IN THE COURT OF APPEAL OF NEW ZEALAND

CA396/2014
[2015] NZCA 374

BETWEEN	GREENSHELL NEW ZEALAND LIMITED (IN RECEIVERSHIP) Appellant
AND	KENNEDY BAY MUSSEL COMPANY (NZ) LIMITED Respondent

Hearing:	12 May 2015
Court:	Harrison, Stevens and Miller JJ
Counsel:	D R Kalderimis and K E Yesberg for Appellant B A Fletcher and D P Neild for Respondent
Judgment:	17 August 2015 at 4.00 pm

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The appeal is dismissed.

C The appellant must pay the respondent costs on a standard appeal on a band B basis and reasonable disbursements. We certify for second counsel.

REASONS

HARRISON AND STEVENS J

(Given by Stevens J)

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Introduction

[1] Kennedy Bay Mussel Company (NZ) Ltd (KBMC) is a small family company established by the late Mr George Potae. The Potae family consider Kennedy Bay in Coromandel part of their turangawaewae and KBMC has held two coastal permits for mussel farming in Kennedy Bay for many years. These comprise 11.1 and three hectares respectively of the coastal marine area near Kennedy Bay.

[2] In 2006, Mr Potae was diagnosed with terminal cancer. Having previously run KBMC and the marine farms on his own, he needed to put in place arrangements for the sale of the mussel lines and for the operation of the farms. He wished to generate an income stream for the purpose of protecting the ability of his family to remain living on their turangawaewae. Mr Potae arranged for KBMC to sell some of the seeded mussel lines to Greenshell NZ Ltd (Greenshell) for around $60,000. KBMC also entered into deeds of lease and sub-licence granting Greenshell the right to use and occupy coastal marine areas under the coastal permits.

[3] Greenshell thereafter operated the mussel farms, initially successfully.[1] However, in November 2013 Greenshell was placed in receivership and KBMC purported to exercise its right to re-enter and terminate both the lease and sub-licence. The receivers of Greenshell applied to the High Court for relief against forfeiture, which was declined by Cooper J.[2] Greenshell now appeals.

[4] The appeal raises important issues about the exercise of the Court's equitable jurisdiction to grant relief against forfeiture and the nature of the rights created by coastal permits and leases and sub-licences of such permits. If this is found to be a case to which the jurisdiction to grant relief may apply, the next question is whether this Court should exercise its discretion to grant that relief.

Background

[5] The business of Greenshell involves a substantial mussel farm operation utilising coastal marine areas in the Coromandel.[3] Greenshell's operation extends over some 278 hectares of coastal marine area. It holds its own coastal permits and resource consents and those leased and licensed from third parties. The coastal permits from KBMC represent only two per cent of the total area farmed by Greenshell.

[6] The coastal permits and resource consents to which the deeds related were not before the High Court. They were provided to us by consent and we grant leave to admit them. We will later discuss the relevant provisions in more detail.

[7] In November 2013 Greenshell was placed in receivership pursuant to a general security agreement (GSA) granted in favour of Rabobank NZ Ltd, which granted it a security and interest in each of the KBMC agreements, namely:[4]

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1 KBMC contends that Greenshell has not yet made payment of one disputed invoice of $66,825, for seeded mussel lines.

2 *Greenshell NZ Ltd (in rec) v Tikapa Moana Enterprises Ltd* [2014] NZHC 1474 [High Court judgment]. Greenshell was also a licensee under a licence with Tikapa. Tikapa and Greenshell reached an agreement on all issues between them subject to the sale by Greenshell of its assets, including its position as licensee under the licence. Tikapa is not a party to the present appeal.

3 As defined in s 2 of the Resource Management Act 1991 [RMA].

4 Conveniently set out in the High Court judgment, above n 2, at [3].

(a) A deed of unknown date in 2006 granting Greenshell a lease of KBMC's rights to use and occupy 11.1 hectares of coastal marine area pursuant to a coastal permits and land use consent; and

(b) A deed of unknown date in September 2006 granting Greenshell a sub-licence of KBMC's rights to use and occupy three hectares of coastal marine area pursuant to a coastal permit.

[8] The entering into of the deeds of lease and sub-licence followed the signing of a memorandum of understanding (MOU) between KBMC and Greenshell in 2006. It set forth the key terms and conditions including the agreement by Greenshell to prepare at its cost the various legal documents to give effect to the MOU. Mrs Allison-Potae, wife of the late Mr Potae and managing director of KBMC,[5] confirmed the deeds of lease and sub-licence were drafted by Greenshell and its advisors. The two deeds are in broadly similar terms with obvious differences to accommodate the lease and the sub-licence.[6] The default clauses are materially similar.

[9] Central to the appeal are the provisions in clause 12 setting out six acts of default by the lessee. Clause 12 provides if there is an act of default the lessor may at any time re-enter the marine coastal area or any part of it. For example, KBMC could re-enter if the rental was in arrears and unpaid after the given payment date. Re-entry was also authorised where KBMC had given written notice to the lessee specifying a breach of the lease, which remained unremedied 28 days after giving the notice. There were numerous other separate acts of default which could arise and allow re-entry, including:

> (f) the Lessee (if a company) has a resolution passed or an order made by a court for the winding up of the Lessee (except for the purposes of reconstruction approved by the Lessor) or if the Lessee is placed in receivership or under official or statutory management.

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5 She and Mr Potae's eldest son, Martin, became directors of KBMC after Mr Potae's death.

6 The length of the terms of the two deeds are, however, slightly different. The lease commenced in 2006 and expires on 1 October 2036. There are two rights of extension: one automatic right of extension of 15 years, exercised at the lessee's request, and a further extension of 20 years, solely at the desire of the lessor. The sub-licence runs from 2006 and expires on 31 December 2026, with only one automatic extension for a term of 20 years.

[10] Despite being placed in receivership in November 2013, Greenshell continued to be operated by the receivers for several months as they hoped to be able to sell the business as a going concern. However, on 21 February 2014 the solicitors for KBMC sent letters and two notices of the same date notifying Greenshell it was exercising its rights under cl 12.1(f) of both deeds to re-enter the coastal permit areas and determine the lease and sub-licence. Greenshell subsequently applied to the High Court on 6 March 2014 for relief against forfeiture.

[11] After the High Court hearing, but before the High Court's decision was released, Greenshell entered into (and subsequently settled) an agreement for sale and purchase with Sanford Ltd, which Greenshell contends is a suitable assignee of its interests in the KBMC permits.[7]

[12] One of the Greenshell receivers, Mr Gibson, gave evidence that the area comprising the KBMC coastal permits was located alongside sites owned by Greenshell; the sole purpose of leasing those areas was to supply mussel seed to Greenshell's own operation. This was said to be fundamental to Greenshell's economic operation (and therefore, its value as a going concern).[8] This is disputed by Mrs Allison-Potae who contends the relevant mussel seed could be sourced from anywhere. This view is supported by an experienced marine farmer, Mr Peter Bull, who does not agree that an inability to use the KBMC permits would make the whole Greenshell operation uneconomic.[9]

High Court decision

[13] It was common ground in the High Court (as on appeal) that the relief sought by Greenshell required application of the Court's equitable jurisdiction.[10] Cooper J declined to exercise the equitable jurisdiction to grant relief to Greenshell from forfeiture of its lease and sub-licence to KBMC for the following reasons:

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7 Settlement occurred on 9 May 2014, subject to the outcome of this appeal and KBMC's consent to assignment.

8 High Court judgment, above n 2, at [17].

9 At [20].

10 High Court judgment, above n 2, at [28]. Despite the fact the rights conveyed were in a lease and sub-licence respectively, the interests at stake were rights to use and occupy the "coastal marine area".

