

“OF STRAWS AND CAMEL'S BACKS” — FUNDAMENTAL BREACH OF LEASE

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1. Introduction

Occasionally, the determination of a case gives rise to a significant rethinking of long accepted conventional wisdom and results in a hasty review of many standard precedents. Such a case was *Shevill v. The Builders Licensing Board*.¹

The facts were relatively uncomplicated. A lease provided that if rent was unpaid for 14 days or if the lessee was in breach of any covenants (or if certain other events occurred (such as bankruptcy or liquidation²), then the lessor might re-enter the land ‘without prejudice’ to any action or other remedy the lessee has or might or otherwise could have had for arrears of rent or breach of covenants or damages as a result of any such event.

During the entire period the respondent lessor was owner of the land, the lessee was consistently late with payments of rent which were so accepted and sometimes only in part. During a five month period preceding recovery action by the lessor, the lessees’ account was chronically in debit and three rental cheques were dishonoured. The inference from the lessees’ conduct was that while they were financially unable to meet the rental payments as they fell due they were not generally unwilling to comply with their obligations to do so. It was merely a matter of consistent late payment of rent.

The respondent lessor gained possession of the demised premises upon an order being made at a time when the rent was two months in arrears. Upon possession being resumed, the lessor claimed the two months rent, damages for breach of covenants of the lease and interest. The arrears totalled some \$5,442.00 and these were paid. However, the trial judge entered judgment for \$41,261.00 being damages assessed upon the amount which the respondent lessor would receive by way of rent during the remainder of the term, less credit for the rent which it was able to receive during that period.

The question for determination in the appeal was whether the lessee was liable for the damages for loss of bargain at all. The High Court held that the conduct of the lessee had not evinced an intention not to be bound by the lease, and the failure to pay rent, in itself, was not such a breach of a term going to the root of the contract to make further performance impossible.³

Without more, as Gibbs C.J. said, the covenant to pay rent in advance at specified times would not be a fundamental or essential term having the effect that any failure, however slight, to make payment at specified times would entitle the lessor to terminate the lease and sue for damages for loss of the bargain.⁴

His Honour did say, however, that any contract may stipulate that a term will be treated as having a fundamental character, although, in itself it may seem of little importance⁵ so that a right to forfeit a lease might arise ‘in the case of any breach of covenant, however trifling, if the parties had agreed that a breach of covenant should create a forfeiture’.⁶

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1. (1981-1982) 149 C.L.R. 620.

2. Cf s.301, Bankruptcy Act, 1966.

3. *Supra* n. 1 at 627 per Gibbs C.J., (Murphy J. and Brennan J. concurring at 631 and 638 respectively); at 634-635 per Wilson J.

4. *Ibid.* at 627.

5. *L. Schuler AG v. Wickham Machine Tool Sales Ltd* [1974] A.C. 235 at 250-251.

6. *Campbell v. Payne and Fitzgerald* (1953) 53 S.R. (N.S.W.) 537 at 539.

In other words, a lease was to be construed as every other form of contract and meet the test of essentiality of conditions after considering the agreement as a whole.⁷ Why, therefore, had there been such confusion in the past regarding the proper construction of leases?

2. Abandonment and fundamental breach

Traditionally, abandonment of possession by a lessee must be accompanied by some act of the lessor accepting that abandonment as a relinquishment of possession, before the lease will be deemed to have been surrendered by operation of law.⁸ Of course, if there is an agreement between lessor and lessee to put an end to the term followed by a resumption of possession, that also operates as a surrender by operation of law.⁹ However, the two notions are completely different, and certainly have different legal consequences.

What rights does the lessor have to claim rent or damages against the lessee in these circumstances for the balance of the term? Can the lessor decide to leave the demised premises vacant in so far as the lessee might still be liable for rent?

