SHORT NOTES AND COMMENTS

REPUDIATION OF LEASES — THE APPLICATION OF CONTRACTUAL PRINCIPLES TO LEASES

I. INTRODUCTION

LEASES have a dual personality. They are both contractual and proprietary in nature. This duality is inextricably linked to their historical development. In English law, leases originated as contracts for the use of land, being regarded as personal business arrangements under which one party allowed the other the use of his land in return for a rent.[1] Evolving in the twelfth century, they were not regarded as contracts, as contract law itself received recognition only in the 17th century.[2] Neither were they recognised as a form of feudal tenure. The lessee, or termor as he was then referred to, although he had possession of some sort, was not in the same position as a freeholder: he was seised of the property but did not have seisin.[3] They were initially rejected by the law of real property but later gained recognition falling into that category called "quasi" chattels although in their inception they were by nature contracts. Thus leases were denied recognition as contracts and came to be recognised in property law as a middle kingdom between realty and personalty.

Over time, the dual personality possessed by leases was forgotten; they became part and parcel of property law and their contractual beginnings were forgotten. This was despite the addition of covenants (express or implied) to leases. The resultant effect was that contractual doctrines of frustration and termination for breach were denied application to leases. The rationale of this approach is the perceived inappropriateness of those contractual doctrines to a lease viewed as analogous to a form of feudal tenure. For example, when one speaks of the determination of a lease, it is not the language of repudiation which we encounter but expiry, notice, forfeiture, surrender, frustration[4] and merger.[5]

However, there is a move away from this approach in some jurisdictions and the aim of this note is to examine the trends in Australia, Canada and Hong Kong and to study its implications for

[1] Holdsworth, *A History of English Law* (5th ed., 1942) Vol. 2 at pp. 106-107 and Vol. 3 at pp. 213-214; Megarry & Wade, *Law of Real Property* (2nd ed., 1959); see also, Douglas R. Stollery, "The Lease As A Contract" [1981] 19 Alberta L. R. 234. The lease was then a device for avoiding the rules against usury, under which the debtor leased his property to the creditor.

[2] See Milton R. Friedman, *Friedman on Leases,* (2nd ed.). Vol. 1 at p. 3 and Guest, *Anson's Law of Contract* (26th ed.), at p. 12.

[3] Pollock & Maitland, *A History of English Law Before The Time of Edward I* (2nd ed., 1898, 1968 re-issue) Vol. 2 at pp. 102 and 110.

[4] Frustration was only included recently after the House of Lords' decision in *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* [1981] A. C. 675.

[5] W. J. M. Ricquier, *Land Law* (1985) at p. 162.

Singapore and Malaysia. In Australia, Canada and Hong Kong, contractual principles of termination have been applied to leases. The law seems to have come full circle as contractual principles are held to apply to the rejected "child", the lease, as the lease is being given due recognition as a child of dual parentage. The courts in these countries have held that a lease may in certain circumstances be terminated in the same manner as any contract, that is, a lease may be repudiated[6] and the remedy of damages applies.

II. THE STARTING POINT: ENGLISH LAW

Before looking at these developments, it would be helpful to consider the English position as all these three countries have been (and in the case of Hong Kong still is) influenced by English law. Singapore and Malaysia have a similar connection. The position in England is clear, a lease cannot be repudiated. Aldridge states categorically in his book: "An ordinary contract comes to an end if one party repudiates its terms and the other party accepts that repudiation. This does not apply to leases ..."[7] Hill & Redman and Woodfall[8] do not mention repudiation as a means of termination.

The authority for this position lies in the decision of Lord Denning M. R., in *Total Oil* v. *Thompson Garages.*[9] There, the Court of Appeal held that the principle that the acceptance of a repudiation brings a contract to an end had no application to a lease because a lease was more than a contract. In Lord Denning M. R.'s words: "A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance."[10] Although modern leases often take the form of commercial leases[11] and are generally closer in nature to contracts, the position in *Total Oil* is still the law. The hesitation of the House of Lords in extending the application of the doctrine of frustration to leases is probably an argument against the application of the doctrine of repudiation to leases.[12]

III. THE DEVELOPMENTS IN CANADA

English law has been a major influence in the provinces in Canada (except Quebec) through the application of English case law by the early

6 Although it has been noted that there is ambiguity as to the exact meaning of the word "repudiation", it is generally accepted as referring to breaches of contract which discharge the innocent party and justify the termination of the contract: see Lord Wright in *Hevman* v. *Darwins Ltd.* [1942] A. C. 356 at p. 378 and Carter, *Breach of Contract* (1984) at para. 702. In this article, the word "repudiation" shall refer to this. See Carter, *op. cit*., para. 706 for a definition used in that work. See Gibbs C. J.'s definition in *Shevill & Anor.* v. *The Licensing Board*(1982) 36 A. L. J. R. 793 at p. 794 quoted later at n. 40.