(a) Relief from forfeiture is typically exercised only in respect of property or possessory rights. Although it was argued the permits were not property rights,[11] Cooper J found they were sufficiently analogous to property rights for the jurisdiction to apply in an appropriate case.[12]

(b) The jurisdiction to grant relief was nonetheless not triggered. Relying on the classic statement of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* as to the scope of jurisdiction, the Judge rejected Greenshell's argument that the substance of the deeds came within the scope of jurisdiction.[13]

(c) Cooper J found the forfeiture provision was not included in the deeds as security for the right of KBMC to receive rent on an ongoing basis.[14] Rather, cl 12.1(f) was a contractual right to terminate the agreement in the event of receivership and not a means of protecting against non-performance of Greenshell's obligations.[15]

[14] The Judge emphasised the parties had engaged in a commercial arrangement negotiated at arm's length, adding:[16]

> It is important not to lose sight of the fact that, as with all relief against forfeiture applications, here the grant of relief would be on the face of it contrary to the contract of the parties entitling KBMC to cancel on the basis of Greenshell's receivership. The agreements were commercial arrangements freely undertaken by parties negotiating at arm's length. The receivership has already occurred. The grant of relief would treat that fact as inconsequential, and do nothing to remedy the breach the receivership represents. That is not the bargain that the parties struck. And there is no suggestion here that there could be any compensation payable to KBMC for the removal of its rights on the occurrence of a receivership. I suspect that the answer Greenshell would give to that would be that KBMC would suffer no loss as a result of the receivership provided that relief were accompanied by the full payment of any money due under the lease. But the fact is that

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11 Resource Management Act, s 122(1).

12 High Court judgment, above n 2, at [30]–[36] relying on dictum from *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268 (HC) at [35] per Chisholm and Harrison JJ.

13 At [40]–[45], citing *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) at 722, which describes relief should be provided 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".

14 At [40]–[42].

15 At [42].

16 At [44].

> KBMC would inevitably be faced with having to deal with the consequences of a receivership when it had contracted that it would be able to terminate the agreement if a receivership occurred.

[15] The Judge also referred to three factors relied upon in a previous High Court decision as necessary conditions to ground jurisdiction to grant relief, being:[17]

(a) The primary object of the bargain must be to secure a stated result.

(b) That result must be one which can effectively be attained when the matter comes before Court.

(c) It must be possible to say of the forfeiture provision it was added by way of security for the production of that result.

[16] Having considered the terms of the deeds, Cooper J concluded:[18]

> These conditions are not satisfied here. Greenshell is in receivership and there is nothing that the Court can do in the present circumstances about that. Nor can it be said that the provision in the agreements providing for termination in the case of receivership had as its primary object the securing of a stated result, or that the provision was added by way of security for the production of a stated result.

[17] Accordingly the Judge held there was no jurisdictional basis for the grant of equitable relief. He was not therefore required to consider discretionary factors.[19]

Issues on appeal

[18] There are three issues agreed between the parties:[20]

(a) Did the High Court err in finding the appellant did not meet the jurisdictional test for the grant of the equitable remedy of relief against forfeiture?

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17 Citing *Dark v Weenink* HC Auckland CIV-2003-404-5846, 11 August 2005, which referred to *Halsbury's Laws of England* (4th ed, reissue, 2003) vol 16(2) Equity at [804].

18 High Court judgment, above n 2, at [46].

19 At [47].

20 There was a further issue identified by the parties, that being whether Cooper J wrongly considered there to be a jurisdictional test for the exercise of discretion. We see this as logically falling within the ambit of the first issue on appeal. Whether the appellant meets any jurisdictional text necessarily involves a discussion of what that test is.

(b) Did the High Court err in finding relief against forfeiture was potentially available in respect of the interests transferred by the deeds (dealing with coastal marine permits), even though the permits are not property rights?

(c) If the Court does have jurisdiction, should the Court exercise its direction to grant relief from forfeiture?

Application to adduce fresh evidence

[19] Greenshell seeks leave to adduce updating evidence from one of the receivers, Mr Gibson. It relates to a sale and purchase agreement between Greenshell and Sanford Ltd executed and settled in May 2014, after the High Court hearing but before release of the High Court judgment. Greenshell says the details of the sale negotiations, including the identity of the purchaser, were commercially sensitive at the time of the High Court hearing and could not be disclosed. Greenshell submits the evidence is fresh, cogent and likely to have a bearing on the outcome of the appeal. The issue of whether Greenshell can guarantee or secure a reputable and solvent lessee is relevant and material to the exercise of the court's discretion to grant relief, in that it goes to the harm suffered or likely to be suffered by KBMC.

[20] KBMC opposes leave to adduce the affidavit on the grounds:

(a) The commercial viability of a proposed assignee is irrelevant to whether there is jurisdiction to grant relief against cancellation of the lease. The evidence is therefore irrelevant.

(b) If the financial viability of the assignee is relevant to the exercise of discretion, expert evidence should be adduced to support that fact.

(c) Such evidence can only be relevant to whether the Court should exercise its discretion to grant relief. Even if relief is granted to Greenshell, KBMC would still need to consider whether to consent to the assignment.

[21] We grant leave to Greenshell to adduce the further evidence. Its relevance to the questions we must resolve is limited. However, we consider it is best treated as updating evidence to inform this Court as to the most recent status of the sale transaction.

The coastal permits and the statutory context

Coastal permits

[22] Counsel for the parties helpfully summarised the key features of the permits. An analysis of these is necessary to determine the true nature of rights and interests involved.

[23] KBMC held two coastal permits. Resource consent 113825 (the first coastal permit) was linked to a separate land use resource consent. The second was resource consent 112674. This is a combined coastal permit and land use permit (the second coastal permit). Resource consent 113825 and the related land resource consent were leased to Greenshell under the deed of lease. Resource consent 112674 was sub-licensed to Greenshell by the deed of sub-license.

[24] Both resource consents are coastal permits, a type of resource consent as set out in s 87(c) of the Resource Management Act 1991 (RMA).[21] The first coastal permit grants permission to the consent holder to undertake mussel farming activities in Kennedy Bay, in the 11.1 hectares set out in the permit. Clause 1 of the permit provides for "Activities Authorised" as follows:

> 1. This resource consent authorises the activity of marine farming, including spat catching, of Greenshell™ Mussels (*Perna canaliculus)*, that had previously been carried out pursuant to marine farming permit 754 … .

[25] The first coastal permit has a schedule setting out "advice notes" providing, for example, as follows:

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[21] These were initially granted as marine farming permits under the Fisheries Act 1983. However, pursuant to the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, ss 10 and 20, licences under the Marine Farming Act 1991 and marine farming permits granted under the Fisheries Act respectively were deemed to be coastal permits.

(a) The resource consent is transferable to another owner or occupier of the marine farming space concerned (subject to compliance with various provisions of the RMA) (cl 1).

(b) The consent holder is responsible for all sub-contracted operations related to the exercise of the consent (cl 2).

(c) The consent holder has a general duty under s 17(1) of the RMA to avoid, remedy or mitigate any adverse effect on the environment arising from the marine farming activity, and is required to comply with the provisions of the Building Act 2004 (cls 5 and 6).

[26] Clause 3 provides that the coastal permit resource consent does not, of itself, authorise the consent holder to occupy the coastal marine area. It is to be read in conjunction with the corresponding land use consent.

[27] The land use consent certificate provides for the "structures and occupation of space associated with the marine farm" for the commercial growing of green lipped seed mussels only (cl 1). The consent holder is to be responsible for all subcontracted operations related to the exercise of this resource consent (cl 3). The marine farming activity authorised by the consent certificate is to be located in the coastal marine area prescribed (cl 4). The resource consent does not authorise exclusive occupation rights of the seabed or water column (cl 5).

[28] The second coastal permit is the combined coastal and land use permit. The consent holder is listed as Greenshell, KBMC and a third party. The authorised activity is to:

> Undertake 3 hectares of Mussels and Rock Lobster farming activities in Kennedy Bay, including use and maintenance of marine farming structures, occupation of the coastal marine area, and associated discharges.

[29] The general conditions specify the authorised activities as:

(i) the marine farming of Mussels and Rock Lobster (*Jasus edwardsii)*, including spat catching; and

(ii) the use of conventional marine farming structures; and

(iii) the associated discharges; and

(iv) the occupation of 3 hectares of space in the coastal marine area as shown on the attached survey plan and schedule of coordinates

that had previously been authorised pursuant to marine farming licence 351 …

[30] The second coastal permit also contained a schedule of "advice notes".[22] These include a clause dealing with "Extent of occupation" as follows:

8. This resource consent does not grant exclusive occupation rights to the consent holder. The consent holder may not occupy the marine coastal area outside the space authorised by this resource consent.

