

# Damages for breach of leases

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### Lessor's breach

#### [1] Damages for breach of a lease

Damages for breach of a lease<sup>1</sup> are recoverable under the general law of contract because although the lease effects a demise of the leased premises, it nevertheless remains a contract subject to the ordinary principles of contract; and one remedy for breach of contract is a claim for damages: *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.<sup>2</sup>

The issue that arises is what damages are appropriate so as to put the innocent party in the position it would have been had the lease been properly performed? <sup>3</sup> Cases on chattel leases are cited in this context, for example, *Financings Ltd v Baldock* [1963] 2 QB 104.<sup>4</sup>

- 1 See generally *Woodfall's Law of Landlord and Tenant* (28th ed, 1978).
- 2 This is consistent with the principle that a lease may be frustrated just like any other contract, even though it deals with an interest in land (albeit that courts will reluctantly come to this conclusion).
- 3 Per Mason, Wilson and Dawson JJ in *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-12 extended in this context by the WA Sup Ct in *Toscana (WA) Pty Ltd v Pidd* (unreported, Supreme Court of Western Australia, Wallwork, Murray and Steytler JJ, 19 February 1999).
- 4 Cited in cases such as *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275.

**[2] Damages for breach of covenant for quiet enjoyment**

Where the lessor breaches the covenant for quiet enjoyment<sup>1</sup> then the ordinary principles as set out above apply.<sup>2</sup>

Trivial interference is not actionable; historically, substantial interference with the tenant's peaceful enjoyment of the premises is required, but it may be that in more recent times, the bar has been lowered: *Barsoum v Glebe Administration Board* [2002] NSWADT 19 para [36] [the case also has a useful analysis of the principles relating to landlord's implied not to derogate from the grant].

Litigants in New South Wales ought not lose sight of Secs 34 and 36 of the *Retail Leases Act* which allow compensation to tenants where there has been disturbance to trade by the landlord.

In *Toscana (WA) Pty Ltd v Pidd* (unreported, Supreme Court of Western Australia, Wallwork, Murray and Steytler JJ, 19 February 1999) the landlord, Toscana, leased premises to Pidd, which operated an interstate road transport business. Toscana allowed to remain on the demised premises, unlawfully, a number of containers that occupied about 40% of the leased area of the yard.

The lessee relocated to other premises. Damages recovered consisted primarily of a reasonable sum for the use of the yard by the storage. In addition, the lessee sought to recover by way of damages the rent and outgoings it had paid in the period of the storage by reference to the principle in *Orr v Smith* [1919] NZLR 818 which, phrased very broadly, relieves the tenant from paying rent in circumstances where the landlord's interference with quiet enjoyment is grave. Their Honours refused to extend the *Orr principle*, noting that the lessee had:

[T]he benefit of occupation of a substantial portion of the premises and was able to continue in occupation, apparently conducting his business as he intended when he took the lease.

The lessee also recovered removal and associated expenses consequent upon the lessor's repudiation. Solicitor's costs on the new lease would have been allowed but for want of evidence.

The plaintiff lessee restaurateurs in *Battick Pty Ltd v Hawkesbury Nominees Pty Ltd* (unreported Supreme Court of Australian Capital Territory, Higgins J, 8 June 1999) successfully alleged that their landlord had breached the covenant of quiet enjoyment by having a defective exhaust and air-conditioning system. Smoke billowed from the kitchen. Patrons were turned away. Once, the chef fainted.

The lessee was awarded damages because, as a result, the restaurant was rendered substantially less profitable. It was held that although the restaurant would have been attractive and moderately successful, "it was not going to be a big money-earner. It is realistic to suppose that in terms of returning a living to the staff and management, it would have been successful".

Damages were awarded in the sum of \$130,000, comprising mostly a return of capital (purchase

price plus costs of refurbishment). Loss of earnings were compensated for, said the court, by interest.

*Battick* is important as it surveys the cases on the right to damages of a lessee who takes by assignment.

In *Martin's Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, Yeldham J allowed a lessee damages where the landlord's failure to remedy roof drains constituted a breach of the covenant for quiet enjoyment, and caused damages to the premises.

See also: *Telex (Australasia) Pty Ltd v Thomas Cook & Son (Australasia) Pty Ltd* [1970] 2 NSWLR 257 and *Reid House Pty Ltd v Beneke* (1986) 5 ACLC 451 (landlord breaches covenant by not complying with a statutory notice); *Haig v Chesney* [1925] SASR 82 (landlord installs faulty steam cooker); *Baier v Heinemann* [1962] Qd R 192 (breach of covenant by electricity being cut off); *Lend Lease Developments Pty Ltd v Zemlicka* [1985] 3 NSWLR 207 (dust, noise and thieves); *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1988] 1 Qd R1 (landlord permitting another tenant to interfere with plaintiff tenant's quiet possession); and *Nichols Global Enterprises Pty Ltd v Biviano* [2000] NSWSC 956 per Young J (claim for diminution in the value of the lease, by reason of breach of covenant of quiet enjoyment consequent upon unlawful threat by landlord to re-enter, referred to a Master for assessment. The court expressed doubt as to whether tenant's costs of hiring the security guard in light of such threat, fully recoverable; but held<sup>3</sup> that the tenant was entitled to some damages for protecting itself against possible re-entry); *Spathis v Hanave Investment Co Pty Ltd* [2002] NSWSC 304, a judgment of Campbell J<sup>4</sup> on, inter alia, breach of the covenant for quiet enjoyment in which HH held that aggravated damages for upset, were not able to be awarded for breach of a purely commercial (as opposed to a residential) lease; but where the landlord acted in contumelious disregard of an injunction, this warranted \$5000.00 exemplary damages. The interference by the landlord was by way of padlocking the premises.

- 1 The obligation to give quiet enjoyment can also be expressed as an obligation not to derogate from the grant: *Moore v Western Australia* (1907) 5 CLR 326; and *Goldsworthy Mining Ltd v Commissioner of Taxation (Cth)* (1973) 128 CLR 199.
- 2 *Toscana (WA) Pty Ltd v Pidd* (unreported, Supreme Court of Western Australia, Wallwork, Murray and Steytler JJ, 19 February 1999).
- 3 *Nichols Global Enterprises Pty Ltd v Biviano* [2000] NSWSC 956 at [53].
- 4 (As his Honour then was prior to elevation to the New South Wales Court of Appeal.)

### **[3] Damages for breach of landlord's covenant to repair**

The textbooks on landlord and tenant deal with three different types of covenants to repair which are common in leases:

- (a) a covenant to put in repair;

- (b) a covenant to keep in repair; and
- (c) a covenant to yield up in repair.

As Young J (as his Honour then was) observed in *Reilly v Liangis Investments Pty Ltd* [2000] NSWSC 47, both (a) and (c) above are covenants which “may be breached once and for all, and then give rise to only one claim for damages: see for instance, *Coward v Gorton* (1836) LR 2 CP 153 at 169-170.”

However, as his Honour observed, (b) above is a continuing covenant which may be the subject of separate breaches.

Where the landlord fails to keep its covenant to repair within a reasonable time after notice the tenant can sue the landlord in damages without first having to pay for the repairs: *Hewitt v Rowlands* (1924) 131 LT 757 referred to by the UK Court of Appeal in *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* (1959) 2 All ER 176 at 184.

