Neutral Citation Number: [2018] EWCA Civ 1100

Case No: A3/2017/0278 & A3/2017/0291

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION**
**HIS HONOUR JUDGE BEHRENS SITTING AS A JUDGE OF THE HIGH COURT**
**[2016] EWHC 2960 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th May 2018

**Before :**

**LORD JUSTICE LEWISON**
**LORD JUSTICE FLOYD**
and
**LORD JUSTICE DAVID RICHARDS**

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**Between :**

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| **THE MANCHESTER SHIP CANAL COMPANY LIMITED** | **Appellant** |
| **- and -** | |
| **VAUXHALL MOTORS LIMITED (formerly GENERAL MOTORS UK LIMITED)** | **Respondent** |

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**Ms Katharine Holland QC and Ms Galina Ward** (instructed by **Hill Dickinson LLP**) for the **Appellant**
**Mr William Norris QC, Mr Simon Edwards and Mr Daniel Stedman Jones** (instructed by **Duane Morris**) for the **Respondent**

Hearing dates : 24 & 25 April 2018

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# Approved Judgment

**Lord Justice Lewison:**

## Introduction

1. Vauxhall Motors Ltd own a substantial manufacturing plant at Ellesmere Port close to the Manchester Ship Canal. Under the terms of a Licence granted in 1962 by the Manchester Ship Canal Company Ltd (MSCC) they were entitled to discharge surface water and trade effluent into the Canal through a drainage system constructed by Vauxhall on MSCC's land under the terms of the licence. The Licence was granted in perpetuity in consideration of an annual payment of £50. It contained a provision entitling MSCC to terminate the Licence by notice if the annual payment remained in arrear after a warning notice had been given. It is now common ground that the Licence was terminated by notice on 10 March 2014. The current value of the right to discharge surface water and trade effluent is of the order of £300,000 to £440,000 per annum.

2. The issue on this appeal is whether HHJ Behrens was wrong to grant Vauxhall relief against forfeiture of the Licence, thus enabling them to continue to exercise the rights granted by the Licence at the contractual rate of £50 per annum. MSCC says he was; both because he had no jurisdiction to do so, and also because the application for relief was made too late.

3. Vauxhall also claim the right to discharge surface water independently of the Licence, by virtue of statutory rights granted to one of its predecessors in title by the Manchester Ship Canal Act 1885 which authorised the Canal to be built. The judge decided that the claimed rights did not encompass the current drainage system. Vauxhall say that he was wrong. That is the issue on the cross-appeal.

## The facts

4. The judge's judgment is at [2016] EWHC 2960 (Ch). I can take the facts from his careful judgment. The judge began with a short history of the Manchester Ship Canal which, although fascinating, is not of direct relevance to the issues before us.

5. At the time when the Canal was under consideration one of its opponents was Mr Richard Naylor, a banker in Liverpool. He was the owner of the Hooton, Netherpool and Overpool Estates, upon which there was a country house known as Hooton Hall, a racecourse and a polo field. His land was riparian land, adjoining the River Mersey. The majority of the natural rainfall over the site would have been absorbed by the land entering the groundwater, with sporadic ponding during extreme storm events. A small proportion of rainfall over the site would have been converted to flow in the ditch network and stream which discharged directly into the River Mersey via the ravine at the north western corner of Booston Wood. This is the drainage channel with which we are concerned. A further drainage point of Mr Naylor's land was the Pool Hall Brook, which also flowed into the River Mersey. The construction of the Canal severed the physical connection between Mr Naylor's land and the river. Mr Naylor's land now abutted the Canal itself.

6. When the Canal was constructed, the water level was lower than the ground level at the end of the ravine and it would therefore have discharged directly to the Canal. The flow of water was not significant enough to warrant any special measures and ground water would have continued to flow towards the Mersey Estuary. The Canal would have intercepted any direct surface run-off from the strip of land adjoining. Furthermore, the drainage regime at the ravine did not change as a result of the Canal construction. The expert evidence was that annual flow from the ravine into the river at that time was approximately 100,000 cubic metres.

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

8. Over the years various developments took place over the land. In 1914, Hooton Hall was requisitioned by the War Office and became a training ground for one of the newly created Liverpool 'Pals' battalions and later a military hospital. The house itself was demolished in the 1920s or 1930s and the site was used as a military airfield until the War Office relinquished possession in 1957 (including a period from 1930 to 1933 when it was officially Liverpool Airport). Following a planning inquiry held in 1960 Vauxhall obtained permission to develop the land by erecting a large manufacturing plant and associated works.

**The Licence**

9. The purpose of the Licence was to enable Vauxhall to alter the arrangements for drainage both as regards surface rainwater and also trade effluent. As a result of negotiations that took place before the grant Vauxhall and MSCC had agreed a plan of the proposed works. The Licence is dated 12 October 1962. On its front cover it is described as a Licence in respect of a spillway at Ellesmere Port. It states the yearly rent is £50. The parties were Vauxhall and MSCC (described as "the Canal Company"). In each case the reference to each party was said to include "their successors and assigns where the context so requires". There are 3 recitals. The first two recitals refer to the land owned by Vauxhall and MSCC. The first recital stated that MSCC was seised in fee simple of the "land hatched red on the plan hereto annexed [and] the land there coloured blue". The third recital stated that the parties had agreed to execute the Licence:

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

10. Clause 1 of the Licence contained the grant in the following terms:

> "In consideration of the rent or annual sum hereinafter made payable and of the covenants on the part of Vauxhalls and the conditions hereinafter contained the Canal Company as BENEFICIAL OWNERS hereby GRANT unto Vauxhalls:

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

11. It is to be noted that the defined expression "the Spillway" included all the infrastructure that Vauxhall were to construct. Both the land hatched red and the land coloured blue on the plan annexed to the Licence lay outside the boundary of Vauxhall's land, and formed part of land owned by MSCC.

