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Repudiatory Breach of Leases – Hard Lessons for the ‘Contractualisation’ of Leasehold Law

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# INTRODUCTION

A considerable period of time has passed since the English courts acknowledged that contractual termination principles could be applied to leases – first frustration in 1981, by the then House of Lords;[[2]](#footnote-2) second, repudiatory breach of contract, in 1992.[[3]](#footnote-3) In the intervening years, there have been a handful of reported cases in England and Wales, which have sought to clarify the operation of repudiatory breach of contract as it applies to the leasehold bargain, though none at appellate level where the operation of that doctrine has been central to the case presented.

This is, in a very real sense, perplexing. In the intervening years, the property market has felt the effects of numerous financial crises, before and after the deep global recession triggered by the American sub-prime mortgage market. One might have expected a veritable rash of both landlords and tenant seeking to terminate leases in these troubling economic conditions, but this has not happened or, at least, the reported cases do not suggest that it has, as they are both scant in number and scope.[[4]](#footnote-4)

That said, a reasonable amount of academic and (extra-) judicial ink has been spilt on the question of whether repudiatory breach (and frustration) should apply to leases,[[5]](#footnote-5) as part of a wider question of what is known as ‘contractualisation’ of the lease, or, as Bright has neatly expressed it,[[6]](#footnote-6) the move to treat the regulation of the lease as more than property, but ‘property plus’ other obligations. This is to suggest that although the lease is both a creature of contract and property, the fact that it normally creates an estate in land (so-called *Bruton* tenancies aside[[7]](#footnote-7)) is not the sole focus of the relationship in practice, nor should it preclude the application of more general contractual doctrine to the leasehold context. Generally, viewing the lease as a contract has been welcomed, and it appears to be an established process of thinking in Anglo-Welsh law, albeit with some disquiet expressed at times in the developing case law, as will become apparent. Parliamentary intervention has followed the trend of viewing leases as contracts, with residential letting agreements in England and Wales entered into on or after 1 October 2015 may now fall to be regulated in line with other consumer contracts under the Consumer Rights Act 2015,[[8]](#footnote-8) and, in Wales, housing law has moved away from leases in a proprietary sense to the creation of contractual occupation agreements, regulated under the Renting Homes (Wales) Act 2016.[[9]](#footnote-9)

This paper will re-examine the impact of the decision in *Hussein v Mehlman*,[[10]](#footnote-10) which introduced the doctrine of repudiatory breach into landlord and tenant law in England and Wales.[[11]](#footnote-11) It will suggest that some of the initial concerns concerning the importation of the doctrine have been assuaged, but that more significant, ‘bright line’ issues have emerged.[[12]](#footnote-12) The major concern is that the doctrine operates differently depending on whether the claimant is either the landlord or tenant, which is both unprecedented in other common law jurisdictions that allow repudiatory breach of leases and creates serious anomalies in the law. Using repudiatory breach as a case study, the paper will also consider whether the importation of contract principles has benefitted the regulation of leases more generally and suggest that, while it is proper to treat leases as contracts in many respects, it is preferable to regulate them primarily as property rights.

# THE ‘CONTRACTUALISATION’ OF LEASES: CONTEXT AND PROBLEMS

Before embarking on re-examination of repudiatory breach, it important to consider the nature of the leasehold bargain and the issue of contractualisation of leases. It is a trite proposition that the lease (or tenancy) has a duality of legal character; that it is a ‘hybrid, part contract and part property’.[[13]](#footnote-13) No-one denies that the contractual character of a lease is significant, but the key to the contractualisation debate lies in whether the proprietary nature of a lease means that contract should or should not regulate the agreement in the same way as it would any other contract agreed between parties, giving landlords and tenants the same remedies for breach of contract as other contracting parties.

The arguments for applying contractual remedies to leases have been oft rehearsed, but can be summarised in the words of Lord Roskill:

However much weight one may give to the fact that a lease creates an estate in land in favour of the lessee, in truth it is by no means always in that estate in land in which the lessee is interested. In many cases, he is interested only in the accompanying contractual right to use that which is demised to him by the lease, and the estate in land which he acquires has little or no meaning for him.[[14]](#footnote-14)

To suggest that the proprietary nature of a lease might still preclude the full reach of the contractual arm ‘conjures up images of parchment and sealing wax, of copperplate handwriting and fusty title deeds’.[[15]](#footnote-15) Nevertheless, there are very real reasons to argue that the very nature of the leasehold itself should deny these remedies.