#### **[4] The prima facie measure**

The fundamental principle in quantifying the tenant's damages is to restore the tenant to position he or she would have been in if there had been no breach.<sup>1</sup> Where the premises are rendered uninhabitable consequent upon the landlord's breach, the prima facie measure is the cost of alternative accommodation, subject to it being reasonable, but this does not include outgoings which are off-set by recovering outgoings on the alternative premises.<sup>2</sup>

However, this measure is premised on the tenant acquiring the premises for personal occupation. The tenant can also recover costs of repairs and a solatium for unpleasantness for living in deteriorating premises until they become uninhabitable.

- 1 *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759.
- 2 *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759.

#### **[5] Diminution in value**

Diminution in value of premises can be claimed by the tenant for breach of the repairing covenant if to the knowledge of the landlord, the premises were acquired for the purpose of re-selling or sub-letting; or if driven out of occupation by the breach and forced to sell.<sup>1</sup>

- 1 *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759.

#### **[6] Interaction of damages for breach of lease and specific performance**

The usual case where a tenant would obtain damages in addition to specific performance of the lease (for example, where the landlord wrongly refuses to honour an option) is where the property has deteriorated in value between the date of the contract and the date of the conveyance.<sup>1</sup>

<sup>1</sup> Per Young J in *Nichols Global Enterprises Pty Ltd v Biviano* [2000] NSWSC 956.

**[7] Common law damages based on part performance of a contract struck down by the Statute of Frauds?**

In *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 176, PWS agreed to give L occupation of premises at the Penrith Whitewater Stadium for a fixed term plus an option to renew at an agreed rent, the purpose of the lease being that L wanted to carry on a café business there.

L relied on a contract that was partly in writing and partly oral, and in respect of which it alleged that there had been acts of part performance. For example, L pointed to the fact it had taken possession of the premises, and had paid rent. This submission was upheld. Moreover, L had been told it would not be entitled to operate the café during the Olympic Games, for a period of up to two weeks. However, PWS ejected L from the premises for over three months, quite possibly more, and this in effect amounted to a repudiation.

Noting that the deed impliedly conferred exclusive possession of the premises for a fixed term on L, the Court of Appeal concluded that there was an agreement for a lease which created a leasehold interest, and not a licence.

The court noted an impeccable pedigree of cases which held that even where parties were negotiating for one to provide the other with an interest in land, then even where the prospective provider of the interest had no such interest in the land, for example a broker attempting to put together a hotel sale, then nevertheless, the Statute of Frauds applies.<sup>1</sup>

What the Court of Appeal then said is of such importance that it is set out in full at [39] – [47]:

In *Powercell* (2004) 11 BPR 21,429, Giles JA said (at [29]):

Equity has devised the doctrine of part performance as a basis of equitable relief in the absence of a written record, but part performance does not excuse the absence of a written record in an action for damages for breach of contract: *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282; *O'Rourke v Hoeven* [1974] 1 NSWLR 622.

The remarks of Campbell J at first instance in *Powercell* (2004) 11 BPR 21,429 (at (2003) 11 BPR 21,385) have ineluctable persuasive force. His Honour commenced (at 21,391, [29]):

Part performance is a doctrine invented by the Chancery Court, and provides a

basis upon which a Court of Equity will provide equitable relief concerning a contract, when that contract is unenforceable by reason of non-compliance with the Statute of Frauds. The equitable relief most commonly provided when acts of part performance of a contract are established is specific performance of that contract. It may be that part performance can also provide a basis for other equitable remedies, such as an injunction to enforce a provision of the contract: R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies*, 4th ed, LexisNexis Butterworths, Sydney, 2002, at [20] – [220]), or some other equitable remedy: *Jones v Baker* (2002) 10 BPR 19,115. However, an action for damages for breach of contract is a common law action, to which part performance is irrelevant.

His Honour said (at 21,391 to 21,392, [30]) that these principles had been adopted, authoritatively, in New South Wales. He referred to *O'Rourke v Hoeven* [1974] 1 NSWLR 622 where Glass JA (with whom Reynolds and Hutley JJA agreed) said (at 626):

The doctrine of part performance was developed in the Equity courts and has never been available in an action at law for damages to excuse absence of the writing which the *Statute of Frauds 1677* demanded. As Dixon J, as he then was, said in *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282 at p 297.

An action of damages could not but fail, because, when a common law remedy is sought, part performance never did and does not now afford an answer to the *Statute of Frauds 1677* ... if the doctrine is not confined to cases in which a decree might be made for the specific performance of the contract, it is at least true that the doctrine arose in the administration of that relief and has not been resorted to except for that purpose' (and see per Starke J and Evatt J *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282 at pp 294, 306). The position is in no way altered by the concurrent administration of law and equity directed by Pt IV of the *Supreme Court Act 1970*. This is not a fusion of two systems of principle but of the courts which administer the two systems: *Britain v Rossiter* (1879) 11 QBD 123 at p 129. The rules continue to be influenced by the system to which they belong, so as to disentitle a party claiming damages at law from praying in aid an exemption from writing on equitable grounds.

His Honour continued (at 21,392, [31]):

Before 1858 the Court of Chancery might have had a limited jurisdiction to award damages in lieu of, or in addition to, specific performance: *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies*, [23-025]. In 1858 Lord Cairns' Act conferred on the Court of Chancery jurisdiction to award damages either in addition to, or in substitution for, the grant of an injunction for specific performance; that provision now has its equivalent in New South Wales in s 68 *Supreme Court Act 1970* (NSW).

Mr Street sought leave to argue that *O'Rourke v Hoeven* [1974] 1 NSWLR 622 and *Powercell Pty Ltd v Cuzeno* (2004) 11 BPR 21,429 were wrong, principally on the ground that “fusion” permitted the remedy of damages to be granted because, he argued, “part performance in equity treats the appellants in the same way as if the lease had been granted: *Williams v Frayne* [1937] HCA 16; (1937) 58 CLR 710 at 721, 730”. He submitted that *Chan v Cresdon Pty Ltd* [1989] HCA 63; (1989) 168 CLR 242 (at 252) supported his argument.

*Williams v Frayne* [1937] HCA 16; (1937) 58 CLR 710 does not deal with the fusion of equitable and legal remedies and was not in any way concerned with a claim for common law damages based on part performance of a contract otherwise struck down by the *Statute of Frauds 1677*. *Williams v Frayne* [1937] HCA 16; (1937) 58 CLR 710 is not authority for the proposition advanced.

In *Chan v Cresdon Pty Ltd* [1989] HCA 63; (1989) 168 CLR 242, the majority (Mason CJ, Brennan, Deane and McHugh JJ) made remarks (at 252) about the court's willingness to treat an agreement for lease as a lease in equity in cases where the agreement is specifically enforceable. These remarks do not support the proposition that part performance of a contract rendered unenforceable by the *Statute of Frauds 1677* enables an action to be brought for common law damages for breach of that contract. *Chan v Cresdon Pty Ltd* [1989] HCA 63; (1989) 168 CLR 242 does not represent any departure from *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282 (at 297).

In any event, the majority's observations in *Chan v Cresdon Pty Ltd* [1989] HCA 63; (1989) 168 CLR 242 (at 252), on which the respondents relied, were predicated on the assumption that the notional agreement for lease being discussed was specifically enforceable. By the time the respondents commenced their action, the Café contract was not specifically enforceable. The appellants had repudiated it and the respondents had accepted that repudiation.