7 Trevor Aldrige. *Leasehold Law* (up-dated by current service) at para. 6.173.

8 Michael Barnes, *Hill & Redman's Law of Landlord and Tenant* (1978) and V. G. Wellings, *Woodfall's Law of Landlord and Tenant* (1978); both notered-up by current service.

9 [1972] 1 Q. B. 318.

10 *Ibid*., at p. 324.

11 The term "commercial leases" refers to leases of business premises as contrasted with residential premises. For justification of this terminology, see Laskin J. in *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.* (1971) 17 D. L. R. (3d) 710; and Stephan Tromans, *Commercial Leases* (1987).

12 *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* [1981] A. C. 675, for a contrary view, see *Shevill, supra,* n. 6 and for a discussion of the Australian position, see *infra.*

settlers from the British Isles.[13] However, in the area of landlord and tenant law, the principles in *Total Oil do* not apply. In Canada, the full armoury of remedies ordinarily available in a case of repudiation of contract applies in varying degrees to the termination of leases. This has come about as a result of express legislation and the adoption of the decision in *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.*[14] In this case, a landlord who owned eleven shops and one supermarket in a shopping centre, leased the supermarket to an anchor tenant. There was an express covenant by the anchor tenant to run the business of the supermarket from the date the lease commenced. The tenant abandoned the premises and subsequently the shopping centre failed. The landlord resumed possession, giving notice to the defaulting tenant that it would be held liable for damages suffered by the landlord. The significance of the *Highway Properties* case lies in Laskin J.'s decision that contractual principles applied to leases. He said:[15]

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

Laskin J. chose not to follow the existing law.[16] Until the *Highway Properties* decision, any determination of a lease where the tenant abandoned the lease would involve a discussion of the principles of surrender, especially surrender by operation of law.[17] Laskin J. criticised[18] the existing position under the law of surrender as being unsatisfactory. He felt that the remedies available to a landlord should not be limited to surrender and that the view that the law of surrender was the only applicable remedy, stemmed from the concept of a lease creating an estate in land. There had, he said, been some questioning of the persistent ascendancy of this concept which antedated the development of the law of contracts in English law.

The unsatisfactory situation referred to by Laskin J. becomes obvious when one considers the role of the court in assessing whether surrender has taken place when a tenant abandons the premises. The court has to evaluate the conduct of the parties bearing in mind the courses open to the landlord when a tenant abandons the lease. According to Laskin J.,[19] under the then existing law, the landlord had three mutually exclusive courses:

[13] See W. H. Jennings & Thomas G. Zuber, *Canadian Law* (4th ed.) Chapter 1 for an account of the origins of law in Canada and in particular the effect of the British North America Act 1867 (30 & 31 Vic. c.3) and the Statute of Westminister 1931 (22 & 23 Geo. c. 4).

[14] (1971) 17 D. L. R. (3d) 710.

[15] *Ibid*., at p. 721. He was quoted by Lord Wilberforce in *National Carriers Ltd* v. *Panalpina (Northern) Ltd.* [1981] A. C. 675 at p. 696.

[16] See *Goldhar* v. *Universal Sections & Mouldings Ltd.* (1962) 36 D. L. R. (2d) 450 (Ont. C.A.)

[17] A surrender by operation of law refers to those cases where the law implies a surrender from the unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy; usually when one party to the lease does an act inconsistent with the continuance of the tenancy with the agreement of the other party. In all these three countries, the law of surrender of leases is similar to that of England.

[18] (1971) 17 D. L. R. (3d) 710 at pp. 718-719. He was not the first to do so, see Charles T. McCormick, "Right of Landlord Upon Abandonment" (1925) Michi L. Rev. 211 and W. O. Douglas and Jerome Frank, "Landlords' Claims in Reorganisations" (1933) 42 Yale Law Journal 1003; the second of which Laskin J. made reference to.

[19] *Ibid*.,*at* p. 716.

(a) do nothing but insist on performance of the terms and sue for rent or damages[20] for any breach of covenants by the tenants, on the footing that the lease remains in force;

(b) elect to terminate the lease and retain the right to sue for the rent accrued to the date of termination;

(c) advise the tenant by notice before the re-possession that he proposes to re-let the property on the tenant's account (in which case, the rent continues to be payable until the premises are re-let).

Apart from these, it was always possible for the landlord to preempt such a situation by having a clause in the lease reserving his rights to damages in the event the tenant abandons the lease. Where there is no such clause, it is not a simple task discerning which of the three courses the landlord has taken. An illustration of the ambiguity between a surrender of the lease and the insistence on the performance of a lease by the landlord, is the acceptance of the keys to the premises by the landlord. Although mere receipt of the keys by the landlord may not amount to an acceptance of a surrender by the landlord, yet in some instances, coupled with the conduct of the landlord, it could.