## The Impact of the Estate in Land

The presence of the estate in land, which is central to the concept of a lease, is one element not recognised in contract law, and was, for many years, the reason why it was felt that leases, as property rights, could not be subject to contractual rules to terminate the relationship.[[16]](#footnote-16) It is part of the central distinction between a lease (tenancy) on the one hand, which is a method of property ownership, and a licence to occupy property, which is a permission to use and occupy land, but does not endure against third parties in itself like the lease. For many in the legal world, however, this central distinction between the two forms of occupation is no longer a given.[[17]](#footnote-17) Lord Hoffman’s (in)famous speech in *Bruton v London Quadrant Housing Trust*,[[18]](#footnote-18) as later explained in *Kay v London Borough Lambeth*,[[19]](#footnote-19) confirmed that it is possible to have the relationship of landlord and tenant on a contractual level, distinct from a licence.[[20]](#footnote-20) This led a number of commentators to rethink the very basis of the leasehold relationship and the lease/licence distinction, and to suggest that there is no need for an estate. *Bruton* provides, it is argued, a welcome clarification of the law, as it is all about relativity of title and protecting possession.[[21]](#footnote-21) This view of *Bruton* has won judicial acceptance at the highest level; Lord Neuberger said in *Mexfield v Berrisford* that ‘Bruton] was *about relativity of title which is the traditional bedrock of English land law*.[[22]](#footnote-22) [emphasis added] Some commentators have thus suggested that a licensee in possession is seised in fee, and that ‘consensual possession is the root of title’.[[23]](#footnote-23)

This is, with respect, going too far. While title is relative, it is *adverse* possession, not possession which explains the root of title. Hence, a licensee is not in adverse possession as their occupation is explained by their licence.[[24]](#footnote-24) On this reasoning:

…the licensee’s possession merely supports the enjoyment by their licensor of their estate. *Bruton* itself was decided consistently with that approach. It is also one accordant with indications that one can be in possession merely qua licensee.’[[25]](#footnote-25)

The centrality of the lease/licence distinction as the boundary between proprietary and contractual forms of occupation of land, therefore survives. *Bruton* tenancies are an anomalous footnote, as the fact that they do not appear to bind third parties or attract rights that a licence does not, mean that it is understandable that the case law has not been swamped with parties claiming that a ‘non-estate tenancy’ has been created by the document they entered into, rather than a contractual licence. The fact remains that an estate in land is a feature of a lease. This is significant, because one question left unaddressed by the importation of contractual doctrine is how would a contractual doctrine end the lease as a matter of legal theory? The central issue is whether the contractual doctrine of repudiatory breach operates within property law, or outside and independently from it. In other words, does repudiatory breach need to make use of property law to bring about the destruction of the leasehold estate, or can it do so on simple contractual principles? The consensus is that an integrated approach is required, because of the presence of an estate in land.[[26]](#footnote-26) There is still something of a conceptual ‘muddle’ about the underpinning theory by which an estate is terminated, and is not revealing too much to note that none of the cases before the courts in England and Wales dealing with repudiatory breach have addressed this head on.

## The Regulatory Framework

The presence of the estate is significant to the definition of a lease, but is just one factor that makes the lease distinct from other specialist contracts. The more significant issue is, in many ways, the particular rules and regulations that have built up around the regulation of leases work against the effective operation of broad contractual principles in this specialist context of lettings between landlord and tenant.[[27]](#footnote-27) This context is more than the specialist nature of a particular form of contract, where the operation of rules differs from one contract to another. Leases have distinct features, such as:

[T]he comprehensive process of assignment of the benefit and burden of leasehold covenants is something unique to the law of leases and is not to be found under general contract law. Leases are also clearly distinguishable from other contracts of hire because engrafted onto them are complex statutory codes, which, often for reasons of policy, seek to confer on tenants additional benefits and advantages. In particular, the complex law relating to the recovery of possession and eviction of tenants (including the law of forfeiture and relief from forfeiture) make leasehold agreements very different from ordinary commercial contracts.[[28]](#footnote-28)

McFarlane has suggested that any tension between the contractual and proprietary aspects of a lease is an ‘illusion’:[[29]](#footnote-29) the classification of a lease as a property right is one of content (does the right given impose a prima facie duty on the rest of the world not to interfere with the use of a thing?), whereas designation as a contractual right is an acquisition question (does the right arise as a result of a contractually binding promise with the lessor?). It follows that, ‘when analysing the practical problems that are often said to depend on a choice between the ‘proprietary’ and ‘contractual’ views, the false opposition obscures the solution to the problems’.[[30]](#footnote-30)

While there is much to commend this as a theoretical perspective, it does not address the concerns raised that the presence of a proprietary estate, and the rules which exist around it, have a fundamental impact on the operation of how the law regulates this extra dimension, which is absent from contracts generally. An analysis which suggests that some contractual doctrines have no place in leasehold law does not deny the importance of the creative, contractual element of the lease, but instead recognises that the presence of the estate and the obligations arising from it, present real obstacles to the effective operation of contractual principles in leasehold law. These will be revealed in the consideration of repudiatory breach.