Mr Street sought to rely on the “doctrine of coherence” and observations by Mason P in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298 (at 335). Mason P was in dissent in that case and nothing said by Spigelman CJ and Heydon JA (as his Honour then was) could, by any stretch of the imagination, be regarded as supporting a fusion argument. The contrary is the case.

Mr Street submitted: “The blending of the waters by the equity to prevent the use of the statute as a fraud and provision of common law damages accords with a single coherent common law of Australia”. Whatever the merits of that proposition (on which I make no comment), the present case does not involve the use of s 54A(1) as a fraud.

The respondents have no prospect of succeeding in their argument that *O'Rourke* [1974] 1 NSWLR 622 and *Powercell* (2004) BPR 21,429 were wrongly decided. The principles that the respondents seek to challenge are entrenched in our law

and have been enunciated and accepted by the high authority for many years. It is sufficient to refer to *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282. The respondents' argument must fail. I would not grant the leave sought.

- <sup>1</sup> See *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 176 at [28] – [38].

### **[8] Assignment by landlord and damages**

If Landlord 1 assigns the lease (or transfers the reversion) to Landlord 2, Tenant can still sue Landlord 1 for such damages as it can establish from any breach by Landlord 1.<sup>1</sup>

Such a claim would be based on privity on contract, whereas any claim against Landlord 2 under the lease would be based on privity of estate.

- <sup>1</sup> *City and Metropolitan Properties Ltd v Greycroft Ltd* [1987] 3 A11 ER 839.

### **[9] Tenant's right to set-off damages against rent claimed by assignee landlord; or claim recoupment**

It is well settled that a tenant can set off a claim for damages for breach of the covenant to repair, or breach of the covenant to construct premises, against rent (subject to any contrary provision in the lease): *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* :<sup>1</sup>

There, the plaintiff claimed rent due under a lease; the defendant cross claimed for damages for breach by the plaintiff of a separate agreement to repair the premises. It was held that there was such a close connection between the claim for rent of the premises and the claim for damages for breach of the covenant to repair that, in equity, the defendants were entitled to set-off against their admitted liability for rent their claim for unliquidated damages. The decision in that case was referred to with approval by the Court of Appeal in *Roadshow Entertainment Pty Ltd v ACN 053 006 269 Pty Ltd* (1997) 42 NSWLR 462, at 488.<sup>2</sup>

*Anzani* was also applied Tadgell J in *Mek Nominees Pty Ltd v Billboard Entertainments Pty L*.<sup>3</sup>

However, there is a divergence in the authorities on the question of whether a promise to pay rent without deduction excludes a right of equitable set-off.<sup>1</sup>

For example, Bryson J (as his Honour then was), held in *Batiste v Lenin*<sup>2</sup> that the words “without deduction” prevent the lessee from relying on rights or claims to set-off, recoup or otherwise withhold payment of part of the rent. White J, in *Carrathool Hotel P/L v Scutti*<sup>3</sup> [2005] NSWSC 401, said at [62]-[65] “On the other hand, his Honour may not have had the benefit of a full citation of authority. Further, the Court of Appeal expressed the view, albeit obiter, that it was not persuaded that such a clause could defeat a lessee’s right of recoupment.”

“A right of recoupment may stand in a different position from an equitable set-off. Where a tenant himself carries out repairs which the landlord ought to have carried out, his expenditure is often treated as if it had been a direct payment of rent, such that credit for the cost of repairs in arriving at the figure for outstanding rent is a matter of recoupment, rather than deduction ...”

White J left the question open for later argument.

A wider formulation of the right to set -off, namely so long as there was a close connexion between the tenant's claim for damages and the landlord's claim for rental, was articulated by the New Zealand Court of Appeal in *Hamilton Ice Arena Ltd v Gordon Alexander Speirs, Hugh*.<sup>6</sup>

Brereton J summarized the **early 2008** position in *Australian Receivables Ltd v Tekitu Pty Ltd* [2008] NSWSC 433 at [23] as follows (an application for Mareva type orders):

Secondly, given the obligation under clause 17.5 to pay “immediately and without deduction”, it is at least arguable that ARL's claim is not amenable to a set-off. On this, there are cases in both directions, with United Kingdom authorities tending to favour the view that such terminology might be insufficient to exclude the right to set-off [see *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501; *Edlington Properties Ltd v J H Fenner & Co Ltd* [2006] EWCA Civ 403], while recent New South Wales authority arguably tends in the opposite direction [see *Batiste v Lenin* (2002) 10 BPR 19,441; [2002] NSWSC 233 at 19,468-19,169 (BPR), [102]-[105]; cf on appeal *Batiste v Lenin* (2003) 11 BPR 20,403; [2002] NSWCA 316 at 20,417 (BPR), [49]; *Carrathool Hotel Pty Ltd v Scutti* [2005] NSWSC 401, [62]-[65]].

The more complex question is whether the tenant can set off such claims against an assignee landlord, or a mortgagee of the landlord. The law was considered in 2006 in a QBD decision, *Edlington Properties v JH Fenner and Co*.<sup>7</sup> As that case concerned a different statutory context, and also because set-off and assignment are topics distinct to damages, I merely make reference to the case, in passing. However, it does contain a useful summary of the UK cases, such as *Reeves v Pope* [1914] 2 KB 284, CA. See also *Tempirose Pty Ltd v Whitehorse Property Group Pty Ltd* (30 October 2002).

For the sake of context, reference is made to *Shiloh Spinners Ltd v Harding*,<sup>8</sup> which held that a right of entry could be validly reserved on an assignment of a leasehold property when the assignor retained no reversion. Consideration was also given to whether the Court should grant relief against the exercise of that right.<sup>9</sup>

To the extent *Shiloh Spinners* deals with the right to relieve against forfeiture of a lease, it is dealt with in the Thompson's loose leaf service, by Jacobs, McCarthy and Neggo, *Injunctions: Law and Practice*.

Further cases on topic are in fn 10 below

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1 *British Anzani(Felixstowe) Ltd v International Marine Management (UK) Ltd* [1979] 2 All ER 1063; [1980] QB 137 at 1076-1077 (All ER), 156 (QB), per Forbes J.

- 2 I adopt the summary of Palmer J at [9] of *Current Knowledge Print Solutions Pty Ltd v Kent Road Holdings Pty Ltd* [2004] NSWSC 1208.
- 3 *Mek Nominees Pty Ltd v Billboard Entertainments Pty Ltd* [1994] ANZ ConvR 363.
- 4 *Carrathool Hotel P/L v Scutti* [2005] ANZ Conv R 471; [2005] NSWSC 401 at [62].
- 5 Referring to (*Lee-Parker v Izzet* [1971] 1 WLR 1688 at 1693; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501 at 507; contra *Batiste v Lenin* (2002) 10 BPR 19,441; [2002] NSWSC 233 at 19,468-19,469, [102] – [105]; but on appeal see *Batiste v Lenin* (2003) 11 BPR 20,403 at [49].
- 6 *Hamilton Ice Arena Ltd v Gordon Alexander Speirs, Hugh* [2001] NZCA 308 (10 September 2001).
- 7 *Eddington Properties v JH Fenner and Co* [2006] 1 All ER 98, Bean J.
- 8 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 725-726.
- 9 See the analysis of that case in *Batiste v Lenin* (2003) 11 BPR 20,403; [2002] NSWCA 316 at [56] by Sheller JA, Giles and Santow JJA agreeing.
- 10 *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168 at 175; *Batiste v Lenin* (2002) 10 BPR 19,441; [2002] NSWSC 233 at 19,468-19,469 (BPR), [102] – [105]; on appeal *Batiste v Lenin* (2003) 11 BPR 20,403; [2002] NSWCA 316 at [49]; *Debonair Nominees Pty Ltd v J & K Berry Nominees Pty Ltd* (2000) 77 SASR 261 at 271, [43], and compare *Waite, Disrepair and Set-Off of Damages Against Rent: The Implications of British Anzani* [1983] Conv 373; *Waite, Repairs and Deduction from Rent, The Conveyancer and Property Lawyer* [1981] 45 Conv (N.S.) 199; *Lee-Parker v Izzet* [1971] 1 WLR 1688; *Connaught Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501; *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410 at 424-425; *Grant v NZMC Ltd* [1989] 1 NZLR 8; Derham, *The Law Relating to Set-Off* 3rd ed, at 5.82 – 5.85.