Statutory context

[31] The coastal permits in question are governed by the RMA. Section 122 is relevant to the construction of the deeds and permits, and the interest they conveyed. Section 122 of the RMA provides:

Nature of resource consent

122 Consents not real or personal property

(1) A resource consent is neither real nor personal property.

…

(5) Except to the extent—

(a) that the coastal permit expressly provides otherwise; and

(b) that is reasonably necessary to achieve the purpose of the coastal permit,—

no coastal permit shall be regarded as—

(c) an authority for the holder to occupy a coastal marine area to the exclusion of all or any class of persons; or

(d) conferring on the holder the same rights in relation to use and occupation of the area against those persons as if he or she were a tenant or licensee of the land.

(6) Except to the extent—

[22] Apart from dealing with the extent of occupation clause, it contains the same advice notes as described above at [25] onwards.

(a) that the coastal permit expressly provides otherwise; and

(b) that is reasonably necessary to achieve the purpose of the coastal permit,—

no coastal permit shall be regarded as an authority for the holder to remove sand, shingle, shell, or other natural materials as if it were a licence or profit à prendre.

[32] With reference to the words "occupy" and "occupation" in s 122(5), s 2 of the RMA defines the concept of "occupation" in the context of an activity occupying any part of the coastal marine area.[23] It provides:

Occupy means the activity of occupying any part of the coastal marine area—

(a) where the occupation is reasonably necessary for another activity; and

(b) where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and

(c) for a period of time and in a way that, but for … the holding of a resource consent under this Act, a lease or a licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense

[33] We also mention the statutory context relevant to the lease and licence instruments. The deeds were entered into in 2006, so the Property Law Act 1952 applied to both transactions. The equitable jurisdiction to grant relief against forfeiture was not excluded by that statute (as is now the position). The Property Law Act 2007 created a statutory code governing leases and application for relief against cancellation. We accordingly do not consider the statutory provisions granting relief.

The deeds

[34] Before addressing the three questions for determination, some further detail of the terms of the deeds is necessary. They were drafted in similar terms. The key

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[23] There is also a definition of "use". However, that definition is expressly limited to specific provisions of the RMA, listed in that definition (for example "uses" in relation to protected land, boundary adjustments, the effect of designation and the effect of a heritage order). That definition does not apply to the present situation.

difference relates to the nature of the instrument, the first being a deed of lease and the second a deed of sub-license.

[35] The deed of lease leased the first coastal permit and the associated land use consent to Greenshell. Clause 3 of the deed established the term of the lease and clause 4 specified a right of extension. Importantly, clause 1.8 set out as follows:

> **1.8 Permitted use of the marine coastal area**
>
> The development and operation of a commercial marine farm as permitted pursuant to the Lease.

[36] Clause 5.1 set out the covenant to pay rent. There was also a rent review provision, interest on overdue rental and GST clauses. Clause 6.1 establishes the prohibition on subletting or assignment without the Lessor's consent. It stipulates:

> … The Lessor will not unreasonably withhold the Lessor's consent to an assignment to a respectable, responsible, solvent and suitable assignee or Sub-Lessee ("the Transferee"). Before giving consent and as a condition precedent the Lessor shall be entitled to performance and satisfaction of the following conditions:
>
> (a) the Lessee shall demonstrate to the satisfaction of the Lessor that the proposed Transferee is responsible and of sound financial standing and has reasonable experience in the type of farming provided in cl 1.8.
>
> (b) all rental and other moneys payable by the Lessee to the Lessor up to the date of the proposed transfer assignment or subletting have been paid;
>
> (c) there is not any existing unremedied breach of any of the terms of this Lease;
>
> …

[37] The substantive requirements of the lease, in terms of use of the coastal marine area, are set out at cl 7. It required the lessee to develop at its own cost, as far as reasonably practicable a commercial mussel farm at all times in accordance with the requirements of the Ministry of Fisheries and Waikato Regional Council. It required the lessee to at all times repair, maintain and keep in good order and condition all of the mussel plant, to ensure the lessee's mussel farm is as productive as is reasonably practicable. Clause 9 confirmed the lessee occupied the coastal marine area at its own risk. The permits also require performance consistent with the

detailed requirements of the Mussel Industry Environmental Code of Practice. It provided an indemnity to the lessor against all claims for which the lessor may become liable in relation to the farm, or any loss or claims due to the lessee's neglect, misuse of the area or breach of statute or regulation.[24] Clause 11 provided a first right of refusal to the lessee to purchase the lease from the lessor.

[38] Clause 12 set out the default provision. It provided as follows:

> **12 Default by Lessee**
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> 12.1 If at any time:
>
> (a) the rental is in arrears and unpaid for 28 days after any payment date (whether it has been demanded or not) or
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> (b) the Lessor gives written notice to the Lessee specifying any breach of this Lease which breach remains unremedied 28 days after giving the notice; or
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> (c) the Lessee (if an individual) is declared bankrupt or insolvent according to law; or
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> (d) any assignment is made of the Lessee's property for the benefit of creditors or if the Lessee compounds with the Lessee's creditors; and
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> (e) the interests of the Lessee in or under this Lease or in the mussel plant are attached or taken in execution or under any legal process; or
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> (f) the Lessee (if a company) has a resolution passed or an order made by a court for the winding up of the Lessee (except for the purposes of reconstruction approved by the Lessor) or if the Lessee is placed in receivership or under official or statutory management
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> the Lessor may
>
> (a) immediately or at any time subsequently and without any notice or demand immediately re-enter (forcibly if necessary) the marine coastal area or any part of the marine coastal area;
>
> (b) by such action determine the Lessee's rights to occupy the marine coastal area and expel and remove the Lessee and the effects of the Lessee and those claiming under the Lessee without being guilty of any manner of trespass or conversion, and

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[24] We note that this would go some way to protect the lessor from the risks associated with enforcement action in respect of the consents taken under the RMA, under ss 314 and s 339.

(c) consequently the Vendor shall have 30 days within which to remove the mussel stock and plant from the marine coastal area

(d) upon such event this Lease shall cease and determine but without releasing the Lessee from liability in respect of any breach of this Lease.

[39] As the second deed, creating a sub-licence of the second coastal permit, is in materially similar terms, we need not repeat the key provisions.

Equitable jurisdiction to grant relief against forfeiture

[40] Greenshell contends Cooper J erred in finding there was no jurisdictional basis for the exercise of the Court's equitable power to grant relief from forfeiture. Mr Kalderimis submits such equitable jurisdiction is available to protect against the forfeiture of proprietary or possessory (as opposed to merely contractual) rights.[25]

[41] The classic statement of the doctrine of relief against forfeiture is the dictum of Lord Wilberforce in *Shiloh Spinners*:[26]

> 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 (Peachy v Duke of Somerset* (1721) 1 Stra 447 and cases there cited). Yet even this head of relief has not been uncontested …"

[42] In *The Scaptrade*, the House of Lords considered whether the doctrine was available where the owners had exercised their rights under a withdrawal clause in a

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[25] Citing *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana ("The Scaptrade")* [1983] 2 AC 694 (HL) [*The Scaptrade*]; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (HL); *BICC Plc v Burndy Corporation* [1985] Ch 232 (CA) at 252A–B per Dillon LJ; and the two Privy Council decisions in *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2 [*Cukurova Finance I*] and [2013] UKPC 20 [*Cukurova Finance II*].

[26] *Shiloh Spinners Ltd v Harding*, above n 13, at 722 (emphasis added).

charter-party agreement following the non-payment of hire charges.[27] In rejecting the application for relief against forfeiture, Lord Diplock referred to the dictum of Lord Wilberforce in *Shiloh Spinners* and confirmed the doctrine was not intended to apply generally to contracts not involving any transfer of proprietary or possessory rights.[28] The principles were addressed more recently in *Cukurova Finance I* by the Privy Council.[29] The Board applied the proposition 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.[30]

[43] The basic rationale for the equitable doctrine can be drawn from these authorities. The thrust is to prevent a particular type of unconscionable conduct, being A's abusing a right contractually conferred upon it, or agreed to. The proposition is that A obtained that right for the purpose of securing a particular outcome; if A unconscionably insists on using that right to acquire a benefit, or to impose a burden on B, which exceeds that which would have arisen had the particular primary outcome for which the right was secured been obtained, equity intervenes.[31] Thus, rather than A's right not being freely agreed to or being unfair, A's right was acquired for the purpose of securing a particular primary outcome, and its assertion by A should be controlled by reference to that purpose.[32] This rationale has been the basis for protecting a party against the forfeiture of proprietary or possessory rights contained in many different kinds of agreements, leases and licences.[33] However, as a matter of policy, (or, as Lord Wilberforce put it in *Shiloh Spinners*, "self-limitation") courts have refused to invoke the relief jurisdiction in

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27 *The Scaptrade*, above n 25.

