Neutral Citation Number: [2023] EWHC 484 (Ch)

Case No: BL-2021-001842

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

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

Date: 10 March 2023

Before :

MASTER BRIGHTWELL

- -

Between :

DR ROHIT KULKARNI	**Claimant**
- and -	
(1) GWENT HOLDINGS LIMITED	**Defendants**
(2) ST JOSEPH'S INDEPENDENT HOSPITAL LIMITED	

- -
- -

Dominic Chambers KC (instructed by **DJM Solicitors**) for the **Claimant**
Thomas Braithwaite (instructed by **Veale Wasbrough Vizards LLP**) for the **First Defendant**

Hearing date: 16 February 2023

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 10 March 2023.

Master Brightwell :

Introduction

1. At the hearing of an earlier application in these proceedings, the first defendant made a statement in its skeleton argument accepting the claimant's pleaded case as to the remedy to which he would be entitled if the admitted breaches of contract relied on by the claimant were not capable of remedy. An issue now arises as to whether that statement by the first defendant was for the purposes of CPR rule 14 an admission that it would not in such circumstances be entitled to apply for relief from forfeiture and, if so, whether it should be permitted to withdraw that admission.

2. The claimant and the first defendant ("Gwent") are shareholders in the second defendant company ("SJIH"), which owns a private hospital, St Joseph's Hospital, in Newport, Wales. On 13 February 2020, the claimant subscribed for 1,651 'A' shares in SJIH and the parties to these proceedings entered into a shareholders agreement ("SHA") in relation to SJIH.

3. In October 2021 the claimant issued these proceedings, claiming that Gwent had committed repudiatory breaches of the SHA which, he alleges, were so serious and had such a negative effect on him that they could not be remedied. Before a defence was filed, the claimant issued an application for summary judgment, seeking without a trial both rectification of the register of shareholders, and a declaration that the breaches of the SHA were not, as a matter of construction of the SHA, capable of remedy. It served a draft order giving effect to clause 7.1(d), deeming Gwent to have served a Transfer Notice and providing for the sale price of the shares to be sold in accordance with the terms of the SHA.

4. The claimant's application for summary judgment was heard by Deputy Master Marsh on 12 and 13 April 2022, and dismissed in a judgment handed down on 8 June 2022 ([2022] EWHC 1368 (Ch)). The claimant has sought permission to appeal his order dismissing the application. By an order dated 17 October 2022 Joanna Smith J directed that there be a rolled-up hearing of that permission application, with the hearing of the appeal to follow if permission is granted. This hearing has been listed in early April 2023.

5. In its skeleton argument in response to the claimant's application for summary judgment, Gwent's leading and junior counsel made the following statement at paragraph 67, the ante-penultimate paragraph of the document. It is on the meaning and effect of this statement that the present application turns.

> "Gwent accepts that if, contrary to its case, it is deemed to have served a Transfer Notice by reason of the alleged breaches engaging clause 7.1(d),

> then the relief sought in paragraphs 1 to 8 of the draft order would follow. [The Claimant] would be entitled to acquire Gwent's shares at the lesser of (a) the price Gwent paid for them and (b) market value. On that basis, it is not necessary for Gwent to address section G of [the Claimant's] skeleton argument. The effect would be to entitle [the Claimant] to obtain the shares at the price that Gwent paid for them, which by all accounts would be significantly less than market value given the success that has been made of the hospital over the last 2 years."

6. In its points of defence, filed on 12 August 2022, Gwent has pleaded as follows at paragraph 56, in the alternative to its plea that its admitted repudiatory breaches of the SHA were not accepted by the claimant, and that they are capable of remedy:

> "… clause 7.1 of the SHA is an expropriatory provision, the primary purpose of which is to seek to secure compliance with the parties' obligations under the SHA. Its operation is therefore subject to the court's equitable power to grant relief from forfeiture. Even if, therefore, any breaches of the SHA by Gwent are to be treated as irremediable under clause 7.1(d) for all, some or any of the reasons pleaded in Paragraphs 89 to 91, Gwent claims relief from forfeiture on the grounds that it has, as a matter of fact, and prior to the issue of these proceedings substantively remedied any breaches of the SHA by restoring the 'A' shares and 'B' shares as aforesaid, by affirming the SHA and indicating its willingness to remain a party to the same with the Claimant, and by agreeing the appointment of Mr Hussain."

7. In reply to this paragraph, as well as pleading that clause 7.1(d) is not within the scope of the court's equitable jurisdiction to grant relief from forfeiture, the claimant has pleaded as follows at paragraph 18(1) of his points of reply:

> "As a threshold issue, Gwent is not entitled to make a claim for relief from forfeiture because Gwent has already admitted in paragraph 67 of its written skeleton argument dated 6 April 2022 that, if Gwent is deemed to have served a Transfer Notice by reason of its breaches of the SHA engaging clause 7.1(d), then the Claimant is entitled to the relief which he seeks (namely the compulsory purchase of all Gwent's 'A' shares). This constitutes an admission by Gwent for the purposes of CPR Part 14.1(1) and (2) that the Claimant is entitled to the relief which he seeks if Gwent is deemed to have served a Transfer Notice under clause 7.1 of the SHA. In the premises, unless Gwent obtains the permission of the Court to withdraw that admission under CPR Part 14.1(5), Gwent is precluded from making any claim for relief from forfeiture because such a claim is directly contrary to Gwent's admission."

