

# Landlord's Choice of Remedies on Tenant Abandonment – Time for a Rethink?

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The following scenario may not be uncommon to readers specialising in landlord and tenant law. A tenant is granted a tenancy of property (assume this is either a 12-month residential tenancy or a three-year commercial lease). In either case, after only three months of occupation, he decides that he no longer has any need for the property (because, for example, he has found cheaper premises elsewhere) and informs the landlord that he intends to vacate and stop paying rent. The tenant argues that the landlord should accept the surrender of the premises and instruct agents to market the property with a view to re-letting to a new tenant. The landlord is reluctant to accept a surrender given that the tenancy still has some time left to run. What options does the landlord have in these circumstances? Is he obliged to treat the tenancy/lease as at and end? Must he now seek to re-let the premises regardless of the state of the rental market? Can he accede to the tenant's demand and claim for loss of rent during the remainder of the term? If so, is he under any obligation to mitigate his loss by taking appropriate steps to find a new tenant?

In attempting to answer these questions, it will be convenient to consider the current English law before examining the position in other Commonwealth jurisdictions which have favoured a different approach to the landlord's choice of remedies on tenant abandonment. The writers' findings into the views of a sample cohort of 200 practising solicitors in England and Wales (specialising in commercial and residential landlord and tenant law)<sup>1</sup> on the issue of tenant abandonment is also considered in some detail. The findings were compiled from replies to a questionnaire (comprising 12 separate questions) which was structured so as to allow for a choice of answers (so as to avoid leading a response) or, alternatively, to provide an opportunity for more detailed feedback to deliberately open-ended questions. A response rate of 25 per cent was achieved from those contacted.<sup>2</sup>

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<sup>1</sup> The sample was selected randomly from senior solicitors and partners (taken from the Law Society website) grouped evenly amongst eight different regions, namely, London, the southern counties, the south-west, Manchester, Midlands, East Anglia, Wales and the north.

<sup>2</sup> A good geographical spread of responses was received, albeit a number were returned anonymously, including: Cheshire, Coventry, Gloucester, Huddersfield, Oldham, Birmingham, Cambridge, London, Surrey, Doncaster and Norwich.

## The “estate” model

### (a) *The landlord’s election to end the tenancy*

Under this model, a landlord has the choice of two alternative remedies when faced with a tenant who has defaulted on the rent and seeks to abandon the premises. First, the landlord can accept the abandonment and thus retake possession in lieu of rent. In these circumstances, the orthodox view is that the covenant to pay rent for the unexpired portion of the term ceases to bind the tenant. Thus, once the lease is determined, the tenant commits no breach of covenant by reason of his non-payment of rent for that unexpired portion.<sup>3</sup> Alternatively, the landlord may refuse to accept the abandonment and sue the tenant for rent as it falls due under the tenancy. This stems from the notion that the landlord is not bound to accept possession whenever the tenant chooses to offer it but is entitled to hold the tenant liable for rent until such time as he gives a valid notice to quit or the tenancy comes to an end by surrender. Thus, in *Boyer v Warbey*,<sup>4</sup> the tenant had to give notice to end the tenancy but left without serving a notice to quit. The landlord re-let the property and successfully sued the tenant for the rent due up to the date of the re-letting which operated as a surrender by operation of law. Romer L.J. put the matter in this way:

“A tenant who goes out of possession without giving due notice has no right to dictate to his landlord how he shall deal with his property, and why the landlords here should have disposed of the flat in a manner disadvantageous to themselves merely in order to save the tenant from the full consequences of his wrongful act, I am at a loss to conceive.”

This reasoning is based on the premise that the tenancy confers a leasehold estate on the tenant for a defined term - if the tenant chooses to enjoy his property without actually occupying it, the landlord remains entitled, regardless of the tenant’s premature vacation, to sue for the current rent<sup>5</sup> as it continues to accrue.

### (b) *The writers’ survey*

Interestingly, virtually all replies (88 per cent) to the writers’ questionnaire favoured an option that would entitle the landlord *as of right* to treat the tenancy/lease as still continuing and continue to demand the rent as it falls due. Typical responses included: "the landlord should be entitled as of right to treat the lease as continuing and it is then up to the tenant to offer a suitable surrender fee/damages to the landlord for an early release"; "the tenant should understand a fixed term is just that - the landlord is entitled to the benefit of commercial certainty"; "the parties have entered into a contract and the contract should prevail - the tenant has effectively agreed to pay rent for the entire term"; "the parties should be bound by the terms of the contract"; "the lease is still alive unless the tenant has validly exercised a break clause

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<sup>3</sup> See, *Jones v. Carter* (1846) 15 M. & W. 718, at 726. See also, *Matthey v Curling* [1922] 2 A.C. 180, at 200, (H.L.), where Atkin L.J. stated that rent issues out of the land demised.

<sup>4</sup> [1953] 1 Q.B. 234. See also, *Bhogal v Cheema* [1999] L. & T.R. 59, at 65, per Sir John Vinelott.

<sup>5</sup> If the tenant is unable to pay, the landlord may be able to pursue a guarantor of the tenant's covenant to pay rent. Indeed, some guarantor covenants will impose on the guarantor a primary liability to pay rent which will operate co-extensively with the tenant's obligation to pay rent under the lease.

or assigned or sublet in accordance with the terms of the lease"; "the landlord's investments and rights need to be protected"; "in entering into a fixed term arrangement, the tenant commits to that number of years"; "the tenant should request a break clause to preserve his position if necessary"; "the landlord is entitled to keep the lease going"; "a tenant should not be able to just walk away"; "the parties made a contract and the landlord should be entitled to enforce that".

