

REPUDIATION OF LEASES

BLUNDELL LECTURE

26TH JUNE 2000

THE RIGHT HONOURABLE THE LORD MILLETT

SPEAKS FOR THE PROPOSITION THAT THE DOCTRINE OF  
IREPUDIATION IS AND SHOULD BE PART OF THE ENGLISH LAW OF  
LANDLORD AND TENANT

AND

THE HONOURABLE MR JUSTICE NEUBERGER

SPEAKS AGAINST THE PROPOSITION

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**REPUDIATORY BREACH OF CONTRACT AND LEASES.**

It is a great honour to be asked to give one of the Blundell Lectures, which have long been acknowledged to be the leading series of lectures on real property law. It is a particular honour to be asked to do so this year, which marks the 25<sup>th</sup> anniversary of the foundation of the lectures. To mark the occasion, the usual lecture will be replaced by a debate. The proposition is that the Contractual Doctrine of Repudiatory Breach of Contract forms no part of the law of landlord and tenant. I shall be speaking for that proposition, and Sir David Neuberger will be speaking against it. He is a formidable opponent. I regard David as the leading landlord and tenant lawyer today. He is a worthy successor of Lionel Blundell. He knows far more about the law of landlord and tenant than I do. I have sought to even up the odds by giving him the task of opposing the motion. He will have the difficult, I would say impossible, task of explaining just how a legal estate in land can be brought to a premature end by the acceptance of a repudiatory breach of contract.

The doctrine of accepted repudiation is of general application in the law of contract. There is no reason why it should not apply to an agreement to grant or take a lease. The question this evening is different. It is whether it can be used to bring a subsisting legal estate in land to a premature end. The Australian Courts have said that it can. There is no authority on the question in this country above the level of the County Court, though Court of Appeal has assumed without hearing argument that the contractual doctrine is capable of applying. I suggest that this is conceptually and historically unsound, sits uneasily with established aspects of the law of landlord and tenant, is inconsistent with the basis on

which Parliament has legislated in this field for over two hundred years, and prejudicially affects third parties.

**1 First: the importation of the contractual doctrine into the law of landlord and tenant is Conceptually Unsound.**

It is conceptually unsound because it disregards the fundamental division between property and obligation. The Roman lawyers bequeathed this to us. It is fundamental to the structure of our law. At the most basic jurisprudential level, it is a line which must be held if the law is to have any coherence. At the practical level, it confuses the reciprocal discharge of *future* contractual obligations by accepted repudiation with the termination of *existing* property rights by forfeiture, subject to the availability of relief from forfeiture. The distinction is critically important for two main reasons. The first is that property rights may affect third parties, as contractual rights may not. The second is that equity grants relief from forfeiture of property rights; it has never claimed the right to give relief from the consequences of a repudiatory breach of contract.

Now leases entered into our law as contracts, and for that reason were outside the feudal system. But they have been recognised as property since 1480. They were called chattels real, to show that they were property even if not real property. Page 1.1 of Woodfall describes the relationship of landlord and tenant as "the relationship which exists between the parties to a demise and between their respective assigns. The relation is one of tenure."

I stress that. The relationship is tenurial, not contractual. A lease is not a mixture of contract and property. We must distinguish between the document, which is

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usually contractual, and the covenants which it contains, which are contractual, at least in origin; and the legal estate which it creates. That is property. It lies in grant. The owner of a legal estate has a right of exclusive possession, a right maintainable against the world. In other words, it is a right *in rem*. The tenant can sue in trespass. Once created, the legal estate has an existence independently of any contract which may have brought it into being. Like other property, it is freely assignable. It cannot be made non-assignable. An assignment in breach of an absolute covenant against assignment has legal effect. It may bring about a forfeiture if the landlord chooses to re-enter, but it is effective to vest the lease in the assignee. This is because the subject-matter of the assignment is the legal estate, ie. property not contract, and while contractual rights can be made inalienable, a legal estate in land cannot.

The relationship continues after assignment despite the absence of any privity of contract. It subsists by virtue of privity of estate, ie. because the parties' rights and liabilities are not contractual but property rights and liabilities. The original tenant usually has a contractual liability to pay the rent, which is why it formerly continued after assignment when he was no longer the tenant. But while he remains the tenant he is liable to pay rent even in the absence of a covenant to do so. This is because rent issues out of the land itself, ie. it is payable by the person who is the tenant for the time being. This is, of course, the basis on which a subsequent tenant is liable on any of the covenants. And now it is the only basis on which even the original tenant is liable. The tenant's liability is looking even less contractual today than it once did.

David is, I suggest, going to have to explain how the contractual doctrine of repudiatory breach can possibly apply when there is no contract between the parties. If he cannot do that, he will have to concede that it only applies to the original parties,

which is a severe limitation on the application of the doctrine. And I shall suggest that this is not the only limitation which he may have to concede.

**Secondly: it is Historically Unsound.**

The importation of the contractual doctrine into the law of landlord and tenant is certainly historically unsound. In its modern form the contractual doctrine is of relatively recent origin. It cannot be traced back before 1831. It was not fully understood even by common lawyers until the late 19<sup>th</sup> Century (1888), or by Chancery lawyers until the late 20<sup>th</sup> Century (1980). The law of landlord and tenant of course predated these developments by many centuries.

Of course, it was long recognised that the refusal or inability of one party to perform his obligations should immediately excuse the other from performing his. Before the middle of the 19<sup>th</sup> Century, however, this had nothing to do with breach of contract. The common law treated the innocent party as discharged from further performance, not because the other party had committed a repudiatory breach of contract, but because he had failed to perform a condition precedent to his own liability. The critical question was whether the two promises were mutually interdependent or independent. As we shall see, it was settled law that the covenants in a lease were independent.

A lease could, of course, be rescinded *ab initio* for fraud, though not, incidentally, for innocent misrepresentation until the Misrepresentation Act 1967. This did not bring the lease to an end. It meant that there no lease ever came into being. The same result followed if there was a failure of a condition precedent to the grant. This is probably the explanation of the handful of cases which have been relied upon in support of the

doctrine. Take the most recent, **Wilson v Fitch-Hatton** in 1877, a case in the Court of Appeal. The landlord agreed to let a furnished house for three months. Owing to defective drainage, the house was unfit for human habitation. The tenant refused to take the tenancy, or go into occupation, or pay the rent. The landlord's claim for rent failed. There is more than one possible explanation given in the three judgments, though none of them treats the case as a simple breach of covenant, and one of them expressly says that on this basis the result would have been different. But the important thing is that the tenancy failed at the outset. The tenant never went into possession at all. He never became liable for any rent. It was not a case where a valid and subsisting lease was brought to an end by a subsequent breach of covenant. I think the tenancy was rescinded *ab initio*. There never was an effective grant. The defendant never was a tenant.