# CASE STUDY: REPUDIATORY BREACH OF LEASES

##  What is a repudiatory breach?

Put simply, a breach of an obligation (or obligations) under a contract is repudiatory when it is so fundamental that it is tantamount to the party in breach repudiating or rejecting the whole contract.[[31]](#footnote-31) The classic formulation is such breach deprives the injured party of ‘substantially the whole benefit’ of the contract,[[32]](#footnote-32) or goes the very root of the contract so that damages will not provide an adequate remedy. A repudiatory breach of contract renders the contract voidable, and the injured party has a right to elect to terminate the contract or to continue it and sue for damages for the breach.[[33]](#footnote-33)

The effect of the termination by repudiatory breach is twofold. It operates to bring an end to the primary contractual obligations of both parties and to release them from any future liability. Liability remains for past breaches of contract occurring before the rescission and for the performance of any obligations so accruing. Secondly, in technical, contractual terms, it creates a secondary obligation on the part of the defaulting party to pay damages to the injured party for the loss sustained by him in consequence of the non-performance of his primary obligations in the future[[34]](#footnote-34) and for the period before rescission. The injured party is thereby compensated for the loss of the contract as a whole.

## Acceptance of Repudiatory Breach in English Leases: A Tenant Remedy

The acceptance in *Hussein v Mehlman*[[35]](#footnote-35) that a lease might be terminated by a repudiatory breach like any other contract has been considered in detail elsewhere.[[36]](#footnote-36) In essence, the fact that the majority decision of the House of Lords in *National Carriers v Panalpina (Northern) Ltd*,[[37]](#footnote-37) treated a lease as any other contract,[[38]](#footnote-38) despite the presence of an estate in land, meant that repudiatory breach could be applied to leases. Freed from the constraints of precedent, Assistant Recorder Stephen Sedley QC recognised that a tenancy could be ended by, thereby giving *tenants* a right to terminate a contract for sufficiently serious breach of covenant by the landlord.[[39]](#footnote-39)

Where a tenant is in breach of covenant, the law of forfeiture provides a means whereby a landlord can seek to terminate the lease, but there is no analogue system of forfeiture for tenants.[[40]](#footnote-40) Where a landlord is in breach of covenant, absent repudiation, the tenant is generally only entitled to damages for breach of the covenant, alongside some limited rights to set off rent where the breach concerned is of a repairing covenant.[[41]](#footnote-41) This ‘is certainly no substitute for a right to end the tenancy and find a better landlord elsewhere.’[[42]](#footnote-42) It is easy to understand why the Assistant Recorder felt sympathy for the plight of the tenant before him, not least that English law has no general warranty of fitness for purpose of residential lettings,[[43]](#footnote-43) which would provide a remedy for tenants in jurisdictions such as Canada or the USA.

This is significant, as English law was unique in the common law world in first applying repudiatory breach for a tenant. In all other commonwealth jurisdictions, repudiatory breach was held applicable as a device that landlords could access.[[44]](#footnote-44) This is more than an arbitrary matter of coincidence as to the type of claimant who happened to bring an action in court, as it has legal consequences, which are explored below. The lack of any proprietary framework, such as the scheme of forfeiture, within which to seat the operation of repudiatory breach when claimed by a tenant against a landlord, has led to significant concerns as to how an action to terminate a lease by repudiatory breach actually operates. The significance of this appears, with respect, not to have impacted on the Assistant Recorder, and what is missing from the judgment in *Hussein v Mehlman* is any analysis of how repudiatory breach should be applied in English leasehold law by tenant or landlord, or whether, indeed, it should be so applied, beyond a tacit recognition that ‘the proposition that a contract of tenancy can be repudiated like any other contract has a number of important implications, which it is not appropriate to explore on the facts of this case.’[[45]](#footnote-45)

This is something of an understatement and while it might have been proper to leave the details of these implications to later cases, it does not cover a failure to consider what was, after all, a sea-change in the law. So, what have later cases made of repudiatory breach of leases?

## Developments since Hussein: No Actionable Repudiation

There has not been a reported case of successful termination of a lease by repudiatory conduct in a decided case since *Hussein v Mehlman* itself. However, the application of repudiatory breach for tenants appeared to be confirmed in *Chartered Trusts v Davies*.[[46]](#footnote-46) It was assumed at first instance that the lease could end through repudiation and acceptance, and the point was not argued in the Court of Appeal. The case concerned possible non-derogation from grant by the landlords in allowing other tenants in a shopping mall to commit what amounted to a nuisance which interfered with the toy business carried on by the tenant at their demised unit. The tenant alleged that this was a major contributing factor to the driving the business into bankruptcy. It was uncontested at the Court of Appeal that the action complained of as a nuisance was a substantial interference with the letting and would have fulfilled the criterion for an action in repudiatory breach, if it had been argued.