12. Clause 2 contained the obligation to pay the £50 per annum:

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

13. Clause 3 contained a number of covenants by Vauxhall. They included covenants:

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

ii) To lay and construct the spillway only in accordance with plans approved in writing by the Engineer and under his supervision and to his satisfaction. (Covenant (c))

iii) To maintain and keep the spillway in good repair and condition and when necessary to renew and replace the same in default of which it would be lawful for MSCC to effect the repairs and renewals at Vauxhall's expense (Covenant (e))

iv) To do as little damage as possible to the land etc of MSCC and upon every repair renewal alteration or diversion to restore the lands properties and works so disturbed or interfered with (Covenant (g))

v) To make full compensation to MSCC for damage caused in consequence of the laying construction maintenance repair renewal alteration diversion removal user or failure of the spillway (Covenant (h))

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

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

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

ix) On receipt of a notice from MSCC that the surface water was not of the relevant quality or purity to take such steps as might be necessary to improve the purity and quality forthwith (Covenant (n))

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

14. Clause 4 reserved certain rights to MSCC. These included:

i) The right to lay construct maintain and renew work and use pipes and other works over under along or across the spillway in such manner and position as should not interfere with the maintenance and operation of the spillway. (Clause 4 (i))

ii) Liberty to MSCC to use its lands for any purpose they might think proper. (Clause 4 (ii))

iii) The rights conferred on or reserved to MSCC by the preceding sub-clauses were only to be exercised in accordance with certain provisos. The provisos included an obligation to offer Vauxhall a reasonable opportunity of providing an alternative means of discharge in the event that the rights were exercised in

> such a way as materially to interfere with the discharge of surface water and trade effluent through the spillway. (Clause 4 (iii))

15. Clause 5 dealt with termination:

> "If the said yearly rent or sum or any part thereof shall at any time be in arrear for the space of Twenty one days after the same shall have accrued due (whether legally demanded or not) or if and whenever Vauxhalls shall make default in the performance and observance of any of the covenants conditions and provisions herein contained and on their part to be performed and observed the Canal Company may (but without prejudice to any right of action available to them by way of injunction or otherwise) by notice in writing require Vauxhalls to pay the rent in arrear within Twenty eight days or (as the case may be) to pay reasonable compensation for the said default and remedy the same (if capable of being remedied) within a reasonable time and if Vauxhalls fail to comply with such notice the Canal Company may thereupon by notice in writing determine this Licence forthwith and in such event this Licence and every clause matter and thing herein contained shall forthwith absolutely cease and determine but without prejudice to any claim by either party against the other in respect of any antecedent breach of any covenant condition or provision herein contained"

**The drainage system**

16. Following the grant of the Licence Vauxhall arranged for the construction of what is now the drainage system. It was a substantial undertaking, costing some £90,000. The centrepiece of the surface water drainage scheme is still the ravine. However, it no longer flows freely into the Canal. What Vauxhall did was to create a dam at the Canal end of the ravine. Water collected in the ravine flows through a pipe into a hexagonal distribution chamber. From that chamber it flows through two further pipes to the outfall into the Canal.

17. The current drainage system is shown schematically in a plan which the judge included as an annex to his judgment, which I reproduce. It is also shown in a number of photographs.

18. The plan shows the ravine and a lagoon. The ravine is the same ravine as drained the land since before the Canal was built. It is open to the air. The lagoon is essentially a storage pond that was dug out in the sixties, lined with rubber and used as fire mains. It has not been used for that purpose for quite some time. It is connected to the basin by a pipe, and so offers Vauxhall an attenuation or storage option.

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

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

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

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

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

24. At the lower end of the ravine is a basin. This was created by excavation. It operates on the principle of a dam. Water flows into that basin via a 500mm pipe controlled by a penstock valve. The valve will only open when the water reaches a certain level. Mr Heath's evidence was that throughout his lengthy period of employment the 500mm pipe has always coped with the quantity of water. However, Mr Jones, MSCC's hydrologist, was of the opinion that it would not cope with a 1 in 30 year storm where the flow was 4,000 litres per second for a prolonged period. In that event water would overtop the dam. There was some dispute about whether further works have been carried out to enlarge the ravine. The judge made no findings, and we are not in a position to do so. It is, however, common ground that the capacity of the ravine is now very much larger than it was in Mr Naylor's time.

25. All these elements of the drainage system are situated on Vauxhall's land. The following elements are on land owned by MSCC.

26. The water is free to exit the basin and into the Canal. The water does this through another gated pipe of approximately 2100mm diameter. The gate on this pipe functions to catch pieces of debris that have not been caught earlier in the system and also acts as a security device to prevent trespassers entering Vauxhall's land from the Canal. The pipe then travels over the boundary and onto MSCC's land where water collects in a hexagonal distribution chamber, before splitting into two other 1675 mm outlets that lead to the Canal. The hexagonal distribution chamber is a covered reinforced concrete structure surrounded at surface level by a metal enclosure. Each of its walls is approximately 5 metres long. On either side of the outlets to the Canal itself there is a concrete wall.