In *Hughes v. N.L.S. Pty Ltd*¹⁰ a lessee (defendant) vacated the demised premises and repudiated a ten year lease with nearly nine years left to run. Within one month, the lessor (plaintiff) relet the premises for a rental of about one third the original rent which was conceded to be the best rental then obtainable. The plaintiff sued for arrears of rent and an amount representing the difference between the rental which would have been paid under the first lease and that which would be paid under the new lease.

Jackson J., in holding that the damages sued for were not for breach of the covenant to pay rent but for repudiation of the whole lease said, 'The breach of the covenant to pay rent entitles the lessor to sue for the rent as a liquidated sum, not for damages'¹¹ (i.e. arrears of rent only). Here, the cause of action was based upon the lessee's repudiation and abandonment of the whole contract and it was from this action by the lessee that the damages naturally flowed. Following the High Court in *Buchanan v. Byrnes*,¹² and put shortly, his Honour held that, until surrender, the lessor is limited to suing for rent as such, but after surrender, he may claim liquidated damages for loss of rent at large, flowing from the lessee's breach of contract. These damages were assessed by making an appropriate allowance by way of discount for the value of present payment for a future periodic loss, a different calculation from that achieved merely by deducting the rent payable under the new lease for that period from that payable under the surrendered lease.¹³ On appeal to the High Court,¹⁴ this finding was not disturbed, except by holding that the small security deposit taken by the lessor at the commencement of the original lease was to be credited against the damages awarded, as it did not represent a genuine pre-estimate of damage in the event of total repudiation of the lease.¹⁵ However, the principle was not entirely accepted.

In *Maridakis v. Kouvaris*,¹⁶ upon a re-letting, which evidenced a surrender of the breached lease by operation of law, the lessor was held not to be entitled to damages for loss of the first lease on the basis that the act of abandonment in the circumstances did not amount to a repudiation of the lease. This line of reasoning had been adopted in the United Kingdom.

7. *D.T.R. Nominees Pty Ltd v. Mona Homes Pty Ltd* (1978) 138 CLR 423 at 431; *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 SR (NSW) 632 at 642.

8. *Andrews v. Hogan* (1952) 86 C.L.R. 223 at 252-253; *Spinks v. Mundy* [1957] St.R.Qd. 234 (handing over and acceptance of keys).

9. *Buchanan v. Byrnes* (1906) 3 C.L.R. 704 at 712 per Griffith C.J.

10. [1966] W.A.R. 100.

11. *Ibid.* at 102.

12. (1906) 3 C.L.R. 704.

13. *Supra* n.10 at 102.

14. *N.L.S. Pty Ltd v. Hughes* (1966) 120 C.L.R. 583.

15. *Ibid.* at 589 per Barwick C.J.

16. (1975) 5 A.L.R. 197.

In *Total Oil Great Britain Ltd v. Thompson Garages (Biggin Hill) Ltd*,¹⁷ the Court of Appeal had occasion to consider the effect of a repudiation of a lease by the lessor by letter and the lessee's apparent acceptance of that repudiation. Lord Denning M.R. questioned the effect of the repudiation. His Lordship said,

Does it put an end to the lease? I think not. A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance. There is no authority on point.¹⁸

His conclusion was that the lease did not come to an end and remained in existence so that a 'tie clause' in the lease remained valid and enforceable notwithstanding acceptance of the repudiation. The net result of this would appear to be that a lease might continue to affect land as a demise even after the contract embodied in the lease had been repudiated and that repudiation, accepted by the innocent party, would not of itself bring an end to the lease. Until the lessee was ejected or abandoned the premises *and* the lessor re-entered, the estate of the lessee would not determine. An abandonment would generally operate as a surrender by operation of law only upon re-entry. Until then, no action for loss of the lease could be maintained, only an action for arrears which constituted a debt at law under the appropriate covenant.

Two separate issues arise, one the determination of the contract comprised in the lease, and the second, the determination of the estate evidenced by the lease. One repudiates a contract but forfeits an estate.