The contractual doctrine does not work in this way. It does not rescind the contract *ab initio*. It merely discharges both parties from further performance of their reciprocal contractual obligations. But it was established from very early times that the covenants in a lease are independent of each other. Anthony Tanne of Falcon Chambers has traced this rule back to a case in the reign of Charles II, but it is almost certainly much earlier. This meant that neither the landlord nor the tenant was discharged from his obligations under the lease by the other's breach. This was settled law for centuries, long before the emergence of the modern contractual doctrine. It has been repeatedly confirmed in more recent times: **Dawson v Dyer** (1833); **Edge v Boileau** (1885); **Taylor v Webb** (1937); **Yorkbrook v Batten** (1986). These cases decide that the tenant's failure to pay rent does not absolve the landlord from liability under his repairing covenant. How then can the landlord's failure to repair absolve the tenant from his liability to pay rent, still less bring the lease to an end, so

that his breach is irremediable? The independence of the covenants is a two-way affair. So is the contractual doctrine.

**Thirdly: it sits uneasily with other aspects of the law of landlord and tenant.**

For centuries, therefore, and long before the emergence of the doctrine of repudiatory breach of contract, the law of landlord and tenant developed on the footing that the parties' respective obligations were independent of each other, with the result that neither was absolved from performance by the non-performance of the other. This is inconsistent with the contractual doctrine. Conveyancers responded by including in the lease a proviso for re-entry, allowing the landlord to bring the lease to an end for non-payment of rent or breach of covenant on the part of the tenant. But since they acted for the landlord they resisted any attempt to include a proviso to allow the tenant to bring the lease to an end for breach on the part of the landlord. No such clause can be found in any precedent book.

So the law developed that a lease could not be determined by the landlord for breach of the tenant's covenants, no matter how serious, in the absence of an express proviso for re-entry, and none was to be implied. This rule can be traced back to 1824, but is almost certainly far older. The trouble with the importation of the contractual doctrine is that it sits uneasily with the need for an express proviso for re-entry, allows the landlord to bring the lease to an end without re-entering and without any prospect of relief from forfeiture, and operates in favour of the tenant as well as the landlord, contrary to the intentions of the original parties.

**Fourthly: it is inconsistent with the basis on which Parliament has legislated in this field.**

Parliament has continuously intervened to protect the tenant from forfeiture. It has done so on the basis that the only way a landlord can determine a lease for breach of covenant is by exercising his right of re-entry. Section 146 of the Law of Property Act 1925 expressly restricts the exercise of "a right of re-entry or forfeiture". It does not apply to a right to bring the lease to an end simply by accepting the tenant's repudiatory breach of contract. If Parliament (or Benjamin Cherry) had thought for a moment that the landlord had such a right, Section 146 would have been expressed very differently. Likewise, the Leasehold Property (Repairs) Act 1938 applies only where the tenant serves a counter-notice, and he can only serve a counter-notice if the landlord has served a Section 146 notice. A tenant who persistently refuses to carry out repairs during the currency of the lease is clearly evincing an intention not to comply with his obligations. If the landlord can bring the lease to an end by invoking the contractual doctrine, and is prepared to forego his claim for damages, he can deny the tenant the main protection of the 1938 Act.

David, I suggest, will have to explain how the doctrine can be invoked by the landlord consistently with the existing law which protects tenants, or he will have to concede that the doctrine is available only to tenants. That would be only half the contractual doctrine. And, oddly enough, the Australian cases are all cases where the doctrine was invoked by the landlord who insisted that he was not exercising his right of re-entry.



**Fifthly: it is Unnecessary.**

It is not as if the importation of the contractual doctrine would meet a long felt want. The parties to a lease have adequate alternative remedies. The landlord can take an express proviso for re-entry for breach of covenant. He should not be allowed to circumvent the tenant's right to apply for relief from forfeiture. The tenant, for his part, enjoys a right of recoupment. If the landlord is in breach of his repairing covenant, the tenant can do the work and recoup himself out of the rent. This right was recognised as early as 1591. It is not actually inconsistent with a right on the part of the tenant to bring the lease to an end for breach of the landlord's repairing covenants. But if the landlord cannot bring the lease to an end for breach of the tenant's repairing obligations and without complying with the statutory requirements (**LPA** Section 146 etc.), why should the tenant be allowed to bring it to an end for breach of the landlord's repairing covenants when he can do the work himself and withhold the rent to pay for it? In practice, he can simply walk away and leave the premises empty. The landlord is in no position to bring an action for the rent, since he will be met with a cross-claim.

Again, if the landlord evicts the tenant, the tenant's obligation to pay rent is suspended while he is out of possession. This is an adequate remedy, particularly when he can also have damages for trespass and an injunction to obtain reinstatement. It is not strictly inconsistent with giving the tenant the alternative remedy of treating the lease as at an end, but why should he have this? The existing remedies are surely the appropriate way of dealing with the situation bearing in mind (i) that the lease is a property interest (ii) that there

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may be no privity of contract between the parties and (iii) that others such as subtenants and mortgagees may be affected.

[I suppose the clearest possible repudiatory breach must occur if the tenant denies his landlord's title. It is true that, under the feudal law, this gave the landlord the right to forfeit the lease. No proviso for re-entry was necessary. Forfeiture was automatic without hope of relief. In **Warner v Sampson** in 1958 Lord Denning explained the basis of this rule. It had nothing to do with breach of contract. Denial of title was repugnant to the feudal obligations of a tenant. Lord Denning suggested that the rule is obsolete. I must say I agree with him. The landlord is sufficiently protected by saying that the tenant is estopped from denying his landlord's title. We would surely say that a tenant cannot at one and the same time deny his landlord's title and rely on a grant by the landlord or his predecessor].

**Finally: it affects third parties.**

If the contractual doctrine is imported into the law of landlord and tenant, then the problem of subtenants and mortgagees has to be faced. This problem arises precisely because the lease is property, not contract. It is the practical consequence of the fundamental distinction between property and obligation.

There are three possibilities. One is that the destruction of the lease automatically destroys any subtenancy and the subject-matter of any mortgage. This would certainly be the position at common law and in the absence of statutory provision to the contrary. The injustice arises because, as the contractual doctrine is relatively modern, and it has only very recently been suggested that it can be used to bring a lease to an end, the relevant statutes have all been enacted on the assumption that the landlord can only bring a

lease to an end by forfeiture. Section 146(4) of the Law of Property Act 1925, which preserves subtenancies and other derivative interests, applies only where the landlord is proceeding by action or otherwise to enforce a right of re-entry or forfeiture.