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

28. As part of the overall development which the new drainage system was intended to serve Vauxhall has created a large factory and extensive hardstanding. Whereas in Mr Naylor's time most of the estate was permeable, now some two thirds of Vauxhall's

land is impermeable. This has the result that there is more surface run-off because less water is absorbed by the ground. The experts' estimate of the amount of water now passing down the ravine and thence into the Canal is of the order of 700,000 cubic metres, or some seven times the amount that passed down it in Mr Naylor's day. The effect on the Canal, however, is as follows. In the event of a 1 in 30 year storm the water level of the Canal would be raised by between 1.0 cm and 1.4 cm; and in the event of a 1 in 100 year storm the water level of the Canal would be raised by 1.3cm to 1.9 cm.

**The variation**

29. The Licence was varied by deed dated 25 July 1997. For present purposes I need only note two features of that document. First, it removed the restriction in clause 3 (l) which prohibited Vauxhall from assigning underletting etc except to a Vauxhall company. Second, Vauxhall granted MSCC the right to connect into the pipes and drains on Vauxhall's land, and thence into the storm water discharge system.

30. Following the variation Vauxhall developed what is known as the supplier park. This is owned or occupied by other companies unrelated to Vauxhall. As part of the conveyancing history of the supplier park Vauxhall granted owners of parts of the supplier park the right to discharge water through the drainage system.

**Termination of the Licence**

31. For whatever reason Vauxhall failed to pay the £50 due on 12 October 2013. MSCC sent a reminder constituting notice under clause 5 of the Licence; but that elicited no payment. On 10 March 2014 MSCC terminated the Licence. Vauxhall made an immediate offer to pay the outstanding sum but it was not accepted.

32. There then followed some months of negotiations between the parties over the terms of a new licence. A form of licence was agreed in the summer of 2014; but the agreement was "subject to contract." Although there was some activity after that, nothing of significance happened. Then, on 30 January 2015 Duane Morris on behalf of Vauxhall wrote a long letter setting out the grounds upon which they claimed that Vauxhall were entitled to apply for relief from forfeiture and intended to apply for such relief. They gave MSCC 14 days to respond. These proceedings were issued on 5 March 2015. Vauxhall initially claimed that the original Licence had not been validly determined and only claimed relief from forfeiture in the alternative. The first of these claims was subsequently abandoned. What remained live was the claim to relief against forfeiture and later by amendment the claim to rights under the 1885 Act.

**The issues**

33. The judge decided that he had jurisdiction to grant relief against forfeiture; and exercised his discretion in favour of such relief. Both these holdings are challenged by Ms Holland QC on behalf of MSCC.

34. Her essential submission is that the equitable jurisdiction to relieve against forfeiture only applies to contracts which confer proprietary or possessory rights. The 1962 Licence confers no proprietary rights because that is the nature of a licence (and Vauxhall does not now contend that it does). Nor did the Licence confer any

possessory rights. The nearest proprietary analogy is an easement; and it is well settled that an easement does not confer possession of the servient tenement. Mr Edwards, who argued this part of the case on behalf of Vauxhall, disputes this argument. He argues that although the Licence created no proprietary rights, it did create possessory rights sufficient to enable a court of equity to grant relief against forfeiture. The judge exercised his discretion in favour of the grant of relief, and there is no ground upon which an appeal court should interfere with that exercise of discretion.

**Scope of relief against forfeiture**

35. The origins of the grant of relief against forfeiture lie in the practice of the Courts of Chancery. In early times the grant of relief against forfeiture was seen as part of the jurisdiction to relieve against penalties. This is clear from the judgment of Lord Macclesfield LC in *Peachy v Duke of Somerset* (1720) 1 Str 447, 453, which was a case about a claim for relief against forfeiture of a copyhold interest. In the course of his judgment he said:

> "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired: but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.
>
> But even in the case of copyholds there are some cases of forfeitures intended for a different purpose, as for non-payment of rents or fines, which are only by way of security of the rent or fine; and therefore when these are paid afterwards with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this Court gives in those cases."

36. In *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 the Supreme Court traced the historical process by which the common law courts adopted the equitable doctrine thus giving rise to the modern rule against penalties. Both courts of equity and courts of common law applied the rule against penalties to all kinds of contracts including contracts for personal services. One early example is *Kemble v Farren* (1829) 6 Bing 141 which concerned the engagement of the well-known actor Charles Kemble to perform at Covent Garden Theatre.

37. However, although the doctrine of relief against forfeiture and the rule against penalties had a common origin, their paths diverged over the years. Lord Wilberforce surveyed the practice of Courts of Equity to relieve against forfeiture in *Shiloh Spinners Ltd v Harding* [1973] AC 691. In that case he said at 722:

> "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. There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs…. Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults."

38. At 723 he concluded:

> "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."

39. Although Lord Wilberforce glossed his use of the word "appropriate" he did not give any further explanation of the second adjective: "limited". Subsequent cases have explored what those limitations might be.

40. *The Scaptrade* (*Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694) concerned a clause in a time charterparty entitling owners to withdraw the ship on non-payment of hire due in advance. The House of Lords held that there was no jurisdiction to grant relief against forfeiture. There were, in my judgment, two essential reasons for that conclusion. First, it was not possible to say that the right to withdraw the ship was security for payment of hire. On the contrary, payment of hire was necessary to provide owners with a fund out of which to discharge their own obligation to crew the ship. Second, the contract being a contract for services, it was not one of which the court would order specific performance; and the effect of the grant of relief would have amounted in substance to just that. Having referred to the first of the two quoted passages from *Shiloh* Lord Diplock said:

> "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." (Emphasis added)

41. It will be noticed that Lord Diplock suggested two alternatives (i) proprietary rights and (ii) possessory rights. These were, however, obiter observations; and Lord Diplock stressed that his decision was limited to time charters.