3. Source of confusion

This highly artificial approach to the contractual characterization of leases had its roots in cases upon the frustration of leases. For some time in the United Kingdom, authority existed to the effect that because a lease granted a demise, or an interest in land, it was generally, but not without some reservation, accepted that it could not be frustrated in the same manner as an ordinary contract.¹⁹ However, in 1981, the whole area of the law was extensively reviewed again by the House of Lords in *National Carriers Ltd v. Panalpina (Northern) Ltd*²⁰ where the point arose directly for decision. The view of the House could well be summed up in the majority judgment of Lord Wilberforce:

In my opinion, though such cases may be rare, the doctrine of frustration is capable of application to leases of land. It must be so applied with proper regard to the fact that a lease, that is, the grant of a legal estate in land is involved. The court must consider whether any term is to be implied which would determine the lease in the event which has happened and/or ascertain the foundation of the agreement and decide whether this still exists in the light of the terms of the lease, the surrounding circumstances and any special rules which apply to leases or to the particular lease in question.²¹

4. Australian authority — agreements for lease

Although there had been a considerable amount of dicta concerning the question of whether or not a lease could be repudiated by breach and whether the usual contractual consequences followed,²² most of the definitive statements related to agreements for lease, interests falling short of an actual demise.²³

17. [1972] 1 Q.B. 318.

18. *Ibid.* at 324 (Edmund Davies and Stephenson L.JJ. agreeing at 324-325).

19. *Matthley v. Curling* [1922] 2 A.C. 180; *Cricklewood Property and Investment Trust Ltd v. Leighton's Investment Trust Ltd* [1945] A.C. 221.

20. [1981] A.C. 675.

21. *Ibid.* at 697, (cf. Lord Russell at 708-709); cf. *Firth v. Halloran* (1926) 38 C.L.R. 261 at 268 per Knox C.J. and Gavan Duffy J.

22. Eg. *Lamson Store Service Co. Ltd v. Russell Wilkins & Sons Ltd* (1906) 4 C.L.R. 672 at 684 per Griffith C.J. *Burnham v. Carroll Musgrove Theatres Ltd* (1928) 41 C.L.R. 540 at 550 per Isaacs J.

23. Eg. *Dimond v. Moore* (1931) 45 C.L.R. 159 at 187 per Evatt J.

The basis of this limited proposition was well stated by Glass J.A. in *Leitz Leeholme Stud Pty Ltd v. Robinson*.²⁴ In that case, an intended lease of registered land for a period of six years remained informal through want of registration. After about three years into the purported term, the lessee vacated. The lessor treated the abandonment as a repudiation of the agreement for lease and reserved its right to damages for loss of the bargain, notwithstanding that under S.127 *Conveyancing Act 1919* (NSW) (S.129 *Property Law Act 1974* (Qld)), the agreement took effect as a month to month tenancy at will.²⁵

Glass J.A. in holding that the agreement for lease in equity took effect as a contract at law said:

If the innocent party deems damages to be adequate, there is no reason why the contract may not be enforced at law . . . Given the availability of the legal remedy, the contractual position is entirely clear. The defendant by executing the memorandum of lease concluded an agreement to take a lease for six years . . . (A)fter being in occupation for under three years, he gave a notice which amounted to a wrongful repudiation of his obligations under that agreement. The plaintiff accepted that repudiation and thereby elected no longer to be bound by the agreement. Upon such rescission, it became entitled to sue, for damages — for loss of bargain.²⁶

Thus, whilst the question seemed settled with respect to agreements for lease, it still remained generally unsettled with respect to leases themselves.

5. The Tabali factor — a natural progression?

A surprisingly short time elapsed after *Shevill v. The Builders Licensing Board*²⁷ before the High Court was again given an opportunity to take the principle a step further. In the case of *Progressive Mailing House Pty Ltd v. Tabali Pty Ltd*²⁸ (hereafter called 'Tabali'), a lessee under a five year (unregistered)²⁹ lease fell behind in rental payments for four months and committed several breaches of the covenant to repair, ignoring notices to make good the default. The lease contained the usual terms which gave the lessor a right of re-entry after 14 days of non-payment of rent or breach of covenant not remedied for 30 days 'but without prejudice to any claim the lessor might have against the lessee in respect of any breach of the covenants and provisions in the lease to be observed or performed.'