The second possibility is that the lease is destroyed but any subtenancy or mortgage continues, exactly as it would if the tenant had surrendered the term to the landlord. The difficulty with this solution is that, at common law, the extinguishment of the lease by surrender also extinguished the reversion to any subtenancy, with the result that the subtenant could remain in possession without any obligation to pay rent or perform the covenants in the subtenancy. The common law rule was reversed by statute in the 18<sup>th</sup> Century: (see now Sections 139 and 150 of the Law of Property Act 1925). But these Sections apply only where the head lease is surrendered. That is because no one ever thought that it could be brought to an end simply by breach of contract.

A third possibility has been suggested: that a tenant who has granted a derivative interest will not be allowed to invoke the contractual doctrine to bring the lease to an end. This solution invokes the doctrine only to depart from it. It is born of the unnatural marriage of property and contract. But it is only half a solution. There is nothing to stop the *landlord* treating the *tenant's* breach of covenant as repudiatory. The Court has no discretion to disapply the contractual doctrine or to give relief from its consequences. It is difficult to see how the *landlord* can lose his right to invoke it because the *tenant* has granted a subtenancy.

But the problem is not merely that the doctrine causes injustice. It is that all these statutory provisions have been enacted on the assumption that a lease can be brought to a premature end only by surrender or forfeiture. They are inconsistent with the availability of the contractual machinery.

It is not as if the Australian decisions are without their problems. In the first of the cases (in 1981) the High Court held that a tenant's persistent late payment of rent and payment by cheques which were repeatedly dishonoured did not amount to a repudiatory breach. The Court drew a distinction between a party's unwillingness to comply with his contractual obligations and his inability (though willing) to do so. That is unorthodox, to say the least. The Court also seems to have suggested that the obligation to pay rent is not an essential term of the lease, quite contrary to the ordinary contractual rule. In the next case (in 1984) the High Court held that a bona fide refusal to pay rent on mistaken grounds did amount to a repudiatory breach of contract. That is also contrary to the contractual rule.

Both cases were concerned with breach of the tenant's obligation to pay rent. In both cases the lease contained a proviso for re-entry and the landlord claimed that the lease had determined without re-entry. In neither case did the tenant seek relief from forfeiture. It is a pity that he did not, because that might have concentrated minds. The problem was that the property market had collapsed, with the result that the passing rent was temporarily higher than the current rental value of the property. The landlord wanted damages as well as possession, and he could not have damages for loss flowing from his own act in re-entering. The landlord had to choose between re-entering and foregoing any claim to damages, or keeping the lease on foot and suing or proving for the rent quarter by quarter. What is wrong with that? It causes problems when the tenant is in liquidation, because it hinders the completion of the winding up. This difficulty was met by extending the disclaimer provisions to insolvent companies in 1929. But in the century or more before 1929, no one supposed that the landlord could eat his cake and have it by accepting the tenant's liquidation as a repudiatory breach of contract, regaining possession and proving for damages for the loss of the lease which he has himself brought about.

And this causes another problem, for the tenant's bankruptcy is the plainest possible repudiatory breach of contract. In the interests of the other creditors, Parliament has restricted the landlord's right of re-entry in these circumstances. Allowing the landlord to invoke the contractual doctrine will destroy the protection which Parliament has enacted for the protection of the tenant's creditors, as well as his subtenants and mortgagees. If it is thought appropriate, the solution to the problem in the Australian cases is to allow a landlord to forfeit and claim damages, subject to relief from forfeiture; not to bring the lease to an end without forfeiture.

### **Panalpina.**

You may have noticed that I have said nothing about the **Panalpina** case. That is because it has nothing to do with the question we are debating. In that case the House of Lords decided that the doctrine of frustration is, in theory at least, capable of applying to a lease, though it will hardly ever do so in practice. That is obviously right. A lease would be frustrated if, for example, the land demised falls into the sea. So the case involved a question of degree, not of principle. The question was: what can amount to frustration in the case of a lease? There are four points of difference between frustration and repudiatory breach:

- (i) Frustration applies to transactions, not just to contracts;
- (ii) the *tenant* may claim that the lease has been frustrated; it will never be in the *landlord's* interest to do so;
- (iii) if there is a subtenancy it will be the subtenant who alleges frustration, so it will never operate to the disadvantage of a subtenant; and

- (iv) the argument in **Panalpina** was about the allocation of risk, which may be just as relevant where there is a property transaction as where there is a contract.

So you cannot simply extrapolate from frustration to repudiatory breach.

### **Conclusion.**

So I summarise. The doctrine is conceptually and historically unsound. It is inconsistent with other aspects of the law of landlord and tenant. It is unnecessary. It is inconsistent with the basis on which Parliament has legislated in this field for more than three hundred years. And it prejudices third parties such as subtenants and mortgagees. The House of Lords did not have to face these problems in **Panalpina**.

David will have to restrict the doctrine to the original parties to the lease, to the case where the tenant is invoking the doctrine and not the landlord, and where the tenant has not created any subtenancy or other derivative interest. And all because, when the property market collapsed, a couple of Australian landlords with perfectly good forfeiture clauses wanted to bring the lease to an end without exercising their powers of re-entry so that they could claim damages as well.

**Lord Millett**

The law is stated as at 26 June 2000

Lord Millett's Research Assistant - Anthony Tanney, Falcon Chambers

**BLUNDELL LECTURE****WHY LEASES ARE DETERMINABLE BY AN ACCEPTED REPUDIATION****SIR DAVID NEUBERGER****26th June 2000****Introduction**

Although the doctrine of determination of a contract by an accepted repudiation caused the courts some difficulty during the 18th and 19th centuries,<sup>1</sup> the principle is now well established. A contract can be determined by repudiation on the part of one party ("the repudiating party") if, but only if, the other party ("the accepting party") accepts the repudiation. So far as the repudiating party is concerned, his repudiation can come in one of two forms. The first is by committing a breach of the contract which is so grave as to go to the root of the contract, or to take away from the other party virtually all the benefit which the contract was intended to give him. Alternatively, the repudiating party can renounce the contract, that is, he can unequivocally state that he is not bound by the contract, without any apparent justification. In either case, however grave the breach, or however unequivocal the renunciation, the contract will not come to an end, unless and until the other party accepts the repudiation. In the first case, that of a very serious breach, the other party, instead of accepting the repudiation, can elect to treat the contract as subsisting, and simply sue for any loss he has suffered as a result of the breach. In

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<sup>1</sup> e.g. Frost -v- Knight LR 5 Exch. 322 at 326-7 per Kelly CB.

the latter case, the renunciation of itself achieves nothing, and cannot found the basis of any claim: it is "writ in water".