42. The question was next taken up in *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776. That case concerned an agreement to grant a licence to use certain trade marks and names on payment of specified sums. If a sum was not paid, the licence was to terminate immediately. The licence imposed no obligations on the licensee. Both this court and the House of Lords held that relief against forfeiture was not available. In the Court of Appeal the decision turned mainly on the nature of the underlying asset. Oliver LJ said that, historically "the availability of equitable relief from forfeiture has been confined to cases where the subject matter of the forfeiture is an interest in land." He went on to say that:

> "The fact remains that the jurisdiction never was, and never has been up to now, extended to ordinary commercial contracts unconnected with interests in land and, though it may be that there is no logical reason why, by analogy with contracts creating interests in land, the jurisdiction should not be extended to contracts creating interests in other property, corporeal or incorporeal, there is, at the same time, no compelling reason of policy that we can see why it should be."

43. In the House of Lords the case was decided on a different point. Lord Templeman said at 794:

> "My noble and learned friend, Lord Diplock, at p. 702 [of *The Scaptrade*] confined that power to contracts concerning the transfer of proprietary or possessory rights. Mr. Wilson submitted that in the present case the licences to use the trade marks and names created proprietary and possessory rights in intellectual property. He admits, however, that so to hold would be to extend the boundaries of the authorities dealing with relief against forfeiture. I do not believe that the present is a suitable case in which to define the boundaries of the equitable doctrine of relief against forfeiture. It is sufficient that the appellants cannot bring themselves within the recognised boundaries and cannot establish an arguable case for the intervention of equity. The recognised boundaries do not include mere contractual licences and I can see no reason for the intervention of equity."

44. Two points emerge from this. First, Lord Templeman did not purport to define the boundaries of the equitable doctrine. Second, the "recognised boundaries of the doctrine" did not extend to "mere" contractual licences. The significance of the adjective is not entirely clear. It may also be observed that intellectual property, although property, is not a species of property which one can possess, at least in the ordinary sense of the word; so of the two kinds of right that Lord Diplock described the only available category was proprietary rights.

45. The decision of this court in *BICC plc v Burndy Corpn* [1985] Ch 232 established that the equitable doctrine was not confined to real property but could extend to other forms of property (in that case intellectual property). In the course of his judgment Dillon LJ said that he understood the decisions of the House of Lords "to confine the court's jurisdiction to grant relief against forfeiture to contracts concerning the transfer of proprietary or possessory rights"; and he went on to say:

> "Relief is *only* available where what is in question is forfeiture of proprietary or possessory rights, but I see no reason in principle for drawing a distinction as to the type of property in which the rights subsist." (Emphasis added)

46. In *On Demand Information plc v Michael Gerson (Finance) plc* [2001] 1 WLR 155 this court confirmed that relief against forfeiture was not confined to cases of real property (in that case equipment leases). Robert Walker LJ, in discussing an earlier case, said that the possessory rights of a bailee under a hire purchase agreement would have been enough to attract the jurisdiction to grant relief. He said:

> "Those possessory rights arose under contracts but I cannot accept the submission that those rights, or the rights of On Demand under the finance leases, were purely contractual rights if that intensitive implies that they had insufficient possessory character to meet the principles which emerge from the authorities considered above."

47. The next case that I need to mention is the decision of the Privy Council in *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 25; [2016] AC 923. That case concerned a mortgage of shares. So the case involved both the doctrine of relief against forfeiture and also the equitable right to redeem, which the Board considered together. At [92] the Board held that the doctrine was not restricted to real property. Having referred to *BICC v Burndy* the Board held at [94]:

> "That reasoning, with which the Board agrees, supports the conclusion that relief from forfeiture is available in principle where what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, regardless of the type of property concerned."

48. At [96] the Board said:

> "… the mere fact that the transaction is commercial in nature does not preclude the jurisdiction to grant relief from forfeiture, *provided that* the forfeiture is of possessory or proprietary rights and not of purely contractual rights." (Emphasis added)

49. This appears to me to be a limitation on the availability of relief to those cases where possessory or proprietary rights are created, which would be consistent with the Board's approval of the judgment of Dillon LJ in *BICC v Bundy*.

50. Commenting on *Cukurova* in Snell's Equity (33rd ed) para 13-023 Prof Ben McFarlane writes:

> "It is nonetheless submitted that the conventional formulation, that relief against forfeiture is available only in respect of a proprietary or possessory right, must be treated with some caution. If, for example, B has a purely contractual right against X, and then mortgages that right to A as security for a loan, it is submitted that, in line with the approach taken by the Privy Council in *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd*, there is no reason in principle why B could not seek relief from forfeiture if A attempted to retain that contractual right. The point is that B initially held the right independently of the contract with A, and, prior to that contract, A had no claim to the right."

51. The judge placed some reliance on this passage, but in my judgment that reliance was misplaced. Using the symbols in that passage, we are not concerned with the position as between B and A, but with the position as between B and X. Vauxhall had no contractual right before entry into the Licence. As Prof McFarlane goes on to explain:

> "In a case such as *The Scaptrade*, the supposed forfeiture, in contrast, consisted of no more than A simply seeking to bring to an end A's contractual obligation to B, and it is very difficult to justify a jurisdiction that would prevent A from stipulating in any contract with B the conditions on which A is entitled to cease to provide the contractual service to B. The case of a lease of land is treated differently, and this has sometimes been linked to the potential availability of specific performance to B, the lessee, in that context. The more pertinent point, it is submitted, is that, as the granting of a lease gives B not only a contractual right but also an immediate property right in land, the termination of A and B's contract in that case does more than simply end the parties' contractual relations."