28 At 702C.

29 *Cukurova Finance I*, above n 25, at [94].

30 The Privy Council cited *Jobson v Johnson* [1989] 1 WLR 1026 (CA) and *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13, [2003] 1 AC 368, which concerned relief in respect of a commercial agreement for the purchase of shares and in respect of a finance lease respectively. Compare, however, *Sport International Bussum BV v Inter-Footwear Ltd*, above n 25. See discussion in Mark Pawlowski "The Forfeiture of Possessory Rights in Land and Chattels" (1999) 21 Liverpool L R 77 at 81–82. For a useful application of the doctrine, see *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd* [2010] EWHC 185 (Comm) at [48]–[56].

31 John McGhee (ed) *Snell's Equity* (33rd ed, Sweet and Maxwell, London, 2015) at [13–022] [*Snell's Equity*]; C J Rossiter *Penalties and Forfeiture* (The Law Book Company Ltd, Sydney, 1992) at 155.

32 See *Export Credit Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 (HL) at 403 and *Cukurova Finance I*, above n 25, at [90].

33 *Snell's Equity*, above n 31, at [13-023]; *The Scaptrade*, above n 25.

cases considered to involve "merely contractual rights".[34] Where nothing more than contractual rights are at issue, as opposed to interests or rights akin to possession or property, there is nothing collateral to the main obligation at stake to secure the performance of the obligation in question.

[44] We do not see the dicta of Lord Wilberforce in *Shiloh Spinners* as creating inflexible rules for the availability or application of the equitable jurisdiction. As demonstrated by the many varied cases in which relief has been sought, the courts determine the appropriateness of otherwise of invoking the jurisdiction to grant relief with reference to the particular facts of the case at hand. The broad principles governing when such jurisdiction may be invoked can be summarised as follows:

(a) A critical question is whether B can show that it would be unconscionable for A to insist on enforcing a clause designed as security for a primary stipulation.[35] This depends on whether the clause would impose a burden on the forfeiting party, or give the party insisting on forfeiture a benefit that is excessive when compared to that arising through the performance of the secured duty.

(b) Relief can be granted even in the absence of bad faith or improper purpose.[36]

(c) The fact that the party seeking to enforce the contractual provision may have some additional, collateral motivation for enforcing a security right by means of a forfeiture clause does not of itself provide grounds for relief against forfeiture.[37]

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34 At 722B. See for example *The Scaptrade*, above n 25. Further, the doctrine could not be invoked in respect of termination of an exclusive licence granted to the buyer of goods to use the claimant's trade names and trade-marks: *Sport International Bussum BV v Inter-Footwear Ltd*, above n 25. The transfer of a "bare" possessory right for only a portion of the economic life of a chattel, without the option to acquire ownership, was held to be insufficient to attract the jurisdiction to grant relief: *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd*, above n 30, at [57].

35 *Snell's Equity*, above n 31, at [13-025].

36 *Cukurova Finance I*, above n 25, at [82]; *Snell's Equity*, above n 31, at [13-025].

37 *Cukurova Finance I*, above n 25, at [78].

(d) The paradigm case for relief is where the primary object of a bargain is to secure a stated result which can be effectively attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of the result".[38]

(e) Usually, relief will only be available if the party in default is ready and willing to remedy that default or breach by providing the other party with the benefits the forfeiture clause is aimed to secure.[39]

(f) In the cases of equitable relief against forfeiture of a lease, it is no longer the case that it the doctrine is limited to non-payment of rent. Relief can be granted in relation to other duties.

Availability of the equitable jurisdiction

[45] We now address whether the equitable doctrine of relief against forfeiture applies in the present case. The first consideration is the nature to the rights involved. This has traditionally been framed as whether there is any proprietary or possessory right at stake.[40] In situations concerning interests in real property conveyed by way of lease or licence, the granting of such interests gives that lessee or licensee not just a contractual right, but an immediate property right in land. Termination of the lease does more than sever the parties' contractual relations: it also removes the lessee's existing interest in, or right to use, the land.

[46] The rights in issue here concern the two coastal permits and associated land use rights obtained initially by KBMC and later transferred to Greenshell under the

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[38] At [90], citing *Shiloh Spinners* above n 13. See also *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd*, above n 30, at [48].

[39] As the authors of *Snell's Equity* comment, this will not always be the case. Relief may be granted where the defaulting party cannot rectify the breach in situations where, even if forfeiture is not permitted, the party seeking to terminate will be in the same position as it would have been had the defaulting party's duty been performed, as performance of the duty would have made no practical difference to the position of the party seeking to terminate: above n 31, at [13-026]. See also *Else (1982) Ltd v Parkland Holdings* [1994] 1 BCLC 130 (CA) at 144.

[40] Largely attributable to the doctrine's development out of the parallel doctrine of redemption in mortgage agreements. There has been academic discussion as to whether the jurisdiction is strictly confined to cases involving orthodox possessory or proprietary rights: see Sarah Worthington *Equity* (2nd ed, Oxford University Press, Oxford, 2006) at 222. For example, a part interest in a patent was considered to be an interest sufficient "possessory" in nature to warrant the doctrine's application: *BICC plc v Burndy Corp*, above n 25.

deeds. What is at stake is not merely the contractual bargain between KBMC and Greenshell represented by the deeds, but also the interests transferred in the permits. Exercise of contractual rights to re-enter will affect Greenshell's rights to the resource consents involving the coastal permits and the land use consents. However, compliance with the conditions of those underlying permits by Greenshell is central to KBMC's ongoing retention of the permits.[41] It is an elementary obligation of Greenshell to use its resource consents consistently with the conditions imposed in them, the breach of which would render KBMC liable to statutory and regulatory offences (and potential renewal risk consequences, further downstream).

[47] As we have seen earlier when reviewing the coastal permits (and land use rights), what activities are authorised under the RMA consent turns on the wording of the instruments concerned. The relevant occupation or possessory rights are therefore to be found either in the coastal permit itself or in the associated land use resource consent.

[48] The relevant possessory rights of KBMC arise in slightly different ways under the two coastal permits. Under the first coastal permit it is necessary to look to the associated land use resource consent. What is authorised is the activity of marine farming, including spat catching and the farming of green-lipped mussels. The associated land use resource consent authorises the activity of marine farming which may occur through the authorised use of "structures and occupation of space associated with the marine farm". The consent however does not extend to exclusive occupation rights of the seabed or water column.

[49] In the second coastal permit mussel farming activities are authorised "including the use and maintenance of marine farming structures [and] occupation of the coastal marine area". In the relevant advice notes contained in the schedule, it is made clear that the occupation rights granted are not exclusive to the holder. This clause may have been inserted to ensure the rights granted were compatible with the principles in the judgment of this Court in *Hume v Auckland Regional Council*.[42] When considering the wording of s 122(5) of the RMA, this Court observed the

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41 Further, Greenshell has agreed to indemnify KBMC for various defaults and liabilities under the deeds of lease and sub-licence. This would extend to breaches of the consent conditions.

42 *Hume v Auckland Regional Council* [2002] 3 NZLR 363 (HC) at 370.

subsection stated the principle that unless expressly or implicitly provided otherwise in a coastal permit, the public was not excluded from that part of the coastal marine area in or on which a permitted structure was found.[43]

[50] In the same judgment this Court also emphasised there is a material difference between the approach of the RMA to use of land on the one hand and use of the coastal marine area on the other.[44] Land may be used in any manner unless such use contravenes a rule in a relevant plan. When the coastal marine area is involved the position is reversed: nothing may be done in the coastal marine area unless expressly allowed by a rule or in a plan or by a resource consent.