"The doctrine of accepted repudiation is of general application in the law of contract".

So said Lord Millett very recently in Hurst -v- Btyk<sup>2</sup>. Why should this doctrine, which applies to contracts generally, not apply to leases? Various arguments have been put forward. Let me consider them in turn

#### The assumption argument

The first is that, at least until recently, it had always been assumed that it did not apply. That will not do. The law reports are littered with decisions of the courts which show that accepted notions are either based on outdated ideas or simply do not bear analysis once they are subjected to scrutiny. As with any notion, the idea that leases cannot be determined by accepted repudiation must be tested by reference to principle, authorities, and consequences.

#### The estate in land argument and connected points

The second argument is that a lease is an estate in land. However, it is also a contract. As was said by Lord Browne-Wilkinson recently, a lease is "a legal

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<sup>2</sup> [2000] 2 All ER 193 at 199a.



hybrid, part contract part property"<sup>3</sup>. That a lease is normally an estate in land cannot possibly be gainsaid: see Section 1(1)(b) of the Law of Property Act 1925. However, the first problem with this argument is that it is not right to say that a lease always creates an estate. As was said by Lord Hoffmann in Bruton -v- London & Quadrant Housing Trust<sup>4</sup>:

"[T]he term "lease"... describes a relationship between two parties of a designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate... which may be binding upon third parties. A lease may, and usually does, create a proprietary interest called a leasehold estate. ...But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest."

Accordingly, the simple argument that leases cannot be determined by an accepted repudiation because they are always estates in land is based on an oversimplification.

Reverting to the usual case, when the original parties ("the lessor" and "the lessee") execute a lease, they create a contract and an estate. On the basis that determination by accepted repudiation is of general application to contracts, why

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<sup>3</sup> Linden Garden Trusts Ltd -v- Lenesta Disposals Ltd [1994] 1 AC 85, at 108H.

<sup>4</sup> [1999] 3 WLR 150 at 156H to 157A.

should the mere fact that the lease creates an estate as well as a contract prevent the doctrine applying to leases?

Consider first the case where there has been no assignment of term or reversion, i.e. where the reversion and term remain vested in the lessor and the lessee respectively. The fact that a lease is an estate in land does not alter the fact that it is also a contract. Furthermore, the fact that the lease is an estate does not mean that it is incapable of coming to an end, Quite the contrary. It is of the essence that a leasehold estate will determine or is capable of determination; a purported lease is invalid if it has no contractual term date and is incapable of determination<sup>5</sup>. In that sense, a lease is not merely different from, but is effectively opposite to, the only other estate in land which can now exist, namely a freehold. Whereas a leasehold estate must be determinable, a freehold estate cannot be determinable. Indeed, a lease can determine early - e.g. by forfeiture, surrender or disclaimer.

Additionally, it is of the essence of a lease that it involves two parties, who have rights and obligations against each other, namely the lessor and the lessee. The only other type of estate, a freehold does not involve two parties: there is simply the freehold. Of course, freeholds are often subject to third party rights, in that they can be subject to restrictive covenants or rent charges, but unlike the landlord's interest under a lease, they are not of the essence of freehold estates; they are merely incidental thereto.

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<sup>5</sup> Prudential Assurance Co. Ltd -v- London Residuary Body [1992] 2 AC 386.

Accordingly, the contention that, because a lease is an estate as well as a contract, it cannot be determined by a method applicable to contracts, gets no assistance from considering the position of the only other estate which can now exist in English law, namely a freehold. A freehold is merely an estate in land; unlike a lease, it has no inherent contractual aspect. Contrary to a lease, it is necessarily perpetual in nature. Indeed, historically, unlike a freehold, a lease was not technically real property. Neither was it personal property. It was classified as a chattel real, a sort of legal duck billed platypus. As between lessor and lessee, there is a contractual relationship, to which one would expect normal contractual principles apply. That would include determination by accepted repudiation. Why should that not put an end to the estate?

The contention that, because it is an estate, a lease cannot be determined by accepted repudiation merely states the proposition we are discussing: it does not answer it. In the National Carriers case, in 1980<sup>6</sup>, Lord Wilberforce made the same point about an argument that a lease could not be determined by frustration:

"The argument must continue by a proposition that an estate in land once granted cannot be divested - which... begs the whole question." <sup>7</sup>.

To the same effect, Lord Simon of Glaisdale said<sup>8</sup> that the argument "cannot be because, once vested, a lease cannot be divested without the agreement of the

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<sup>6</sup> National Carriers Ltd -v- Panalpina Northern Ltd [1981] AC 675.

<sup>7</sup> [1981] AC 675 at 694D.

<sup>8</sup> [1981] AC 675 at 705D-E.

parties. That would be to beg the question: if frustration, applies it can be so divested".

I turn to the case where the reversion and the term have been transferred. In that case, the relationship between the persons in whom the reversion and the lease are vested ("the landlord" and "the tenant" as I shall call them) is based on a privity of estate rather than privity of contract. At first sight, perhaps, the contention that a doctrine, which applies to contractual relationships, cannot continue to apply, has a little more force. On the other hand, it would be startling if an incident of a lease (namely its ability to be determined by a repudiation) disappeared as soon as the term or the reversion was assigned. Analysis shows that this latter view is indeed correct. While the relationship between the landlord and the tenant is based on privity of estate, the rights and obligations as between the landlord and the tenant are entirely rooted in the terms of the contract agreed between the lessor and the lessee. Effectively, the entire bundle of rights and obligations created by the lessor and the lessee passes to their respective successors in title. An example is the right of a lessor to sue a guarantor of the lessee's liability to pay rent: the right passes to the successor landlord<sup>9</sup>. There is no reason why the benefit (and indeed the burden) of the application of the law of repudiation should not similarly be relied on by (or enforceable against) successors in title of the lessor and the lessee.