Another aspect of the unsatisfactory situation is the fact that when there is a surrender, there is no recovery of the prospective rent, *i.e.,* the rent for the unexpired term. Further, if the landlord opts for course (a) above there is no duty on him to mitigate. It makes economic nonsense to the tenant to have to pay rent when the premises are not being used, whatever the reasons he might have for leaving them. Even if he opts for course (c) there is no duty on the landlord to take such reasonable steps to obtain a good rent. This militates against the sense of the arrangement, since on the facts *of Highway Properties* the tenant was to be the "anchor tenant" without whom the shopping centre would lose much of its drawing power in terms of attracting customers. In such an instance, applying the concepts of land law would not do justice to the situation. If there is deemed to be a surrender by operation of law or the landlord elects to adopt course (b), the landlord will not only be unable to recover the rent for the entire term but would also lose in terms of the custom lost by the departure of the anchor tenant. The results are thus unsatisfactory in the light of the premise on which the parties entered the lease; this appears to have been a business arrangement involving the use of space in a shopping centre with expectations of profits to both parties, rather than a dealing involving an estate in land. Hence, Laskin J.'s remarks quoted earlier and his decision to "break away" from the existing law.

Laskin J. introduced a new principle modifying the law of surrender by providing the landlord with the additional remedy of repudiation.[21] He held that damages were available to the landlord as a remedy. Whether surrender or repudiation applies to any set of facts would entail an examination of the acts and words of the parties and the surrounding circumstances.[22] This remedy is not confined to the situation of abandonment. However, it was held that the innocent

[20] Although the learned judge was not explicit on this point, he was apparently referring to damages for any breaches of covenant, *e.g.,* the breach of the covenant to pay rent. On the effect of surrender in general, see Walton & Essayan. *Adkin's Landlord and Tenant (1982) at p.* 231.

[21] *Machula* v. *Tramer* [1972] 1 W. W. R. 550, *per* Geatros D. C. J.

[22] *Commercial Credit Corporation* v. *Harry D. Shields* (1980) 112 D. L. R. (3d) 153.

landlord in the situation of abandonment can only recover damages if he gives notice of intention to claim damages for loss of the benefit of the lease for the unexpired term.[23] The quantum of damages would be assessed on the same principles as in the case of a breach of contract, with the aim of putting the plaintiff (whether landlord or tenant) in the same position as if all the covenants in the lease had been performed.[24] Along with the principle of compensation, there is the duty upon the landlord to mitigate.[25] The "full armoury" of contractual remedies has been introduced without any limit to the circumstances when they would apply. Many of the cases following *Highway Properties* have involved abandonment of the premises by the tenant but the availability of the remedies has not been restricted to this set of circumstances.

In some states, contractual principles apply by virtue of legislation. The legislation was the result of the Ontario Law Reform Commission Interim Report in 1968[26] just prior to the *Highway Properties* decision. It recommended that the ordinary rules of contract relating to the mitigation of damages should be made applicable with respect to residential tenancies. Most of the common law jurisdictions in Canada adopted this recommendation.[27] The *Highway Properties* decision came soon after the report and helped in the acceptance of the Commission's recommendation by those jurisdictions which had as their jurisprudence the concept of the lease as a creature of land law. The *Highway Properties* decision applies in the states with common law systems which did not adopt the recommendations of the Law Reform Commission. It also applies in those states which adopted the recommendations since the recommendations were with respect to residential leases and the decision is not limited to residential leases.

III. THE AUSTRALIAN POSITION

The Australian position was identical to the English until the decision of the High Court in *Progressive Mailing House Pty Ltd.* v. *Fabiali Pty Ltd*.[28] Before this, there had been a few isolated decisions[29] which could have been interpreted as holding that repudiation could apply to

[23] *Machula* v. *Trainer, supra.*
[24] *Toronto Housing Co. Ltd.* v. *Postal Promotions Ltd.* (1982) 140 D. L. R. (3d) 117 at p. 119, *per* Lacouciere J.
[25] *Apecoof Canada Ltd.* v. *Windmill Place* (1978) 2 S. C. R. 385 and in *Toronto Housing Co. Ltd., supra.*
[26] This interim report was followed by the actual report in 1976, *The Report on Landlord and Tenant Law Applicable to Residential Tenancies.*
[27] An example is s. 94 (1) of the Manitoba Landlord and Tenant Act, R. S. M. 1970, c. L70 which reads as follows: "(*1*) where a tenant abandons the premises in breach of the tenancy agreement, the landlord's right to damages is subject to the same obligation to mitigate his damages as applies generally under the rule of law relating to breaches of contract". Similar legislation is also found in Alberta, British Columbia, Yukon Territory and Newfoundland to cite some examples. For a detailed list see Williams & Rhodes, *Canadian Law of Landlord and Tenant* (5th ed. 1983 up-dated by a noter-up) at paragraph 12:2:7. Some legislation has stated categorically that the relation of landlord and tenant is solely one of contract.
[28] [1985]59A.L.J.R. 373.
[29] *Buchanan* v. *Byrnes* (1906) 3 C. L. R. 704, *Parsons* v. *Payne* [1945] V. L. R. 34, and *Australian Safeway Stores* v. *Torrak Village Development* [1974] V. R. 268. It was the court in *Progressive Mailing* which realised the portent of some of these decisions especially *Buchanan* which was cited with approval by Laskin J. in Canada.

leases but the Australian courts took no cognisance of them.[30] The *Progressive Mailing* case dealt with an equitable lease under the doctrine of *Walsh* v. *Lonsdale*.[31] The facts involved a lease for five years which was not registered. The tenant failed to pay rent for four months, and committed several breaches of the covenant for maintenance and repair, which it failed to remedy after due notice of thirty days had been given. The landlord commenced action for possession and damages. The parties agreed at the trial that the matter should be decided on the footing that the memorandum of lease had been registered: the main issue was one of damages.