## Lessee's breach

### [10] Introduction

The significant distinction to draw is between two scenarios:

- (i) where the landlord brings the lease to an end by utilising a contractual power so to do, it seems as though the landlord's damages are limited to the accrued rental; and
- (ii) where the landlord terminates by accepting the lessee's repudiation or upon the lessee's breach of a fundamental or essential term, ie a condition, of the contract. For these

purposes, “fundamental breach” equates with what the High Court recently described as “a sufficiently serious breach of a non-essential term.”<sup>1</sup>

In the former scenario, the landlord as a general principle can only claim rental and other entitlements, eg outgoings, accrued to the date of termination. However, it ought be recalled that in *Shevill's case* , dealt with more fully below, Gibbs CJ said:

[I]t would require very clear words to bring about the result, which in some circumstances would be quite unjust, that whenever a lessor could exercise the right given by the clause to re-enter, he could also recover damages for the loss resulting from the failure of the lessee to carry out all the covenants of the lease.<sup>2</sup>

In the latter scenario, the landlord can sue for what is known as “loss of bargain damages”, ie for loss of the benefit of the rental, outgoings and other amounts: *Shevill v The Builders Licensing Board* (1982) 149 CLR 620; and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.<sup>3</sup> However, loss of bargain damages are recoverable on general principles only if the lease agreement has been terminated: *Sunbird Plaza Pty Ltd v Maloney* [1988] HCA 11; (1988) 166 CLR 245 per Mason CJ (with whom Deane, Dawson and Toohey JJ agreed) at [260]:

Where a lessor terminates the lease agreement for breach of an essential term or repudiation, it may claim arrears of rent in respect of the period before termination, in addition to damages for loss of the benefit of the lessee's covenant to pay future rent, outgoings and other amounts in respect of the period after termination.<sup>4</sup>

The advantage of categorising the tenant's conduct as a repudiation is that the landlord may relet and sue for damages, being a sum equivalent to “the benefit of the bargain entered into with the lessee”.<sup>5</sup> If damages are to be assessed on that basis, it is necessary to lead evidence of the value of the “loss of the benefit of the covenant to pay future rent and outgoings”.<sup>6</sup>

As was stated by the High court in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10 at [58]:

[U]nder general contractual principles, an innocent promisee can terminate the contract, and recover loss of bargain damages, when there is repudiation, or a fundamental breach, or a breach of condition – i.e. a breach of an essential term. And under these principles it is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision – not only in order to support a power to terminate the contract, which the Lessee concedes, but also to support a power to recover loss of bargain damages.<sup>7</sup>

*Gumland* is significant in that demonstrates the close interaction between whether clauses are to be characterised as “fundamental” and thus whether loss of bargain damages are claimable. Paragraph 47 of the majority judgment indicates an endorsement of the approach of construing a lease as a whole to determine if any particular clause [in that case, the clause regarding payment of rental] is “fundamental”. The majority acceded to a submission of the lessor that upon a construction of the lease as a whole, it revealed a “preoccupation” with the issue “which is

hardly surprising in a commercial lease creating an economic relationship.”

A lessor's cause of action for damages for loss of bargain damages accrues on the date on which the lessor terminates the lease agreement; although the critical date for the assessment of loss of bargain damages is the date on which the innocent party terminates and thus, where a lessor terminates the lease agreement for breach of an essential term or for repudiation, then the general rule is that loss of bargain damages fall to be assessed as at the date of termination: *Luxer Holdings Pty Ltd v Glentham Pty Ltd* [2007] WASCA 209 at [32] – [33].<sup>8</sup>

However, evidence of events subsequent to termination may be taken into account if they are relevant to the value of the lost bargain or perhaps relevant to whether the lessor has mitigated its damage.<sup>9</sup>

A lessor, who sues for loss of bargain damages, is subject to the doctrine of mitigation of damage in respect of a claim for loss of bargain damages,<sup>10</sup> and accordingly, where a lessor fails to mitigate, the claim for damages for loss of future rent, outgoings and other amounts will be reduced by the amount it would have received had it re-let.<sup>11</sup>

Pincus J in *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre* [1988] ATPR 49,185 at 49,188 observed that “it was not really surprising that these applicants were misled. Presumably because of doubts about its location, the centre did not prove to be very attractive to prospective tenants” and Wakeham, the agent “was disinclined to tell them the rather depressing truth on that subject”.

Arising out of these not infrequently occurring facts, the tenants sued on various bases, including breach of s 52 of the *Trade Practices Act 1974* (Cth), seeking their rentals and trading losses. The landlord cross-claimed for rental and outgoings. His Honour, in this context, held as follows:

To prove the value of the lost bargain, it was necessary to show the difference between what would have been paid and what, given due diligence on the part of the landlord, was actually paid or likely to be paid by each tenant. As far as I can see, there was no evidence directed to efforts to relet. To take an analogy, if the claim were a vendor's suit for loss of the benefit of a contract of sale, it would be necessary to show the market value; of course, the price achieved on resale may be evidence of that value: see *McGregor on Damages* (14th ed), [670] (as to goods) and [745] (as to land). Where the sum actually achieved on resale is the only evidence of value, it would seem clear that it must be supported by sufficient evidence of the circumstances surrounding the resale. A similar principle appears to me to govern damages for repudiation of a lease by a tenant.<sup>12</sup>

In *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 the lessee paid rent for the first three months but then paid no rent for four months and also defaulted in paying its share of maintenance. The landlord re-entered and then claimed damages for the unexpired portion of the lease. The lessee's conduct was held to be sufficiently serious to amount to repudiation/fundamental breach, and the lessor, after re-entry, was awarded loss of bargain damages. The landlord thus had two bases on which to terminate: the right to terminate under the lease; and the repudiation, and could rely on both.

Deane J alluded in passing to the difficulty that he had with *Shevill's case*. His Honour noted that that case seemed to be out of step with modern notions of causation and remoteness in the law of contract and that decision also confounded the long understanding of property lawyers in NSW.<sup>13</sup>

His Honour repeated his misgivings in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 205 where he had stated that the “prima facie assumption” is that the result of the exercise of an express contractual right to terminate on breach is governed by “the ordinary law applicable to the avoidance of contracts for breaches of essential promises”.<sup>14</sup>

*AMEV-UDC* was a case dealing with the lease of a chattel and not real property.<sup>15</sup> Deane J treated *Shevill's case* as a particular rule applicable only in the context of real property and accordingly refused to extend it to the context of the lease of a chattel.