[51] In the High Court, Cooper J observed that s 122(1) of the RMA stipulated a resource consent is neither real nor personal property.[45] The Judge went on to opine that the rights conferred by the deeds were "so closely analogous to property rights that it would be unduly formalistic to hold that in an appropriate case relief might not be granted in the Court's equitable jurisdiction".[46] The Judge noted that, "although the rights could not exist without appropriate consents under the Resource Management Act, the parties have agreed on terms upon which areas subject to the resource consent can be used by Greenshell, and [agreed] "… the value to be accorded to the exercise of that right.[47]

[52] It is not necessary for us to determine whether resource consents can be properly characterised as "analogous to property rights". That is because this Court in *Hume* held that coastal permits grant an authority to occupy part of the coastal marine area for a limited purpose.[48] We are satisfied the coastal permits in question involve possessory interests (to the extent permitted in the permits themselves) and grant the holder limited rights to occupy the particular coastal marine areas for the permitted purposes.

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43 At [25].
44 Citing s 9(1) of the RMA, at [7].
45 High Court judgment, above n 2, at [31].
46 At [34].
47 At [22].
48 At [12], citing s 122(1) of the RMA and further at [22].

[53] In this context, we observe that coastal permits have also been found to grant a right sufficiently proprietary in nature for equity to regard the interest as transferring according to the right of survivorship.[49] Similarly resource consents have been held to confer a possessory right to use a resource, such that the issuing party could not compromise that right, by issuing consents to the same resource to third parties.[50]

[54] Such possessory rights as the coastal permits authorised were then transferred by the deeds of lease and sub-licence to Greenshell. We are satisfied that Greenshell, through the deeds, acquired the rights of occupation for its marine farming purposes available pursuant to the two coastal marine permits. Greenshell had the right to take, sell and retain the proceeds in respect of marine products (arising from the mussels grown on the seeded mussel lines) from their use of permit areas.[51] In that sense it had rights of both possession and use, to the extent authorised by the permits. It would not be open to third parties to act in a manner inconsistent with these possessory rights.

[55] Determination of the lease and the licence would cause Greenshell to lose these possessory and use rights in the coastal permits, as well as severing the contractual ties between the parties. Accordingly, we consider this is a situation in which equitable relief against forfeiture may potentially be available as a matter of jurisdiction. It is consistent with the underlying rationale of the equitable doctrine.

[56] We therefore uphold the submissions of Mr Kalderimis on the scope of the equitable jurisdiction. We consider the decision of Cooper J to the contrary cannot be sustained. The fact that the deeds were "commercial arrangements freely undertaken by parties negotiating at arm's length" is not decisive on the question of

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49 *Armstrong v Public Trust* [2007] NZLR 859 (HC).

50 *Aoraki Water Trust v Meridian Energy Ltd*, above n 12. The High Court (comprising Chisholm and Harrison JJ) refused to issue a declaration allowing the regional council to grant other parties rights in respect of the same water allocated to Meridian Energy.

51 See further Vanessa Hamm "Resource Consent: property in all but name" [2014] RMJ 17; Robert Makgill "Public Property and Private Use Rights: Exclusive occupation of the coastal marine area in New Zealand" (New Zealand Centre for Environmental Law Conference, University of Auckland, April 2009, updated January 2010) at 97–104.

availability of the equitable jurisdiction.[52] Rather, that question is informed by the nature of the rights and interests involved.

[57] The commercial context is, however, highly material to the question of how the discretion is exercised. We turn now to address the relevant factors.

Exercise of discretion

[58] The Court is dealing with a relief against forfeiture claim, it is called on to consider the position after breach when the innocent party is enforcing the forfeiture.[53] In this case the focus is on events from late February 2014.

[59] Greenshell submits because of his decision on the issue of jurisdiction, Cooper J did not fully address discretionary factors. It is true the Judge did not specifically focus on discretion. However, many of the factors he considered under jurisdiction also fell for consideration in the discretionary area. In terms of the factors guiding the exercise of discretion to grant relief, the following considerations are likely, among others, to be relevant:[54]

(a) the conduct of the applicant for relief (in particular, whether there was wilful conduct leading to the breach/default);

(b) the gravity of the breach/default;

(c) the disparity between the property forfeited and damage caused by the breach;

(d) whether it is reasonable for a Court to impose relief on a party with a contractual right to re-enter or cancel the agreement in question.

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52 High Court judgment, above n 2, at [44].
53 *Else (1982) Ltd v Parkland Holdings*, above n 39, per Hoffmann LJ at 144.
54 *Shiloh Spinners Ltd v Harding*, above n 13, at 723–724, cited with approval in *Cukurova Finance I*, above n 25, at [116].

[60] In terms of the discretion, a court should exercise caution before preventing a party from "enforcing a term that is, ex hypothesi, contractually valid".[55] As the jurisdiction ultimately depends on unconscionability, it is treated as exceptional.[56] Further relevant considerations include the need for certainty in a commercial context.[57] We also refer to the observations of the Privy Council in *Cukurova Finance I*, indicating:[58]

> the breadth and flexibility of the equitable jurisdiction to grant relief against forfeiture are, in the Board's opinion, as great outside the scope of [the statutory provision governing cancellation of leases] as it is within it.

[61] Important factors applicable to the exercise of the discretion include the purpose for which forfeiture was intended, the nature of the default and the gravity of any breach, the disparity between the value of the property forfeited and the damage caused by the breach and the question of unconscionability.

[62] We noted earlier the Privy Council in *Cukurova Finance I* affirmed that the paradigm case for relief is "where the primary object of the bargain is to secure a stated result" which can be effectively attained when the matter comes before court.[59] Whether that is the case before us requires interpretation of the provisions in the permits and the deeds.

The contractual provisions

[63] Greenshell urges this Court to find that the default clause in cl 12.1(f) was inserted by KBMC solely as extra surety for the performance of the covenant to pay rent. Clause 12.1(f), it is argued, was intended as additional protection for the

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55 *Snell's Equity*, above n 31, at [13-027].

56 *Else (1982) Ltd v Parkland Holdings*, above n 39, at 145. Lord Hoffmann in that case adopted the view of the High Court of Australia in *Legione v Hateley* (1983) 152 CLR 406, affirming the exceptional nature of the jurisdiction.

57 *Cukurova Finance I*, above n 25, at [125]; *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC) at 519; and *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship Jotunheim* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep 181.

58 *Cukurova Finance I*, above n 25, at [124]. A similar statutory provision governing relief against cancellation of lease for breach of covenant now applies in New Zealand under s 253 of the Property Law Act 2007. The deeds in issue here come under the Property Law Act 1952 which excludes equitable jurisdiction to grant relief against forfeiture in leases.

59 *Cukurova Finance I*, above n 25, at [90]. Although this falls within the discretionary analysis, we consider it to be of considerable importance, relative to other discretionary factors.

benefit of the lessor, to ensure a solvent lessee, capable of paying rent at all times. We do not accept that view. We agree with the conclusion of Cooper J.[60]

[64] When Mr Potae negotiated the content of the deed with Greenshell, following the signing of the MOU, the parties agreed that a number of different defaults by the lessee would give rise to the lessor's right to immediately re-enter the coastal marine areas. These were separate, stand-alone default provisions in cl 12. This clause also carefully spelled out the steps available to effect re-entry and for ceasing and determining the lease and licence. It is to be recalled the deeds were drafted by Greenshell's solicitors and at its expense.

[65] One such default (cl 12.1(a)) was rental "being in arrears and unpaid for 28 days". Another (cl 12.1 (b)) was related generally to any breach of the lease where written notice is given to the lessee and the breach remains unremedied for 28 days. A further default (cl 12.1(d)) concerns assignment of the lessee's property for the benefit of creditors.

[66] Each default provision (totalling some six grounds in all) separately defines an act of default by the lessee. There is no express reference back in any part of cl 12.1 to the covenant to pay rent in cl 5. The act of default in cl 12.1(f) refers to the lessee being wound up or "placed in receivership or under official or statutory management". This provision appears in the deed in a context in which the prohibition on subletting or assignment without the lessor's consent contains a requirement for the lessee to demonstrate to the lessor's satisfaction the proposed transferor is "responsible and of sound financial standing" (cl 6.1(a)).

[67] Default clauses with powers of re-entry where a party is placed in receivership are common in long-term contracts and construction contracts.[61] The involvement of receivers may put at risk the performance of the important obligations incumbent on Greenshell in the contract — including the resource

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60 Set out in the quote at [16] above.