Just as in Canada, the High Court in *Progressive Mailing* felt that a re-examination of the view that contractual principles were inappropriate to leases was necessary. It was noted that underlying this view was the perception of a lease as being analogous to a form of feudal tenure. The judges agreed that the time had come for the courts to critically examine the rational basis and justification of the assumption that leases "were beyond the reach of fundamental doctrines of the law of contract."[32] One reason for the re-examination was the inadequancy of the special rules of property law to determine the rights and liabilities of modern leases which are normally framed in the language of executory promises of widening content and diminishing relevance to the actual demise. They held that contractual principles applied to leases; that on the facts before them the tenant had repudiated the lease and was liable to the landlord for damages. The decision of *Total Oil* was not followed. One of the judges, Brennan J. implicitly decided not to follow *Total Oil* on the reasoning that since Lord Denning M. R.'s decision was based on *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*[33] and this decision had been overruled by the House of Lords,[34] it need not be followed. The other judges, like Mason J.,[35] were impressed with the move away from the proposition in *Total Oil* in previous Australian decisions as well as in decisions overseas.

The judges curtailed any thought that this might be misinterpreted to be a retrogressive move taking leases back to their origins in contract after they had carved a niche in property law. One of the judges, Deane J. noted that:[36]

> "Upon analysis however, it involves no more than recognition of the fact that the analogy between a leasehold and a freehold estate is an imperfect one and of the related fact that, except perhaps in the quite exceptional case of a completely unconditional demise for a long term with no rent reserved... the leasehold estate cannot be divorced from its origins and basis in the law of contract..."

30 See for example, *Shevill andAnor. v. The Licensing Board* (1982) 36 A. L. J. R. 793, where Gibbs C. J. at p. 794 was content to refer to the view in *"Tenancy Law and Practice Victoria"* [Brooking and Chernov Butterworths (2nd ed. 1980)] that repudiation was available as a remedy but overlooked the fact that *Buchanan* was cited as "an extremely important decision". See also, *Ripka Pty Ltd.* v. *Maggiore Bakeries Pty Ltd.* (1984) V. R. 629 where Gray J. thought there was no Australian authority holding that repudiation and damages were available.

31 (1882)21Ch. D. 9.

32 *Supra.,* at p. 388.

33 [1945] A. C. 221.

34 See *National Carriers Ltd* \ *Panalpina (Northern) Ltd* [1981] A. C. 675.

35 [1985] 59 A. L. J. R. 353 at p. 378.

36 *Ibid*., at p. 388.

The impact of *Progressive Mailing* on landlord and tenant law in Australia would depend on subsequent developments, but it is clear that the contractual doctrine of repudiation applies both to an agreement for a lease and an executed lease. The judges advocated caution; they noted that a lease involves situations which are not present in the case of an ordinary contract and that the actual application to a lease involves some unresolved questions which are best left to be considered on a case by case basis.[37] This caution manifests itself in the area of conduct which is considered to be repudiatory. For most of the judges, though agreeing that what is repudiatory conduct is a question of fact, have indicated that a mere breach of covenant may not be sufficient simply because the lease is not an ordinary contract.[38] Their lordships did not attempt to limit the scope of repudiation and the closest attempt at a definition was by Mason J. who adopted the definition of repudiation taken by Gibbs. C. J. in *Shevill* v. *The Licencing Board:*

> "What needs to be established in order to constitute a repudiation is that the party evinces an intention no longer to be bound by the contract or that he intends to fulfill the contract only in a manner substantially inconsistent with his obligations and not in any other way".[39]

Despite the caution, it would appear that a case of abandonment would amount to repudiation by the tenant. Normal contractual principles apply to the assessment of damages recoverable by a lessor after termination of the lease for breach on the lessee's part; damages being available if the tenant repudiated his obligations or where the tenant's breach was "fundamental" in character.[40] The presence of an express contractual right of re-entry pursuant to breach by the tenant does not usually preclude reliance by the landlord on a repudiation or fundamental breach for the purpose of establishing the right to damages for loss of bargain. Whether or not the new principles co-exist with the doctrine of surrender is not dealt with by *Progressive Mailing* but by a decision of the New South Wales Court of Appeal which followed two months later. Priestley J.A. in *Wood Factory Pty Ltd. and Others* v. *Kiritos Pty Ltd.*[41] held that the principles of surrender co-exist with the "new" principles.

