of entitlement or right lost by the claimant.

Manchester Ship Canal involved a body corporate (MSCC) granting a manufacturer (Vauxhall) a contractual licence in exchange for Vauxhall paying MSCC an annual fee of £50. The licence conferred on Vauxhall the liberty perpetually to discharge water into the Manchester Canal. The water would pass over MSCC's land through a drainage system to be constructed and maintained by Vauxhall. Only Vauxhall could use the drainage system and Vauxhall was obliged to maintain and repair the system even though part of the drainage system was situated on (and acceded to) MSCC's land. A clause in the agreement stipulated the consequences of Vauxhall's failure to pay the annual fee within 21 days of the due date; MSCC could terminate the licence provided it complied with the relevant notice period and Vauxhall did not cure the default within that period.

Several decades later, in what appeared to be a costly administrative blunder, Vauxhall failed to pay to MSCC the licence fee. MSCC terminated the licence after issuing a default notice with which Vauxhall failed to comply, and Vauxhall immediately offered to pay the arrears. After over a year of negotiations concerning a new licence agreement, Vauxhall sought relief against the forfeiture of the original licence. The then annual market value of a right to discharge both surface water and trade effluent over MSCC's land was estimated to be over £300,000. The Supreme Court unanimously affirmed the Court of Appeal's decision that Vauxhall was entitled to relief against the forfeiture of its contractual licence.

The majority held that the contractual licence granted to Vauxhall a possessory right to the land occupied by the drainage system and thus the first bar to seeking relief against forfeiture was cleared. The rights granted by the licence were possessory because (1) they conferred on Vauxhall factual possession (Vauxhall had a contractual liberty to create, and ongoing obligations to maintain, drainage infrastructure and had, as a matter of fact, availed itself of such rights and performed such obligations); and (2) Vauxhall had the exclusive right to use the infrastructure under the terms of the licence. Vauxhall had also manifested an intention to control the relevant infrastructure (at [52]–[57]). The majority, following the Court of Appeal, applied a test derived from the law of adverse possession (*JA Pye (Oxford) Ltd. v Graham* [2003] 1 A.C. 419).

This holding must be placed in perspective. Apart from the proprietary or possessory right requirement, a claimant seeking relief from forfeiture must

show either that: (1) the right to the forfeiture was inserted into a transaction, as a matter of substance, to secure the payment of money or performance of some contractual objective; or (2) the defendant's enforcement of the impugned right or power was affected by "fraud, accident, mistake or surprise": *Shiloh Spinners* [1973] A.C. 691, 722–23. It was common ground between the parties in the Supreme Court – though it had been disputed below – that MSCC's power to terminate the contract on Vauxhall's default was in the nature of a security right with the primary purpose of ensuring that Vauxhall complied with its underlying contractual obligations. In Hohfeldian terms, MSCC's legal power to terminate the licence was accordingly disabled and the Court affirmed the orthodox approach of a Court of Equity in granting relief from the strict enforcement of a security right. The Supreme Court affirmed the trial judge's award of relief on terms that Vauxhall pay what was due plus MSCC's costs (see [2016] EWHC 2960 (Ch), at [160]). In contrast, an Australian court would be willing to grant relief against the forfeiture of contractual rights without the imposition of a proprietary or possessory right threshold.

Does any sound justification exist in defence of this threshold requirement? The majority in *Manchester Ship Canal* adopted a "Goldilocks" approach to the supposed requirement. In response to (1) MSCC's submissions that no relief ought to be given from the forfeiture of a contractual licence granting possession over land (as to do so would make the law too uncertain); and (2) Vauxhall's submissions that relief ought to be available from the loss of any right to use property (whether or not that right was proprietary or possessory), the majority adopted the intermediate position of affirming the proprietary or possessory right requirement. This approach essentially made the law "just right" by balancing considerations of commercial certainty against expanding an equitable rule that interferes with the parties' powers to enforce consent-based transactions to their letter. Further, in rejecting MSCC's submissions, the majority noted that it would make the law incoherent to delineate between cases involving land and chattels (at [44]–[46]). Those who prefer a liberal approach to the parties' powers to create consent-based transactions may see the appeals to certainty and the majority's unwillingness to expand the doctrine as desirable.

In response to arguments based on legal certainty, Glanville Williams once observed that: "it is to the interest of legal certainty that, other things being equal, the rules of law should be as clear of application as possible": (1945) 61 L.Q.R. 179, 185. Before one can appeal to legal certainty, the question arises whether the "other things" are equal. Those who would prefer to remove the proprietary or possessory right threshold (Lady Arden is apparently one: see at [76]) can raise at least three arguments in response to the majority reasoning in *Manchester Ship Canal* and hence in support of the Australian approach.

First, the historical and normative reasons why equity grants relief against penalties and the security rights basis for relief against forfeiture appear the

same: both doctrines prevent, for reasons of corrective justice, the imposition of consent-based punishments. These two jurisdictions mirror each other and share a common origin: *G&C Kreglinger v New Patagonia Meat and Cold Storage Co. Ltd.* [1914] A.C. 25, 35; *Forestry Commission of NSW v Stefanetto* (1976) 133 C.L.R. 507, 519. Second, as a matter of legal history and logic, relief against forfeiture could apply beyond the context of the loss of property and possessory rights. The most obvious example is relief against the strict enforcement of a conditional bond (a form of personal right): *Sloman v Walter* (1783) 1 Bro. C.C. 418. Third, personal rights are often at the core of a security right and the associated equitable jurisdiction to relieve against forfeiture. For example, hallmarks of modern commerce such as charges over book debts or bank accounts involve no actual property but merely impose an equitable encumbrance over wholly personal rights, but relief against forfeiture can apply in such contexts: such as *Re Kent & Sussex Sawmills* [1947] Ch. 177, 181. On this view, if Vauxhall had no possessory right and only a personal liberty against MSCC to drain water through the infrastructure, there appears to be little merit in denying Vauxhall relief against forfeiture as against MSCC for the sole reason that the forfeited rights in such a case had no effect on third parties (i.e. the right was not "possessory" or "proprietary" in nature).

The wider relationship between penalties and forfeitures may explain the difficulty in removing the "proprietary or possessory" right threshold under English law. Removing this threshold effectively breaks down the distinction between the penalties doctrine and relief against forfeiture. For example, in *Andrews v Australia and New Zealand Banking Group Ltd.* (2012) 247 C.L.R. 205, at [10], the High Court of Australia reaffirmed the equitable origins of the rule against penalties and realigned the doctrine in a manner that is conceptually similar to the security rights basis of relief against forfeiture. In *Cavendish Square Holding BV v Makdessi* [2016] A.C. 1172, at [42], however, the Supreme Court characterised the English rule against penalties as a rule of common law and not, as in Australia, a rule of equity. The salient difference between penalties and forfeitures in England is that the "equitable" forfeiture rule limits the *assertion* of a legal right whereas the "common law" penalties rule concerns the valid *creation* of such a right. Hence any removal of the "proprietary or possessory" right threshold will blur the distinction between penalties and forfeitures. This step has been taken in Australia, but the Australian approach to the penalties doctrine was expressly rejected in *Cavendish Square Holding*. Although this issue was not explored in *Manchester Ship Canal*, once this piece of the broader puzzle falls into place it becomes unremarkable that the *status quo ante* has been maintained.

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