

Terminating leases for repudiatory breach

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Introduction to repudiatory breach

A repudiatory breach of a contract (or a renunciation)¹ can be a powerful weapon in the hands of the innocent party to the contract – it gives them a choice:

- (a) Affirm the contract – keep it ongoing, sue for specific performance of whatever contractual obligation the other party has breached, and/or claim damages suffered as a result of the breach; or
- (b) Accept the repudiation – bring the contract to an end, discharging both parties from further performance, and claim damages for loss occasioned by the termination.

The ability to terminate the contract can be extremely important for the innocent party. It allows them to move on and achieve a clean break from the contract whilst claiming all their losses suffered as a result. The property market is fluid and quite often parties who were enthusiastic about a particular transaction or development at the time the contract was made may become lukewarm as time goes on – perhaps the market has moved and they can now sell their property at a much better price than they previously agreed, or perhaps the innocent party simply does not want to continue in a contractual relationship with a party who has breached the contract, and in whom the innocent party has lost trust.

Such considerations most certainly apply to leases, which often tie the parties into long term relationships including onerous obligations on both sides. But can a lease be terminated for repudiatory breach, and if so what are the consequences? Certainly when asked by a landlord client how to bring a lease to an end for a tenant's breach, few lawyers' first (or second) thought would be to consider terminating for repudiatory breach rather than turning to the forfeiture provisions in the lease; and the relative paucity of English authority on the point would suggest that not many tenants are being advised to run the argument against their landlord either.

¹ These are different – a renunciation of the contract in an action or statement of a party showing an intention that they will no longer perform the contract. A repudiatory breach is a breach of a term of the contract which is either a condition (as opposed to a warranty) or an innominate term the breach of which is sufficiently serious so as to deprive the tenant of the whole or substantially the whole of the benefit which he entered into the lease to obtain – see *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26

Lease as a legal hybrid

It has in the past been seriously doubted whether a lease could be terminated for repudiatory breach and Court of Appeal authority supported the view that it was not possible: see Lord Denning MR in *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318 at 324 *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*'.

The problem, in essence, is that a lease is not simply a contractual agreement between parties – it also creates an interest in land – and so if the doctrine of repudiatory breach applies to leases it must presumably operate so as to terminate both a contract and a legal estate in land. A lease has been described as 'a hybrid, part contract, part property'², the legal estate taking on an 'existence as a species of property independently of the contract'³. As a result, there are laws applying to leases which simply do not apply to ordinary contracts, many having their origins in medieval landlord and tenant law, rather than (largely) 19th century contract law. So, for example:

- (a) all leases must have a term certain (not the case in relation to other contracts, including licences where the court can imply terms as to the length)⁴;
- (b) the rules relating to assignment are different – an attempt to assign the benefit of an ordinary contract in breach of a contractual prohibition restricting assignment would generally be ineffective as against the non-assigning party, whereas an assignment in breach of a term of a lease would be effective to transfer the legal estate;
- (c) estates in land such as leases affect the rights of third parties such as sub-tenants and mortgagees in a way that ordinary contracts do not;
- (d) there are complex statutory codes that surround leases and property rights, restricting what the parties can agree or how they can transfer or enforce their rights, in a way that would be completely alien to a pure commercial lawyer – for example CRAR, the Landlord and Tenant Act 1954, Housing Act 1988, Landlord and Tenant (Covenants) Act 1995;
- (e) leases, unlike other contracts, already have a comprehensive (if complex) method by which they can be terminated for breach, which is heavily regulated by statute – forfeiture. The right to forfeit does not generally apply to tenants, but perhaps this is because it has never been intended that tenants should be able to terminate a lease, however serious a landlord's breach.

And yet, a lease is also undoubtedly a contract. We take for granted that a lease behaves just like a contract in many ways: a lease contains obligations that can be breached, an innocent party can

² *Linden Gardens Trust Ltd v Lenester Sludge Disposals Ltd* [1994] 1 AC 85 at 108 per Lord Browne-Wilkinson

³ *City of London Corp v Fell* [1993] QB 589 per Nourse LJ at 604

⁴ See *Berrisford (FC) v Mexfield Housing Co-Op Ltd* [2011] UKSC 51

sue for specific performance or those obligations or claim damages; a lease can be varied and rectified; terms can be implied into leases (indeed one of the leading recent cases on implied terms concerns a lease⁵); leases are generally construed according to the usual contractual principles⁶.