61 Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (Wellington, LexisNexis, 2008) at [2.10].

consents themselves.[62] This arises from the receivers' fundamental obligations to the security or debenture holder.

[68] Further, the financial and other risks to a lessor arising from a lessee being placed in receivership are self-evident, including:

(a) immediate change of management and control of the business in question (to individuals who may lack the necessary experience to successfully perform the highly specific requirements of the contract in question or have inadequate financial resources to achieve these requirements);

(b) uncertainty as to ongoing viability of the company (and lack of clarity as to how bad the financial position of the lessee might be);

(c) uncertainty as to the duration of the receivership and a potentially corresponding short-term perspective;

(d) the fact duties are owed primarily to the creditor appointing the receiver, and not the lessor (as in this case); and

(e) risk that the asset(s) leased to the lessee will be considered surplus to requirements by the receivers.

[69] Accordingly such risks and general financial concerns provide an understandable commercial rationale for the inclusion of such a default provision. The event of receivership itself gives the lessee a negotiated contractual right to re-enter. This was the basis relied on in the notices of re-entry and termination of the lease issued to Greenshell in February 2014 and the accompanying letters from KBMC's solicitors. Reference throughout was made only to the fact of Greenshell's being placed in receivership causing the triggering of cl 12.1(f). We do not accept that clause was inserted to secure the payment of rent and we accept Mr Neild's submissions on this issue.

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[62] As noted above at [46].

[70] Relevant to the exercise of the discretion is the fact each of the risks identified in the previous paragraph applied to KBMC immediately upon the event of receivership. While some risks might be attenuated over time, this cannot detract from the right of a party in negotiation over assets such as the coastal permits to seek to limit or remove the risks.

[71] There is a broader factor at play as well. The provisions in cl 12.1 were indeed part of the commercial arrangements the parties agreed to. They were incorporated into formal deeds of transfer of the coastal permits. This engages the following proposition from *Snell's Equity* where the learned authors comment on the form of relief as follows:[63]

> Although this confers an apparently broad discretion, it is likely to be very difficult to establish a case for relief against forfeiture in a commercial context involving a freely negotiated contract. In such cases courts will place considerable emphasis upon the need for certainty.

[72] This passage was quoted by the Privy Council in *Cukurova Finance I*.[64] The Board went on to endorse with approval the authority cited in support, namely, the decision of Cooke J in *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship Jotunheim*, stating:[65]

> Cooke J, viewing the issue as one of discretion, declined to grant relief – a conclusion which the Board regards as unsurprising in the circumstances. Assuming the existence of a discretion, a court is even less likely to regard relief against termination as appropriate in respect of a chattel lease under which the payments represent the agreed rate for use of the chattel up to termination and no more: see *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd* [2010] EWHC 185 (Comm), [2011] 1 Lloyd's Rep 9, paras 82–83. In contrast, it is in the Board's view material that the present case does not involve a commercial contract in the same sense as that being considered in the *Jotunheim* or *Celestial Aviation*. It is a conventional case of borrowing on security.

[73] It is to be recalled that Lord Simon of Glaisdale in *Shiloh Spinners* said of the considerations influencing the exercise of the discretion:[66]

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63 *Snell's Equity*, above n 31, at [13-015].
64 Above n 25, at [116].
65 *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship Jotunheim*, above n 57, at 118.
66 *Shiloh Spinners*, above n 13, at 727.

> Prominent but not exclusive among such considerations is the desirability that contractual promises should be observed and contractual rights respected, and even more the undesirability of the law appearing to condone flagrant and contemptuous disregard of obligations. Other such considerations are how far it is reasonable to require a party who is prima facie entitled to invoke a forfeiture or penalty clause to accept alternative relief (e.g. money payment or re-instatement of premises) and how far vindication of contractual rights would be grossly excessive and harsh having regard to the damage done to the promisee and the moral culpability of the promisor.

[74] We agree with Cooper J's emphasis on the importance of the commercial arrangements between KBMC and Greenshell.[67] Cooper J added, correctly in our view:

> … The grant of relief would treat that fact as inconsequential, and do nothing to remedy the breach the receivership represents. That is not the bargain that the parties struck. And there is no suggestion here that there could be any compensation payable to KBMC for the removal of its rights on the occurrence of a receivership. I suspect that the answer Greenshell would give to that would be that KBMC would suffer no loss as a result of the receivership provided that relief were accompanied by the full payment of any money due under the lease. But the fact is that KBMC would inevitably be faced with having to deal with the consequences of a receivership when it had contracted that it would be able to terminate the agreement if a receivership occurred.

[75] Greenshell submits the Judge in the above passage attached too much weight to the concept of commercial arrangements entered into after arm's length negotiation. We disagree. As the lessor entering into the deeds, Greenshell knew it faced the commercial risk of re-entry by the lessor, if it were ever in the future placed in receivership. It could have sought to have cl 12(1)(f) removed: there is no suggestion it sought to do so.

[76] As to the purpose and function of cl 12.1(f), we are satisfied that the contractual provisions and the permits themselves point to a clear, stand-alone right to terminate upon Greenshell entering into receivership.[68] To find otherwise would, in our view, imperil other rights of default in cl 12. These could all be said to broadly secure "performance" and as such all could be said for the same reasons, to

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67 High Court judgment, above n 2, at [44].

68 This is particularly so when viewed against the statutory conditions the consent holder must fulfil — it is consistent with those obligations that KBMC might contract for self-standing rights to terminate when situations arise which could legitimately risk Greenshell's performance of those statutory conditions, which in turn could threaten KBMC's consent (or give rise to statutory liability).

be overridden by the doctrine of relief against forfeiture. However, that would run contrary to the principle enshrined in the doctrine itself. We do not accept termination upon receivership was a forfeiture clause inserted to "secure" any primary bargain.

[77] In the face of the inevitable commercial risks to KBMC from receivership, the remedy lay in Greenshell's own hands not to default on its obligations as a borrower under the Rabobank GSA and so trigger a receivership.

Conduct of the parties

[78] We consider the conduct of Greenshell in terms of the nature of the default is a neutral factor in this case. There is no suggestion Greenshell wilfully or intentionally found itself in receivership. We accept the parties acted in good faith. We note also that, following Greenshell being placed in receivership in November 2013, KBMC did not exercise its right to re-enter until late February 2014. Greenshell was given a reasonable time to seek to rectify the situation. We accept Mr Neild's position that KBMC cannot be said to be acting in a peremptory or unconscionable way by insisting on its contractual right to re-enter, exercised after a reasonable period of grace.

[79] Mr Kalderimis submits Greenshell's receivers have made consistent and conscientious efforts to remedy the default and to honour the terms demanded of it in the lease agreement.[69] While that may be true, we consider that where the default relied upon by KBMC is the state of Greenshell being in receivership itself, the subsequent conduct of the receivers is less relevant.

Gravity of the breach

[80] The entering into receivership is not the kind of breach that could be said to exist on a spectrum. There is nothing in substance to distinguish a more serious type of receivership event from a benign one. It is sufficient to note cl 12.1(f) creates a clear right in KBMC to re-enter if Greenshell is placed in receivership. The right is contractually unqualified.

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[69] Relying on *Warnocks (1992) Ltd v Queensgate Centre Ltd* [1993] 2 NZLR 236 (HC) at 245.

[81] Mr Kalderimis contends that KBMC has suffered little or no loss as a result of the receivership. He contends that this submission is supported by the fact the receivers have operated on a "business as usual" basis and continued to pay rents. We accept this submission, as far as it goes. What it also does is undervalue the potency of the very fact of receivership, the commercial risks and concerns of which we have already described.[70] Conduct associated with the nature of the breach is less relevant where the trigger for the right (here receivership) is inherently problematic for KBMC both financially and commercially. As we have noted, the directors of KBMC waited three months into that receivership before exercising its right to re-enter.

Proportionality between the breach and forfeiture

[82] Mr Kalderimis contends there was no proportionality analysis carried out by Cooper J. Therefore Greenshell submits KBMC will receive considerable benefit following the termination of the lease and licence, as they still have up to 30 years to run. This is said to be a wholly disproportionate response to the level of damage KBMC has suffered from the default. It is also disproportionate in relation to the harm Greenshell would suffer should relief be declined.