In this connection, it is also worth remembering that, if and when the lease and/or the reversion are transferred, the contract still survives, although only as between

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<sup>9</sup> P&A Swift Instruments -v- Combined English Stores plc [1989] AC 643.

the lessor and the lessee. Accordingly, when the lease and reversion have been transferred, methods of determination by forfeiture, surrender, or notice to quit are operable only between the landlord and the tenant, that is the parties with privity of estate, but if and when determination is effected by one of those means, not only does the estate come to end. The contractual relationship between the lessor and the lessee also ends, although nothing they have done has caused this to happen. The idea that the lease can be determined by acts or omissions of successors in title to the original parties, thereby putting an end both to the estate and to the original contract, is therefore entirely in keeping with very well established principles of leasehold law.

The other conceptual arguments raised against repudiation applying to leases are equally uncompromising. The fact that a lease grants exclusive possession takes matters no further. The tenant's right to exclusive possession continues until the lease expires, and if the lease expires as a result of an accepted repudiation, then his right to exclusive possession goes. The fact that the law treats the rent as issuing out of the land is also irrelevant: if the rent issues out of the land so long as the lease continues, and if the lease determines by an accepted repudiation or otherwise, the rent no doubt stops issuing. So too with the covenants: they continue until the lease expires. In any event the notion of rent issuing out of the land was rightly characterised by Lord Denning as one of the "outdated relics of medieval law"<sup>10</sup>.

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<sup>10</sup> CH Bailey Ltd -v- Memorial Enterprises Ltd [1974] 1 WLR 728 at 732.

Historical considerations and the case law

This conveniently brings me to the third argument. It is said that to apply the doctrine of accepted repudiation to leases is historically unsound. Properly analysed, that argument can in fact be seen to support the contention that the doctrine applies to leases: "historical soundness" is really a euphemism for out of date technicalities.

The notion that a lease cannot be determined by accepted repudiation is based on an old fashioned view of leases. The point was well expressed in an article by William O Douglas and Jerome Frank<sup>11</sup> in the Yale Law Journal in 1933:

"[T]he law of landlord and tenant went through a profound development at a time when the law of contract was only nascent and the law of property dominant. It is but natural that its roots should be found in the latter. Yet this history should not bar courts from treating leases more realistically today. To assimilate leases of modern office buildings to feudal tenure in 17th-century England is to disregard the essential elements of the bargain made, the present market economy, and the great development in contract law which has taken place since Coke wrote."

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<sup>11</sup>Landlords' Claims in Reorganisations (1933) 42 Yale Law Journal 1003, at 1005.

That was an American opinion in 1933. More importantly from our point of view, it is the modern view in England. Thus, Lord Diplock said in the United Scientific

"[T]he medieval concept of rent as a service rendered by the 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."

In 1993, an article in *The Conveyancer* observed: "This increasing "contractualisation" of leases is a process which has been gathering pace in this country for the last 20 years"<sup>13</sup>. This view is also to be found in the most recent edition of Megarry & Wade<sup>14</sup>.

The decision of the House of Lords in National Carriers<sup>15</sup>, when contrasted with the earlier decision in Cricklewood<sup>16</sup> not only shows how the law has developed in this country in the second half of this century, but renders the argument against determination by accepted repudiation very difficult to maintain. In Cricklewood, decided in 1945, the majority of the Court of Appeal and two members of the House of Lords (Lord Russell and Lord Goddard) indicated that a lease could not be determined by frustration, essentially because a lease was an estate in land.

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<sup>12</sup> United Scientific Instruments Ltd -v- Burnley Borough Council [1978] AC 904 at 935.

<sup>13</sup> [1993] Conv. 71 (S Bright).

<sup>14</sup> Law of Real Property (6th edition) para 14.003.

<sup>15</sup> National Carriers Ltd -v- Padiuin (Northern) Ltd [1981] AC 675.

<sup>16</sup> Cricklewood Property and Investment Trust Ltd -v- Leighton's Investment Trust Ltd [1943] KB 493; [1945] AC 221.

Two other members of the House of Lords (Viscount Simon LC and Lord Wright) took the opposite view. Some 40 years later, in National Carriers the House of Lords (by a majority of 4 to 1) reached the conclusion that a lease could be determined by frustration. This shows how the law has developed so that the contractual nature of a lease now predominates, and the normal incidents of contract will apply to leases.

National Carriers is also important more specifically to the present debate: if a lease can be determined by frustration, it is hard to see any argument of principle why it should not be capable of being determined by accepted repudiation. In the case of frustration, an unanticipated event puts an end to the contract, normally against the wishes of one of the parties; that is a more extreme result than the act or statement of one of the parties putting an end to the contract, only if the other party agrees.

Indeed, as a matter of principle, if (as the House of Lords have held) a lease can be determined by frustration, then it must follow that it can be determined by accepted repudiation. In his judgment in the famous Hong Kong Fir case<sup>17</sup>, Diplock LJ said this:

"Where an event occurs the occurrence of which neither the parties nor Parliament expressly stated will discharge one of the parties from further performance of his undertakings. It is for the court to determine whether

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<sup>17</sup> Hong Kong Fir Shipping Co Ltd-v- Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 at 66.



the event has this effect or not. The test whether an event has this effect or not has been stated in a number of metaphors.... This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event is different in the two cases."

Diplock LJ went on to explain that if the event is due to the fault of one of the parties, then "the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong"<sup>18</sup> means that the defaulting party cannot rely on his own default as a reason for saying the contract is at an end. Importantly, he then went on to say this:

"This branch of the common law has reached its present stage by the normal process of historical growth, and the fallacy in Mr Ashton Roskill's contention that a different test is applicable when the event occurs as a result of the default of one party from that applicable in cases of frustration where the event occurs as a result of the default of neither party lies, in my view, from a failure to view the cases in their historical context." <sup>19</sup>

As he explained, determination by frustration and determination by accepted repudiation are part of the same "branch of the common law", and "it is the event and not the fact that the event is a result of a breach of contract which relieves the

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<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

party not in default of further performance"<sup>20</sup>. Indeed, the point is underlined by the fact that all four members in the majority of the House of Lords in National Carriers not only decided that leases could determine by frustration, but when doing so approved the Canadian decision in the Highways Properties case<sup>21</sup>, which decided that leases could be determined by accepted repudiation<sup>22</sup>.

So far as other authorities are concerned, the position is as follows. In 1971, in Total Oil<sup>23</sup> the Court of Appeal held, relying on Cricklewood, that a lease could not be determined by accepted repudiation. However, we are now in a very different world. Cricklewood is no longer good law, and leases can be frustrated: see National Carriers. Total Oil is similarly no longer good law, according to Sedley LJ, albeit then only an Assistant Recorder: see Hussein -v- Mehrlan<sup>24</sup>. That case, where he held that a landlord had committed a repudiatory breach, was, described in the Cambridge Law Journal as "a striking exception to the rule that county court decisions are neither reported nor of authority"<sup>25</sup>. In other common law or quasi-common law jurisdictions it now seems to be clear that leases can be determined by accepted repudiation: it has been so held in Australia<sup>26</sup>, Canada<sup>27</sup>

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<sup>20</sup> *ibid.* at 69

<sup>21</sup> Highways Properties Limited -v- Kelly Douglas & Co. Limited (1971) 17 DLR (3d) 710 at 721.