The lessor commenced an action against the lessee in which it sought an order for possession and damages. The Court at first instance granted an order for possession and awarded damages, including damages for loss of the benefit of the covenant to pay rent.

In holding that the ordinary principles of contract law, including those applying to termination of contract for repudiation or fundamental breach, applied to leases, the High Court affirmed the decision below and held that the lessor was entitled to recover damages for its loss of the benefit of the covenant to pay rent.

It is clear from the judgments in *Tabali* that, in line with *Shevill v. The Builders Licensing Board*,³⁰ something more than mere non-payment of rent is usually required to amount to a fundamental breach of the lease.³¹

To determine what act or acts would amount to a fundamental breach of the lease which could be accepted by the lessor as a repudiation of the lessee's obligations thereunder, their

24. [1977] 2 N.S.W.L.R. 544.

25. *Carberry v. Gardner* (1936) 36 S.R. (N.S.W.) 559 at 569.

26. *Ibid.* at 547 and at 551 per Mahoney J.A. The situation may well have been different if the agreement for lease had been for a period not exceeding three years and taken effect as a demise.

27. *Supra* n.1.

28. (1985) 59 A.L.J.R. 373.

29. The parties agreed to treat the lease as being registered for the purposes of the action.

30. *Supra* n.1.

31. *Supra* n.28 at 379 per Mason J, at 383 per Brennan J.

Honours resorted to the ordinary principles of contract law. Mason J. indicated that termination of the lessee's estate pursuant to a contractual power (ie. by re-entry) and the right to terminate a contract for breach could go hand in hand. He said,

The well recognised distinction between common law rescission and termination pursuant to a contractual power supplies no reason in principle why such damages are recoverable by the innocent party in one case and not in the other, provided of course, that the exercise of the power is consequent upon a breach or default by the defendant which would attract an award of such damages. Termination in the exercise of a contractual power is not an affirmation of the contract which debars the innocent party from suing for damages for breach on the ground of repudiation or fundamental breach. This is because the termination, so far from insisting on performance by the party at fault brings to an end his obligation to perform the promise in specie.³²

His Honour equated forfeiture, which may be incurred by breach of a fundamental term with the contractual right of the lessor to bring about forfeiture which may lead to the determination of the estate by re-entry under the lease terms or by ejectment action. The same acts might, but may not necessarily, attract the consequences of a right of re-entry (contractual) and a right to damages. However, the two rights could co-exist depending upon the construction of the lease and the seriousness of the breaches relied upon by the lessor to found his action.

Brennan J. approached the question from the different perspective of anticipatory breach resulting in a forfeiture. He concluded, after an examination of authority,

It accords with principle to permit a lessor to recover damages for anticipatory breach by a lessee when the benefit which has passed to the lessee — the interest in the land demised — is revoked by enforcing a forfeiture or by some other means of determining the lease. It accords too with authority.³³

Further, His Honour continued,

Where the lease is liable to forfeiture, (as it was in the present case) enforcing the forfeiture both determines the lessee's interest in the land and constitutes the lessor's election to accept the repudiation . . . Once the lessee's interest is determined, there is no reason why damages should not be recoverable provided the lessor has not made an election to keep the lease on foot.³⁴

6. What straws may break the camel's back?

What acts are thus necessary to constitute a complete repudiation of the lessee's obligations and so invoke this right to damages for loss of bargain, bearing in mind, in the words of Mason J, that,

a repudiation of a contract is a serious matter and is not to be lightly inferred and that neither a breach of a covenant to pay rent nor a covenant to repair, without more, constitutes a breach of a fundamental term nor amounts to a repudiation of the lease.³⁵

The impact of this statement is fortified by the recognised equitable and statutory right to claim relief against forfeiture of the lessee's estate where enforcement action is taken in the case of trivial breach. (S.124, *Property Law Act*, 1974-1985) It was conceded by Mason J. that the catalogue of breaches relied upon would have to virtually amount to abandonment of the lease (in the sense of total renunciation) before a case for repudiation could be made out against the lessee.³⁶

32. *Ibid.* at 379 E & F.