The SHA

8. Whilst the issues on this application are quite different from those which arose on the summary judgment application, an understanding of the structure of the SHA informs the issues that do fall for determination. In particular, as I explain below, the claimant relies on an issue of construction of the SHA in support of his submission that relief from forfeiture would not in any event be available to Gwent. I gratefully adopt the summary of the SHA set out by Deputy Master Marsh in his judgment, at [13]–[21], which I repeat here for ease of reference:

> "13. The SHA describes the claimant and Gwent as the Initial Shareholders and the claimant was one of the five directors on the board as at 13 February 2020. Consultants who were associated with the hospital would be entitled to subscribe for B shares in the Company and would be required to execute a Deed of Adherence in favour of the other parties to the SHA. It was therefore anticipated that the parties to the SHA would increase in number over time, albeit that the A shareholders would always retain ultimate control and Gwent would be entitled to appoint a Controlling Shareholder Director and thus maintain control of the board.
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> 14. The recitals, and in particular recital (B), are central to the claimant's case:
>
> "BACKGROUND
>
> (A) The Company currently has an issued share capital of £3,370, divided into 3,370 A shares of £1.00 each, all of which are fully paid.
>
> (B) Each Initial Shareholder is the registered owner of the number and class of Shares set out opposite his name in Part 1 of Schedule 1.
>
> (C) The parties have agreed to enter into this agreement as a deed for the purpose of regulating the exercise of their rights in relation to the Company and for the purpose of making certain commitments as set out in this agreement."
>
> 15. Schedule 1 Part 1 of the SHA shows 1,718 A shares set out opposite Gwent's name and 1,652 A shares set out opposite the claimant's name.
>
> 16. Two points arising from the Recitals bear emphasis. First, Recital (A) records that all the A shares are fully paid. Secondly, Recital (B) when read with Part 1 of Schedule 1 records that the claimant was the registered owner of 1,652 shares. Neither of these statements was accurate at the date and time of execution of the SHA. The claimant was the registered owner of one A share and Gwent did not become the registered

owner of the 1,717 shares until the following day, the 14 February 2020. At the date of the hearing, it remained the case that the claimant was the registered owner of one A share. Although it only indirectly affects the disposal of the claimant's application, since the hearing the claimant has accepted an offer made by the Company and is now the registered owner of 1,652 A shares. The date of registration is the date in May 2022 when the claimant executed an agreement to acquire 1,651 A shares from the Company.

17. The SHA describes the business of the Company as the operation of the Hospital. The core obligations were that (1) the shareholders each agreed to use reasonable endeavours to promote the success of the business (clause 2.2), (2) the Company agreed not to take any of the actions set out in Schedule 2 without shareholder consent (clause 3) and (3) the shareholders agreed to use reasonable endeavours to procure that the Company would not take any such actions (clause 4).

18. The list of prohibited steps in Schedule 2 is conventional and includes such matters as charging the business, incurring borrowing in excess of £100,000, merging with another business, granting a licence over IP rights and passing a resolution for its winding up or its administration unless it had become insolvent.

19. Clause 6 governs the transfer of shares. Under clause 6.4(a), a shareholder wishing to transfer shares was required to give a Transfer Notice to the Company. The clause then sets out a machinery for the sale of such shares at a Fair Value, as defined in clause 8.

20. Clause 7.1(d) of the SHA is of central importance. It provides:

"7.1 A Shareholder is deemed to have served a Transfer Notice under clause 6.4 immediately before any of the following events:
…
(d) the Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)."

21. The remaining provisions of the SHA to be noted are:

(1) Clause 6.13 which provides that a shareholder who sells its entire holding of shares automatically ceases to be a party to the SHA.

(2) Clause 15 which provides that the SHA shall terminate in three circumstances: (i) upon either a resolution to wind up the Company being

> passed or a winding up order being made; (ii) the appointment of a receiver, administrator or administrative receiver and; (iii) when as a result of transfers of shares only one person remained the legal and beneficial holder of the shares.
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> (3) Clause 19.1 which contains an entire agreement provision and clause 19.2 confirmation of non-reliance upon representations, assurances or warranties.
>
> (4) Clause 20.2 which provides that the waiver of any right or remedy is only effective if it is in writing."

15. Deputy Master Marsh also set out, at [23]–[37], a summary of events after the date of the SHA and before the commencement of proceedings. In particular, on 28 August 2020 Gwent purported to terminate the SHA "on the grounds that [the SHA] is based upon a fundamental flaw, namely, that the Initial Shareholders included [the claimant] owning 1,652 A Shares in the Company. By contrast, [the claimant] only owned 1 A Share and he did not properly subscribe for, nor was he issued with, an additional 1,651 A Shares". The company later indicated that no termination of the SHA had taken place.

Does paragraph 67 constitute an admission?

16. The parties were agreed that the reference in CPR rule 14.1(1) to the truth of the whole or any part of another party's case was a reference to an admission as to any statement of fact or law relied on by the other party. See *Sabbagh v Khoury* [2020] 1 WLR 187 at [42] (HHJ Pelling QC). Mr Braithwaite, for Gwent, did not submit that a statement that Gwent would not be entitled to apply for relief from forfeiture was incapable of constituting an admission; his position was that Gwent had not on analysis made any such statement.