<sup>22</sup> [1981] AC 675, at 690A, per Lord Hailsham, 696A-C, per Lord Wilberforce, 703A-C, per Lord Simon, and 716D-G, per Lord Roskill.

<sup>23</sup> Total Oil Great Britain Ltd -v- Thompson Garages (Biggin Hill) Ltd [1972] 1 QB 318.

<sup>24</sup> [1992] 2 EGLR 87.

<sup>25</sup> [1993] CLJ 212 per Charles Harpum.

<sup>26</sup> Progressive Mailing Co. -v- Tabali Pty Limited (1985) 157 CLR 17.

<sup>27</sup> Highway Properties.

and the United States<sup>28</sup>. The alleged conceptual and practical difficulties of leases being determined by accepted repudiation could be raised in those jurisdictions just as much as in the English jurisdiction. Why should the result be any different here?

One further fairly recent at first instance case deserves a mention to indicate how well the law of accepted repudiation ties in with landlord and tenant law. It is a well established, if somewhat controversial, doctrine that, a tenant who denies his landlord's title is liable to have his lease forfeited<sup>29</sup>. In a case in 1991 (the WG Clark case)<sup>30</sup>, it was held that this doctrine was effectively equivalent to, and was to be treated in the same way as, repudiation of a contract: the denial of title was a renunciation by the tenant which the landlord could accept by forfeiting.

#### Avoidance of relief from forfeiture

A fourth argument is that, if a landlord can determine a lease by accepting a repudiation by the tenant, that would avoid the equitable and statutory power of the court to grant relief to the tenant. This argument involves identifying the basis upon which the estate determines if a lease can be ended by repudiation.

The easy answer is that the same problem, indeed a more difficult problem, arises with frustration, but that did not prevent the House of Lords holding that a lease could determine by frustration. The more satisfactory answer is that the

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<sup>28</sup> Teller -v- McCoy 253 SE 2d 114.

<sup>29</sup> see e.g. Warner -v- Simpson [1959] 1 QB 297.

<sup>30</sup> WG Clark (Properties) Ltd -v- Dupre Properties Ltd [1992] Ch 297 at 307.

determination of the estate is effected by forfeiture, surrender or by a new sui generis method. It does not embarrass my case to say that there is more than one possible answer to the problem: on the contrary.

The forfeiture solution was favoured by Sedley LJ in Husse in<sup>31</sup> and is supported by the WG Clark case<sup>32</sup>. There are obvious similarities between determination by accepted repudiation and determination by forfeiture. If forfeiture is the correct analysis, then either Section 146 of the Law of Property Act 1925 applies<sup>33</sup> or it does not. If it does, then the tenant can seek relief under its provisions. If it does not then there is a powerful argument for saying that there would be an inherent equitable jurisdiction to grant relief. If statute has not intervened, then there is nothing to stand in the way of equity doing so<sup>34</sup>. The fact that it may represent an extension of the equitable jurisdiction should not cause concern: equity is not past child-bearing<sup>35</sup>, and if the law develops to extend repudiation to leases, why should equity not develop as well, especially in light of its wide powers to grant relief<sup>6</sup>.

There is a powerful case for saying that the determination of the estate in a case of accepted repudiation is not by forfeiture, but by surrender or an arrangement similar to surrender. At first sight, of course, repudiation appears closer to forfeiture, because each involves a breach by one party, which gives the other party

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<sup>31</sup> [1992] 2 EGLR 87 at 90J.

<sup>32</sup> see WG Clark [1992] Ch 297.

<sup>33</sup> as was held in WG Clark [1992] Ch 297 at 309.

<sup>34</sup> Official Custodian for Charities -v- Parkway Estates Developments Ltd [1985] Ch 151 at 153F-166F and Billson -v- Residential Apartments Ltd [1992] 1 AC 494 at 516D-519D, 520C-522H.

<sup>35</sup> Re Murphy [1998] 3 All ER 1 at 10e.

<sup>36</sup> see e.g. BICC Ltd -v- Burndy Corporation [1985] Ch 232 and Johnson -v- Johnson [1989] 1 WLR 1026.

a right to determine. However, apart from the fact that repudiation can apply either way as between landlord and tenant, whereas a tenant cannot ever forfeit his landlord's interest, the essential difference between determination by forfeiture and determination by accepted repudiation is that forfeiture is a determination in accordance with the express terms of the lease: it has been catered for by the parties. **AS** the observations I have quoted from Diplock LJ in Hong Kong Fir demonstrate, the whole point of determination by accepted repudiation (or by frustration) is that it is extra-contractual. In that sense, it is like a surrender.

Determination by repudiation is like surrender for another important reason. Like a surrender, a determination by accepted repudiation can be said to involve each party communicating to the other a desire and intention to put an end to the lease. The repudiating party either expressly (by renunciation) or impliedly (by committing a breach which goes to the root of the contract) evinces an intention no longer to be bound by the contract, but the contract only comes to an end if and when the other party unequivocally communicates his acceptance that the contract is at an end. **AS** it is of the essence of determination by repudiation that the repudiation has to be accepted, there is force in the notion that the estate is effectively surrendered when the repudiation on the part of a tenant or landlord is accepted by the landlord or tenant. **AS** was very recently said by Lord Millett in Barrett -v- Morgan<sup>37</sup>:

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<sup>37</sup> [2000] 1 All ER 481 at 485C-E.

"A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the in the fullest sense of the term ...It is because the landlord... has not, by granting the tenancy, previously agreed that the tenant should have the right to surrender the tenancy prematurely that the landlord's consent is necessary."

Given that determination of a lease in a case of repudiation can be said to involve both parties mutually communicating, by word or deed, the desire to put an end to the lease, it may be that it leads to an actual surrender of the lease.

If that is the right analysis then there would be no room for relief for the tenant or the landlord. That is not a particularly startling or unfair result. The principle unfairness of forfeiture without relief is that the forfeiture clause can be implemented for relatively slight breaches. Repudiatory breaches are, by definition very serious. Particularly if leases can only determine by repudiation rarely, the breaches would have to be particularly substantial, and the absence of a right to relief would not be particularly unjust.