There is an area of doubt raised by *Wood Factory.* Priestley J.A., whilst agreeing with *Progressive Mailing* seemed to follow the lead of Brennan J. in that decision, by placing a pre- requisite on the application of contractual principles to leases. This pre-requisite is that the landlord must be able to exercise the remedy of forfeiture before repudiation can apply. Brennan J. was the sole proponent of this view in *Progressive Mailing* and his observation was *obiter.*[42] Placing such a pre-requisite would be retrogressive since it limits the availability of repudiation and links the remedy to the "outmoded"

37 *Ibid*., *per* Deane J. at p. 388.

38 See Mason J. at p. 380 and Brennan J. at p. 383 where both judges pointed to special considerations being applicable to a lease.

39 Mason J. at p. 380. For other definitions of repudiation, see Carter, *Breach of Contract* (1984), *op. cit*., at para 701 and 702.

40 The judges in *Progressive Mailing used* the terms repudiation or fundamental breach and anticipatory breach, often as if they were synonymous terms seeing no need for a distinction between them.

41 (1985) 2 N.S.W.L.R 105 at p. 133.

42 See Carter and Hill, "Repudiation of Leases: Further Developments" (1986) Conv. (NS) 262.

remedy of property law which the majority of the judges felt to be inadequate for the purposes of the modern lease.

IV. THE HONG KONG POSITION

The courts in Hong Kong have accepted the application of ordinary principles of repudiatory breach[43] following the *Highway Properties* decision. In Hong Kong today where a tenant abandons premises and refuses to pay rent, the landlord can accept the breach as repudiation of the lease. The landlord can make it clear to the tenant that he does not approve of the tenant's abandonment and would then seek a substitute tenant in discharge of his obligation to mitigate his loss. Since the landlord has accepted the breach he cannot sue for arrears of rent but would only be entitled to damages which will usually be the difference between the old and the new rent. What amounts to repudiation has not been categorically stated but the basic requirement is that the conduct must be tantamount to the tenant's intention to renounce his obligation.

V. IMPLICATIONS FOR SINGAPORE AND MALAYSIA

In the jurisdictions that we have looked at, the contractual principles of repudiation apply to leases. Even Hong Kong which remains a British colony until 1997 is in advance of England in this regard. The trend is clear, contractual principles have permeated leasehold law.[44] These developments are attractive as they reflect the modern circumstances, where one is accustomed to rapid changes and transience, and the leases one is accustomed to are closer in nature to contracts than to the feudal leases. In those jurisdictions, it was felt that the traditional view of the lease as merely an estate in land had to be rethought. In the words of the Ontario Law Reform Commission:[45] "Concepts rooted in an agriculture economy of a by-gone day provide little logical relevancy for today's landlord and tenant realities." A result of this rethinking is the application of repudiation to leases.

The decisions have indicated that it would be impossible to limit the scope of repudiation. The doctrine of repudiation and its consequences applicable in contract law are not modified in their application to leases. Gibbs C. J.'s definition[46] that repudiation arises where one party has evinced the intention not to be bound by the contract is indicative of this. It will be a question of fact. However, there is hesitation in having the doctrine apply where the conduct indicates the existence of minor breaches of covenants. This is reflective of the cautious attitudes of the courts, mindful that the lease is a contract with a difference.[47] Abandonment of the premises by the tenant is but

43 Malcolm Merry, *Hong Kong Tenancy Law,* (1985) at pp. 151-152.

44 Quaere whether the floodgates have been opened and not merely those principles pertaining to termination but all contract principles apply to leases; that the lease is a contract. In some states in America this is the case, see Milton R. Friedman *op. cit.*, Chapter 1. In the civil law system the lease is treated wholly as a contract, merely a transfer of the use and enjoyment of the property see Pothier, *Contral de Louage No. 74* cited and translated in *Viterbo* v. *Friedland* 120 U.S. 707.

45 The interim report of the Commission referred to earlier at n.27.

46 Quoted earlier at n. 40.

47 See earlier discussion at n.39.

an instance of repudiatory conduct and not the only instance.[48] In none of the jurisdictions was it suggested that the availability of the remedy be limited to the landlord, though the cases were illustrative of breaches by the tenant.

With the application of repudiation, both the landlord and tenant would have an additional remedy. It would be possible for either party, where there is no express provision for such termination, to terminate the lease by notice, if such notice is a clear indication of the intention not to continue with the lease amounting to repudiatory conduct. However, it would be a rare occurrence since the natural consequences of such a step would be the payment of damages, which would include the prospective rent for the unexpired term less any amount by which the innocent party has mitigated.