In recent years there has been a something of a trend within the courts to emphasise the contractual nature of a lease⁷ – the most compelling for our purposes being the case of *National Carriers v Panalpina (Northern) Ltd* [1981] AC 675 in which the House of Lords accepted that the doctrine of frustration can apply to a lease in rare cases (although it did not apply on the facts of that case where the only access road to the demised warehouse was to be closed, rendering the warehouse useless, for a period of around 20 months of a 10 year lease – and has not applied, so it seems, in any reported case in the period of over 35 years since that case).

It was against this background that the courts came to reconsider the issue as to whether a lease could be terminated for repudiatory breach – because if a lease can be terminated by the contractual doctrine of frustration (brought to an end as a result of an event outside anyone's control) why should it not be brought to an end as a result of a fundamental breach by one of the parties?

The cases

Surprisingly for an issue of this magnitude there is no wholly authoritative statement of the law from a high level court, and decidedly mixed messages from the Court of Appeal. The thrust of the authorities that there are, however, do suggest that a lease can be terminated for repudiatory breach, but the issue is not beyond doubt (particularly in relation to the ability of landlords to terminate leases for tenant's breach), and will not be resolved until the Court of Appeal and/or Supreme Court decides a case where the question is fully argued and considered as a central issue.

The only reported recent case in which the issue was considered in any real detail is *Hussein v Mehlman* [1992] 2 EGLR 287, a County Court decision, albeit one from Stephen Sedley QC who later became a judge in the Court of Appeal. That case concerned a tenancy of residential premises which were in serious disrepair – so much so that one of the bedrooms had become uninhabitable because the ceiling had collapsed. The landlord had been asked by the tenant to put the property into repair, but had simply ignored the problem. The tenant eventually moved out 15 months into their 3 year

⁵ *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72

⁶ Although the rules will always be applied within a property context – see e.g. *Cherry Tree Investments v Landmain* [2013] Ch 305 regarding the construction of documents in the context of registered land

⁷ See eg *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, e.g. per Lord Diplock at 935: 'the medieval concept of rent as a service rendered by a tenant to the landlord has been displaced by the modern concept of a payment which a tenant is bound by his contract to pay to the landlord for the use of his land'. See also *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 which is often put forward as another example of the 'contractualisation' of leases

lease, returned the keys to the landlord and claimed that the lease had come to an end. The court was clear that the disrepair constituted a breach of the landlord's implied repair obligations in s.11 Landlord and Tenant Act 1985, and that the breaches were sufficiently serious to constitute repudiatory breaches. The issue was whether a lease could be terminated for repudiatory breach. The judge considered the matter at some length and concluded that it could be – the statement of Lord Denning in *Total Oil* was based on an outdated premise that a lease could not be frustrated, and there was in any event a significant body of 19th century authority which held that a lease could be terminated for breach.

In *WG Clark Ltd v Dupre Ltd* [1992] Ch 297⁸ the High Court seemed to consider a tenant's denial of its landlord's title (and the consequent ability of the landlord to forfeit the lease) as effectively the same as (or at least analogous to) a repudiation of a contract.

Next in the case of *Chartered Trust Plc v Davies* (1998) 76 P&CR 396 the Court of Appeal appeared simply to accept that a lease could be terminated for repudiatory breach (without any argument).

In *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7 the High Court followed the above authorities, and again held that a lease could be terminated for repudiatory breach (although held in that case that the breach of contract was not sufficiently serious to amount to a repudiation)⁹.