In *AMEV-UDC*, Dawson J noted that in *Shevill's case*, the lease did not provide for the recovery of any loss resulting from the lessor's re-entry and that that case did not deal with the situation where there was such a clause and hence such loss was within the contemplation of the parties. His Honour stated that if a lease provides for termination by the lessor for non-repudiatory conduct then “there is no reason in principle why it should not also provide that it be at no loss to the lessor”.<sup>16</sup>

It is quite clear that Dawson J would have allowed the lessor of real property to recover loss of bargain damages where the lessor has determined the lease for non-repudiatory conduct, if such loss was within the contemplation of the parties.

In *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209 at [39] – [40], [42] – [49] Buss JA (with whom Wheeler JA agreed) held as follows:

Where the trial of the lessor's action against the lessee occurs before the term of the lease would otherwise have expired, the normal measure of damages is the total rent and outgoing, etc that would otherwise have been payable after the date of termination, less:

- (a) any amount the lessor has obtained as profits from the use of the premises between the date of termination and the date of trial; and
- (b) any amount the lessor is likely to obtain as profits from the use of the premises between the date of trial and the date on which the lease would otherwise have expired,

by re-letting the whole or part of the premises or otherwise. If the lessor has failed to mitigate its damage between the date of termination and the date of trial, it will be necessary to make a further adjustment on that account. Interest will usually be awarded on any damages referable to the period between the date of termination and the date of trial. Also, a discount for acceleration must be applied in calculating any damages referable to the period between the date of trial and the date on which the lease would otherwise have expired. The doctrine of mitigation applies directly in respect of the period between the date of termination and the

date of trial. The calculation of the damages in respect of the period between the date of trial and the date on which the lease would otherwise have expired is carried out on the basis that the lessor will act reasonably, throughout that period, to mitigate.

A further deduction will be required if the lessor has failed to mitigate its damage. It will usually be appropriate to order the payment of interest on the award of damages.

...

As I have mentioned, Luxer relied on ... the proposition that the applicable measure of damages in the present case was “the contractual rent reserved by the lease *less the rental value of the premises at the time of breach*” (emphasis added).

In my opinion ... “the rental value of the premises at the time of breach” should be understood as referring:

- (a) where the lessor has terminated the lease agreement for breach of an essential term or for repudiation, to the date of termination; and
- (b) to the amount which the lessor has derived, or is likely to derive, as profits from the use of the land between the date of termination and the date on which the lease would otherwise have expired (by re-letting the whole or part of the premises or otherwise).

...

It seems to me that there are several ways one may assess damages for breach of a lease agreement and in the end the method adopted may have to depend upon the circumstances of the existing case and the attitude taken by the lessor. In my view *in this case* the true measure of damage is the difference between the value of the premises as a going concern with a tenant in possession pursuant to the contracted term and one without a tenant in possession the relevant time at which such valuations to be made being either the date of breach or date of acceptance by the lessor of that breach. In assessing the value of the premises without a tenant at the time account must be taken of the commercial prospects of obtaining a tenant for the balance of the term then left under the lease and no doubt the rent that could be commanded during that period.

See further *Peet & Co v Rocci* [1985] WAR 164, where a lessee in a shopping centre decamped one year into a ten year lease. The lessor sold the shopping centre at a loss about three years into the lease and recovered damages based on three years' lost rental. In *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209, Buss JA's comments on *Peet's case* suggested that the lessor led evidence of the diminished capital value of the centre that may well have been an appropriate measure.

Whether a guarantee embraces loss of bargain damages (as opposed to only rent and outgoings) depends on the construction of the guarantee: *Lewy v Moss Nominees* (unreported, NSW Court of Appeal, 10 October 1996), per Priestley and Clarke JJA, Giles AJA; *Pilkington v Ulysses* (unreported, NSW Court of Appeal, Grove J, 4 December 1995); and *Moschi v LEP Air Services* [1973] AC 331.

- 1 *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10 at [52] which is perhaps the key passage. This case must, in due course, be officially reported.
- 2 *Shevill v The Builders Licensing Board* (1982) 149 CLR 620 at 628. See also Wilson J at 637 (“requiring a clear expression of intention”); observations which were endorsed by the High Court in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10 at [53].
- 3 Per Mason J at 31, per Brennan J at 46-47, per Deane J at 55; applied in *Karacominaakis v Big Country Developments Pty Ltd* [2000] NSW CA 313; *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209: the lead judgment was delivered by Buss JA, with whom Wheeler JA concurred, dealt with mitigation at [36] ff. However, EM Heenen JA, in his Honour's separate judgment, explored the interaction between causation on the one hand and mitigation on the other at [159], by reference to cases such as *Castle Constructions Pty Ltd v Fekala Pty Ltd* [2006] NSWCA 137; (2006) 65 NSWLR 648; and also the decision of Goff J in *Koch Marine Inc v D'Amico Societa di Navigazione ARL (the Elena D'Amico)* [1980] 1 LI Rep 75.
- 4 *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209, per Buss JA at [31], with whom Wheeler JA agreed.
- 5 *Shevill v The Builders Licensing Board* (1982) 149 CLR 620 at 632.
- 6 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 32.
- 7 Some of the cases which the High Court referred to in support of these propositions included *Financings Ltd v Baldock* [1963] 2 QB 104 at 120; *Lombard North Central plc v Butterworth* [1987] QB 527 at 535 and 545-546.
- 8 Citing authorities such as *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 per McHugh JA at [146] – [149].
- 9 *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209 at [35] and the authorities there cited.
- 10 *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209 at [36] and the authorities there cited, eg *Young v Lamb (No 2)* [2001] NSWSC 1014 per Austin J at [9].
- 11 *Karacominaakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18,235 per Giles JA (with whom Handley and Stein JJA agreed at 18,271 [187] – [188]).
- 12 *Karacominaakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18,235 at 49,198.
- 13 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 55-56.

- 14 Citing the dicta of Jordan CJ in *Larratt v Bankers' & Traders' Insurance Co* (1941) 41 SR (NSW) 215 at 225-226.
- 15 This case is dealt with more fully in the chapter *Liquidated damages and penalties* from [13.10].
- 16 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 217.

**[11] Determination of the lease for non-payment under an express contractual power to terminate**

If a tenant does not pay the rent then the landlord may sue for it whether or not the tenant is in possession.<sup>1</sup> Many leases contain a clause to the effect that if the lessee is late in paying rent and other amounts due under the lease, such as contribution towards maintenance and so forth, then the lessor may terminate the lease. In many cases, the non-payment may not constitute repudiation because the lessee genuinely desires to continue with the lease but can only afford to pay say two weeks after due date.

Clauses such as the above generally entitle the lessor to re-enter the premises. In such circumstances, any loss occurring after the determination (sometimes referred to as “loss of bargain” damages)<sup>2</sup> is generally not recoverable, as it results not from the lessee's breach of contract in being late in its payments, but rather from the lessor's election to determine the lease. This is the rule in *Shevill v The Builders Licensing Board* (1982) 149 CLR 620.

*Shevill* is authority for the proposition that a right of re-entry for non-payment of rent does not of itself make the covenant to pay rent into a fundamental term. Although the lessee defaulted by being persistently late in paying rent, allowing re-entry under the terms of the lease, it was held that such breach was not fundamental and did not of itself entitle the lessor to rescind and claim loss of bargain damages (that is, an amount equal to the rent payable over the remainder of the term).