## The "legitimate interest" model

### (a) *The landlord's qualified election to end the tenancy*

In *Reichman v. Beveridge*,<sup>6</sup> the Court of Appeal concluded that the option of electing to treat the lease as continuing and suing for rent as it falls due was subject to qualification based on strict principles of reasonableness and legitimate interest. In this case, the defendants were solicitors holding a tenancy of office premises in Yateley, Hampshire, for a term of five years from January 2000. In February 2003, they ceased to practise and had no further need for the premises. They stopped paying rent from March 2003 and, in January 2004, the claimant landlords sued for the arrears due up to then, seeking only a money judgment. The defendants responded by arguing that the claimants had failed to mitigate their loss arising from the non-payment of rent by refusing to forfeit the lease for breach of covenant. In particular, the defendants contended that the landlords had: (1) failed to instruct agents to market the premises; (2) failed to accept the offer of a prospective tenant who wanted to take an assignment of a new lease of the property; and (3) failed to accept an offer to negotiate a payment for a surrender of the lease. The central issue, therefore, was whether the landlords were under a duty to mitigate their loss when seeking to recover the arrears of rent by applying the analogous doctrine of mitigation postulated by Lord Reid in *White & Carter (Council) Ltd v McGregor*.<sup>7</sup> Significantly, the Court of Appeal acknowledged that there was a "very limited category of cases" in which an innocent party would not be allowed to enforce its full contractual right to maintain the contract in force and sue for the contract price. In the words of Lloyd L.J.:<sup>8</sup>

"The characteristics of such cases are that an election to keep the contract alive would be wholly unreasonable and that damages would be an adequate remedy, or that the landlord would have no legitimate interest in making such an election."

The success of the defendants' argument, therefore, hinged on establishing both these components, namely, that: (1) if the landlord terminated the tenancy and took steps to re-let, he could recover any loss in rental by way of a claim in damages against the defendants (i.e., that damages would be an adequate remedy); and (2) it would be "wholly unreasonable" for the landlord not to terminate the tenancy (i.e., that the landlord had no legitimate interest in continuing to sue for rent as it fell due). On the first point, the Court of Appeal concluded that there was no English case which decided that a landlord could recover damages for the loss of

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<sup>6</sup> [2006] EWCA Civ 1659.

<sup>7</sup> [1962] A.C. 413, (H.L.). See also, *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH*, *The Puetro Buitrago* [1976] 1 Lloyd's Reports 250; *Gator Shipping Corporation v Trans-Asiatic Oil Ltd*, *The Odenfeld* [1978] 2 Lloyd's Reports 357; *Clea Shipping Corporation v Bulk Oil International*, *The Alaskan Trader* [1984] 1 All E.R. 129; and *Ocean Marine Navigation Ltd v Koch Carbon Inc.*, *The Dynamic* [2003] EWHC 1936 Comm.

<sup>8</sup> [2006] EWCA Civ 1659, at [17].

future rent based on the tenant's breach of contract. The case of *Walls v Atcheson*,<sup>9</sup> was to the contrary, and the Commonwealth case law, which had accepted a right to claim for loss of future rent, was not decisive of the position under English law. In the words of Lloyd L.J.:<sup>10</sup>

“It may be a logical development to hold that a landlord, having forfeited the lease, can recover damages for the loss of future rent, at least if the breach which led to the forfeiture was fundamental and repudiatory, but it does not seem to me that English law has yet reached that stage.”

That being the case, it followed that damages could not be an adequate remedy for the landlord in the instant case and one of the essential pre-conditions for fettering the landlord's ability to treat the lease as continuing was absent. In any event, even if it was not entirely clear whether the landlord could sue for loss of bargain damages in this way, the uncertainty of the legal position made it entirely reasonable for the landlord not to pursue this course of action which might inevitably lead to lengthy (and costly) litigation.

On the second point, the question was whether the landlord could be said to have been acting “wholly unreasonably”<sup>11</sup> in failing to take steps to find an alternative tenant instead of treating the tenancy as continuing and suing for the rent as it fell due. Here again, the Court of Appeal had little difficulty in finding for the landlords. If the rental market was buoyant, the landlord would, no doubt, forfeit and re-let at a profit. On the other hand, if the landlord could only re-let at a lower rent, he could not, as discussed earlier, sue for damages in respect of the difference between the lower rental under the new letting and the higher rent under the old tenancy. As we have seen, under English law, the right to the original rent ceases on termination of the tenancy. So, from the landlord's point of view, the option of keeping the tenancy alive and suing for the current rent was entirely sensible and practical. Apart from this, the Court of Appeal felt that the onus of finding an assignee or sub-tenant and asking the landlord's consent (under the terms of the tenancy) for the assignment or subletting, was squarely on the defendants (as tenants). In these circumstances, Lloyd L.J. concluded that:<sup>12</sup>

“... it would be difficult to describe the landlord's position as “wholly unreasonable” if it took the line that the tenant, whose default created the problem, should bear the burden of finding a solution, in circumstances in which the lease allows the tenant to do so, with an obligation on the landlord not unreasonably to refuse consent to such a proposal.”

On this aspect, his Lordship referred to a number of Commonwealth authorities where the issue whether the landlord was under a duty to mitigate by re-letting the demised premises was canvassed. Thus, in *Tall-Bennett & Co Ltd v Sadot Holdings Property Ltd*,<sup>13</sup> the Supreme Court of New South Wales concluded that there was nothing unreasonable in a landlord insisting on maintaining his position under the lease and being reluctant to assume the trouble

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<sup>9</sup> (1826) 11 Moore C.P. and Exchequer Rep. 379.

<sup>10</sup> [2006] EWCA Civ 1659, at [27].