Bucking the trend to an extent is *Reichman v Beveridge* [2006] EWCA Civ 1659 in which Lloyd LJ stated that '*Since [Hussein v Mehlman], other courts have held, or assumed, that a lease can be brought to an end by acceptance of a repudiatory breach, but there is no decision to that effect in this court' and later in his judgment 'we were shown the Blundell lectures delivered in 2000 by Lord Millett and Sir David Neuberger, respectively against and for the proposition that the doctrine of repudiation is and should be part of the English law of landlord and tenant. It is clear from those powerful texts that there is much to be said each way on the point of principle. I note that the Law Commission's very recent report, Termination of Tenancies for Tenant Default (2006) does not refer to question of repudiation, being concerned only with the procedure by which tenancies may be brought to an end', and later still he concluded 'I do not decide whether or not repudiation plays any, and if so what, part in the English law of landlord and tenant. That is not directly in issue before us, and it would be wrong to decide it unnecessarily'.*

The most recent reported statement of the position is in *Grange v Quinn* [2013] 1 P & CR 18 in which Jackson LJ stated without considering any argument, and without it being the central issue in the case that '*although there were earlier indications to the contrary, it is now clear that a lease may be*

⁸ And see *Abidogun v Frolan Health Care Ltd* [2001] EWCA Civ 1821

⁹ See also *Petra Investments v Jeffrey Rogers* (2001) 81 P&CR 21

brought to an end by repudiation and acceptance; see Woodfall. In the present case the defendant's conduct in unlawfully and permanently evicting the claimant was a repudiation which necessarily brought the lease to an end without any need for acceptance'.

Most practitioners' text now also accept that a lease can or probably can be terminated for repudiatory breach¹⁰.

It is also worth noting that England & Wales is out of step with other major Commonwealth countries in not having authoritatively decided in a high level court that a lease can be terminated for repudiatory breach¹¹.

Guidance: what breach will count as repudiatory?

What overall principles can be drawn from the cases to date as to if and when a lease may be terminated for repudiatory breach (if, indeed, the thrust of authorities is correct that it can occur), and what damages might be awarded?

Tenants

As might be expected since they cannot rely on forfeiture provisions in the lease, there are many more reported cases concerning a tenant terminating or seeking to terminate a lease for landlord's breach than vice versa. The courts have found as follows:

LANDLORD'S REPAIRING OBLIGATIONS

Hussein v Mehlman [1992] 2 EGLR 287 – in the context of an assured shorthold tenancy of 3 years, breaches of the landlord's implied repair covenant in s.11 Landlord and Tenant Act 1985 meant the tenant was entitled to terminate the lease for repudiatory breach. The breaches were serious – Sedley LJ found the house was uninhabitable – the ceiling had caved in one of the bedrooms, other parts of the house were not watertight or were collapsing and there were a number of other issues. The landlord simply refused to carry out any repairs, and the tenant eventually walked out and returned the keys 15 months into the tenancy. Sedley LJ stated: *'I find...that the two plaintiffs who were living in the house did suffer real hardship, and that the breaches deprived all three [plaintiffs] of the essential part of what they had contracted for – a house in which all rooms were usable, in which ceilings were not either collapsed or collapsing and into which rain, wind and cold did not penetrate through the associated defects in the structure...I hold...that the defects in the ceilings were such as to render the house as a whole unfit to be lived in and that the defendant's conduct, in the*

¹⁰ See e.g. Dowding & Reynolds *Dilapidations* at 34–48; Woodfall on Landlord & Tenant para 17.314; Hill & Redman's Law of Landlord and Tenant at [5106]

¹¹ See Australia: see *Progressive Mailing House Pty v Tabali Pty* (1985) 157 CLR 17 and Canada: *Highway Properties v Kelly Douglas & Co* (1968) 1 DLR (3d) 626

classic language, evinced an intention not to be bound by the implied covenant to repair. The breach, in my judgment, vitiated the central purpose of the contract of letting".¹²

As to damages, the judge awarded:

- (a) general damages for breach of the repair covenant – essentially damages reflecting the unpleasantness of living in a house in serious disrepair;
- (b) damages relating to additional costs incurred during the course of the lease as a result of the breaches – e.g. supplying extra heaters, and having to find alternative accommodation at points during course of lease.

The court refused to award:

- (a) the cost of the plaintiffs' alternative accommodation after the date the lease terminated. Although the judge implied that this would have been recoverable had it exceeded the cost they would have paid under the lease.
- (b) Removal and storage costs after the end of the lease – on the basis that these were no greater than they would have been had the lease run its course and expired by effluxion of time.
- (c) Rent thrown away – the plaintiffs argued they should be refunded the rent they had paid under the lease whilst it was ongoing. Sedley LJ held this would amount to double recovery since the plaintiffs were already receiving damages to compensate them for the landlord's breaches, and was not permitted under the law.