Gibbs CJ pointed out a lessor might have the right to re-enter for an insignificant breach such as failure to keep the premises clean, and that very clear words would be required to bring about the unjust result that whenever the lessor can exercise such right, it could also recover loss of bargain damages.

In situations where the lessor cannot claim loss of bargain damages, it will be restricted to recovering heads of loss such as the rent, outgoings accrued to date, contributions to maintenance and so forth. So too, a failure to pay rates or paint the building. Such breaches go no further than the breach of the term involved.<sup>3</sup>

Thus, the *Shevill* line of reasoning holds that before a lessor can recover “loss of bargain” damages, such as rent not earned until a new tenant can be found and the costs of searching for a new tenant, the lessee must have first repudiated and such repudiation must have been accepted by the lessor; or there must have been breach of a fundamental term of the lease. Even if the contractual right to terminate does not distinguish between fundamental and other breaches, the rule in *Shevill* does.

The New Zealand position seems to be broadly in line with the rule in *Shevill : Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 per Gallen J especially at 289. It should be noted that inasmuch as *Morris* comments on Australian law, it should be treated with caution for the reason that counsel obviously did not refer the court to *Tabali's case*, nor to the tension between *Shevill* and *Tabali*.

- 1 Per Pincus J in *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre* (unreported, Federal Court of Australia, 11 March 1988).
- 2 Which is one and the same as expectation loss: *Gates v The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-12 per Mason, Wilson and Dawson JJ. This term is used also by some writers, for example, Treitel, *The Law of Contract* (8th Ed, 1991), p 834.
- 3 Per Hardie Boys J in *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 at 277.

### [12.1 ] Where the lessee repudiates and abandons the land

It is not the province of this book to analyse the law of repudiation. It suffices for present purposes to point to the leading Australian authority such as *Esanda Finance Corporation v Plessnig* (1989) 63 ALJR 238 at 242 and to note that repudiation is not to be lightly inferred and only occurs where the actions of a party deprive the other party of “substantially the whole benefit” of the contract or frustrated its commercial purpose.<sup>1</sup> Where it is not self-evident that the lessee's conduct is repudiatory, then the court must construe the terms of the lease to determine if, objectively, it was the intention of the parties that breach of a particular term was so grave so as to allow the lessor to reasonably infer that the lessee had repudiated. Where the lessee has repudiated, formal re-entry is, of course, unnecessary.<sup>2</sup>

In such circumstances, where there is an express covenant to pay rent for a term of years, the lessor may sue for breach of that covenant and recover the total rent for the full term, less such amount as the lessor is likely to obtain as profits from the use of the land during the residue of the term.<sup>3</sup> Further, a guarantor of a lessee's obligations will be liable notwithstanding that the lease is determined by the lessor's acceptance of the lessee's repudiation.<sup>4</sup>

- 1 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757 at 778-779; *Shevill v The Builders Licensing Board* (1982) 149 CLR 620 at 625-626, 633; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 31, 40, 55; and *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 63 ALJR 372 at 376, 380, 387.
- 2 *Williams v K F Meates & Co Ltd* (1971) 1 NZCPR 594; and cf *Miller v Mattin* (1993) 2 NZ Conv C 191 at 714.
- 3 *Lamson Store Service Co Ltd v Russell Wilkins & Sons Ltd* (1906) 4 CLR 672 at 684 per Griffith CJ.
- 4 *Nangus Pty Ltd v Charles Donovan Pty Ltd (in liq)* [1989] VR 184; and *Liley v Pipers Furniture Makers of Tasmania Pty Ltd* (unreported, Federal Court of Australia, Heerey J, 15 August 1996).

**[12.2] Where the lessee abandons the premises and the landlord accepts same**

Abandonment is a form of repudiation—perhaps the quintessential form. The nettle which the landlord must grasp is how to respond : regard the lease as on foot on sue for rental as and when it falls due ? Or regard as at an end ?

Depending on the wording of the lease, if the landlord accepts the abandonment , that may well sound the death knell to loss of bargain damages. So for example, if the landlord re-entered and set up its own trading operation, that would be inconsistent with the continued existence of the lease : *Emhill Pty Ltd v Bonsoc Pty Ltd (No 2)* [2007] VSCA 108 para [84] .

**[13] Where the lessee fails to honour obligation to maintain/repair and to re-instate the premises**

Certain Australian jurisdictions have ameliorated the rule in *Joyner's case* , by enacting legislation such as that in s 133A of the *Conveyancing Act 1991* (NSW). That section in effect provides that damages for breach of a covenant to keep or put premises in repair during the currency of a lease, or to yield up premises at termination, are limited to the diminution in value of the reversion occasioned by the breach of covenant: *Waterways Authority of New South Wales v Coal & Allied Operations Pty Ltd* [2005] NSWSC 1285 at [22] per Barrett J. These amendments were driven presumably, by cases such as *James v Hutton & J Cook & Sons Ltd* [1950] 1 KB 9, which concerned a lessee who, under licence, altered the shop front of the leased building having covenanted in the licence to restore the building, on request, to its original condition at the expiration of the lease. On the determination of the lease, the lessee was requested to restore the shop front and to reinstate the premises as they were before the licence was granted. The lessee failed to do so and the lessor sought damages being the cost of the restoration work. However, the failure to restore the shop front had had no negative impact on the value of the premises.

In *Gimtak Pty Ltd v Cathie* [2001] VSC 88, the lessee had breached both repair and also re-instate covenants. Prior to doing any rectification work, the lessor sold the building and sued the ex-tenant for loss. The plaintiff argued that the only restraint on the prima facie measure of damages for breach of a repair covenant is that damages must not be unreasonable; and that that reasonableness depends only on the proportionality between the cost of compliance with the contractual obligation and the benefit in the fulfillment of the promise; and if there were such disproportion, the prima facie measure was displaced in favour of the diminution in value to the property resulting from the breaches.

There seemed broad agreement as to this proposition between the plaintiff, the defendant and the court, viz where the covenant to maintain was breached, damage can, in effect, be presumed and the prima facie measure the cost to do the works, includes also the rental that would notionally

be lost while the work was on foot; and same would be displaced only if out of all proportion. However, the lessee propounded, with respect, an ingenious argument, which may yet provide the foundation to build on in future cases. It said that where the covenant to re-instate was breached, damage could not be presumed, and the prima facie measure was diminution in value (if any could be proven).

Smith J of the Victorian Supreme Court noted that there will be instances where failure to comply with the covenant to restore will cause no detriment or diminution in value; but concluded that it was going too far to suggest that there was a prima facie rule that loss of value is the measure of damages: *Gimtak Pty Ltd v Cathie* [2001] VSC 88 at [16].