52. We were also referred to the decision of Edelman J sitting in the Federal Court of Australia in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 in which the judge said at [981] that there were authorities which suggested that the doctrine might apply to contractual licences; and at [982] that there were other authorities which suggested that it was only available to protect a proprietary right. What is notable, however, is that the cases in the first category are all Australian, while the cases in the second category are all English.

53. Although in some cases it is desirable to harmonise the common law and the principles of equity as between those jurisdictions in which they apply (*FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250 at [45]) there are nevertheless areas in which different common law systems diverge. One recent example may be found in *Makdessi* itself in which the Supreme Court declined to follow the decision of the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205. The extent of the jurisdiction to relieve against forfeiture may be another area in which England and Wales on the one hand and Australia on the other have taken different forks in the road.

54. The judge said at [94]:

> "Assuming, without deciding, that the right of passage of water through the Spillway does not amount to a possessory right it comes about as close to a possessory right as it is possible to imagine."

55. It was on that basis that he decided that he had jurisdiction to grant relief. In one respect it seems to me that his approach was too narrow, and in another it seems to me to have been too wide. First, in concentrating on the right of passage of water I think that his view was too narrow. The question was not whether that particular right was or was not possessory. It was whether the Licence, considered as a whole, granted possessory rights. Second, in apparently extending the boundaries of the jurisdiction to rights which were not possessory but which were close to possessory, the judge was diverging from a considerable body of precedent. Unless all the various statements in the cases can be regarded as no more than obiter I consider that he ought to have kept within the established boundaries.

56. Accordingly in my judgment the question remains: did the Licence grant Vauxhall proprietary or possessory rights?

**Did the Licence grant proprietary rights?**

57. Mr Edwards conceded that once constructed, the infrastructure became part of the land. That concession was correct. In *Simmons v Midford* [1969] 2 Ch 415 there was the grant of a right to lay pipes and sewers on neighbouring land together with the free passage of water etc. Buckley J held that the pipe did not become part of the land but remained a chattel owned by the grantee. However, in *Melluish (Inspector of Taxes) v BMI (No 3) Ltd* [1996] AC 454 the House of Lords held that this part of his judgment was wrong. As Lord Browne-Wilkinson explained:

> "The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil… The terms of such agreement will regulate the contractual rights to sever the chattel from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as against certain third parties. But such agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed. To the extent that *Simmons v Midford* decides otherwise it was wrongly decided."

**Did the Licence grant possessory rights?**

58. The fact that Vauxhall has no proprietary interest in the infrastructure on MSCC's land does not entail the proposition that it has no possessory rights in it. Ms Holland correctly submitted that because the Licence granted the rights "in perpetuity" it could not have created a lease because a lease without a defined term is not one that the common law will recognise. Where an agreement for a defined term grants rights over

property the distinction between the grant of possessory rights and rights falling short of possessory rights is of importance in deciding whether the agreement creates a tenancy or not. But in the case of an agreement which cannot be a lease for other technical reasons, there is no necessary impossibility of such an agreement conferring possessory rights. Ms Holland accepted that that was so.

59. So we need to consider whether the rights conferred by the Licence were possessory. There are two elements to the concept of possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What amounts to a sufficient degree of physical custody and control will depend on the nature of the relevant subject matter and the manner in which that subject matter is commonly enjoyed. The existence of the intention to possess is to be objectively ascertained and will usually be deduced from the acts carried out by the putative possessor: *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419.

60. It will be appreciated that, in consequence of the way in which the law has developed, it is not necessary that the possessory rights be rights *in land* in order to attract the jurisdiction to grant relief against forfeiture. Possessory rights in the infrastructure, or even in the airspace enclosed by the infrastructure would, in my judgment, be enough.

61. In *Newcastle-under-Lyme Corporation v Wolstanton Ltd* [1947] Ch 427 the Corporation laid gas pipes under statutory powers. Their pipes were damaged by the activities of a coal mine, and they sought compensation from the mine owner. It was accepted that the statute under which the pipes were laid gave no such right. They argued that they were entitled to an easement of support at common law. At trial Evershed J held that the statute under which the Corporation had laid the pipes gave them the exclusive right to occupy the space in the soil occupied by the pipes and that subterranean part of the soil on which the pipes rested; and that they were entitled, by virtue of that occupation, to maintain a common law action of nuisance against the mine owners for their unlawful interference with the natural right to support of the land. This court disagreed but on a narrow ground. Having quoted the passage from the judgment at first instance in which Evershed J expressed those conclusions, Morton LJ (with whom Cohen LJ agreed) said:

> "I accept the whole of this reasoning, with the vital exception that I do not accept the judge's reference to "that (subterranean) part of the soil on which the pipes rest." This is, in my view, the crucial point at which the corporation's line of argument breaks down. I do not think that the corporation have the exclusive right to occupy anything except the space which is filled by their pipes. To test this, let me assume that some person, not authorized by the corporation, removed all the soil round a portion of the corporation's pipe, being careful to do no damage to the surface of the pipe and providing sufficient support to prevent any damage by subsidence. Could it be said that that person had committed a trespass against the corporation? In my judgment, no. If this is so, it seems to follow that the corporation have not the exclusive right to occupy any part of the soil by which their pipes, are surrounded."

62. In his summary of principle he said:

> "… the corporation have not the exclusive right to occupy any portion of that soil, as distinct from the space or cavity occupied by their pipes."