33. *Ibid.* at 385 G.

34. *Ibid.* at 387 E & G.

35. *Ibid.* at 379 G.

36. *Ibid.* at 380 C & D.

In *Tabali*, the lessee had persistently caused damage to the demised premises largely due to carelessness and had either failed to rectify properly the damage at all or had done it tardily or improperly. It had also sublet without consent (10% of the area), was in breach of the clause requiring it to comply with all laws governing the use of the premises by obstructing a vehicular access area and causing parking and unloading problems in breach of local authority ordinances. The lessee further breached the covenant to pay rent and at the time of the action was four months in arrears. The grounds of its refusal to pay rent were found to be fatuous.

Individually, these breaches were of a nature as would not have alone amounted to the evincing of an intention by the lessee to repudiate the lease, but considered together were held sufficient to achieve that result.³⁷

Coincidentally, with the handing down of the *Tabali* judgment, the New South Wales Court of Appeal reserved its decision in *Wood Factory Pty Ltd v. Kiritos Pty Ltd*.³⁸ In a majority decision,³⁹ that Court held that a lessee had repudiated its obligations under a lease by committing certain breaches. The breaches complained of included non-payment of rent, the giving up of possession in favour of adjoining premises, the giving of the key to another party without the consent of the lessor and the short occupation by that other party of the demised premises. The vacation of the premises involved the removal of most of the lessee's equipment and the cessation of its business upon the demised premises. The final acceptance of the repudiation was evidenced by the granting of the new lease to another lessee at a lower rental.

The lessee was thus liable for damages for loss of the lease. However, the decision raised other questions concerning the abandonment of the demised premises being open to different interpretations having different legal consequences.

7. The problem of surrender by operation of law and damages

Where a lessor expressly agrees to accept a surrender of a lease, the lease determines and no question of damages arises. However, difficulties for the lessor were thought to arise in the case of surrender by operation of law. The difficulties are well summarised from the judgment of Priestley J.A.⁴⁰

Where a lessee abandons demised premises without agreement with the lessor, in circumstances manifesting his intention to put the lease to an end, the lessor not immediately retaking possession, there are two possible scenarios. One interpretation is that the lessor retakes possession on his own account which was thought in certain circumstances to have deprived the lessor from seeking damages for loss of the lease.⁴¹ This view has now been modified since the *Tabali* decision in that it is recognised there is now no inconsistency with a surrender by operation of law determining the lease, concurrently preserving the right to damages for loss of bargain. However, the breaches relied upon would naturally have to precede the act of surrender. If there is no lease, there can be nothing to breach.

Secondly, in rare cases, the lessor may be seen to be taking possession not solely on his own account, but either on account of the lessee or on account of both parties. In those cases, the lease would stand, unsurrendered, and the tenant would remain liable for rent as previously.⁴² There would, however, from the facts, have to be a very strong inference that the lessor intended to keep the original lease obligations alive and keep the original lessee

37. *Ibid.* at 382B per Mason J.; at 389B per Deane J.

38. [1985] 2 N.S.W.L.R. 105.

39. Priestley and McHugh JJ.A., Samuels J.A. (diss).

40. *Ibid.* at 133.

41. See *Buchanan v. Byrnes* (1906) 3 C.L.R. 704.

42. *Oastler v. Henderson* (1877) 2 Q.B.D. 575.

bound notwithstanding the letting to a new lessee. The idea behind this practice was no doubt to keep the first lessee liable as a type of 'guarantor' to make up any shortfall in rent occasioned by the terms of the subsequent letting. Now, for all practical purposes, since *Tabali*⁴³ and the concurrent right to damages upon a surrender by operation of law, the same result would be achieved in practical terms either way.