[83] We do not accept the harm claimed by Greenshell is as great as submitted. The coastal permits in question represent around two per cent of its mussel farming assets. The evidence confirms these relatively small areas of marine coast do not affect Greenshell's ability to utilise their other, related mussel farms and coastal permits controlled by Greenshell. The contrast for KBMC, as Mr Neild submits, is that the permits constitute its major and primary asset.

[84] Moreover, the fact Greenshell has secured a conditional sale to Sanford Ltd, as disclosed in the updating evidence, does not assist.[71] Any contribution of the KBMC coastal permits to the consideration of the sale would be minimal. That is to be compared with the long term importance of the coastal permits and associated land use rights to the Potae family.

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70 At [67] above.

71 We refer for example to the various conditions precedent to assignment, set out above at [36] and also the fact these include the requirement for KBMS's reasonable consent.

[85] This assessment is supported by other aspects of the evidence. Mrs Allison-Potae complained about lack of advice by the receivers of KBMC that the business was to be sold. She also said she found out by chance that offers for the Greenshell business had been sought. She considered the areas subject to the agreements were not necessary for Greenshell's ongoing operation and referred to benefits that would flow to her family, as Māori, if the areas now sought to be sold were retained in the control of KBMC. This evidence was implicitly accepted by Cooper J.[72] The Judge also relied on her apparently unchallenged evidence as follows:

> While my husband George with the best of intentions arranged for the leasing of the mussel farms there is considerable benefit in our company and whanau retaining the farms. This would allow us to exercise our direct control over what we consider to be our manamoana. It will provide employment directly to our family members.

[86] The Judge also referred to the evidence of Mr Peter Bull, an experienced marine farmer who has operated in the Coromandel area for some 31 years. Mr Bull said:

> 13. The statement in paragraph 30 of Mr Gibson's affidavit that to lose the Kennedy Bay licences means that Greenshell sites in Kennedy Bay would no longer compromise economic operation cannot be correct. Greenshell has significant interests in marine farms.
>
> 14. From my knowledge of the industry I do not agree that not being able to use the licences of Kennedy Bay Mussel Company (NZ) Ltd would make the whole operation uneconomic. With appropriate management the farming including the growing of mussel seed can be properly carried out.

[87] The Judge eventually did not need to rely on such evidence because of his approach to jurisdiction. However, we consider it relevant to the exercise of the discretion. It shows that any claimed loss to Greenshell from being unable to use the coastal areas covered by the coastal permits would not be material.

[88] A final factor in the present context is that Greenshell has obtained the benefit of all the rights it paid for, up until the point after receivership when KBMC sought in late February 2014 to re-enter and enforce the forfeiture. Thereafter Greenshell would lose the interests under the two coastal permits. Greenshell's "loss" is very

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[72] High Court judgment, above n 2, at [19].

much for the future. However, it will not be required to pay the rental from the point of forfeiture. There is evidence it will have access to other marine coastal areas should they be required for the business of any purchaser to replace the areas to which it no longer has access. We agree with Mr Neild that the risk of losing such access through an event of default under the deeds was a commercial risk Greenshell took when it agreed to cl 12.1(f).

Ability to remedy the breach

[89] Greenshell contends that the sale of its business to Sanford Ltd constitutes is willingness and ability to rectify the breach. This, it says, should be viewed as making good the breach and rendering KBMC's insistence on termination unconscionable. Like Cooper J, we find this difficult to accept. KBMC has already had to suffer, and through the course of the litigation continues to suffer, the very detriments a receivership of Greenshell would involve. The ability of Greenshell to make good eventually is not an answer to KBMC's wish to exercise its contractual right to re-enter for the default by Greenshell.

[90] As a matter of practicality, assignment under the deeds is subject to the agreement of KBMC. Plainly, Greenshell cannot make good the breach unilaterally (as opposed to, for example, a party paying any unpaid rent). KBMC has suffered the breach (the receivership) against which it gained protection in the deeds. That has not been rectified. We do not consider this to be a compelling factor in favour of granting relief.

[91] We emphasise, also, that this is but one factor to be considered in the exercise of discretion. Absent the underpinning commercial arrangements supporting the granting of relief against forfeiture (particularly, the presence of a collateral obligation securing the existence of a primary obligation), the ease with which default can be remedied seems, to us, to be less compelling.

Certainty of commercial contracts and unconscionability

[92] We refer finally to the important principle guiding the exercise of discretion to grant relief in these cases. We have already mentioned the need for caution before

preventing a party from enforcing a contractually valid term.[73] The significance of certainty in commercial arrangements has been consistently emphasised as a relevant consideration.[74] We accept Mr Neild's submissions on this issue and we consider it would be to cut across KBMC's clear contractual rights for this Court to grant relief against forfeiture to Greenshell in the present circumstances.

[93] There is nothing in the evidence in this case to support a claim by Greenshell that permitting KBMC to enforce its contractual rights would be unfair, let alone unconscionable. Exercise of relief against forfeiture would not be fair to KBMC for the reasons we have given. We return to the underlying rationale of the doctrine: is KBMC attempting unconscionably to insist on its rights, in circumstances where that right merely secures a separate, primary obligation? Termination for default if based on a receivership does not secure some other, important right. We do not consider KBMC's seeking to enforce the right is, in all the circumstances, unconscionable. Any balance in equity favours KBMC as the owner of the coastal permits.

Result

[94] The appeal is dismissed.

[95] The appellant must pay the respondent costs on a standard appeal on a band B basis and reasonable disbursements. We certify for second counsel.

MILLER J

[96] I agree with the majority that the equitable jurisdiction to grant relief against forfeiture is available in this case. The jurisdiction has long extended to leases that confer proprietary or possessory interests and in which a forfeiture provision serves as security for some particular obligation such as the timely payment of rent.[75] The interests at stake here sufficiently qualify as possessory: KBMC enjoyed the right to occupy and use a designated part of the coastal marine area under the coastal permits

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73 At [71] above.

74 *Cukurova Finance I,* above n 25, at [125]; *Union Eagle Ltd v Golden Achievement Ltd*, above n 57, at 519.

75 *Shiloh Spinners Ltd v Harding*, above n 13, at 722; *Cukurova Finance I*, above n 25, at [94]; *The Scaptrade*, above n 25, at 702.

and associated land use consents, and Greenshell acquired those possessory rights for a term under the lease and licence. KBMC's rights under the permits and consents are qualified or conditional, but those properties do not oust the jurisdiction, although they might inform its deployment.

[97] It is necessary to say something about each of the criteria for decision: what was the objective of the parties' bargain, were the forfeiture provisions added to secure that result, can the objective of the bargain now be attained, and should relief be granted in the exercise of discretion?

What was the objective of the parties' bargain?

[98] I agree with the majority that these agreements are correctly characterised as leases or licences under which rent is paid in exchange for the right to use the permits for a term, for the permitted commercial purpose of marine farming. On termination Greenshell is to remove its plant or sell it to KBMC, at the latter's option, and KBMC is to resume possession.

[99] Still in company with the majority, I accordingly reject Mr Kaldermis's characterisation of the arrangement as one in which KBMC retains no reversionary interest. It is true that the permits expire with the initial lease and licence terms in 2036, but KBMC remains the permit holder and the agreements plainly contemplate that it will seek new permits;[76] they include rights of extension, exercisable at Greenshell's option, under which their terms expire finally in 2071. It follows that the parties contemplated that KBMC will retain some reversionary rights when the permits expire in 2036, and further that renewed permits will revert to KBMC in 2071, or earlier should Greenshell not exercise rights of extension.

[100] Several other features of the parties' bargain merit emphasis. First, KBMC's rights under the permits and consents are qualified, and it is at risk of penalty or more onerous conditions of use should the terms be breached. The consenting

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[76] RMA, s 124. Under s 124B of the Act an application by an existing consent-holder takes priority over any other application.

authority reserved the right to review the conditions of the consents five-yearly,[77] and KBMC may confront enforcement orders or fines if the conditions of the permits and consents are not complied with.[78] Non-compliance presumably may also put renewal of the consents at risk in due course.