<sup>11</sup> See, for example, *Gator Shipping Corporation v. Trans-Asiatic Oil Ltd, The Odenfield* [1978] 2 Lloyd's Reports 357, at 374. According to Lloyd L.J. in *Reichman*, “it would have to be a most extraordinary case for a tenant to be able to show that the landlord's conduct could properly be characterised as [wholly unreasonable]”: [2006] EWCA Civ 1659, at [40].

<sup>12</sup> [2006] EWCA Civ 1659, at [31].

<sup>13</sup> (1988) 4 B.P.R. 9522, (Supreme Court of New South Wales).

of finding a new tenant. According to Lloyd L.J., therefore, the case would have to be “most extraordinary” in order to convince the Court that the landlord had acted wholly unreasonably in refusing to accept the tenant’s abandonment and continue claiming rent as it accrued. If the market rent was lower than that under the existing tenancy, the landlords would not be able, under English law, to recover the difference in a claim for damages if they decided to forfeit for non-payment of rent. If, on the other hand, the market rent was the same or higher, it was possible for the defendants (as tenants) to take the initiative themselves and find a suitable assignee or subtenant. Moreover, if they found a new tenant whom the landlords refused to accept on reasonable terms, the tenants would have an appropriate remedy under the Landlord and Tenant Act 1988. In principle, therefore, if the landlord chose to regard it as up to the tenant to propose a new tenant, that was not unreasonable, still less wholly unreasonable.<sup>14</sup>

Given the landlord has no right to claim for loss of future rent if he decides to accept the tenant’s surrender and end the tenancy, it is, perhaps, not surprising that most landlords would prefer to keep the tenancy alive, especially at a time when the rental market is poor. Moreover, having elected to treat the lease as continuing (assuming the landlord is not acting “wholly unreasonably” in doing so in the *Reichman* sense), it would seem that he would have also waived his right to accept the tenant’s repudiation of the lease at some later date when the rental market had improved. The result, it may be argued, is to generate many years of rental liability for the tenant and create (potentially) and economically inefficient use of the land if the tenant has abandoned the property.

*(b) The appropriate standard of the landlord's conduct*

The very limited application of the *White & Carter* principle in *Reichman* prompts the question of whether the Court of Appeal may have set the bar of “wholly unreasonable” conduct on the part of the landlord too high and placed too much emphasis on the lease as creating an immutable estate in land which must endure for the duration of the term unless there are very strong and compelling reasons to end it. For example, would the landlord be treated as acting “wholly unreasonably” if he decided to hold the tenant to its lease indefinitely because of the poor state of the rental market? One commentator, Jill Martin, in her commentary on *Reichman*,<sup>15</sup> makes reference to the Scottish case of *Salaried Staff London Loan Co Ltd v Swears and Wells Ltd*,<sup>16</sup> in which the tenants under a 35-year lease repudiated the lease after five years. The landlords refused to accept the repudiation and their claim for rent and service charges for almost a year after the repudiation succeeded. However, the court was reluctant to accept the suggestion that the landlords could have continued to treat the lease as ongoing for the next 29 years. According to Lord Ross, to allow the landlords to sue for rent and service charge indefinitely would be “manifestly unjust or unreasonable”. Jill Martin also refers<sup>17</sup> to the Scottish Law Commission's Report on *Remedies for Breach of Contract*,<sup>18</sup> which proposed that legislation should be enacted to solve the problem in *White & Carter* by requiring a party to a contract who has been told that performance under the contract is no longer wanted but

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<sup>14</sup> [2006] EWCA Civ 1659, at [42].

<sup>15</sup> See, J. Morgan, [2008] Conv. 165, at 172.

<sup>16</sup> (1985) S.C. 189.

<sup>17</sup> See, J. Morgan, [2008] Conv. 165, at 172.

<sup>18</sup> Scot Law Com. No. 174, SE 1999/59, (Edinburgh, 1999).

who, nonetheless, carried it out would be precluded from recovering payment for post-notification performance if: (1) he could have entered into a reasonable substitute transaction without unreasonable effort or expense; or (2) it was unreasonable for him to proceed with the performance. An example given by the Commission<sup>19</sup> of a "substitute transaction" was:

" that of a landlord whose tenant repudiates a lease which has still many years to run. The landlord could not go on claiming rent for the whole duration of the lease if the [premises] could easily be re-let to another tenant on reasonable terms. The landlord would . . . be able to rescind and claim damages for the difference between the rent obtainable from the new tenant (if less) and the rent due under the repudiated contract."

The Commonwealth experience is also of interest in this context. In *Tangyne v Calminton Investments Ltd*,<sup>20</sup> the appellant guaranteed the performance of the lease obligations of the original tenant of business premises leased to it by the respondent. The original tenant assigned its interest to a new tenant and became dormant. The new tenant then defaulted in the payment of rent. Subsequently, the respondent recovered possession of the premises and continued to operate the same business as the tenants, but at a considerable loss. The respondent brought an action against the appellant guarantor claiming arrears of rent and damages. One issue on appeal was whether the respondent landlord had failed in his duty to mitigate his loss by not making more effort to let the premises to a new party. In this connection, it was argued that any rental from an outsider, no matter how low, would have been better than a negative cash flow from the losing business. The Alberta Court of Appeal held that the burden was on the appellant to prove that the respondent had failed to mitigate, and this burden he had failed to discharge on the facts. Significantly, the test was whether a reasonable but conservative person in the landlord's position, knowing only the facts then known, might have made the same choice. In particular, the landlord was obliged to exercise "due" or "reasonable" or "ordinary" diligence, or "reasonable" effort in finding a substitute tenant. Thus, the landlord was not obliged to accept a new tenant who is a financial risk or proposes to occupy under terms that vary from the existing lease. However, the landlord had a duty to "seek out" prospective tenants by appropriate advertising and listing the property with an estate agent in accordance with local rental practice for similar properties. The duty could also extend to accepting an eligible tenant sought out and found by the existing tenant and offered to him.