DEROGATION FROM GRANT

Chartered Trust Plc v Davies (1998) 76 P&CR 396 – this case concerned a landlord's breach of the implied covenant not to derogate from grant in failing to restrain a nuisance by another tenant of a shopping mall. The Court of Appeal held the trial judge had been entitled to hold this was a repudiatory breach of the lease by the landlord. The landlord had let an adjoining shop to a pawnbroker, which for various reasons (type of clientele, queues outside the defendant's shop, darkened windows of pawnbroker's shop) deterred trade from the defendant's shop.

Cf Nynehead Developments Ltd v RH Fibreboard Containers Ltd [1999] 1 EGLR 7 – adjoining tenants of the same landlord were parking vehicles on a forecourt which the defendant was entitled to use under the terms of its tenancy (a 23 year lease of commercial premises). Eventually the defendant vacated the premises and withheld rent. The High Court found that the landlord had breached the implied covenant not to derogate from grant (in effectively consenting to or adopting the nuisance of the adjoining tenants in persistently parking on the forecourt), but the breach was not sufficiently

¹² See also *Wilson v Finch Hatton* (1877) 2 x D 33 – landlord let a furnished property in breach of an implied condition that it was fit for human habitation.

serious to be repudiatory – the breach did not deprive the defendant of substantially the whole benefit that it was intended it should obtain from the contract. The judge was clearly very influenced by the fact that, he held on the evidence, the tenant could still have marketed the lease and managed to dispose of it, notwithstanding the parking issue.

Petra Investments Ltd v Jeffrey Rogers (2001) 81 P&CR 21 – the tenant had a 25 year lease of a retail unit in a shopping precinct in central London. The tenant claimed that the landlord opening a new Virgin megastore at the precinct fundamentally changed the character of the centre, had led to a downturn in the tenant's profits and amounted to a derogation from grant sufficiently serious to entitle the tenant to terminate the lease. The court was not persuaded that the loss of profits was related to the opening of Virgin, nor that there was any derogation from grant in selecting Virgin as a tenant for the precinct.

WRONGFUL EVICTION?

Grange v Quinn [2013] 1 P & CR 18 in this case the tenant had been wrongly evicted from her business premises by her landlord 6 months into her 6 year term, and she brought a claim for damages. The case concerned whether the tenant could recover a premium she had paid the landlord on executing the lease for the goodwill of a business that the landlord had carried on at the premises. The Court of Appeal held that she could recover the majority of the premium, and in doing so seemed to assume that the lease had come to an end as a result of a repudiation by the landlord.

Landlords

Of all the reported recent cases very few involve a landlord seeking to assert a repudiatory breach against the tenant, and so there is almost no guidance available as to if and when a landlord could make out such a claim. It is only in cases involving a denial of title by the tenant that the issue has been considered recently¹³. The reason for this is perhaps obvious – landlords looking to bring a lease to an end are presumably relying on forfeiture provisions.

Is this the best approach, or should we, as property lawyers, be more alive to the possibility that a landlord could argue it had the contractual right to terminate a lease for repudiatory breach, rather than relying on the traditional remedy of forfeiture? Some relevant considerations in this respect are set out below:

- (a) Lease may contain no or limited forfeiture provisions – this perhaps the most likely scenario where a landlord might want to rely on the doctrine of repudiatory breach. It would, however, be unusual (and largely unheard of for professionally drafted leases), particularly since even

¹³ See *W G Clarke (Properties) Ltd v Dupre Properties Ltd and Abidogun v Frolan Health Care Ltd* [2001] EWCA Civ 1821

in the event a lease contains no express forfeiture provisions, there is still an implied right to forfeit in the event that:

- (i) a tenant denies its landlord's title – this applies in limited circumstances; or
- (ii) the tenant breaches a condition of the lease.

There may, however, be circumstances in which it could be argued that a right to terminate the lease for repudiatory breach had arisen, but not a right to forfeit (perhaps if the term of the lease breached could only be characterised as an innominate term, or where the particular requirements to forfeit for denial of title do not apply). One issue to which there is not yet a clear answer is whether, particularly where the parties have included a forfeiture clause which is limited in scope, there is an argument that the parties have intended to exclude the landlord's ability to terminate the lease for tenant breach in any other circumstances or by any other method – i.e. by repudiation – and if this was the parties' intention whether it would be effective to exclude the common law right.