63. Having referred to a number of rating cases he said:

> "I do not think that any one of the cases cited before us bears out the proposition that the corporation have the exclusive right to possession of the soil surrounding the pipes, as distinct from the pipes themselves and the cavity which is filled by the pipes."

64. This is consistent with the second ground for the decision in *Simmons v Midford* (which was not disapproved in the House of Lords) namely that the grant of the free passage of water etc was the grant of an exclusive right. It also envisages that an entity that lays and has exclusive use of a pipe may have exclusive possession of the pipe itself as well as the airspace that the pipe encloses.

65. How does the matter stand as regards the 1962 Licence?

66. I note at the outset that the rights granted are preceded by the implied covenant for title imported by the words "as beneficial owners". Clause 1 (ii) of the Licence gave Vauxhall the right "to lay construct maintain repair alter renew and use … pipes of such dimensions and capacity as Vauxhalls may from time to time require." This was not limited to the initial works, since the rights included a right to "alter" the infrastructure. Vauxhall was also obliged by clause 3 (e) not only to repair the infrastructure, but also to "renew and replace" it when necessary. Clauses 3 (g) and 3 (h) also envisaged the possible "diversion" of the infrastructure; and additionally clause 3 (g) required Vauxhall to "restore the lands properties and works" disturbed by repair, alteration etc. This clause clearly envisaged that Vauxhall would be empowered to break open the surface of the land in order to comply with their obligations. Clause 3 (e) additionally provided for MSCC to be entitled to carry out repairs and renewals, but only if Vauxhall was in default of their own obligations. The inference must be that if Vauxhall was not in default, MSCC would not be entitled to interfere with the infrastructure. This is borne out by clauses 4 (i) and 4 (ii) which gave MSCC rights to carry out its own works "over under along or across" the spillway, but not to connect into the spillway itself. Importantly, MSCC was only entitled to exercise these rights "in such manner and position as shall not unreasonably interfere with the maintenance and operation" of the spillway.

67. The purpose of the Licence was as stated in recital (3) to enable Vauxhall to discharge surface water and trade effluent from identified land all of which was identified on the plan attached to the Licence as Vauxhall's "Factory Site". Clause 3 (m) prohibited use of the spillway for any purpose other than discharge from that identified land. It was therefore plainly contemplated that Vauxhall would be the only entity to use the infrastructure. The physical characteristics of the spillway were agreed between the parties before the Licence was granted. Those physical characteristics were such that large structures on MSCC's land were to be enclosed or buried; and the only physical

landward access to the enclosed and buried parts of the spillway was to be from Vauxhall's land.

68. Thus the Licence cast upon Vauxhall the responsibility for the physical construction of the infrastructure and the sole primary responsibility for its maintenance and repair. It did not reserve to MSCC any rights to use the infrastructure or (except in case of default by Vauxhall) to carry out works to it. Those rights over the physical property, coupled with its physical characteristics and the clear intention that Vauxhall would be the only entity able to use and maintain it, amount, in my judgment, to a sufficient degree of physical custody and control of the infrastructure (although not of the soil in which it was placed), having regard to the nature of the property and the manner in which property of that character is commonly enjoyed. Vauxhall plainly intended to exercise those rights (and fulfil those responsibilities) on its own behalf and for its own benefit. The combination of those elements means that the rights granted by the Licence were possessory in nature and thus opened the way to the exercise of the equitable jurisdiction to grant relief against forfeiture.

69. Ms Holland submitted that the fact that, as a result of the 1997 variation, others had the right to use the system negated any possessory right on the part of Vauxhall. I do not consider that that is so. First, I do not consider that the variation can have retrospectively altered the nature of the rights granted by the 1962 Licence. Second, Vauxhall retained control over the physical infrastructure. Third, the right of others to discharge water was the result of a series of grants by Vauxhall. If A has possessory rights in property, the fact that he grants B the right to use that property does not result in his ceasing to have possession unless the granted rights themselves are possessory. It is not suggested that any of the others who are entitled to discharge water through the infrastructure have possessory rights in it.

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. But that additional stage, at least in the case of a breach other than non-payment of the annual sum, does no more than replicate in contractual form the provisions of section 146 of the Law of Property Act 1925 which apply to all leases.

71. In my judgment, therefore, the judge had jurisdiction to grant relief against forfeiture.

**Was the judge wrong to grant relief?**

72. In granting relief against forfeiture, the judge was making a discretionary decision. It is only possible to interfere with his decision if he was wrong in principle. Ms Holland submitted that in view of the delay in making the application for relief,

coupled with the fact that there had been extensive negotiations for the grant of a temporary licence in the mean time, the judge was wrong in principle.

73. The general approach of a court of equity, where the default in question is a failure to pay, is to grant relief on terms that the defaulter pays what is due plus the costs of the other party. In the court below Ms Holland suggested by analogy with section 210 of the Common Law Procedure Act 1852 that a claim for relief had to be made within six months. But that section only applies where either the landlord has physically re-entered, or where the landlord has recovered judgment against the tenant. That analogy cannot apply where Vauxhall has throughout the period of alleged delay continued to exercise the rights granted under the Licence.

74. Ms Holland argued that it was not right that the initiative to take action should rest on MSCC. It was up to Vauxhall to make its claim promptly. However, in the context of landlord and tenant, from which the analogy derives, the initiative does indeed rest on the landlord either to begin proceedings for possession or to re-enter physically. I can see that a defence of laches could arise, but that would only apply where the delay had caused prejudice. The judge found no such prejudice in our case.

75. The judge was also entitled to take into account, as he did, the windfall that would accrue to MSCC if relief against forfeiture were to be refused.