A covenant to yield up premises in a state devoid of “structures” does not fall within the compass of s 133A.<sup>1</sup>

Where sections such as 133A of the *Conveyancing Act 1991* (Cth) do not exist,<sup>2</sup> the principles applicable to the quantification, at common law, for breach of a tenant's covenant to leave premises in good and tenantable repair are set out by Fullagar J in *Telecom & CPS Community Credit Cooperative Ltd v Heberg Pty Ltd* [1993] ANZ ConvR 312, at pp 65,273-65,274:

Cases in England decided at the end of the nineteenth century establish clearly that at common law the measure of damages for breach of a covenant to repair in the circumstances of the present case is not the diminution in the value of the reversion. For the purposes of the present case the most succinct affirmative statement of the applicable measure of damages that I have found is contained in the small Victorian text book, Brooking and Chernov: *Tenancy Law and Practice in Victoria* (1st Ed 1972) at 121, in the following passage: “At common law the measure of damages, where an action is brought upon the covenant to repair at the end of the term, is such a sum as will put the premises into the state of repair in which the tenant was bound to leave them.” To apply this measure of damages, the court looks at the state of the premises at the end of the term. It then has to consider what it is that a landlord - a hypothetical and reasonable landlord wishing to put the premises into the state of repair in which the tenant was bound to leave them - would have to expend in money in order to put the premises into the latter state of repair. I shall call this sum of money the “essential expenditure”. I have called the person concerned a hypothetical landlord because it is immaterial whether the actual landlord wishes to repair the premises or not, and immaterial whether they ever will be repaired by anybody. Save in one respect, it is immaterial to know that the actual landlord has repaired the premises. In a case where the actual landlord has done the breach - necessitated repairs or some of them by the time of the trial, all the repairs he has actually done and the cost of them are material only because they may afford reliable (or unreliable) evidence of what the relevant repairs would have cost a reasonable landlord to do. I have called the person concerned a reasonable landlord, because when the court is seeking to determine what is the essential expenditure, breach necessitated, it must bear in mind that the hypothetical landlord would be bound to mitigate his loss, in that he would be bound to do the repairs in a reasonable way for a reasonable price and within a reasonable time.

It might or might not be a reasonable course, if breach unrelated operations are also in fact to be done, to do the breach necessitated repairs along with or before or after the unrelated operations; but the enquiry is and remains, in the sense which I have endeavoured to spell out, what is, at the termination, the sum which “will put the premises into the state of repair in which the tenant was bound to leave them”. For the word “will” one could as well substitute “would”, because the substituted word emphasizes what should be apparent from the text book version, namely that the essential expenditure is a sum that remains constant irrespective of what the actual landlord does or does not do, and irrespective of what the actual landlord intends at any particular time to do or not do.

The measure of damages at common law is the expenditure to be necessarily encountered by a reasonable landlord who put the premises into the state of repair contracted for, whether the actual landlord does those repairs or not.

The rules postulated above are associated with the well known judgment of Lord Esher MR in *Joyner v Weeks* [1891] 2 QB 31 at [43]; the correctness of which was endorsed by the High Court in *Graham v Market Hotels Ltd* [1943] HCA 8; (1943) 67 CLR 567.

As Barrett observed in *Waterways Authority of New South Wales v Coal & Allied Operations Pty Ltd* [2005] NSWSC 1285 at [26], “there may however be circumstances in which the cost of putting the premises into the contracted state does not represent the applicable measure of damages. That will be so where, for example, the lessor does not, in reality, want or require premises in the contracted state and is well content to have and enjoy the premises in the state in which they actually exist at the end of the term.” His Honour noted that in those circumstances there may nevertheless be damages assessed on the basis of a reduction in value of the reversion, and if no such reduction, then only nominal damages would be appropriate.

The measure associated with *Joyner* is claimable even if the landlord has sold the building and the reinstatement will never occur. The only limitation is that the damages must be reasonable in the sense of not being out of all proportion: *Gimtack Pty Ltd v Cathie* [2001] VSC 88, Smith J.

A question of construction which arose in both the *Gimtack* and *Waterways* cases, is if there be a provision for the landlord to obtain liquidated damages in the event premises are not yielded up as contractually required, then that constitutes a cap on damages.

The relevant clause in the *Gimtack* case required the lessee to yield up the demised premises in good repair and to remove its fixtures and fittings, failing which the landlord could do so and seek the costs thereof as a liquidated debt payable on demand.

The relevant clause in the *Waterways* case was to the same effect of that in *Gimtack*, except that it, in addition, gave the landlord the option to accept the fixtures and fittings which the lessee had left behind.

Barrett J in the *Waterways* case held that this option by the landlord, if exercised, prevented it from claiming damages; and in any event, if the landlord chose to claim its out-of-pocket expenses as a liquidated debt, it could not in addition claim damages.

The Full Court of the Federal Court in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2008] FCAFC 38 at [9] – [10], [13], [15] considered that the timing of an action by a landlord to claim damages pursuant to the *Joyner principle*, impacted on quantum. The majority in that case, consisting of Finkelstein and Gordon JJ relevantly held as follows:

A repair covenant is breached not only if the premises fall into disrepair during the term of a lease but also if the tenant destroys or alters the premises: *Gange v Lockwood* (1860) 2 F & F 115, 117 [175 ER 984, 985]; *Barton v Reilly* (1878) 1 SCR (NS) NSW 125, 127; *Graham v Markets Hotel Pty Ltd* [1943] HCA 8; (1943) 67 CLR 567, 580-582, 585-586, 593-594. An action may be brought for breach of a repair covenant while the lessee is still in possession during the term of the lease. If brought while the tenancy continues the general rule is that the damages “represents the diminution in the value of [the] reversion owing to the breach of covenant” – an amount that will be determined by reference to the length of time the lease is still to run: *Conquest v Ebbetts* [1896] AC 490, 494; *Gooderham and Worts Ltd v Canadian Broadcasting Corporation* [1947] AC 66, 83. The reversion referred to is the reversion that falls in on the expiry of the lease: *Terroni v Corsini* [1931] 1 Ch 515, 519; *Hanson v Newman* [1934] Ch 298, 304. The diminution in value is preferred to the cost of putting the premises into repair because the landlord is not bound to expend any money recovered as damages in carrying out the repairs and whatever he recovers beyond his reversionary interest is regarded as excess compensation: *Turner v Lamb* (1845) 14 M & W 412, 412 [153 ER 535, 535-536].

On the other hand, if the action is brought at or near the termination of the lease the rule, firmly established in *Joyner v Weeks* [1891] 2 QB 31, is that the landlord is entitled to recover the cost of repairs. Strictly speaking the cost of repairs includes any loss of rent during the repair period with some deduction, if appropriate, for betterment: *Woods v Pope* (1835) 6 Car & P 782 [172 ER 1461]; *Birch v Clifford* (1891) 8 TLR 103, 103; *Yates v Dunster* (1855) 11 Exch 15 [156 ER 726]. In *Joyner v Weeks* [1891] 2 QB 31 Lord Esher described (at 43) this measure of damages as “a rule of law” and later as the “ordinary rule” but, more accurately as Fry LJ put it (at 46 and 47), it is the “ordinary rule” or the “prima facie rule”.

...

It will be noticed that the cases to which we have referred all concern a covenant to keep and leave premises in repair: a covenant such as cl 2.10. There can be no meaningful distinction between a full repair covenant and cl 2.13, at least as regards the extent to which the clause prohibits alterations or additions without approval.

...

The cases do suggest that damages will be assessed on a different basis if the breach is of a covenant to reinstate premises at the end of the term. Here the court

must determine: (a) what loss the landlord suffered and what damages are necessary to place the landlord in the same position as if the contract had been performed; and (b) where the cost of reinstatement is claimed, whether the insistence on reinstatement is reasonable: Dowding & Reynolds, *Dilapidations: The Modern Law and Practice* (2004, 3rd ed) [31-09] – [31-12].