In the writers' view, therefore, a test based on the more relaxed standard of what is "reasonable" in all the circumstances has more to recommend it, not least because it attempts to draw a fairer balance between the competing interests of landlord and tenant.

*(c) The writer's findings*

The option that the landlord should only be allowed to treat the tenancy/lease as still continuing (and continue to demand rent as it falls due) if he is acting *reasonably* in keeping the tenancy/lease alive was supported by only 12 per cent of the cohort who responded to the writer's survey. Respondents were also asked whether the landlord should be denied the right to elect whether or not to accept the tenant's abandonment only in *extreme cases* where he is

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<sup>19</sup> Ibid, at para. 2.8.

<sup>20</sup> (1989) 51 D.L.R. (4th) 593, (Alberta Court of Appeal).

acting "*wholly unreasonably*" in keeping the tenancy/lease alive. Here again, 65 per cent of responses disagreed signifying general disapproval of the *Reichman* ruling on this point. As one reply commented: "it will only cause endless disputes". Indeed, the overall view was that any test of reasonableness would only result in uncertainty and give rise to needless litigation between the parties. Of the remaining 35 per cent who agreed, however, most supported the view that it should be the landlord who bears the burden of proof in determining the question of reasonableness. As one recipient put it:

" . . . using the example of where a landlord objects to a tenant being granted a new lease because they intend to redevelop the property themselves under s.30(1)(f) of the Landlord and Tenant Act 1954, the burden is on the landlord to demonstrate their intentions in respect of the redevelopment; not the tenant. This is because the landlord would have access to documents which would demonstrate its intention . . . Similarly, the same should be the case here when determining if the landlord is acting reasonably because the landlord would have access to documents/information which would demonstrate such reasonableness (or lack of it); not the tenant."

It was also very clear from the responses (82 per cent) that a landlord would be acting reasonably in treating the tenancy/lease as still alive (and not ending the tenancy and marketing the property) if the rental market was static and he could only re-let at a rent that was the same (or lower) than that under the existing tenancy/lease. This is, perhaps, not at all surprising given the overwhelming support for the estate model option mentioned earlier. Views were more mixed, however, in answer to the question whether the landlord would be acting unreasonably in treating the tenancy/lease as still alive (and not ending the tenancy and marketing the property) if the rental market was buoyant and he could re-let at a higher rent relatively easily and without much inconvenience. Here, 33 per cent agreed, but a significant number (67 per cent) felt that the landlord would still be justified in not ending the tenancy. A typical response was that "it has nothing really to do with the state of the rental market, it's about the tenant following the terms of the lease"; "you cannot take away the underlying rule that a landlord is entitled to be paid rent for the use of their property"; "it doesn't matter if the landlord is reasonable or not, if the tenancy/lease is still alive, the landlord is entitled to enforce it."

The questionnaire also asked whether the onus of re-letting the property should fall on the landlord or whether it should be the responsibility of the tenant to find a suitable new tenant. (It was noted that, if the tenant found a new tenant that was unsuitable, the landlord would have reasonable grounds for refusing to accept the new tenant). The majority (75 per cent) favoured the view that the burden should fall squarely on the tenant. This, of course, accords with the *Reichman* ruling that the onus of finding an assignee or sub-tenant and asking the landlord's consent (under the terms of the tenancy) for the assignment or subletting should lie with the tenant. A typical response stated: "it is the tenant who will have repudiated the lease so all the onus should be on him".

### **The "re-letting on the tenant's account" model**

Under this model, canvassed in the Canadian case of *Highway Properties Ltd v Kelly, Douglas & Co Ltd*,<sup>21</sup> the landlord is entitled to inform the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis only. This approach, however,

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<sup>21</sup> (1971) 17 D.L.R. (3d) 710, at 716, per Laskin J. See also, *Green v Tress* [1927] 2 D.L.R. 180 and *Goldhar v Universal Sections and Mouldings Ltd* (1962) 36 D.L.R. (2d) 450, at 459-460.

has also not found favour in the English courts. In *Walls*, mentioned above, the Court of Common Pleas held that putting in another tenant amounted either to accepting a surrender or to evicting the tenant, so that the right to claim further rent was extinguished. Accordingly, the landlord could not claim for the loss of rent once the tenancy had ended (representing both the amount by which the rent was less under the later lettings and the whole of the rent for the period when the property was empty). In *Reichman*, Lloyd L.J. was of the view that the scope and effect of this possible course of action was "somewhat uncertain and questionable"<sup>22</sup> and that "a landlord whose rights and obligations are governed by English law could not be criticised for taking the view that it would not be wise to place reliance on that approach to the consequences of a tenant's default".<sup>23</sup>

## The “loss of future rent and mitigation” model

### (a) *The Commonwealth position*

In the Canadian case of *Highway Properties*,<sup>24</sup> mentioned above, the landlord took possession of the demised property following the tenant’s repudiation of its lease (by abandonment of possession) and attempted, without success, to re-let them for the unexpired term. The landlord subsequently claimed damages not only for the loss suffered to the date of acceptance of the repudiation but also (and mainly) for prospective loss resulting from the tenant’s failure to carry on its business at the premises for the full term of the lease. The Supreme Court of Canada had no difficulty in applying the doctrine of anticipatory breach to a contractual lease, notwithstanding that the lease was partly executed and that the estate in the land had been terminated. Laskin J,<sup>25</sup> giving the judgment, concluded that:

“... a landlord upon an abandonment or repudiation of a lease by his tenant may qualify his re-entry to make it clear that he is not foregoing his right to insist on continuation of the tenant’s obligation to pay rent. Since rent was regarded, at common law, as issuing out of the land, it would be logical to conclude that it ceased if the estate in the land ceased. But I do not think it must follow that an election to terminate the estate as a result of the repudiation of a lease should inevitably mean an end to all covenants therein to the point of denying prospective remedial relief in damages.”