A. Singapore

These developments are of great interest in Singapore as the foundation of land law in Singapore is English law. This is the result of the Second Charter of Justice.[49] The Charter is generally accepted[50] to have caused English law (both common law as well as statute law) as at 27 November 1826 to be received in Singapore. Subsequent English common law developments are still received on the basis of the declaratory theory that the judges merely declare the law.[51] This position has been verified by local cases[52] applying English principles of land law. English statutes after 1826 are not received under the Charter as there is a cut-off date since the Charter has a reference to the law as existing at that date. Although there is provision for the continuing reception of English commercial law statutes by way of s. 5 (1) of the Civil Law Act,[53] no post-1826 English statutes impinging on land law are received since this is prohibited by s. 5 (2) of the same Act.[54] This situation of having a foundation of English common law in land law has not been altered by local statutes. The introduction of the Torrens system of land registration in Singapore has not altered any of this.[55]

Since English law forms the foundation of Singapore land law, the position regarding repudiation of leases would still be the decision of *Total Oil,* this aspect of landlord and tenant law being an aspect of English common law. It is also no surprise that the two local commentaries on land law in Singapore recite the same remedies as

48 Mason J. in *Progressive Mailing, supra,* at p. 380. Mason J. did point out at p. 381 that in leases for a long term where the rent is not at the market rate or was nominal repudiation would only apply where the breaches were serious and the conduct should be close to abandonment.

49 6 Geo. IV c. 85.

50 Andrew Phang, "English Law In Singapore: Precedent, Construction and Reality or 'The Reception That Had To Be'" [1986] 1 M.L.J. civ.; *contra,* see Mohan Gopal, "English Law in Singapore: The Reception That Never Was" [1983] 1 M.L.J. xxv.

51 See G.W. Bartholomew, "The Singapore Legal System" in *Singapore: A Society in Transition* (1976 R Hassan ed.); *contra,* see Helena Chan, *An Introduction to The Singapore Legal System* (1986) at p. 35, n.68.

52 For example, see *Ng Kim Pong* v. *Goh Ching* [1956] M.L.J. 87 where surrender by operation of law in *Oastler* v. *Henderson* (1877) 2 Q.B.D. 575 was applied; see also, W.J.M. Ricquier, "Land Law and Common Law in Singapore" *op. cit*., at p. 232.

53 Cap. 43, 1985 (Rev. Ed.).

54 W.J.M. Ricquier, "Land Law and Common Law in Singapore" in *The Common Law In Singapore and Malaysia* (1985) at p.233.

55 W.J.M. Ricquier, *Land Law* (1985) and by the same author in "Land Law and Common Law in Singapore" *op. cit.*

those applying in English law for the termination of a lease.[56] Thus the remedy available to parties in instances of breaches of covenants would lie in the area of damages, specific performance and injunction,[57] and the principles of surrender would be applicable to a situation of abandonment.[58] However, this account must be qualified by the position in neighbourhood Malaysia which has an influence on Singapore as the Malaysian decisions are of persuasive authority.

B. Malaysia

The position in Malaysia on the other hand is not clear. There have been two cases where the courts seem to have dealt with termination of leases by applying contractual principles which are not expressly included in the National Land Code as methods of determining leases and tenancies.[59] The two cases are *Teh Wan Sang & Sons Sdn. Bhd.* v. *See Teow Chuan*[60] and *Zainal Abidin* v. *Century Hotel Sdn. Bhd.*[61] To refer to the two cases as dealings with leases is inaccurate as the National Land Code differentiates between two types of dealings: the lease (where the term is for more than 3 years) and the tenancy exempt from registration (where the period is less than or equal to 3 years). Both the cases involved tenancies exempt from registration. The terms were for three years with no express clauses regarding termination.

In *Teh Wan Sang,* the tenant gave notice that he would vacate the premises after occupying the property for about a year and four months. The landlord rejected the tenant's termination. His view was that the tenancy continued and rent was to be paid. The landlord agreed on a without prejudice basis to look for a new tenant. An exchange of letters ensued with the tenant asserting that the tenancy was a monthly one and the notice of three months given by him was sufficient for termination. The tenant then abandoned the premises and returned the keys. When the matter came before Peh Swee Chin J., one of the issues was an allegation that the landlord had failed to mitigate his damages by accepting a new tenant earlier. He had waited until a tenant offered the same rent as the tenant. The landlord argued that he had not accepted the defendant's breach and there was no duty to mitigate until he did. Further, he argued that if there was a duty he had acted reasonably in mitigation. The High Court held that the landlord had not accepted the "breach" but exercised his right of election as an innocent party to treat the contract as existing. The breach took place when the landlord finally accepted the "anticipatory repudiation" in taking a new tenant; alternatively he held that the landlord had taken reasonable steps to mitigate the loss.[62] The landlord was awarded damages being the arrears of rent from the date of vacating the premises till the entry of the new tenant. This decision was upheld by the Federal Court.[63]

56 See W.J.M. Ricquier, Land Law (1985) at p. 162 and N. Khublall, *op. cit.* at pp. 139-142.

57 Yates and Hawkins, *Landlord and Tenant Law* (2nd ed., 1986) p. 111.

58 *Oastler v. Henderson, supra, i.e.,* options similar to those listed by Laskin J. in *Highway Properties* as being under the existing law.

59 Act No. 56 of 1965.

60 [1984] 1 M.L.J. 130.