17. The parties were also agreed that the question whether paragraph 67 constituted an admission was to a significant extent a matter of impression, and their submissions on the point were short.

18. Mr Braithwaite submitted that there was no admission because paragraph 67 addressed only the consequences of the relief that would follow at the particular hearing. It was thus not addressed to the truth of the claimant's case, but only to the procedural consequences that would follow if the claimant's application for summary judgment succeeded. Furthermore, he points out that on four occasions in Gwent's skeleton argument it was explicitly stated that admissions were made by Gwent only for the purposes of the instant application. This was said, for instance, in relation to the summary of the background found in the claimant's skeleton argument, and to the assertion that Gwent had breached the SHA. The skeleton argument sought to

narrow the issues for the court on the summary judgment application and paragraph 67 was written in that vein.

19. Gwent also submits that paragraph 67 is not inconsistent with an application for relief from forfeiture which can be made after the forfeiture has taken place. It draws a parallel with a claim for relief for forfeiture after a landlord of commercial premises has re-entered. An admission that the landlord has a right to repossess is not inconsistent with the tenant's right to apply for relief.

20. Mr Braithwaite also submitted that paragraph 67 was, in the context of the summary judgment application in which it was made, in the nature of an averment rather than an admission.

21. In *Bayerishe Landesbank Anstalt Des Offentlichen Rechts v Constantin Medien AG* [2017] EWHC 131 (Comm), Popplewell J, as he then was, said this at [20]–[22]:

> "20. There is an important distinction, in my view, between the principles which apply to amendments involving withdrawal of admissions, and the principles which apply to amendments which involve withdrawal of averments. The former always require permission of the Court by reason of Rule 14.1(5); and considerations which must specifically be taken into account are set out in paragraph 7.2 of the Practice Direction, which was described by Mr Justice Briggs, as he then was, in *Kojina v HSBC Bank No. 2***,** as a useful and uncontentious distillation of earlier authority. Account also has to be taken of all the circumstances of the case and the overriding objective.
>
> 21. By contrast, applications which involve withdrawal of averments only require permission at the appropriate stage of proceedings; and the principles are those which govern amendments more generally, which were usefully summarised by Mr Justice Hamblen, as he then was, in *Brown v Innovatorone Plc*. In particular it is often appropriate for permission to be given to withdraw averments on the usual terms as to paying the costs thrown away because it is open to parties to choose what allegations they wish to make or pursue. A party is not bound to make a positive allegation by way of a positive averment merely because he believes it to represent the true position. He will often, therefore, be permitted to abandon an averment which he was free to choose whether or not to make in the first place. Admissions are different. The allegation has been put in play by the opponent, and the party is therefore obliged to state a position in respect of it. He cannot avoid the issue arising.
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> 22. When considering withdrawal of a plea, different considerations arise depending on whether what is to be withdrawn is an admission or an

> averment. In relation to an averment which a party wishes to pursue, the party is concerned not merely with whether the averment is true, but also whether and how it can be proved. On the other hand, in relation to an admission in response to an averment by the opposite party, what the party is concerned with is simply whether what is alleged against it is true. No question arises of it being able to prove or disprove the allegation evidentially distinct from the question as to whether the allegation is or is not true."

22. Having considered Gwent's arguments I am able to conclude only that paragraph 67 is a statement that, if the claimant succeeded in his claim for summary judgment on the irremediability of Gwent's breaches, he would be entitled to the relief in his draft order, which would provide for a sale of Gwent's shares to him at a value determined in accordance with clause 8 of the SHA. Gwent's statement to this effect was an admission in writing of the truth of the claimant's entitlement to the relief set out in his draft order, itself based upon his pleaded case.

23. If the application had succeeded, the claimant would have been entitled to that relief immediately. While in theory a claim to relief from forfeiture can be brought after the forfeiture has occurred, in a contractual case in practice it must be intimated before judgment is given. After that point, a new claim for relief may well be met with the objection that it should have been brought earlier, and that it is thus an abuse of process. This is a long way from the case of a non-residential landlord who re-enters without a court order, leaving the tenant to commence a claim for relief. If the summary judgment application had succeeded and if upon the judgment being handed down Gwent had sought to apply for relief from forfeiture it would, in my view, have been in the same position in which it is now. It would have been required to make an application to withdraw the admission in paragraph 67.

24. As to the submission that paragraph 67 is only an averment, and not an admission, it seems to me by reference to the words of Popplewell J set out above that the question is whether anyone could be concerned by "whether and how it can be proved" that what is said in paragraph 67 about the claimant's entitlement to the remedy sought is true. The entire purpose of the paragraph is to tell the court that it need not be concerned with the section of the claimant's skeleton argument where he explained his claimed relief. There is nothing to be proved and thus no averment. The statement in the final sentence of the paragraph appears to be a jury point; to signify to the court the unfairness (from the perspective of Gwent) of the consequences said by the claimant to have arisen in the event the breaches of the SHA could not be remedied. It is not a qualification to the prior admission but rather a statement of its effect.

25. Accordingly, I consider paragraph 67 to constitute an admission. The issue thus becomes whether Gwent should be permitted to withdraw it.