8. Overcoming doubts — making certain terms fundamental

The non-payment of rent, in itself, will not usually amount to a breach of a fundamental term, however, this may depend upon the circumstances surrounding the failure to pay. For example, in *Ripka Pty Ltd v. Maggiore Bakeries Pty Ltd*,⁴⁴ a lessor had spent a considerable sum (\$3,000,000.00) fitting out the demised premises, a reception centre, for the lessee and had obtained finance to carry out the construction. The lessee entered into possession but fell into arrears in rent and outgoings. The plaintiff, who had no other source of financing his repayments had to borrow more money to meet its obligations to its financiers. At the time of acceptance of the repudiation of the lease, the arrears of rent amounted to approximately \$160,000.00 and of outlays to \$35,000.00 being about four months total arrears. The default was accompanied by persistent statements on behalf of the lessee that it was unable to pay the rent due or the other charges. Several rental cheques were dishonoured upon presentation.

Gray J. held that the 'massive defaults' in rent and other payments coupled with an obvious inability to pay evidenced an inability to perform the contract, and having regard to the lessor's obligations to its financiers, that default went to 'the root of the contract making further commercial performance impossible'.⁴⁵ The declaration of an intention not to perform was considered paramount.

The relevance of looking at the circumstances surrounding the non-payment of rent is of some consequence, but may not be conclusive. However, generally one must look at the whole sequence of events. Whether repudiation is by unwillingness or inability to perform, the question is what objectively has been indicated to the other party in the circumstances by the conduct of the parties alleged to have repudiated.⁴⁶ For example, the failure of the lessees to execute a formal lease having executed an agreement for lease was not a sufficient act on the part of the lessee to amount to repudiation. Objectively, whilst the behaviour of the lessee was obdurate, it was not possible to draw the conclusion of total renunciation from that conduct.⁴⁷

The obvious practical point arising from these decisions is that it should not be left to general contract law to determine whether or not a definable act of default on the part of the lessee amounts to fundamental breach permitting the damages remedy. This is particularly so in the case of common clauses which are usually breached, i.e. the covenants to pay rent, to keep in repair, to use for a specified purpose and not to assign without consent. However, whilst specified covenants can be deemed to be essential, as the lease will now be interpreted as would an ordinary contract, there is an obvious problem in deeming all terms to be essential. This would put the lessor back in the Courts where the usual tests of essentiality would be applied,⁴⁸ thus defeating the purpose of the exercise. The proper procedure is to state that certain enumerated significant clauses of the variety expressed above are essential and carry the consequence of fundamental breach in the event of default.

43. (1985) 59 A.L.J.R. 373.

44. [1984] V.R. 629.

45. *Ibid.* at 634. (Order for payment of arrears to date of acceptance of repudiation, mesne profits from then until delivery of possession.)

46. *Tourello Nominees Pty Ltd & Wilbow Pty Ltd v. Begg Dow Friday Pty Ltd* [1984] A.N.Z. Conv. R. 704, 707. (Agreement for lease) per McGarvie J.

47. *Ibid.* at 708.

48. E.g. *D.T.R. Nominees Pty Ltd v. Mona Homes Pty Ltd* (1978) 138 C.L.R. 423.

Despite the High Court's caution upon the question of classification of particular clauses in contracts, expressed in *Meehan v. Jones*⁴⁹ and *Perri v. Coolangatta Investments Pty. Ltd.*,⁵⁰ there seems no reason why contracting parties cannot still indicate what should occur upon an event of default, that is, repudiation or re-entry (or both), and define that event of default with some particularity. However, mere nomenclature as a guide to determination of the relative importance of clauses is now less esteemed, and the view offered here must be read against these developments.

9. Setting mode of calculation of damages

So that damages for loss of the bargain are not left at large, many lessors now include a clause setting out a formula by which damages can be calculated upon a repudiation. The object of this exercise is to achieve a formula which is a genuine pre-estimate of damage being such as would not be struck down as constituting a penalty. As Gibbs C.J. said in *O'Dea v. Allstates Leasing System (W.A.) Pty Ltd.*⁵¹

The question whether a contractual provision amounts to a penalty depends upon all the surrounding circumstances existing at the time of the making of the contract as well as on the terms of the contract itself, and it is therefore not always possible to apply a decision given upon one contract to another case even though that case concerns a contract in identical terms.