Interestingly, many Canadian leases contain terms imposing an express duty to mitigate on the landlord if he elects to accept the tenant's abandonment or repudiation of the lease. In *Vinland Holdings Ltd v Wisniowski*,<sup>26</sup> for example, the residential tenancy contained a clause which provided that, if the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord should mitigate any damages that may be caused by reason

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<sup>22</sup> [2006] EWCA Civ 1659, at [25].

<sup>23</sup> *ibid*, at [25].

<sup>24</sup> The decision was applied by the Supreme Court of Victoria in *Ripka Property Ltd v Maggiore Bakeries Property Ltd* [1984] V.R. 629.

<sup>25</sup> (1971) 17 D.L.R. (3d) 710, at 721. See also, *Wood Factory Property Ltd v Kiritos Property Ltd*, where the damages included the net loss of rent on re-letting.

<sup>26</sup> (1990) 9 R.P.R. (2d) 194, (Supreme Court of Nova Scotia). See also, *Globe Convestra v Vucetic* (1990) 15 R.P.R. (2d) 200, at [5].

of the abandonment or termination. It is important to stress, however, that the landlord's duty to mitigate only arises if the landlord elects to end the lease - in other words, the option of treating the lease as continuing and claiming the rent as it falls due is still open to him.<sup>27</sup>

A similar contractual approach has been taken in Australia. In *Buchanan v. Byrnes*,<sup>28</sup> the High Court of Australia concluded that, upon abandonment by a tenant (in breach of covenant) of hotel premises the subject of a 15-year lease, the landlord was entitled to claim damages over the unexpired term subject to a duty to mitigate his loss. Subsequently, in the landmark case of *Progressive Mailing House Property Ltd v Tabali Property Ltd*,<sup>29</sup> the landlord was held entitled to recover damages for the loss of the benefit of a lease where the tenant had repudiated the lease (the repudiation consisting of a failure to pay a significant amount of rent) before determination of the term. In effect, the High Court of Australia applied the contractual doctrine of anticipatory breach in order to permit the landlord to accelerate its right to recover for future rent subject to its duty to mitigate. In this connection, it was assumed that a period of approximately six months would elapse before the landlord would succeed in re-letting the premises and upheld an award of \$85,000 for breach of the tenant's covenant. Similarly, in *Vickers v Stichtenoth Investments Property Ltd*,<sup>30</sup> the Supreme Court of South Australia, applying *Progressive Mailing*, recognised that the landlord should be subject to a duty to mitigate his losses. Here again, however, as with the Canadian experience, the landlord has the option of treating the lease as continuing despite the tenant's default and claiming the rent as it falls due. The point was made forcefully by Young J. in *Tall-Bennett & Co Property Ltd v Sadot Holdings Ltd*.<sup>31</sup>

"I can see nothing unreasonable about a landlord insisting that he retain the comfortable legal position that the granting of the lease has put him in and I can see nothing unreasonable about the landlord being reluctant to assume the trouble of expending and preparing a new lease and suing the tenant afterwards. I can see nothing particularly grotesque about the situation of putting it at the feet of the tenant who wishes to abandon his lease to go to the trouble to obtain a new tenant. If the landlord is unreasonable about consenting to the person who is to take the tenancy, then normally there can be a sub-letting or assignment without consent."

The American case law is also instructive. In *Schneiker v. Gordon*,<sup>32</sup> for example, the Supreme Court of Colorado held that the principle of mitigation should be applied to a situation in which the tenant under a commercial lease had abandoned the premises. The application of the

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<sup>27</sup>See, *Ontario Inc. v First Consolidate Holdings Corporation* (1992) 26 R.P.R. (2d) 298, (Ontario District Court); and *Transco Mills Ltd v Percan Enterprises Ltd* (1993) 100 D.L.R. (4th) 359, (British Columbia Court of Appeal). Contrast, *Tangyne v Calmonton Investments Ltd* (1989) 51 D.L.R. (4<sup>th</sup>) 593, (Alberta Court of Appeal).

<sup>28</sup> (1906) 3 C.L.R. 704, (High Court of Australia).

<sup>29</sup> (1985) 157 C.L.R. 17, (High Court of Australia). See also, *Vickers v Stichtenoth Investments Property Ltd* (1989) 52 S.A.S.R. 90, at 100, per Bollen J., (Supreme Court of South Australia); and *Gumland Property Holdings Ltd v Duffy Fruit Market (Campbelltown) Property Ltd* [2008] 82 A.L.J.R. 576, (High Court of Australia).

<sup>30</sup> (1989) 52 S.A.S.R. 90, (Supreme Court of South Australia).

<sup>31</sup> (1988) NSW Conv. Rep. 57, at 881. See also, *Maridakis v Kouvaris* (1975) 5 A.L.R. 197, (Supreme Court of the Northern Territory), where Ward J. held that a landlord was under no duty to mitigate by taking steps to re-let the premises. Contrast, *Vickers v Stichtenoth Investments Property Ltd* (1989) 52 S.A.S.R. 90, where the Supreme Court of South Australia held that mitigation applied to leases requiring the landlord, upon tenant abandonment, to take reasonable steps to seek another tenant.