Withdrawal of an admission

26. CPR Practice Direction 14 paragraph 7.2 sets out the non-exhaustive considerations to apply on an application to withdraw an admission as follows:

> "In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
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> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
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> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
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> (c) the prejudice that may be caused to any person if the admission is withdrawn;
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> (d) the prejudice that may be caused to any person if the application is refused;
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> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
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> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
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> (g) the interests of the administration of justice."

27. The application of these factors was described by Ward LJ in *Woodland v Stopford* [2011] EWCA Civ 266, in the following terms at [26], after confirming there is no "threshold test" to be satisfied before an application to withdraw an admission can be made:

> "It is quite clear to me that CPR 14.1A(3) confers a wide discretion on the court to allow the withdrawal of a pre-action admission and para 7.2 of Pt 14 of the Practice Direction lists the specific factors the court must take into account in addition to the need to have regard to all the circumstances of the case. These factors are not listed in any hierarchical sense nor is it to be implied in the Practice Direction that any one factor has greater weight than another. A judge dealing with a case like this must have regard to each and every one of them, give each and every one of them due weight, take account of all the circumstances of the case and,

> balancing the weight given to those matters, strike the balance with a view to achieving the overriding objective. Cases will vary infinitely and the weight to be given to the relevant factors will inevitably vary from case to case. Sometimes the lack of new evidence and the lack of explanation may be the important considerations; in others prejudice to one side or the other will provide a clear answer and in all the interests of justice will sway the balance. It would be wrong for this court to circumscribe the manner of the exercise of this discretion or to give any more guidance than is trite, namely, carry out the task set by the Practice Direction, weigh each of the identified factors as well as all the other circumstances of the case and strike a balance with due regard to the overriding objective."

28. *Woodland v Stopford* was a case concerning admissions made before the commencement of proceedings, governed by CPR rule 14.1A. The principles above, however, apply also to applications under rule 14.1(5): see e.g. the *Bayerishe Landesbank* case at [54].

29. The factor which assumed particular importance at the hearing of the application was (f). Mr Chambers KC argued for the claimant that the claim for relief from forfeiture was unarguable and bad in law, and that the application should be dismissed for that reason alone. It is appropriate, therefore, to consider that issue next.

Relief from forfeiture

30. The claimant argues that Gwent's claim for relief from forfeiture is unarguable, for three reasons:

(a) The equitable jurisdiction to grant relief from forfeiture applies only where the contract which has been breached involves a transfer or creation of proprietary or possessory rights.

(b) Clause 7.1(d) of the SHA does not operate as security for the occurrence of a particular condition, but is part of the primary obligations in the contract.

(c) Relief from forfeiture is not available where a party to a contract renounces it through a deliberate breach.

The scope of the jurisdiction to grant relief from forfeiture

31. Both the origins of the modern understanding of the jurisdiction to grant relief from forfeiture, and its current formulation, have been recently considered by the Supreme Court in *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd* [2020] AC 1161. In that case, the claimant had forfeited a licence in perpetuity for failure to make the annual payment in consideration of which the licence had been granted. The extent of the jurisdiction to grant relief fell

for consideration. Previous expressions of that jurisdiction were explained in this way by Lord Briggs JSC:

> "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:
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> "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."
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> 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. Lord Wilberforce did not however state any second condition for the exercise of the jurisdiction to grant relief, relating to the nature of the rights liable to be forfeited. Earlier, at p 722, he said:
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> "There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power."
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> 19. The property liable to forfeiture in that case was a lease but, since the right of re-entry was reserved by an assignee of the lease rather than

by the lessor upon its grant, the statutory regime for relief from forfeiture did not apply. Nonetheless, since the proprietary interest in land constituted by a lease had always been fairly and squarely within the types of property liable to forfeiture within the reach of equity's remedy of relief, the issue as to the nature of the property to which the remedy might extend simply did not arise.

20. That question did arise for decision in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694. The rights in issue consisted of the charterer's rights under a time charter of a ship, which entitled the owners to withdraw the vessel from the service of the charterers if specified monthly payments due in advance were not made on time. Having failed to make timely payment and received a telex from the owners withdrawing the vessel, the charterers claimed that withdrawal amounted to a forfeiture and sought equitable relief, including an injunction restraining the owners from withdrawing the vessel from service. Affirming the Court of Appeal, the House of Lords held that the court had no jurisdiction to grant relief in such a case.

21. Giving the leading judgment, Lord Diplock identified two reasons for that conclusion, in relation to time charters. The first was that a time charter conferred upon the charterer no interest in or right to possession of the vessel. He said, at pp 700–701:

"A time charter, unless it is a charter by demise, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; it is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give to them. Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity a court would never grant specific performance: *Clarke v Price* (1819) 2 Wils 157; *Lumley v Wagner* (1852) 1 De G M & G 604 …

"To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer, though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy that English courts have always disclaimed any jurisdiction to grant. This is, in my view, sufficient reason in itself to compel rejection of the suggestion that the equitable principle of relief from forfeiture is juristically capable