(b) Would relying on the doctrine of repudiation allow the landlord to get round the complex and comprehensive statutory protection imposed on forfeiture? For example, would a landlord avoid the need to serve a s.146 notice, and would a tenant be prevented from applying for relief? The answer to these questions are not clear. There is certainly an argument that forfeiture and repudiatory breach are different methods of terminating a lease, and that the statutory restrictions only apply to forfeiture. Indeed the terms of s.146 are somewhat anachronistic in the context of the contractual right to terminate for repudiatory breach. Would, for example, serving a notice requiring a tenant to remedy the breach be treated as an affirmation of the contract?

However the few comments that the courts have made on this issue suggest that they will strive against allowing a landlord to use repudiatory breach to get round the statutory protection imposed on forfeiture.

In *Hussein v Mehlman* Sedley LJ appeared to assume that the statutory codes applying to forfeiture would also apply to termination for repudiatory breach – *'I recognise that the proposition that a contract of tenancy can be repudiated like any other contract has a number of important implications, which it is not appropriate to explore on the facts of this case. For example, if the obligation to pay rent is as fundamental as the obligation to keep the house habitable, it will follow that a default in rent payments is a repudiatory act on the tenant's part...[This] will, however, have effect subject not only to all the statutory provisions which now hedge the right to recover possession but also, I would think, to the provisions contained in the contract of letting itself in relation to forfeiture (where there is a term certain):*

in other words the right to terminate by acceptance of repudiatory conduct may itself be modified by further contractual provisions which lay down conditions, supported by statute, for the exercise of the right'

This position was supported by the Court of Appeal in *Abidogun*¹⁴ in which it was held that the requirement to serve a s.146 notice applies to forfeiture for a tenant's denial of title: *'I can well accept the first point in [the appellant's] argument that relations between a landlord and tenant under his lease, are governed by the ordinary law of contract as well as by the more specific doctrines of landlord and tenant. It does not, however, follow from the interaction of those two parts of the law that the protection for a tenant, as has been provided by Parliament in section 146 can be avoided by recourse to a purely contractual doctrine such as that of repudiatory breach.'*

On the issue of relief from forfeiture, Hill & Redman has another suggestion as to the solution to this problem – that by including a forfeiture in a lease a landlord is effectively electing not to rely on any common law right to terminate for repudiatory breach: para [5107] – *'it is respectfully submitted (without the benefit of authority) that...where a lease reserves to the landlord the right to re-enter for breach of covenant, the landlord elects not to use his common-law rights to repudiate for any breach of covenant, which would otherwise prevent the tenant from seeking relief.'*

(c) What is the position in relation to business tenancies under Landlord and Tenant Act 1954? It is not clear that terminating a tenancy for repudiatory breach would bring it to an end for the purposes of the 1954 Act, since s.24(2) of the Act only preserves the termination of a tenancy by a landlord without having recourse to the Act by surrender or forfeiture.

(d) Might the landlord be able to rely on the doctrine of repudiation to put itself in a better position in relation to damages? In the Australian *Tabali* case it was held that the landlord was entitled to terminate the lease for the tenant's repudiatory breach in failing to pay rent (and other breaches). The landlord was also entitled to recover as damages the rent it would have become entitled to under the lease if it had not been terminated for the tenant's breach. However, the Court of Appeal case of *Reichman v Beveridge* [2007] 1 P&CR 358 seems to close the door on this approach in English law¹⁵.

¹⁴ And see the obiter comments in *Clarke v Dupre*

¹⁵ Although of the Northern Irish case of *Rainey Brothers v Kearn* [1990] NI 18 which relied on English authorities which do not appear to have been cited in the case of *Reichman v Beveridge*. See Mark Pawlowski 2010 LQR 361.

(e) Another issue is how the courts would treat third party interests where a lease is terminated for repudiatory breach – would they be treated akin to forfeiture, surrender or in some other sui generis way? Again, the question is not clear although if the approach in *Abidogun* is followed of analysing a repudiation as analogous to forfeiture, it may be that the courts would strive to treat repudiation as no different from forfeiture in terms of third party interests.

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