<sup>32</sup> 732 P. 2d 603 (1987), (Supreme Court of Colorado). See also, *Brown v Republic Bank First National Midland* 766 SW 2d 203 (188), (Supreme Court of Texas).

principle was merited, however, on policy grounds, namely, to prevent the landlord from passively suffering preventable economic loss, to encourage productive use of land and to decrease the likelihood of physical damage (e.g., through accident or vandalism) to the premises.<sup>33</sup> Thus, the landlord was required to exercise reasonable efforts to procure a substitute tenant in order to fulfil its duty to mitigate loss. Interestingly, these same policy considerations have also influenced several decisions in both Canada and Australia. In the Canadian case of *Globe Convestra v Vucetic*,<sup>34</sup> for example, Taliano J. stated<sup>35</sup> that "it is difficult to accept, in this day and age, the continuing accuracy of a proposition that permits a landlord to sit back and do nothing to mitigate a loss occasioned by a forfeiting tenant".<sup>36</sup>

(b) *The writers' survey*

Perhaps the most significant finding which emerged from the writers' survey was that 88 per cent of respondents agreed that, in addition to electing to terminate the tenancy/lease, the landlord should be entitled to claim damages from the tenant for any loss occasioned by the premature ending of the tenancy/lease (including loss of future rent for the unexpired period of the tenancy/lease) subject to a duty to mitigate loss by taking reasonable steps to re-let the property. There was also almost universal agreement that the tenant should be liable for the difference between the rent obtainable from the new tenant (if less) and the rent due under the terminated tenancy. This, of course, accords with the model adopted in many of the Commonwealth jurisdictions. Significantly, the primary reason given for favouring a landlord's claim to recover future rent was that this would actively encourage the freeing up of property back into the rental market instead of landlords adhering strictly to the terms of the lease despite the premises remaining empty.

The questionnaire asked two further (related) questions. The first question was whether respondents would favour the practice of including a specific clause/condition in the tenancy/lease which would entitle the landlord to claim damages from the tenant for any loss (subject to mitigation) occasioned by the premature ending of the tenancy including loss of future rent. Again, not surprisingly given the answers to earlier questions, 70 per cent of replies were in favour of such a practice for both commercial and residential lettings. One recipient stated:

" . . . a specific clause could save time and expense of protracted proceedings if such an entitlement is contained as a clause in a lease/tenancy agreement. It would also provide clarity on what is commonly an uncertain area where it can be difficult to advise a landlord on what to claim from a tenant in such a circumstance and where it is difficult to advise a tenant on what their likely liability could be".

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<sup>33</sup> Several American statutes are to the same effect. See, for example, section 9-213.1 of the Illinois Code of Civil Procedure 1983, which imposes an affirmative duty on a landlord to take reasonable measures to minimise losses caused by a tenant's breach of a lease. The legal duty is specifically designed to encourage the most efficient and productive use of land.

<sup>34</sup> (1991) 15 R.P.R. (2d) 200, (Ontario C.J.). See also, *Tangyne v Calmonton Investments Ltd* (1989) 51 D.L.R. (4th) 593, (Alberta Court of Appeal).

<sup>35</sup> *Ibid*, at [51].

<sup>36</sup> See also, A. Bradbrook, "The Application of the Principle of Mitigation of Damages to Landlord-Tenant Law", (1976) 8 Sydney Law Review 15, at 17.

Interestingly, the advantage of clarity was expressed in several of the replies. However, several responses identified practical difficulties with incorporating such a clause in the tenancy agreement. One reply stated: "I have seen such clauses concluded in some tenancies; in practice, they amount to nothing as often when a tenant abandons the premises, they have no assets or other income".

The second question asked was: "would you favour the practice of including a *specific clause/condition* in the tenancy/lease which would automatically penalise the tenant for ending the tenancy/lease prematurely by forfeiting the deposit paid under the tenancy/lease in lieu of any claim for damages for loss of future rent?" The question asked respondents to assume that such a clause would not be treated as a penalty, or an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999/Consumer Rights Act 2015. Given the controversial nature of such a proposal, it is not at all surprising that this received very mixed replies. An even number of respondents were both in favour and against such a practice for commercial and residential tenancies alike. One recipient replied:

" . . . this is likely to make tenants take their obligations under a lease/tenancy agreement more seriously and make them think twice about abandoning properties. Furthermore, it upholds the credibility of the timescales set out in leases/tenancy agreements where parties can expect to contract with one another for a minimum period of time".

Another commented that "restitution is fair, but automatic penalisation is not". It was also noted that "whilst it might avoid court proceedings, it might also preclude any other claims by the landlord against the tenant". It was also suggested that such a clause "would be likely to discourage tenants from moving in" and that "the loss could be greater than the deposit paid".

## **The “landlord’s duty to accept abandonment” model**

### *(a) The Canadian approach*

Certain Canadian statutes have restricted the landlord’s options on tenant abandonment in the specific context of residential tenancies. Thus, in Ontario, for example, the option of the landlord doing nothing and claiming rent as it falls due was prohibited for residential leases under s.90 of the Landlord and Tenant Act RSO 1990. More recent legislation,<sup>37</sup> however, provides that, if the landlord believes that a tenant has abandoned a rental unit, he may apply for an order terminating the tenancy. Similarly, in British Columbia, s.48(6) of the Residential Tenancy Act 1984<sup>38</sup> placed the landlord of residential premises under a duty to re-let them at a reasonable economic rent when a tenant terminated the lease or vacated or abandoned the premises.

The question arises, therefore, as to whether a distinction should be drawn between residential and commercial lettings which would require the landlord of residential premises to accept the tenant’s abandonment with no option as to whether or not to treat the tenancy as continuing

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<sup>37</sup> See, s.79 of the Residential Tenancies Act 2006.