> of extension so as to grant to the court a discretion to prevent a shipowner from exercising his strict contractual rights under a withdrawal clause in a time charter which is not a charter by demise."
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> 22. At p 702, referring to the dicta of Lord Wilberforce in the *Shiloh Spinners* case, he said:
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> "That this mainly historical statement was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights, but providing for a right to determine the contract in default of punctual payment of a sum of money payable under it, is clear enough from Lord Wilberforce's speech in *The Laconia* [1977] AC 850. Speaking of a time charter he said, at p 870: 'It must be obvious that this is a very different type of creature from a lease of land.'"
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> 23. Lord Diplock's second reason was that, in any event, the provision that the owner could withdraw the vessel upon failure by the charterer to make payment in advance was not a mere security, since timely payment was needed to fund the wages and victualling of the master and crew together with the insurance and maintenance of the vessel sufficient to enable her to perform the contracted services.
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> 24. For present purposes, the key phrases which stand out from Lord Diplock's speech are "no interest in or right to possession of the vessel" on p 700 and "proprietary or possessory rights" on p 702. He used the concepts of proprietary and possessory rights as a sine qua non in relation to the rights liable to be forfeited, in the absence of which equity could not intervene…."

32. The issue for the Supreme Court thus was, as expressed at [19], what is the nature of the property to which the remedy might extend. Mr Chambers relies on Lord Diplock's words in *The Scaptrade*, viz that the remedy "was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights". See too *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 at 786, where Oliver LJ (later upheld by the House of Lords) said that "There is, however, the more general proposition to be derived from [*The Scaptrade*], that, even where the primary object of the insertion of a forfeiture clause may be said to be to secure the payment of money or the performance of some other obligation, the equitable jurisdiction does not extend to contracts which do not involve the transfer or creation of proprietary or possessory rights."

33. The Supreme Court did not have to consider in *Vauxhall Motors* whether the requisite proprietary or possessory interest must be transferred or created by the very contract by which the right was forfeited. In that case, it was so

created. The same was true also of the time charter in *The Scaptrade*, which conferred only an insufficient interest. Even the requirement for a proprietary or possessory interest was, at least until the decision of the Supreme Court in *Vauxhall Motors*, only governed by dicta (see Dr P G Turner, "What Delimits Equitable Relief From Forfeiture?" [2019] CLJ 276 at 280, cited by Lady Arden JSC in *Vauxhall Motors* at [70]).

34. The appellant in *Vauxhall Motors* argued that, in relation to land, possessory rights were not enough, and that in order for relief from forfeiture to be granted, a proprietary interest must be involved, see at [36]. The Supreme Court unanimously rejected this argument, upholding the decision of the Court of Appeal that the jurisdiction applies to a possessory interest in land. It was already established that the jurisdiction applies to possessory interests in chattels and other personalty, see at [44].

35. There was no statement in Lord Briggs' judgment to the effect that the ability of the court to grant relief from forfeiture applies only where a proprietary or possessory interest is transferred or created by the contract concerned. This was no part of the court's decision. The comments to such effect by Lord Diplock and Oliver LJ remain dicta. I was not referred to any case in which the requirement for the transfer or creation of the interest by the contract in question (as opposed to the type and nature of the interest) has been argued.

36. I would also note that Lady Arden, concurring in the result, articulated and highlighted the role of equity in this jurisdiction. At [63]–[66] she said this:

> "63. 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.
>
> 64. Some element of uncertainty in the application of the doctrine of relief from forfeiture is inevitable. Equity in general operates by principles rather than by rules. That means that relief from forfeiture is not an automatic consequence if particular conditions are fulfilled but instead is given in appropriate cases. It is not a foregone conclusion that once the conditions for relief are shown relief will necessarily be granted and that inevitably means an element of uncertainty about its availability.

> 65. 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, such as shares in a registered company or aircraft. Thinking ahead, it may be applied in the future to forms of property which only exist in the cybersphere, or to rights which are treated as to all intents and purposes as rights to property (see e g Matteo Solinas "Bitcoiners in Wonderland: Lessons from the Cheshire Cat" [2019] LMCLQ 433). I note that the view that the law of forfeiture may yet expand in this general area is supported by Professor Ben McFarlane in *Snell's Equity*, 33rd ed (2015), para 13-023, cited by Lewison LJ in his judgment in this case [2019] Ch 331 paras 50–51.
>
> 66. 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…."

37. I am satisfied that any question of the scope of the jurisdiction of the court to grant relief from forfeiture is not suitable for determination on an application such as the present where there are no relevant factual findings. No doubt, as a matter of fact, most cases where the jurisdiction is invoked will involve contracts transferring or creating proprietary or possessory interests in land or in personalty. But the explanations of the rationale for the limits to the jurisdiction refer to the type of interest that has been forfeited; not how it came into existence or to be vested in the party seeking relief. Furthermore, and as Lady Arden explained in *Vauxhall Motors*, the scope of the jurisdiction is not merely developing, but likely ever to continue doing so to take account of changing social and commercial circumstances.

38. Mr Braithwaite also points out that the facts of the present case may exemplify the view that arbitrary rules are inappropriate: the subscription for shares in SJIH and the execution of the SHA took place on the same day and were part of the same commercial deal even if separate transactions. I am fortified in the view that the ability to grant relief may extend to a case such as this by the obiter assumption of Mr Stephen Jourdan QC, sitting as a Deputy High Court Judge, in *Re Quiet Moments Ltd* [2013] EWHC 3086 (Ch) at [236], that relief from forfeiture of shares for breach of a shareholders agreement would in principle be available.