60 [1987] 1 M.L.J. 236.

61 [1984] 1 M.L.J. at p. 133 applying *White & Carter (Councils) Ltd.* v. *McGreggor* [1962] A.C. 413.

62 The decision of the Federal Court is not reported but only reflected in an editorial note in the report of the High Court decision.

63 Seah S.C.J. at p. 237.

In *Zainal Abidin,* the landlord operated a hotel and he sublet the third floor of the hotel to the tenant to run a health/recreation centre. The tenancy ran for about nine months when the tenant was prevented from entering the premises by the hotel security guards. Subsequently the landlord's letter giving notice of termination was received. The tenant maintained that the termination was wrongful but he ultimately left the premises upon receipt of another notice to the effect that if he did not vacate the premises the landlord would charge him for the costs of removing his property. The tenant's assertion in the court proceedings was that the landlord had wrongfully repudiated the lease. There were two issues before the Supreme Court. The first issue was whether the termination by the landlord amounted to a determination of the lease. The other issue before the court was one of damages. In deciding whether there was a determination of the tenancy, the Supreme Court considered the effect of the landlord's refusal to perform his part of the tenancy agreement; if the refusal had gone to the root of the tenancy agreement then the tenant was entitled to conclude that the landlord no longer intended to be bound by the terms of the tenancy agreement in the future.[64] The Supreme Court agreed with the lower court -decision that the landlord had evinced a clear intention to put an end to its obligations under the tenancy agreement and awarded damages for the loss of profits suffered by the tenant from being deprived of the premises to run his recreation centre.

It must be observed that the two decisions did not refer to the two methods for termination of leases listed in the National Land Code: surrender (ss. 239-240) and forfeiture (ss. 234-238) but to contractual principles of repudiation. In *Teh Wan Sang* there was no mention of the basis for applying the contractual principles of repudiation. In *Zainal Abidin,* reference was made to s. 240 (2) of the National Land Code which provides for the determination of leases otherwise than by surrender under s. 239. It is not clear on what basis the Court applied the law of contract: whether they have followed the developments in the jurisdictions discussed earlier or were merely relying on the methods provided in the Code.

It is when one seeks to understand the basis for the decisions that difficulties are encountered. The Code is not of help in the inquiry since it is silent about the nature of the methods of determination. It is silent, for instance, as to what is encompassed by surrender. So it must be assumed that none of the methods in the Code refers to contractual principles. Consequently, it does not appear that the courts relied on

[64] Although the Privy Council on appeal from Malaysia has decided that English law does not apply in view of s. 6 Civil Law Ordinance 1956, see, *Chin Chov & Ors.* v. *Collector of Stamp Duties* [1981] 2 M.L J. 47 at p. 48 (*per* Lord Roskill), *Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 26 at p. 270 (*per* Lord Diplock) and S.Y. Kok, "The Nature of Right, Title and Interest Under The Malaysian Torrens Systems" [1983] 1 M.L.J. cxlix. The position is unsettled as the authors of the most recent commentary on Malaysian land law (Teo Keang Sood and Khaw Lake Tee, *Land Law In Malaysia Cases and Commentary* (1987) at p. 9) state that the better view is that the prohibition imposed by s. 6 may not be absolute; see also Teo Keang Sood, "The Scope And Application of Section 6 of the Civil Law Act, 1956" [1987] 1 MLJ 1xix. For other views, see, *e.g.,* the view that English equitable principles apply, S.Y. Wong, "Equitable Interests" [1967] 9 Mal. L.R. at p. 36; S.Y. Wong, "Effect of Unregistrable Purported Leases (Under The National Land Code) [1975] 1 M.L.J. xxxvi; S.Y. Wong, *Tenure and Land Dealings in the Malay Stales* (1975); for the view that the Code is exclusive, see D. Jackson, "Equity and the Torrens System - Statutory and Other Interests" [1964] 6 Mal. L.R. at p. 171; Judith Gleeson (now known as Judith Sihombing), "A Lessee and a Registered Proprietor Under The National Land Code" (1974) J.M.C.L. III; and see also. S.Y. Tan, "*Devi* v. *Francis* - A Critique" [1970] 1 M.L.J. x.

any of the methods in the Code. Nor does the answer lie in English law. This is not because the Code is conclusive and no English property law concepts are to be referred to, which in itself is an issue that is not yet resolved,[65] but rather because reference to English law, if permitted, does not explain the decisions since the English position does not permit the repudiation of leases.

The commentators on the Code refer to a list of methods not dissimilar to the available means of terminating a lease in English law. One commentator[66] refers to the following as a list of the instances when surrendered of a lease is available:

(a) effluxion of time;
(b) forfeiture;
(c) merger;
(d) operation of law; or
(e) disclaimer.