As Rares J, in his Honour's separate judgment concurring with the orders of the majority, but for differing reasons, said in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2008] FCAFC 38 at [103]:

The rule in *Joyner's case* [1891] 2 QB 31 is different to that which applies in building and construction cases because it “provides commercial certainty for landlord and tenant as to their responsibilities at the end of leases”. It avoids arguments as to whether the landlord is to receive damages assessed as the diminution in value rather than reinstatement cost for breach of the usual forms of covenant to yield up at the end of the lease in good order and repair.

A unanimous High Court dismissed an appeal against that judgment: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 83 ALJR 390, [2009] HCA 8, endorsing the categorisation of the tenant's conduct as contumelious, because the tenant ripped out the lobby, built to the owner's exacting standards and aesthetic tastes from the highest quality materials, despite knowing there was no consent to this path.

The High Court, in making short shrift of the submissions for the tenant, powerfully rejected the reception into Australian jurisprudence of the notion of allowing an efficient breach of contract, placed firmly on centre stage the judgment on damages of Oliver J in *Radford v De Froberville* [1978] 1 All ER 33; [1977] 1 WLR 1262 at [13]–[16], re-asserted the significance of the compensation principle and the principle *pacta sunt servanda* (agreements must be honoured) and emphasised the difference between damages for defective goods and breach of a lease, in the following terms:

Underlying the Tenant's submission that the appropriate measure of damages was the diminution in value of the reversion was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid. It is an assumption which at least one distinguished mind has shared. It has been dignified as “the doctrine of efficient breach”. It led, in the Landlord's submission, to an attempt “arrogantly [to] impose a form of ‘economic rationalism’” on the unwilling Landlord. The assumption underlying the Tenant's submission takes no account of the existence of equitable remedies, like decrees of specific performance and injunction, which ensure or encourage the performance of contracts rather than the payment of damages for breach. It is an assumption which underrates the extent to which those remedies are available. However, even if the assumption were correct it would not assist the Tenant. The Tenant's submission misunderstands the common law in relation to damages for breach of contract. The “ruling principle”, confirmed in this Court on numerous occasions, with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v*

*Harman* :

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Oliver J was correct to say in *Radford v De Froberville* that the words “the same situation, with respect to damages, as if the contract had been performed” do not mean “as good a financial position as if the contract had been performed” (emphasis added). In some circumstances putting the innocent party into “the same situation ... as if the contract had been performed” will coincide with placing the party into the same financial situation. Thus, in the case of the supply of defective goods, the prima facie measure of damages is the difference in value between the contract goods and the goods supplied. But as Staughton LJ explained in *Ruxley Electronics & Constructions Ltd v Forsyth* [1994] 3 All ER 801; [1994] 1 WLR 650 such a measure of damages seeks only to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the contract goods. The buyer is thus placed in the “same situation ... as if the contract had been performed”, with the loss being the difference in market value. However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the “same situation ... as if the contract had been performed”.

In circumstances like the present, where the relevant covenant is in the form of cl 2.13, it is not the case that, in Oliver J's words: “the disappointment of the plaintiff's hopes and expectations from the contract becomes a relevant consideration only so far as it is measurable either by some deterioration of the plaintiff's financial situation or by some failure to obtain an amelioration of his financial situation”.

To reason otherwise is to undermine a fundamental postulate inherent in cl 2.13.

...

The Tenant relied heavily on findings by the trial judge that the Landlord had erected and leased the building for commercial purposes and that it was an investment property. The Tenant contended that the Landlord had never run a case that it valued the foyer for its aesthetic qualities as distinct from its having “pulling power” as a “leasing tool”, and it relied on the trial judge's implicit finding, based on the resolution of conflicting expert evidence, that the old foyer was no more effective as a leasing tool than the new foyer. The answer to these submissions was put thus by Oliver J in *Radford v De Froberville* :

Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It

may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. *Pacta sunt servanda*. If he contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

Just as in any other contractual context, the lessor is under an obligation to mitigate its loss.<sup>3</sup> However, this obligation is substantially watered down by the right of the lessor to adopt the attitude that it can sue for each month's rent as and when it falls due and not treat failure by the lessee to pay the rent as repudiation. This is discussed more fully in the chapter *Mitigation* from [11.10].

- 1 *Waterways Authority of New South Wales v Coal & Allied Operations Pty Ltd* [2005] NSWSC 1285.
- 2 For example, in Victoria, as at April 2008, although one must of course check the statutory provisions of the State or Territory whose law applies.
- 3 *Karacominakis v Big Country Developments Pty Ltd & Ors* [2000] NSW CA 313; and *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10 at [55].

#### **[14] The date of accrual for breach of the Trade Practices Act**

Three dates presented themselves as contenders for the date of the accrual of the cause of action in *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre* (unreported, Federal Court of Australia, 11 March 1988): firstly, the date of execution of the leases which committed the applicant; secondly, the date of occurrence of the various losses constituted by expenditure of moneys; thirdly, the date upon which the applicants became aware that they had been misled. Relying on the *Forster v Outred & Co* [1982] 1 WLR 86 line of authority, his Honour held in favour of the earliest time, that is, the date of execution, being a time that favours a respondent who pleads a limitations defence.

However, subsequent cases dealing with mortgages and indemnities have significantly eroded the potency of *Forster* in Australia, and thus, while *Keen Mar* is specifically a lease case, its treatment of the limitations issue should be treated with great caution in light of subsequent cases dealt with elsewhere in this work.

#### **[15] Absence of records to prove loss**

Where a tenant has lost records or destroyed records of cash receipts, whether for tax purposes

of some more innocent reason, thereby making it impossible for the landlord to challenge or test allegations of lost profits, then such lack of “competent evidence” may serve to negate loss: *The Ophelia* [1916] 2 AC 206 at 229-230; *Gray v Haig* [1855] 20 Beav 219, as applied in a leasing context in *Kindful (Australia) Pty Ltd v Country Villa Holdings Pty Ltd* NSWADT 224 para [148].

**[16] Guarantees for tenants’ obligations : do they encompass only accrued rental and outgoing or in addition, loss of bargain damages ?**

The main cases are *Moschi v Lep Air Services Limited* (1973) AC 331 and *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17.

They stand for the proposition that .....

The guarantee in *Lewy v Moss Nominees* [1996] NSWSC 481 provided that the lessee guaranteed “the due and punctual payment of all rent and other monies and the .....performance and observance by the Lessee of all other covenants and conditions on the part of the Lessee to be performed and observed under the lease.....”

This clause was held to contemplate loss of bargain damages, especially in context of the further words which referred to the recovery of damages for loss suffered by the lessor during the “entire term” of the lease. This was held to mean to the interval stated in the lease as the term, and not only the term until brought to an end by acceptance of repudiation.

**[17] Jurisdiction of the New South Wales Administrative Decisions Tribunal**

The ADT has jurisdiction regarding retail leases. However, in exercising its powers conferred by the *Retail Leases Act 1994* (NSW), the Tribunal does not have jurisdiction to award damages for misleading and deceptive conduct under State or Commonwealth legislation: *Skiwing Pty Ltd v Trust Co of Australia Ltd (No 3)* [2004] NSW ADT 94 at [5] – [19] upheld on appeal on this point (but not on other points) NSWCA 185 hn’s 1-5.<sup>1</sup>

<sup>1</sup> See also *Bischoff v Werncog Pty Ltd* [2004] NSW ADT 241 at [55].