In striking down a condition in a hire-purchase agreement for a hirer in default to pay the entire balance of rental due upon a default and suffer repossession, the High Court looked at the nature of the agreement, the seriousness of the default *and* the other remedies afforded by the agreement (i.e. repossession of the chattel).

In the words of Deane J:

That question (whether a provision constitutes a penalty) must be determined as a question of substance and cannot be foreclosed by the statements of the parties in their agreement, no matter how genuine they may be, as to their intention in stipulating the sum. The parties to an agreement may have subjectively intended to make a pre-estimate of damages in the event of breach. If, however, that pre-estimate is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach, or judged at the time of making the contract, is unreasonable in the burden which it imposes in the circumstances which have arisen, it is a penalty regardless of the intention of the parties in making it.⁵²

The right to repossession of a chattel and its resale added to the claim for the entire rental enjoys disturbing similarities to the right of a lessor to re-enter upon default of the lessor and relet the property. Thus, any attempt at pre-estimating reasonable damages by precalculation will still be open to scrutiny by a Court.

There seems little doubt that a fair and realistic assessment would be held good but such a formula should have to be actuarially based so that the certificate of (or evidence of) an actuary in any particular case could be called in aid of the evidence required to give support to the claim. As in the case of a contract for the sale of land where the loss and expenses on resale are treated contractually as unliquidated damages, so could the pre-estimate of damages by a lessor be so regarded and agreed to be unliquidated to hasten and cheapen the curial action for recovery. Yet, the Court might still question the precepts behind such calculation if it resulted in a penalty assessment.

49. (1982) 56 A.L.J.R. 813 at 817 per Gibbs C.J., at 821 per Mason J.

50. (1982) 56 A.L.J.R. 445 at 447 per Gibbs C.J. The major characterisations considered irrelevant in both these cases were those of conditions precedent and conditions subsequent.

51. (1983) 57 A.L.J.R. 172 at 177.

52. *Ibid.* at 189 F & G.

Such factors as the projected movements in the consumer price index, the prospective increase in outgoings and moves in rental activity would all form ingredients of any formula, as would costs of eviction (if any). The mitigation of damage as a result of reletting would have to come into account thus making it necessary to incorporate provision for reletting in any formula. A true assessment based on such a formula would have to await reletting.⁵³

Although the use of such a formula is not mandatory, it may save a great deal of time and expense in having to prove a very difficult calculation of damages which may be more liable to challenge.

10. Summation

In a lease, just as with any form of contract, upon a breach of any term, the innocent party (the lessor in these cases) is put to his election as to how the breach is to be treated. If there is some guidance in the instrument itself as to the nature of the term breached and as to its essentiality or otherwise, then this will give significant assistance to the lessor in considering his range of options. If the lessor decides to determine the lease by accepting the lessee's conduct as a repudiation of the lease, then the question of further action will arise. The question of suing for rental arrears (if any) presents no problem. The further action usually will constitute re-entry (peaceably in the case of abandonment) resulting in forfeiture of the estate followed by an action for damages for loss of the lease.

Despite *Tabali*, it is probably best not to re-enter (which in any case would effect a surrender) until the repudiation caused by the breach alleged has been accepted and that acceptance can be satisfactorily established. Certainly, care should be exercised in ensuring that the action for loss of bargain is 'set up' prior to re-entry, and certainly prior to any re-letting. Like any other contract, there is a duty to mitigate loss *after* the acceptance of the repudiation at which time damages begin to flow. Reletting is the most obvious form of mitigation. In any case such damages could not be convincingly calculated until after a reletting, although prospective rental valuations could be adduced as acceptable evidence of the probable rental on a reletting.