The same conclusion applies, I think, if the determination of the estate in the case of repudiation is neither by forfeiture or surrender, but is sui generis.

The argument based on third party rights

I turn to the fifth argument that might be raised, which is based more on practicalities than principle. It is that many leases are subject to inferior interests such as mortgages and underleases, and the position of mortgagees and under tenants would be quite unsatisfactory or quite uncertain if a lease could be determined by accepted repudiation. Once again, a good, if not intellectually satisfactory, answer is that this argument applies equally to determination of a lease by frustration. Yet, as I have said, there can be no doubt now that it is the law that a lease can be determined by frustration, and the consequences for third parties with derivative interests remain to be decided by the court. However, merely to shelter behind that answer would be cowardly.

The substantive answer is that, whether the determination is by forfeiture, surrender or sui generis does not matter: third party rights are protected. If, the proper analysis is that the estate is forfeited, then owners of inferior interests have all the rights given by Section 146 to apply for relief as they would have had if the estate had been forfeited. If the proper analysis is that the estate is surrendered, then any inferior interests are preserved by Section 139 of the Law of Property Act 1925, in the same way as they are preserved in the event of any other surrender. This is not an unjust result in practice: if the landlord repudiates and the tenant accepts the repudiation, the landlord can scarcely complain if he is "landed" with any inferior interest; if the tenant repudiates, it is not as if he has forced any inferior

interests on the landlord, because it is up to the landlord whether to accept the tenant's repudiation or not.

What if it is wrong to characterise the effect of the repudiation as a forfeiture or surrender of the estate, so that the determination is *sui generis*? Lord Millett in Barrett shows why inferior interests will not be detrimentally affected by the determination of the leasehold estate by accepted repudiation. He said this<sup>38</sup>:

"Although a person such as a sub-tenant having a derivative interest may benefit by the surrender and consequent extinguishment of the estate out of which his interest is derived, he cannot be prejudiced by it. It is a general and salutary principle of law that a person cannot be adversely affected by an agreement or arrangement to which he is not a party. So far as he is concerned, it is *res inter alios acta*. It would conflict with this principle if the destruction of a tenancy by surrender carried with it the destruction of the interest of a sub-tenant under a sub-tenancy previously granted. It has been clear from the earliest times that it does not do so."

Those observations suggest that, if determination by accepted repudiation does not result in forfeiture, then, whether the estate is determined by surrender or on some other similar, albeit *sui generis*, basis does not matter. The determination is by a quasi-consensual extra-contractual arrangement between landlord and tenant, and it will not detrimentally affect the rights of third parties, such as mortgagees and

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<sup>38</sup> [2000] 1 All ER 481 at 485H-J.



sub-tenants. The only sensible way in which their rights could be preserved, of course, would be if their interests were accelerated effectively in the way that Section 139 of the 1925 Act provides.

### Repudiation and the forfeiture clause

A sixth argument against determination by accepted repudiation is that it is said to be inconsistent with the existence of a forfeiture clause, which, of course, almost all leases contain. As a point of principle, this has no merit. First, it does not deal with the point as one of principle. There must be commercial contracts subject to determination provisions; in such cases a similar problem as to the application of the doctrine of accepted repudiation could arise. Secondly, the argument does not deal with the case of leases, which are still not infrequent, which have no forfeiture clause. Thirdly, no lease contains a forfeiture clause in favour of the tenant, and therefore the argument does not even begin to address the question of repudiation by the landlord.

Perhaps a more difficult question, which does not go to the principle being debated today, but merely how it is to be applied, is the interrelation of a landlord's right to forfeit and a landlord's right to treat the tenant as being in repudiatory breach. I suggest that the two rights can co-exist, as has been concluded by the High Court of Australia<sup>39</sup>. A forfeiture clause can be implemented by a landlord for any breach, however trivial; as I have mentioned, repudiation can only arise where a

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<sup>39</sup> Progressive Mailing House Property Ltd -v- Tabali Property Ltd (1985) 57 ALR 609.

party either renounces the contract or where his breach is so substantial that it goes to the root of the contract.

### The damages argument

If a landlord forfeits a lease, he cannot recover damages which flow from his election to forfeit, even though he could obviously argue that he would not have been able to forfeit unless the tenant had been in breach<sup>40</sup>. If, however, a lease were determinable by repudiation on the part of the tenant which is accepted by the landlord, then, unless a special rule applies to leases, the landlord would be able to claim damages which resulted from the lease being determined. I suppose that it might be contended that, as the determination of the lease by repudiation results that the lease being surrendered, this normal rule would not apply.

However, assuming that that contention is wrong, I do not see this as giving rise to a valid, seventh, argument against determination by repudiation. This is not an unfair result: the landlord would be under a duty to mitigate his loss in the normal way - e.g. by re-letting). Nor is this an "anti-tenant" conclusion: a concomitant right to damages would be equally available to a tenant who had accepted a repudiatory breach by the landlord. In any event, it would put a repudiator of a lease in no worse and no better a position than a repudiator of any contract of a continuing nature. Indeed, it would mean that a liability of a repudiating tenant for damages would be effectively the same as the liability of a tenant whose liquidator

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<sup>40</sup> Hanson -v- Newman [1934] Ch 298.

disclaims the lease - see Section 178 of the Insolvency Act 1986. As was said by Lord Millett in Re Park Air Services PLC<sup>41</sup>, a disclaimer gives the landlord "an immediate right to prove for the loss or damages which he has suffered in consequence of the operation of the disclaimer, that is to say in consequence of the determination of the lease and the acceleration of the reversion". He then went on to explain that such compensation is calculated in the same way as common law damages<sup>42</sup>.

### Present remedies sufficient

The eighth argument raised against the doctrine applying to leases is that the present remedies are sufficient. The obvious answer to that is that, while a landlord normally has a right to forfeit, a tenant has no such right. It ought not be the law that a tenant should always be forced to bring proceedings for damages or specific performance against a persistently and seriously bad landlord and that, even in an appropriate case, that he should have no opportunity of treating the landlord as being in repudiatory breach.

Given that almost every landlord has the benefit of a forfeiture clause, I accept that the case is less forceful so far as a bad tenant is concerned. However, there are instances where it would be right for a landlord to be able to put an end to a lease where the tenant has been guilty of very bad behaviour. It is not hard to think of

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<sup>41</sup> [1999] 1 All ER 673 at 679E.