Not security for a stated result

39. It is common ground that relief from forfeiture is available only 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": *Shiloh Spinners v Harding* at 724 (Lord Wilberforce). If clause 7.1(d) was introduced merely as part of a lawful and commercial bargain, then relief will not be available.

40. Mr Chambers submits that "clause 7.1(d) was clearly inserted for the specific purpose of making the underlying SHA work effectively, such that shareholders who committed serious breaches of the SHA would be removed as shareholders for the benefit of the Company as a whole and for the benefit of the remaining shareholders". Furthermore, he submits that I should determine summarily that the contrary position is unarguable.

41. In making this submission, Mr Chambers relies on the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, concerned with the related common law rule that contractual penalties are unenforceable. The relevant clause in that case, in a contract for the sale of a controlling interest in a company, provided that an option was granted by each seller to the purchaser to buy their shares at a defined option price in the event that the relevant seller was in default. See at [55].

42. At [82], Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC held that the clause was not penal as it had a legitimate function that had nothing to do with punishment and everything to do with achieving the purchaser's commercial objective in acquiring the business, and was thus a primary obligation. By parity of reasoning, Mr Chambers argues that clause 7.1(d) of the SHA is a commercial provision so as to achieve a severance of the connection between the parties in the event of default, and not mere security for the performance of the parties in the event of the breach by one.

43. Mr Braithwaite draws my attention to the judgment of Lord Hodge JSC in *Makdessi*. He agreed that the clause was not a penalty as it was not exorbitant, but at [280] said:

> "There is again a strong argument, which Lord Neuberger PSC and Lord Sumption JSC favour, that clause 5.6 is a primary obligation to which the rule against penalties does not apply. But if all such clauses were treated as primary obligations, there would be considerable scope for abuse. I construe the clause as a secondary obligation, which is designed to deter (a) the sellers from breaching their clause 11.2 obligations and (b) a seller who is an employee from misconduct which damages the interests of the

> group and leads to summary dismissal (viz the Schedule 12 definition of "defaulting shareholder")."

44. Whilst not a relief from forfeiture case (the breach in *Makdessi* being a once-and-for-all breach), there was disagreement between the Justices about whether the comparable clause was a primary or a secondary obligation, a key question when considering relief from forfeiture. It is also relevant that *Makdessi* was an appeal following a full trial, not a summary application. The trial judge had made findings of fact about the negotiation of the agreement and there was also agreed evidence about the usual structure of acquisition agreements within the relevant sector: see at [66]. I have no evidence before me about the background matrix of facts, which will be relevant to the determination of whether clause 7.1(d) is a primary or secondary obligation.

45. The court is naturally hesitant at a submission that the construction of an agreement is 'clear', such that it can be determined summarily. I do not consider it to be self-evident that clause 7.1(d) is a primary obligation. I was referred to no evidence to assist me in resolving the point. The issue would be a matter for a trial judge to determine.

Renunciation

46. Mr Chambers further submitted that, following a renunciation of a contract, relief from forfeiture cannot be granted save in exceptional circumstances, and no such circumstances are pleaded. He referred to *Shiloh Spinners* at 725, where Lord Wilberforce said:

> "Established and, in my opinion, sound principle requires that wilful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the assignor should not be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations."

47. Mr Braithwaite responds by relying on paragraph 42 of the points of defence:

> "Paragraph 78 is admitted. In purporting to terminate the SHA, Gwent acted in the bona fide belief that as the Claimant had not been paid for or been issued with the 1,651 'A' shares, the fundamental presumptions as to the parties' shareholding on which the SHA was founded had not been achieved."

48. The claimant does not respond to paragraph 42 in his points of reply, and thus puts Gwent to proof on it.

49. It seems to me that when Lord Wilberforce referred to a deliberate breach, he meant a knowing breach. It is Gwent's pleaded case that it believed in good

faith that it was entitled to terminate the SHA, and it is thus its case that it did not commit a wilful breach for these purposes. Again, this is not a matter for summary determination.

50. I do not consider, therefore, that I am able to say that the pleaded claim for relief from forfeiture is unarguable or bad in law or, indeed, to form any concluded view as to its merits.

Should permission to withdraw the admission be given?

51. For the reasons I have given above, I do not consider that permission to withdraw the admission should be refused because it can be said that there is no jurisdiction to grant relief from forfeiture. Nor do I consider that the claim for relief would be so weak that this factor should itself determine the application under CPR rule 14.1(5). It is the other circumstances of the case, with particular reference to Practice Direction 14 paragraph 7.2, which will determine the application. It is appropriate to consider each of those factors in turn.

The grounds of the application

52. The application is not based on any new evidence. Mr Braithwaite was frank in accepting that the point, i.e. to make a claim in the alternative to relief from forfeiture, occurred to Gwent's legal team only between the summary judgment application and the filing of its points of defence on 12 August 2022. He submits that the admission was unwitting, in that Gwent did not positively consider that it was admitting that no claim for relief could or would be made. The issue was overlooked.

53. Mr Chambers submitted in his skeleton argument that Gwent knew exactly what it was doing when it made the admission. He says that there is no reason to be more beneficent with an admission of law than an admission of fact. He submits that the plea was an afterthought and can accordingly be seen to have little merit.