76. I do not consider that it can be said that the judge's exercise of his discretion was wrong.

**The claim under the Manchester Ship Canal Act 1885**

77. That makes it unnecessary to consider Vauxhall's alternative claim to have rights under the Manchester Ship Canal Act 1885, which I can therefore deal with shortly. Mr Norris QC argued this part of Vauxhall's case.

78. The relevant parts of section 63 of the Act are in the following terms:

> "63. Notwithstanding anything in this Act contained or shown on the deposited plans to the contrary the following provisions shall apply for the protection of Richard Christopher Naylor and his heirs or assigns or other owner or owners for the time being of the estate known as "the Hooton Overpool and Netherpool Estates" in the parish of Eastham in the county of Chester (and in this section referred to as "the estate") …that is to say:—
>
> 9. In the event of any works or operations of the Company under this Act or the exercise of any of the powers in this Act contained interfering with or prejudicially affecting the present arterial or other drainage or sewerage or the passage or escape of drainage or sewage or flood-water from the estate as freely as at present the Company shall at their own expense restore and make good such drainage and sewerage and outfalls and provide for the passage or escape of such drainage or sewerage as freely as at present to the reasonable satisfaction of the

> owner. In addition to executing any works that may be required under the foregoing provision the Company shall construct at such points as the owner shall indicate at least two outfalls by means of iron pipes not less than three feet in diameter for the purpose of carrying sewage from that portion of the estate which will lie southwards of the canal into the River Mersey;
>
> 10. The present system of the drainage of the estate and of the sewerage of the buildings thereon shall not be interfered with by the Company until other sufficient provisions have been made therefor by syphons of sufficient capacity or other means and be in operation to the reasonable satisfaction of the owner"

79. Vauxhall rely on sub-sections (9) and (10). Vauxhall's pleaded case was that if they are no longer permitted to use the infrastructure constructed pursuant to the Licence, MSCC will interfere with or prejudicially affect the passage or escape of water into the River Mersey; and in consequence MSCC would have an obligation to restore or make good such passage. The relief claimed was an order requiring MSCC to permit Vauxhall to use that infrastructure or alternatively to provide an alternative means of passage.

80. It is, to my mind, clear from the opening preamble to the section ("for the *protection* of [Mr] Naylor") that it was intended to do no more than to preserve whatever rights Mr Naylor then had. It was not intended to grant him any further or more extensive rights. Mr Norris did not suggest otherwise. This conclusion is reinforced by the references in sub-section (9) to the "present" and to "as at present".

81. It is therefore necessary to consider what rights Mr Naylor had before the Act was passed. Before the Act was passed (and indeed before the Canal was built) he was a riparian owner, whose land bordered the River Mersey. A riparian owner has rights as regards the waterway which are called "natural rights". These natural rights are incident to the ownership of the fee simple and are not easements which need to be granted or reserved: *Portsmouth Borough Waterworks Co v London Brighton and South Coast Railway* (1909) 26 TLR 175. Much of the discussion of natural riparian rights in the case law concerns a landowner's entitlement to the flow of water and the ordinary use of it. However, it is in my judgment clear that the natural rights of a riparian owner include the right to allow naturally occurring water on his land to drain onto or into lower land (which would include land covered by water, such as the River Mersey): *Gibbons v. Lenfestey* (1915) 84 LJPC 158; *Palmer v Bowman* [2000] 1 WLR 842. As it was put in the latter case: it is nature, not law, that imposes the burden of receiving such drainage on the lower land.

82. Where water has been artificially accumulated on one person's land the position is different, although it has been said that because of the historical development of the English landscape the distinction between a natural feature and an artificial feature is one that is difficult to draw: *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2004] 1 P & CR 33 at [81].

83. The law is stated in Gale on Easements (20th ed) at para 6-24 (in my opinion correctly) as follows:

> "The occupier of land has no right: (a) to discharge on to his neighbour's land water which he has artificially brought on to his land or water that has come naturally on to his land but which he has artificially, even if unintentionally, accumulated there; or (b) by artificial erection on his land to cause water to flow on to his neighbour's land in a manner in which it would not, but for such erections, have done. He is, however, under no obligation to prevent water that has come naturally on to his land (and has not been artificially concentrated, retained or diverted) from passing naturally on to his neighbour's land."

84. In the case of water artificially accumulated on land a right to discharge it onto adjoining land is an easement which is acquired, if at all, by grant or prescription. On the facts of this case there appear to have been some artificial ornamental ponds and fish ponds on Mr Naylor's land together with a system of field ditches; and to the extent that they drained into the River Mersey I am content to assume that they did so by virtue of a prescriptive right. The judge also found that although most of the rainfall would have been absorbed by the land, some of it amounting to 150 litres per second for a 1 in 2 year event would have been converted to flow in the system of field ditches which discharged into the ravine at the north east corner of Booston Wood and thence into the River Mersey.

85. An easement acquired by prescription depends on the fiction of a presumed grant. Where an easement is acquired by express grant the extent of the easement is defined by the scope of the grant. Where, however, an easement is acquired by prescription the extent of the easement is defined by the use upon which the fictional grant is based. An easement thus acquired does not generally permit continued use if the nature of the dominant tenement has radically changed. As James LJ explained in *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 Ch D 362:

> "I am satisfied that the true principle is … that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, quâ field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built."

86. In *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, [2005] 1 P & CR 30 what was in issue was an implied grant of a right of drainage under the rule in *Wheeldon v Burrows*, although the court held that the same principles applied. Where there has been a change in the use of the dominant tenement after the date of grant, the question whether the changed use is within the scope of the grant is to be answered by reference to the following two questions:

i) whether the development of the dominant land represented a "radical change in the character" or a "change in the identity" of the site, as opposed to a mere change or intensification in the use of the site; and

ii) whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land.