<sup>42</sup> [1999] 1 All ER 673 at 679H.

cases where a landlord should not have to go through the cost and delay involved in a Section 146 Notice and fighting an application for relief from forfeiture. Further, there will be cases where the landlord should be forced by an unscrupulous tenant to elect between keeping a beneficial lease with a bad tenant or forfeiting: in such cases it would be positively just that a landlord should be entitled to damages for premature determination of the lease, as with any other contract.

While on the question of policy, I can see a powerful argument, once again mirroring the approach of the House of Lords in National Carriers relating to frustration, for concluding that, while a lease can be determined by accepted repudiation, it would be a comparatively rare case which justified such a conclusion.

### Long leases

An ninth argument, leading on from this, which is sometimes raised, is that it is offensive to think that a tenant may be at risk of the court holding that a 999 year lease at a very low rent with few, if any covenants, could be at risk of being determined through accepted repudiation, without any equivalent of a right to apply for relief from forfeiture. I accept that it would be unsatisfactory if there was a risk of such a lease being determined by accepted repudiation, save in very exceptional circumstances. However, even assuming that there is no possibility of applying for relief, I would suggest that that does not, indeed cannot, go to the

question of whether a lease is capable of being determined by accepted repudiation. It is more a reason for concluding, as I have just mentioned, that, while the doctrine of determination by accepted repudiation can apply to leases, it should only be applied in comparatively rare circumstances. Indeed, this was the view of the House of Lords in National Carriers, so far as determination of leases by frustration is concerned<sup>43</sup>. Lord Simon addressed the point in these terms:

"[I]t would be only in exceptional circumstances that a lease for as long 999 years would in fact be susceptible of frustration."

Once one appreciates that the law and principles relating to determination by frustration and determination by accepted repudiation are part of the same branch of the common law, it must follow that, if frustration can only rarely apply (as the House of Lords held), then repudiation can only rarely apply, to leases.

### Legitimate expectation

A tenth and final reason which may be advanced for concluding that the doctrine of accepted repudiation cannot apply to leases is that many lessors and lessees will have entered into their relationship on the common assumption that the law is such that their lease cannot be so determined.

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<sup>43</sup> see [1981] AC 675 at 697A per Lord Wilberforce and 701F per Lord Simon, quoted above.

That is a very unattractive argument. Determination by accepted repudiation only arises where the repudiating party behaves in a way which the other party reasonably would not expect - first because it is inconsistent with their contractual arrangement, and secondly, by definition, because it is something for which the parties have not expressly catered for (see again per Diplock LJ in the passage which I cited from Hong Kong Fir). For the repudiating party to turn round and say that he behaved in such a way in the confident belief that the doctrine of repudiation did not apply to leases is unmeritorious, to say the least.

Quite apart from this, since 1980, when the decision in National Carriers was given, and even more since 1992, when Sedley LJ decided Hussein, prospective lessors and lessees, and their advisers, should have been aware that there was, to put it at its lowest, a risk that the law of accepted repudiation would apply to leases.

As the House of Lords have emphasised in more than one recent decision, the court should be slow to uphold principles or beliefs which are wrong, merely because parties have acted in reliance on them, particularly when the party seeking to invoke the wrong principle or belief has little merit<sup>44</sup>.

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<sup>44</sup> see e.g. Hindcastle Ltd -v- Bamborough Attenborough Associates Ltd [1997] AC 70 and Sudbrook Trading Estate Ltd -v- Eggleton [1983] 1 AC 444.

### Concluding comments

Finally, may I consider the matter a little more widely. The difference between a lease and a licence is that the former gives exclusive possession to the occupier, whereas the latter merely gives the right to occupy. The distinction is rather fine, and is understood only by lawyers (and not by many of them). However, the distinction is well established and it does lead to differences between leases and licences. The same thing may be said about the difference between leases of property and time charterparties of ships: they both grant terms to enjoy the relevant property in return for payment and other covenants. Once again, there are historical, and indeed commercial, reasons for differences in the law applicable to the two sorts of interest.

Time charterparties of ships and licences of land<sup>45</sup>, can be determined by accepted repudiation. Why should that not be true of leases? Unless legal analysis or practical considerations absolutely require it, it is a little difficult to see why a licence or a time charterparty should be capable of determination by accepted repudiation just like any other contract, whereas a lease should be absolutely incapable of such determination in any circumstances. If there are clear and cogent reasons for such a distinction, so be it. However, as I hope this talk has demonstrated, there are no such convincing reasons.

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<sup>45</sup> Krell -v- Henry [1903] 2 KB 740 shows licences may be frustrated: it must follow that they can be determined by accepted repudiation.

Once again, I draw support for the analogy of licences and charter parties from observations in National Carriers: Lord Simon referred to the fact that "the distinction between a licence and a lease is notoriously difficult to draw" and went on to say that "when it comes to the application of a doctrine imported to secure justice [it is] even more difficult to justify",<sup>46</sup> Lord Roskill referred to the illogicality of the situation if the lease could not be determined by frustration, whereas a charterparty could<sup>47</sup>.

The argument that a lease cannot be determined by accepted repudiation because it is an estate in land does not, I would suggest, bear analysis. The essence of the argument is that the estate in land and the contractual aspect are indissolubly entwined and, as an estate cannot be determined by an accepted repudiation, the doctrine of accepted repudiation cannot apply to leases. First, there is no inherent reason why the estate should not be determined by accepted repudiation. Secondly, in any event, now that a lease is to be treated primarily as contractual in nature, the argument involves letting the estate tail wag the contractual dog or, if I may stick with my original zoological metaphor, letting the duck bill wag the platypus. I accept that the contractual aspects of a lease and the fact that it is an estate are indissolubly entwined. Indeed, I rely on it. The modern law clearly indicates that the contractual aspect is to prevail, and, as the contractual aspect and estate are insolubly entwined, if the contractual aspect goes by accepted repudiation, the estate goes with it.

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<sup>46</sup> [1981] AC 675 at 702A.

<sup>47</sup> see at [1981] AC 675 at 705D.



I end with a quotation which encapsulates my case: it shows how modern courts approach the issue and it has been specifically quoted and approved by the House of Lords <sup>48</sup> In Highway Properties.<sup>49</sup> Laskin J said

"It is no longer sensible to pretend that a commercial lease... is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armours of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land."

**Sir David Neuberger**

The law is stated as at 26 June 2000

Mr Justice Neuberger's Research Assistant - Janet Bignell, Falcon Chambers

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<sup>48</sup> National Carriers [1981] AC 675, at 696B per Lord Wilberforce at 703B and per Lord Roskill at 716E-F.

<sup>49</sup> [1971] 17 DLR 3d) 710 at 721.