<sup>38</sup> Section 48 was repealed in 1992. The current statute is the Residential Tenancy Act, SBC 2002.

and claiming rent as it falls due. Such an approach would be premised on policy grounds, namely, that there is a shortage of residential housing in this country and it would be economically inefficient for the property to be left empty once the tenant has indicated that he is moving out. In this connection, the RICS has predicted that at least 1.8 million more households will be looking to rent rather than buy a home by 2025. There is also the potential for economic imbalance between landlord and tenant in the residential sector which would justify a blanket prohibition on the landlord's election whether or not to treat the tenancy as at an end. It is generally accepted that commercial tenants possess a greater degree of bargaining power than residential tenants. However, it is also true that not every commercial lease will be negotiated arm's length. Small and inexperienced commercial tenants may also be potential victims of a standard (one-sided) form of tenancy agreement. Moreover, the policy of keeping land at its most efficient and productive use (by not allowing it to remain vacant after abandonment) would presumably apply equally to commercial and residential leases.

There is another, more fundamental, point to make here. A blanket prohibition imposing a duty on the landlord to end a residential tenancy may be seen to be inherently unfair on the landlord allowing a tenant to simply walk away from his residential tenancy whenever he felt like it (possibly for no legitimate reason), leaving the landlord with no choice but to accept possession and endeavour to re-let regardless of the state of the market. If the rental market has fallen, why should the burden now fall on the innocent landlord to try and find a replacement tenant at the same rent? And if he can only re-let at a lower rent, why should he bear the loss given the tenant is at fault in repudiating the tenancy? One approach, therefore, is to give the courts flexibility in allowing the tenant to walk away only in circumstances where the landlord, in the *White & Carter* sense, is acting "wholly unreasonably" (or "unreasonably", if one accepts a more relaxed standard) in refusing to accept the abandonment. This reflects the notion that there should be some mechanism (both in the residential and commercial rental sector) which determines the legitimacy of the parties' actions. Another approach, if one accepts the orthodox estate model, is to give landlords in both the commercial and residential sectors the unqualified option of treating the lease as at an end in the event of tenant abandonment. Whichever view one adopts, however, it seems appropriate to permit the landlord to claim for any loss of future rent (subject to mitigation) if the tenancy is prematurely ended. This, of course, would necessitate a reconsideration of the *Reichman* ruling on the issue of recovery of damages on tenant abandonment, to which we now turn.

(b) *The writers' survey*

Respondents were also asked to comment on this model. The question posed here was: "In the case of a *residential* letting (as opposed to the letting of commercial premises), would you favour an approach which would require the landlord to treat the tenancy as at an end with *no choice* as to whether to treat the tenancy as continuing?" Again, a largely negative response was received from the majority (83%) of replies. One recipient noted: "such an approach would undermine tenancy agreements and contracts if landlords and tenants think they are committing to six month or yearly tenancy agreements which they can actually get out of earlier with no consequence". Another stated: "it is always open to the tenant to require a break clause before entering into a fixed term"; "such an approach seriously undermines commercial certainty"; "the landlord's investment requires protection given his own financial commitments"; "the landlord should be free to elect as it sees fit - this is the position under other contracts so why

should a lease be different?"; "a tenant could just walk away and leave the landlord high and dry"; "obligations need to have teeth and this would make it too easy for tenants to behave cynically"; "a landlord needs certainty and clarity and there are costs in letting a property"; "the sanctity of contract is important"; "to undermine the contract in a housing scenario depreciates its efficacy and would impact on the residential market generally".

Significantly, those who answered "yes" to this question (only 12 per cent) also unanimously agreed that the landlord should be entitled to claim damages from the tenant for any loss occasioned by the premature ending of the tenancy including loss of future rent (subject to mitigation) for the unexpired period of the residential tenancy. As one recipient put it: "the landlord has a contract with the tenant and future rent should be recoverable if the landlord cannot find a new tenant"; "a no choice scenario would run the risk of landlords being discouraged from entering into the market".

### **Should Reichman be reconsidered?**

Despite the Court of Appeal's insistence that recoverability for loss of future rent does not represent English law, the writers would venture to suggest that there are, at least, three English decisions (not cited in *Reichman*) which support the proposition that a landlord may recover damages for loss of rent on termination of a lease. All three of these decisions formed the basis of the judgment of the Court of Appeal in the Northern Ireland case of *Rainey Brothers Ltd v. Kearney*,<sup>39</sup> which was also not referred to in *Reichman*.

In *Marshall v Macintosh*,<sup>40</sup> the parties entered into a building agreement whereby the defendant agreed to demolish and reconstruct a hotel by a certain date and then take a lease of the property from the claimant for a term of 80 years. The defendant failed to do the work and the claimant re-entered but was unable to re-let the premises for over two years and only then at a reduced rent. Kennedy J. held that the defendant's failure to perform the agreement amounted to a fundamental breach which entitled the claimant, in addition to the re-entry, to recover damages for the loss of rent during the period between the date of forfeiture and re-letting. Although in *Rainey*, the tenant sought to distinguish this case on the grounds that it involved an agreement to enter into a lease (and not a lease itself),<sup>41</sup> Hutton L.C.J. concluded that the "distinction is of no substance and does not affect the principle". In his view, "if a landowner can recover damages for loss of rent on termination of an agreement for a lease . . . a landowner can also recover damages for loss of rent on termination of a lease".

In *Gray v Owen*,<sup>42</sup> the landlord let a house to the tenant, a naval officer, subject to a proviso that, should he be ordered away by the Admiralty, he could determine the tenancy by giving written notice to the landlord. During the tenancy, the tenant received orders to join a ship, but this was cancelled shortly afterwards. Despite this, the tenant mistakenly gave notice terminating the tenancy and the landlord resumed possession. On discovering the true position, the landlord brought an action to recover two quarters' rent which had accrued due. Bucknill

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<sup>39</sup> [1990] N.I. 18.

<sup>40</sup> (1898) 78 L.T. 750.

<sup>41</sup> Such agreement would, in any event, have ranked as an equitable lease under the rule in *Walsh v Lonsdale* (1882) 21 Ch. D. 9 and, therefore, capable of creating a proprietary interest in land.