[101] Second, Greenshell has assumed an obligation to develop the marine coastal area in accordance with the requirements of the Ministry of Fisheries and the Waikato Regional Council, and it has further undertaken to comply with KBMC's obligations under the permits and consents and at law. The former obligation is express. The latter is not, but it seems to me necessarily implicit, for Greenshell has indemnified KBMC for any claims or losses in respect of Greenshell's neglect or misuse of the marine coastal area or its breach of any statute or regulation. Thus it would be a breach of the lease or licence if Greenshell were to expose KBMC to enforcement action under the legislation.

[102] Third, it is also implicit in the agreements that Greenshell must be responsible and reasonably skilled in marine farming. That is inherent in the obligations it assumed and it is made explicit in the assignment clause, under which Greenshell may not assign its interest to anyone who lacks those qualities. That said, Greenshell's obligations under the agreements are not personal to any individual and no provision precludes a change of control.

Were the forfeiture provisions added by way of security?

[103] I acknowledge that cl 12.1(f) can be characterised as a right to resume possession and sever all connection with Greenshell on receivership or liquidation.[79] The agreements contain few provisions holding Greenshell accountable to KBMC, and those one does find are not onerous. It is arguable that KBMC instead chose to rely on a bare right to terminate in certain specified circumstances.

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[77] See cl 3 of the coastal permits (and the separate land use consent for the first permit) and s 128 of the RMA. The permits require compliance with the very detailed requirements of the *Mussel Industry Environmental Code of Practice*, New Zealand, Mussel Industry Council Ltd, 1999.

[78] RMA, ss 314 and 339. A principal is criminally liable for the acts of its agent or contractor, subject to a defence for want of knowledge or having taken reasonable precautions: see s 340.

[79] To adopt terminology used by Oliver LJ in *Sport International Bussum BV v Inter-Footwear Ltd*, above n 25, at 798C.

[104] In company with the majority, I also reject Mr Kaldermis's submission that all the termination rights in cl 12.1 have the objective of securing the payment of rent, directly or indirectly. Clause 12.1(a) does so expressly, and cl 12.1(f) would be redundant if that were its only objective.

[105] However, I differ from the majority in that I accept that cl 12.1(f) secures performance of Greenshell's obligations under the agreements generally. It is only where Greenshell fails to perform, or something happens to put its continued performance or KBMC's interest at risk, that the cl 12 termination right may be invoked. In particular, cl 12 secures Greenshell's obligations to develop and operate the marine farm in accordance with the permits, to pay rent, and to surrender possession on termination. Receivership could put the performance of any of these obligations at risk; receivers owe their primary duty to the creditor who appointed them (in this case, Rabobank),[80] they are likely to take a short-term perspective, and they may lack the skills necessary to operate marine farms.

[106] I also accept Mr Kalderimis's fallback submission that payment of rent is the most significant of Greenshell's obligations; put another way, the long-term right to the income stream that it represents is the most significant of KBMC's entitlements. KBMC retains a reversionary right, but it is remote and attenuated. I acknowledge Ms Allison-Potae's evidence that the area is her whanau's manamoana and she wishes to resume possession to provide jobs for family members. That is nowhere reflected in the agreements, however, and she concedes frankly that her husband's objective in leasing the farms was to secure an income stream which, it seems, was wanted so the family might continue to live on their turangawaewae.

Can the objective of the bargain now be attained?

[107] This is an important consideration.[81] It was likely when the matter came before the High Court that the long-term objectives of the agreements could still be

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[80] Receiverships Act 1993, s 18; Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (2nd ed, Wellington, LexisNexis, 2015) at [14.35].

[81] For the significance of this criterion in the doctrine's operation generally, see *Cukurova Finance I*, above n 25, at [122], citing *Hyman v Rose* [1911] 2 KB 234 (CA) at 241–242; *Cukurova Finance II,* above n 25, at [13] and the powerful dissenting opinion of Lord Sumption at [179]–[184].

met, by assignment to a solvent and competent third party, and that still seems to be the case.

[108] I emphasise that there has been only one breach of the agreements, being Greenshell's receivership. The underlying insolvency and the change of control did create risks for KBMC, but as a matter of fact those risks have not been realised. The receivers have continued with business as usual, paying rent and, on the evidence before us, not putting KBMC at risk of enforcement action or a review of permit conditions.[82]

[109] Counsel agreed that we are not concerned here to decide whether the proposed assignee, Sanford, meets the criteria in the agreements. In my opinion, we must assume that it may do so. I might have taken a different view of the appeal if an apparently satisfactory sale — that is, one that would allow the parties' objectives to be met — was not imminent when the matter came to court. Against the possibility that Sanford does not qualify as an assignee, I am not to be taken as expressing the opinion that KBMC would fail in a renewed attempt to forfeit the permits.

[110] It follows that I respectfully differ from Cooper J. He took the view that Greenshell is in receivership and that default cannot be remedied, and he noted the absence of any suggestion that compensation might be payable for the breach.[83] In my opinion that is to take a narrow view of the objectives of the agreement, treating Greenshell's non-receivership or solvency as an end in itself. As noted, I consider that cl 12.1(f) operates as security for other obligations among which the payment of rent predominates.

[111] I acknowledge that KBMC has had to deal with the immediate consequences of receivership, which the majority have identified at [67] above. I regard these difficulties as incidental. Some of them might have been experienced in the event of an assignment or a change of control of Greenshell.

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82 Mr Gibson deposes that the marine farms are all in normal working order with compliance being monitored by Environment Waikato.

83 High Court judgment, above n 1, at [44] and [46].

Should relief be granted in the exercise of discretion?

[112] Discretionary considerations point both ways. Against relief, the most significant considerations are:

(a) Clause 12.1(f) is not a covenant for payment of money and it cannot be remedied directly. This was traditionally an important, even decisive, consideration.[84]

(b) The rights in question are possessory and affect an area of the seabed, but they lack the unique quality normally attached to land.

(c) The context is commercial; the agreements indicate that both parties are principally interested in the revenue that the marine farm generates. Receivership immediately put that long-term objective at risk.

(d) This is correctly analysed as a lease in which rent represents payment for use, as Mr Fletcher submitted, and the lessor retains reversionary rights. On forfeiture, Greenshell would lose possession but it would also be relieved of the obligation to pay rent and operating costs. In the particular circumstances of this case, I am not prepared to assume that forfeiture must result in an unconscionable disparity in value, as Mr Kaldermis invited us to do. The exchange would result in a substantial disparity in value only if the rent were not commensurate with the returns from marine farming, and that is a question of fact.

(e) The receivers' claim that this very small part of Greenshell's overall operation is of critical significance is controversial. The area is used to grow mussel seed, but there is plausible evidence that that activity could be done elsewhere. In his reply affidavit Mr Gibson shifted position somewhat, pointing rather to the commercial sense of

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[84] Mark Pawlowski, above n 30, at 81–82.

offering all of Greenshell's assets as a going concern. By contrast, the permits are KBMC's major asset.

[113] For relief, the most significant considerations are:

(a) The commercial context notwithstanding, the equitable jurisdiction is available; these are long-term possessory interests and the right to terminate is security for the lessee's obligations.

(b) The breach was not wilful, nor is it especially grave. There is no evidence that receivership has caused KBMC any loss in itself. For the reasons given at [111], I discount the inconvenience and uncertainty inherent in the change of control.

(c) As a matter of fact, the receivers have complied with all of Greenshell's other obligations, including the payment of rent.

(d) Relief can be coupled, as the receivers proposed, with conditions ensuring that all obligations to date are met. This could include payment into a trust account of $60,000 pending resolution of the discrete dispute over seeded lines.[85]

(e) As noted above, the long-term commercial objectives of the bargain can still be met, and without any delay, albeit that they would be met by assignment to a competent and solvent lessee. It is obvious that KBMC now regrets the bargain, but the objectives that must concern us are those that motivated the parties in 2006, when they negotiated the agreements.

[114] In my opinion, and by a slender margin, discretionary considerations favour relief on the facts. KBMC has lost nothing by receivership and there is reason to

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[85] The dispute relates to sale of KBMC's plant to Greenshell, but the agreements do not create any obligations affecting that sale; they assume rather that Greenshell already owned the mussel plant (see, for example, the definition of mussel plant in the agreements, and cl 7.2 of the same).

believe the breach can be remedied imminently. That being so, I find forfeiture of Greenshell's long-term possessory rights a disproportionate consequence.

Conclusion

[115] I would allow the appeal.

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