87. That case concerned a right of drainage, and the increase in the burden was, the court held, to be measured by reference to the increased flow of water.

88. The rights which Mr Naylor enjoyed were those natural rights which attached to his land. By constructing the factory and its associated hardstanding Vauxhall themselves interfered with the natural drainage of rainfall. In particular by greatly increasing the impermeable surface of the land they diverted rainfall from penetrating the ground and caused it to run into the ravine. That change was outside the scope of his natural rights. It is not entirely clear whether the lagoon in which water is accumulated is connected to the ravine, but if it is that only reinforces the point. If and to the extent that Mr Naylor had acquired a right by prescription to drain his ornamental ponds, or water drained through a system of field ditches, the limited nature of that prescriptive right did not extend to the subsequently erected factory and hardstanding. Applying the twin test in *McAdams Homes*:

i) The construction of the factory and hardstanding was a radical change in character of the land; and

ii) It resulted in a greatly increased flow of water down the ravine.

89. It follows, in my judgment, that Vauxhall have no right, independently of the Licence, to discharge water in the way that they do; and, in particular have no right, independently of the Licence, to the use of the structures on MSCC's land. It was not argued at trial that Vauxhall could dismantle the infrastructure and allow water entering the ravine to drain freely across MSCC's land; and the expert evidence was not directed to that hypothetical scenario. But even if that case had been made, I am very doubtful, for the reasons I have given, that it could have succeeded.

90. To put the point another way, in a manner for which Ms Holland contended, the cause of the need for the spillway was nothing to do with the operation of the Canal. It was caused by Vauxhall's decision to develop. It cannot be said, therefore, that the operation of the Canal has interfered with the system of drainage.

**Result**

91. I would dismiss both the appeal and the cross-appeal.

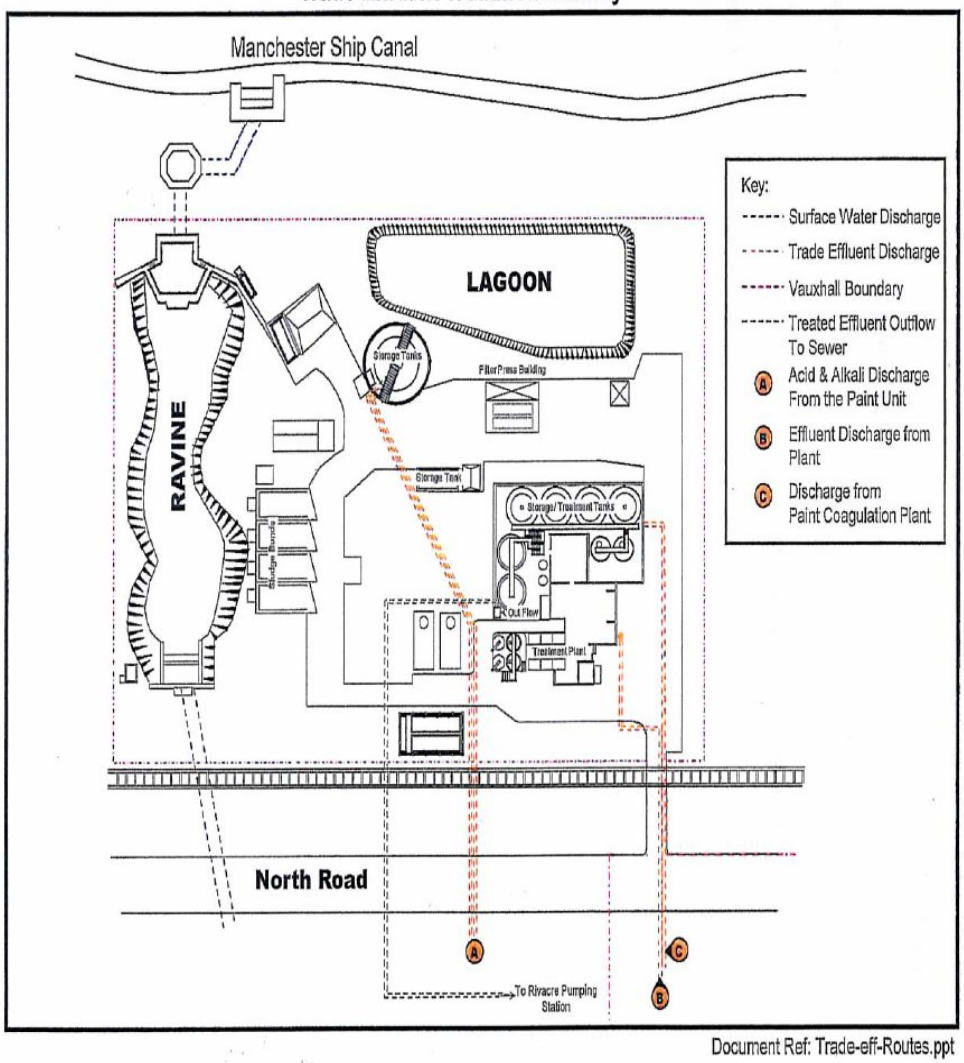
**Lord Justice Floyd:**

92. I agree.

**Lord Justice David Richards:**

93. I also agree.

## Trade Effluent Discharges To General Motors Manufacturing Ellesmere Port's Trade Effluent Treatment Facility




Document Ref: Trade-eff-Routes.ppt