54. I agree with Mr Chambers that there is no distinction in the present circumstances between an admission of fact and one of law. But I have already explained why I do not at this stage consider the claim for relief from forfeiture to be devoid of merit. I also accept Mr Braithwaite's explanation of what happened and that the admission was inadvertent (to the extent that I accept that relief from forfeiture had not been considered) and thus that Gwent did not realise the extent of the admission in question when it did so. I did not understand Mr Chambers to suggest after being provided with Mr Braithwaite's explanation in this regard that it should be disbelieved.

Conduct of the parties

55. The fact that the application for summary judgment was made before a defence is relevant. Deputy Master Marsh began his judgment by commenting on this unusual feature. Gwent's response was formulated before it had pleaded a defence to the particulars of claim. Mr Braithwaite contends that the admission was made at such a stage and to assist the court by narrowing the argument.

56. Mr Chambers says that Gwent benefited at an early stage from the fuller argument and evidence that arises on a summary judgment application. He also submits that Gwent has constantly changed its case, relying on the initial denial of breach of contract and earlier allegations of fraudulent misrepresentation. The denial of breach of contract appears to have been made explicitly only for the purposes of the summary judgment application, and the allegation of fraud was withdrawn before proceedings began. No more recent examples of a 'constant' change of position were provided. I also do not see how Gwent was assisted in considering the possibility of applying for relief for forfeiture by the application being made before a defence was filed, which is when that point would most naturally fall to be considered.

57. The claimant also submits in his skeleton argument that Gwent was under an obligation by reference to classic *Henderson v Henderson* principles to bring forward its claim for relief from forfeiture in response to the summary judgment application. He positively submits that it would be an abuse of process for the court to grant the application. I think what he must mean to say is that the application is an abuse. Mr Chambers referred to both *Discovery Land Company LLC v Axis Specialty Europe SE* [2022] EWHC 585 (Comm) and *Union of India v Reliance Industries Ltd* [2022] EWHC 1407 (Comm). In the first case, at [40]–[44], Moulder J confirmed that the *Henderson* principle requires the court to ask whether a party is misusing the process of the court by raising an issue before it which could have been raised before. She confirmed also that the principle applies to interlocutory hearings.

58. There are some similarities between the *Discovery Land Company* case and the present. There, the claimant consented to amendments to the defence at a hearing and its legal team later said that they had thought of arguments why those amendments may have no real prospect of success and applied for summary judgment. Moulder J held that the application for summary judgment was an abuse of process. The effect of this was that the defence in question would be determined at trial, and not that the claimant would be shut out altogether from arguing that the defence should be rejected. Furthermore, and importantly, the judge came to the assessment at [51] that it was not a case where the point had previously been overlooked (i.e. unlike this case) but rather one where the claimant's views had changed.

59. I consider that in principle the submission that an application to withdraw an admission is an abuse of process must be considered with care when by its very nature permission to do so will enable a party to run a point which was not run at an earlier stage. It is clear that the jurisdiction to permit withdrawal of an admission is not limited to cases where new evidence emerges and so it extends to cases where a point could have been pursued earlier but for some reason was not. Furthermore, Mr Chambers did not develop his arguments on this point orally (although the point was mentioned), or explain to me how the broad merits-based assessment taking into account all the facts of the case and required in order to determine whether there was an abuse of process should be carried out. His submissions appear to assume that, wherever a point is raised which could have been raised earlier, there is an abuse, but the position is by no means so straightforward. In those circumstances, I do not consider that I am in a position to determine that the application is an abuse of process and consider instead that the correct approach is to apply the factors set out in CPR Practice Direction 14 paragraph 7.2.

Prejudice to the claimant if the admission is withdrawn

60. One of the central points raised by the claimant in objecting to the application is that if permission to appeal the order of Deputy Master Marsh is granted, and if the appeal is then allowed, it would be most unfair if Gwent could then argue that it should have relief from forfeiture. In other words, Gwent conceded at the summary judgment hearing that the claimant would be immediately entitled to the relief he sought if the breaches of the SHA were not remediable.

61. There is clearly some considerable force in this point. If the application had succeeded, provisions for the sale of Gwent's shares as valued in accordance with clause 8 of the SHA would have been implemented straightaway, subject to any stay granted if Gwent had attempted an appeal. The claimant now faces the prospect of Gwent seeking to make a claim for relief from forfeiture if the appeal succeeds. If his position is vindicated, the claimant may accordingly have to wait longer than anticipated for the fruits of victory, and may face losing such fruits.

62. On the other hand, the point should perhaps not be taken too far. If, for the sake of argument, the admission had been made only orally and not in a skeleton argument, CPR rule 14.1 would not apply and the instant application would not be necessary in order for Gwent to plead the claim to relief from forfeiture. But it would still be open to the claimant to argue before the appeal court on established principles that, if his appeal succeeds, Gwent should not be given permission to raise a new point on appeal (see *Notting Hill Finance Ltd v Sheikh* [2019] 4 WLR 146 at [21]–[25], Snowden J) and to apply for relief from forfeiture. Furthermore, the claimant does not contend that he

would or might have acted differently if the point had been raised sooner; what he stands to lose is the certainty that he will not have to face the point. This is undoubtedly a real prejudice, and I do not accept Gwent's submission that there is no prejudice to the claimant, but it is not the sort of prejudice which outweighs all other considerations.