An option may be given to the lessee to comply with the terms of the lease after notice of breach, and until the acceptance of repudiation, the lease, and consequent liability for rental, will continue. However, if the premises are abandoned by the lessee, that situation becomes more difficult to maintain in the practical sense and such abandonment would give rise inevitably to the election by the lessor to accept that conduct as breach of a fundamental term. At no stage should it be seen from the circumstances that the lessor has acquiesced in the conduct of the lessee giving rise to the inference of acceptance of a surrender as opposed to surrender by operation of law after repudiation. There should be only cautious acceptance, if any at all, of any money proffered by the former lessee which might prejudice any future dealings by waiver, especially prior to the commencement of the damages action. Whilst, it should be remembered that conduct giving rise to forfeiture under an express provision of the lease may not necessarily constitute a repudiation, it is highly likely that forfeiture under the lease will follow breach of an essential term.

Acceptance of a surrender by a lessee who has repudiated is acceptance of the repudiation which determines the interest in the land. Where the lessee repudiates and remains in possession the lessors acceptance must take some other form.⁵⁴

The estate of the lessee must be determined and the right to damages, already accrued, preserved. Enforcing the forfeiture by ejectment action may be the only method of determining the estate and accepting the repudiation. Although care must be exercised in preserving the right to damages whilst dealing with the question of forfeiture, it is as well to

53. For one view of assessment of damages see *Peet & Co. Ltd. v. Rocci* [1985] W.A.R. 164 at 178 per Rowland J.

54. *Progressive Mailing House Pty Ltd v. Tabali* *supra* n.28 at 386-387 per Brennan J.

note that a forfeiture or re-entry cannot be enforced by action until statutory requirements are met, i.e. a notice served under S.124(1) *Property Law Act*.⁵⁵ Relief may also be claimed by the lessee, in appropriate cases, against forfeiture.⁵⁶

However, an attempt at avoidance of these conventional obstacles to recovery of possession and the gaining of re-entry by proceedings solely on the basis of breach of a fundamental term may be inadvisable as the lessor would have to be very sure of his ground. Breaches of essential terms are not lightly inferred, even if such terms are made expressly essential. Notice under that Act may not be necessary only if the repudiation of the lease is constituted by abandonment followed by peaceable re-entry which would determine the estate as a surrender by operation of law, there being no need for enforcement proceedings.

As indicated, it is highly probable that the right to determine a lease for fundamental breach and to enforce a forfeiture will go hand in hand, but it may not necessarily be so. Caution should be observed in the treatment of the default from the outset, and particularly to guard against either waiver of the breach and forfeiture or acceptance of a surrender by operation of law prior to reserving rights to sue for damages for loss of bargain.

11. Questions for the lessor

Finally, when considering the consequences of a breach or breaches of a term in a lease the following questions should be asked by a lessor.

1. Is the term essential either expressly or by implication?
2. If not, does the general conduct of the lessee amount to a total renunciation of the lease?
3. Does the breach give rise to a right of re-entry and forfeiture under the lease as well as a renunciation of the lease agreement?
4. Has the lessor done anything to waive the breach (and thus the forfeiture) by accepting rent in knowledge of the breach prior to acceptance of the repudiation?
5. Has the repudiation been accepted by the lessor and is their sufficient evidence of this?
6. In cases of abandonment, has the lessor clearly treated the abandonment as a renunciation of the lease and reserved his right to damages prior to re-entry?
7. If there is a damages formula clause in the lease, could it be construed as a penalty?
8. Has the lessee grounds for seeking relief against the enforcement of the forfeiture (in cases where the lessee remains in possession) and requires ejectment action?
9. If reletting has not occurred, what is the lessor doing to mitigate loss? Can damages be properly assessed based upon rental valuations?

These several questions should be borne in mind when considering the legal position of the lessor in advising upon the question of his right to damages for loss of the lease.

55. *Wood Factory Pty Ltd v. Kiritos Pty Ltd* [1985] 2 N.S.W.L.R. 105 at 144 per McHugh J.A.

56. S.124 *Property Law Act* 1974.