Other writers are content to reproduce a similar list as the means of determining leases and tenancies exempt from registration. No mention is made of the methods of determination other than surrender in s. 240 (2), which was relied upon by the Court in *Zainal Abidin.*

The other possibility, since reference to the methods in the Code does not seem to provide a solution as to the basis of the decision, is that the two cases have followed the developments in Canada, Australia and Hong Kong. There may be an alternative explanation for the cases and that lies in the nature of a tenancy exempt from registration. It has been said that the tenancy exempt from registration is a leasing agreement.[67] If this is the case, as agreements, the application of contractual principles to them poses no difficulty. However, this position is far from certain; the Code is again silent on this point and no authority in case law was cited for it. This position would appear to be consistent with the view that the Code is exclusive in the nature of interests created in it. Under this view except for interests created by the Code, there are no other interests. Since only the registered leases have any legal interests, the other interests are .merely personal rights "inter partes" and only give rise to contractual rights.[68]

It would have helped greatly had the Supreme Court and the Federal Court been more explicit in the cases. If the cases involved the application of contractual principles to the tenancies exempt from registration since they are merely contracts, the developments in the other countries would still be of interest to Malaysia and Singapore. On the other hand, if the cases cannot be explained on the above premises,[69] there is only one conclusion and, that is, the courts in

65 Judith Sihombing, *The National Land Code* (1981) at p. 441.
66 Judith Sihombing, *op. cit.,* at p. 404, see also S.Y. Kok, "The Concept Of A Tenancy Exempt From Registration Under The Malaysian Torrens System" [1984] 1 M.L.J. lxxxv.
67 See S.Y. Kok, "The Nature of Right, Title and Interest Under The Malaysian Torrens Systems" *op. cit.*
68 See also R.R. Sethu, *Rent Control Legislation in Malaysia* (1986) at p. 234, where he discusses the effect of repudiation on tenancies and does not indicate any cases in Malaysia having a position similar to the Australian.
69 Lord Roskill in *National Carriers Ltd:* v. *Panalpina (Northern) Ltd.* [1981] A.C. 675 at p. 713.

Malaysia have made new law this would in turn be of relevance in Singapore.

VI. CONCLUSION

In any event, the trend in the jurisdictions we looked at should be seriously considered. There is great merit in the view that:

> "The law should not be compartmentalised. In principle a common law doctrine ought not to be held capable of applying only in one field of contract and not in another. To preserve the dichotomy between leases on the one hand and other types of contract on the other can undoubtedly create anomalies."[70]

Such a view espoused in justifying the application of the doctrine of frustration to leases should also be justification for the application of the doctrine of repudiation. Perhaps, we may see a decision in which the learned judge would be moved to echo Mason J.'s words in *Progressive Mailing:*

> "Accordingly, the balance of authority ... overseas, and the reasons on which it is based, support the proposition that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach apply to leases".[71]

Indeed, there are numerous advantages in the application of contractual principles of repudiation to leases which have been alluded to in the foregoing discussion; for the purpose of a summary, brief reference will be made to some of them. Firstly, the nature of the modern lease in most instances has departed from its predecessor, the feudal lease on which the current methods of determination are based. The modern lease is usually commercial in nature and contains covenants phrased in the language of executory promises. Secondly, under the principle of surrender by operation of law which would apply in cases of abandonment of premises by the tenant (the most common instances of repudiation in the jurisdictions we looked at) there is no duty on the landlord to mitigate his damages. In the case of a fixed term lease, for instance, the landlord need not look for another tenant if he does not accept the abandonment of the premises as amounting to a surrender of the lease. He can wait for the lease to come to an end by effluxion of time and recover the rent unpaid. It is certainly not an economically sound proposition to have resources lying vacant and not maximised to their fullest capacity. Thirdly, since modern leases contain covenants in the nature of contractual promises, it is convenient and fitting that contractual principles be applied. The parties to a modern lease are more than likely to view what they have transacted as a contract and in the event of disputes would probably think in terms of contractual breach and repudiation. Fourthly, the application of contractual principles of repudiation and the availability of damages to the innocent party is more realistic in terms of compensation when one deals with modern leases. Under the existing methods of determination, it is unlikely that the innocent party whether landlord or tenant would be able to recover the loss of

[70] [1985]59A.L.J.R. 373 at p. 378.

[71] This is on the assumption that it did introduce the contractual principles of repudiation; there are other examples from Australia and Canada which have been referred to earlier.

the bargain when either party decided to "repudiate" the lease. One need only refer to the example of the tenant in *Zainal Abidin* who recovered his loss of profits from the inability to operate a health and recreation centre.[72] The application of contractual principles is also realistic in that the landlord or tenant in the face of persistent breaches of covenant need not resort to principles of property for recourse but like the landlord in *Progressive Mailing* may treat the lease as being repudiated.

TAN WEE LIANG*

[72] From the writer's personal knowledge, there have been two instances where *Teh Wang Sang* [1984] 1 M.L.J. 130, has been relied upon; in one instance, the matter was settled out of court and in the other, the matter has been held in abeyance.

* LL.B. (N.U.S.), LL.M. (Cantab.), Advocate & Solicitor, Singapore, Lecturer, School of Accountancy, Nanyang Technological Institute.