63. The claimant also submits that if this application were to be made a few weeks before trial, it would never be permitted because of the prejudice and its lateness. I do not think the position can be stated that straightforwardly; again all the circumstances would have to be considered, including whether the trial date would be affected, and whether any new disclosure or evidence would be required.

64. At one point Mr Chambers submitted that if I allowed the application, it should be on terms only that Gwent does not raise the point on the appeal, if it succeeds, such that it can be argued only at trial in the event that the appeal fails. I am not satisfied that I have power to impose a condition as to what can be argued before an appeal court and, in any event, not satisfied that it would be appropriate for me to do so. The argument that Gwent should not be permitted to raise this point on the appeal, even if the application to withdraw the admission is otherwise allowed, is one that is fully open to the claimant in the appeal court. I do not accept, if it be the claimant's position, that if I allow the application it must follow that Gwent will be allowed to raise relief from forfeiture at the appeal. Mr Braithwaite accepted that Gwent would in those circumstances still have to seek the permission of the appeal court to raise the point.

Prejudice to Gwent if the application is not allowed

65. The claimant has estimated that the shares in SJIH are worth around £60m to £100m. The claim concerns a 51% interest in the company, which the claimant contends he is entitled to acquire for around £520,000. The prejudice to Gwent if the application is dismissed is evident.

66. The claimant submits that any prejudice to Gwent is 'insignificant' because there is no evidence that at the date of the breach of the contract the shares had increased in value, and Gwent is entitled to the return of what it paid. This argument is wholly unrealistic. If Gwent were entitled to apply for relief from forfeiture, and obtained it, it would retain the current value of its shareholding, not merely the value as at June 2020.

Stage in the proceedings at which the application is made

67. The application to withdraw the admission was made on 25 November 2022. The point was first brought to the claimant's attention when Gwent's points of

defence were filed on 12 August 2022, which was some two months after the handing down of Deputy Master Marsh's judgment and six weeks after the claimant had filed his application for permission to appeal this decision. This was followed by correspondence on the point after the points of reply had been filed. The trial is listed in a window beginning on 9 April 2024.

68. The claimant submits that the application is "very late", as it is being determined only shortly before the hearing of his application for permission to appeal the dismissal of the summary judgment application, and submits that the application should have been made much sooner after the points of defence had been filed. It is of course relevant that the application was not made until late November, but the claimant does not suggest that he changed his position or incurred additional expenditure, which would not otherwise have been incurred, in the meantime. For the purposes of this application, as opposed to Gwent's application to raise the question of relief from forfeiture before the appeal court, which will require a separate application, this is not a late application and it will (in the event the claimant's appeal does not succeed) not affect the trial date.

69. I consider that it is of some relevance that the claim for relief for forfeiture was raised by Gwent in its points of defence, the earliest time it could be pleaded, albeit inconsistent with a written statement it had made a few weeks earlier.

The prospects of success of the point on which the admission is sought to be withdrawn

70. I have indicated above why this factor does not assist in the determination of the present application.

The interests of the administration of justice

71. As Mr Chambers rightly submits, this is a compendious factor and often overlaps with the other factors. He says that parties should be encouraged to make admissions, and relies on the comments of William Davies J in *Cavell v Transport for London* [2015] EWHC 2283 (QB) when saying, at [16]:

> "The final consideration within the list set out in the Practice Direction is the 'interests of the administration of justice'. It cannot be in those interests to permit the withdrawal of an admission made after mature reflection of a claim by highly competent professional advisors when there is not a scintilla of evidence to suggest that the admission was not properly made. Were it to be otherwise civil litigation on any sensible basis would be impossible."

72. I agree with this observation but, in light of the fact that the admission was made by oversight, it is not of direct assistance in the present case. I consider that, under this rubric, the factors relied on by Gwent in support of the submission that it had not in fact made an admission are relevant, even though on analysis I consider that an admission was made. The admission was inadvertent, and was made for the purposes of the summary judgment application and, at least in part, for the purposes of narrowing the issues on that application. It was also made before the points of defence were prepared. That is all relevant to whether Gwent should be permitted to apply for relief from forfeiture, at least at trial.

Disposal

73. The factors relied on most heavily by the claimant in opposing the application were the merits of the claim for relief from forfeiture and the prejudice which the claimant would suffer if his proposed appeal succeeded and Gwent was permitted to apply then for relief from forfeiture. I do not consider, for reasons explained above, that the merits of the claim can be determined on this application. Furthermore, the question whether Gwent should be able to argue the point if the appeal succeeds will, if this application is granted, be a matter for the appeal court.

74. I have taken into account all of the matters set out in the above section of this judgment. The conclusion I have reached is that the prejudice which Gwent will suffer if it is not permitted to argue the point at trial outweighs the prejudice to the claimant in losing the comfort it appeared to have for a few weeks that Gwent would not argue for relief from forfeiture. He has taken the step of seeking permission to appeal the dismissal of the summary judgment application, but has not said that he has taken steps in express reliance on the admission which would not otherwise have been taken. The fact that the admission was inadvertent and made by omission and in a skeleton argument on an application where the focus was on the construction of the SHA rather than the relief available, and which application was made before a defence was filed, also points in favour of Gwent being permitted to withdraw its admission.

75. Accordingly, I have concluded that Gwent should be permitted to withdraw the admission made by paragraph 67 of its skeleton argument in response to the summary judgment application and I will make an order accordingly.