<sup>42</sup> [1910] 1 K.B. 622.

J. held that the tenant was in breach of the agreement and was liable for the rent. In his Lordship's words:<sup>43</sup>

“. . . [the tenant] is not liable for rent as though the tenancy were subsisting. But the acceptance of the surrender does not preclude the [landlord] from suing for damages for the breach by the [tenant] of the contract. It did not destroy the existing cause of action. If the [landlord] had succeeded in letting the house at the same or a higher rent, of course he would have only been entitled to nominal damages, but as he did not succeed in letting or selling it he is entitled to recover the amount of the rent which he has lost.”

The third case is *Williams v. Lewis*,<sup>44</sup> where the tenant was in breach of an implied obligation of his tenancy in failing to properly cultivate the land in a good and husband-like manner. Bray J. concluded that the correct measure of damages was the diminution in rent that the landlord would receive on re-letting or any allowance he would have to make to the new incoming tenant. In *Rainey* itself, the landlord had forfeited the lease for non-payment of rent and later re-let the premises but at a lower annual rent. He then sought damages for the loss of rent between the termination of the lease and the date of the granting of the new lease and for the loss arising thereafter by reason of the difference between the rent under the former lease and the rent under the new lease. Significantly, the tenant argued that the landlord had an election either to decide not to terminate the lease (which would allow it to continue suing the tenant for the rent as it became due during the term) or to terminate the lease and regain possession with no right to claim compensation for any loss suffered by reason of the non-receipt of rent following determination. Hutton L.C.J., giving the judgment of the Court, emphatically rejected this approach holding that the submission was “unsound in law”. In his view, the English authorities (i.e., those referred to above) were to the opposite effect allowing a landlord to recover for loss of future rent which would have been payable under the lease had the lease not been terminated.

As we have seen, in *Reichman*, the Court of Appeal was emphatic in concluding that “there is no English case which decides that the landlord can recover damages of this kind”.<sup>45</sup> This conclusion, in the writers' view, is unfortunate given the existence of at least three decisions, albeit at first instance, which have allowed damages for loss of future rent.

## Conclusion

The writers' findings, although admittedly reflecting the views of only a relatively small cohort of practitioners,<sup>46</sup> suggest strong support for the orthodox notion that the landlord is not bound to accept possession whenever the tenant chooses to offer it but is entitled to hold the tenant

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<sup>43</sup> *ibid*, at 626.

<sup>44</sup> [1915] 3 K.B. 493.

<sup>45</sup> [2006] EWCA Civ 1659, at [19] and [26].

<sup>46</sup> The writers acknowledge that the practitioners questioned were established property litigators of seniority and, therefore, more likely to be instructed to act for landlords rather than tenants. To that extent, their views may be tainted with some degree of “conscious or unconscious landlord bias”. However, the writers believe that the survey results remain insightful in that they give the reader, from the coal face of day to day legal practice, an indication of the perceived strengths and weaknesses of the current state of English law on the issue of tenant abandonment.

liable for rent until such time as the tenancy is validly brought to an end by either notice to quit or surrender. Indeed, the "estate" model appears to be by far the more preferred option to the so-called "legitimate interest" solution which found favour with the Court of Appeal in *Reichman*. Interestingly, the primary reason put forward for rejecting legitimate interest as the governing criterion was the obvious concern that it would lead to uncertainty and generate costly litigation in determining whether the landlord's conduct was (or was not) wholly reasonable in the circumstances of each individual case. As we have seen, there was also almost universal disapproval of seeking to restrict the landlord's choice on tenant abandonment in the specific context of residential tenancies.

The most significant finding, however, which has emerged from the writers' survey is that the vast majority of respondents were in favour of giving the landlord, where he accepts the tenant's abandonment,<sup>47</sup> the right to claim damages from the tenant for any loss occasioned by the premature ending of the tenancy/lease including loss of future rent for the unexpired period of the tenancy/lease subject to a duty to mitigate. This, of course, is at odds with our current law as expressed in *Reichman* which, as we have seen, has refused to permit recoverability for loss of future rent on tenant abandonment. That conclusion, as the writers have sought to demonstrate, may be open to question given that there are a number of English authorities, not cited to the Court of Appeal, which support the proposition that a landlord may recover damages for loss of rent on termination of a lease. All of these decisions, as noted earlier, formed the basis of the judgment of the Court of Appeal in the Northern Ireland case of *Rainey* which was also not referred to in *Reichman*. On a broader note, there is also the point here that, in the context of a tenant's acceptance of his landlord's repudiatory breach of the lease, the former may recover damages for breach of contract representing removal costs and expenses, the cost of temporary accommodation until new housing arrangements are made, as well as (in appropriate cases and subject to mitigation) the difference between the original rent and any higher rent payable by the tenant in respect of his new accommodation.<sup>48</sup> In terms of mutuality, therefore, a corresponding entitlement to contractual damages should, it is submitted, be available to the landlord on his acceptance of the tenant's abandonment of the premises.

Given the existence of these decisions, together with the findings of the writers' admittedly limited survey, it is submitted that recovery for loss of future rent may not be so out-of-step with English law principles as to justify its rejection out of hand. It is hoped, therefore, that the matter may be the subject of further judicial scrutiny at Supreme Court level in the not too distant future.

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<sup>47</sup> This would, of course, amount to a surrender of the lease by operation of law: see, s.52(2)(c) of the Law of Property Act 1925.

<sup>48</sup> See, *Hussein v Mehlman* [1992] 32 E.G. 59, (Wood Green Trial Centre); *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 E.G.L.R. 7 and *Chartered Trust plc v Davies* [1997] 2 E.G.L.R. 83, (C.A.).