Similarly, in *Nynehead Developments v. RH Fibreboard Containers*,[[47]](#footnote-47) it was confirmed that leases could, in principle, be determined by repudiatory breach following a landlord’s breach of covenants. On the instant facts, there had been clear breaches of the implied covenant not to derogate from grant and an express covenant relating to the landlord's duties in respect of the efficient operation of the estate. However, Weeks QC found that there had no repudiation of the facts – the breaches were not characterised as sufficiently serious so as to amount to repudiation of the lease. They were an ‘irritant and minor interference’ with the tenant’s business and, though often’ deliberate, prolonged and surreptitious’, they were not such as to go to the root of the parties' contract and damages provided an adequate remedy. Weeks QC also sounded a note of caution in applying the doctrine too readily to allow tenants an escape from what had become a disadvantageous bargain.

In *Petra Investments Ltd v Jeffrey Rogers plc*,[[48]](#footnote-48) it had originally been intended that a shopping centre would have an individual and exclusive image for high quality fashion retail. However, in order to increase trade and sales revenue, the landlord created a new unit as a Virgin Megastore.[[49]](#footnote-49) The tenant of one of the retail units in the shopping centre, who had suffered a loss of profits, claimed that the landlord’s conduct had been repudiatory and also constituted a non-derogation from grant. Hart J concluded that, in a purpose-built centre, there was an obligation on the landlord not to alter or use the common parts of the centre in such a way as to cause it to lose its character as a retail shopping mall. In relation to the letting of units within the centre, the landlord was required to take account of the expectations of its existing tenants by not doing, or permitting something to be done, that it was reasonably foreseeable would render the premises already demised less fit for the purpose for which they had been let. Having found that there was no actionable non-derogation from grant on the facts, Hart J said:

In those circumstances, it is unnecessary for me to consider whether, had I come to a had I come to a different conclusion, the result would have been that the defendant was entitled to accept the claimant's conduct as repudiatory of the lease…or whether the defendant simply has a claim to damages.

The important decision of *Abidogun v Frolen Health Care*,[[50]](#footnote-50) concerned denial of title, so this time it was the landlord alleging that the tenant had committed a repudiatory act: a first in a reported English decision. Space here militates against a full discussion of denial of title as a doctrine, but it was confirmed in this case by Arden LJ that the basis of denial of title is an implied term in a lease,[[51]](#footnote-51) even though it operated by way of repudiation. Significantly, the case also decided that an action for denial of title was an action for forfeiture, which needed to be brought within s.146 to be effective, more on which later.

The repudiation action failed, on numerous grounds. It was by no means clear that either the actions of the tenants in seeking a determination of the court on issues that had arisen between the parties would be seen as a repudiatory or that the tenants did not intend to be bound by the lease. Even if there was repudiatory conduct, the acceptance of that conduct by the landlords was lacking, and at trial the case had proceeded on the basis of forfeiture, not repudiatory breach.

Denial of title was also at issue in *Crisp v Eastaugh*.[[52]](#footnote-52) The court found that the actions by the tenant were equivocal and did not amount to a repudiation of the lease, so entitling the landlord to forfeit the lease.

Given the lack of true clarity demonstrated by these cases, which all suggest that repudiatory breach is applicable in principle but not on their individual facts, it is unsurprising that the whole application of repudiatory breach was called into question by Lloyd LJ in the Court of Appeal in *Reichman v Beveridge*.[[53]](#footnote-53) The material facts were straightforward. The tenants took a lease of offices for the purposes of a partnership business. The partnership ceased to practise and vacated the offices. The landlords sued for rent. The tenants alleged that the landlords had failed to mitigate their loss by forfeiting the lease and seeking to re-let. In consequence, they said, they ought not to recover the rent. In holding for the landlords, Lloyd LJ cast doubt on the application of the doctrine of repudiatory breach, having considered that:

Since [*Hussein v Mehlman*] other courts in England have held, or assumed, that a lease can be brought to an end by acceptance of a repudiatory breach, *but there is no decision to that effect in this court*. [[54]](#footnote-54) [emphasis added]

He added:

I do not decide whether or not repudiation plays any, and if so what, part in the English law of landlord and tenant. That is not directly in issue before us, and it would be wrong to decide it unnecessarily.[[55]](#footnote-55)

Read together, it is impossible not to feel that his Lordship was severely doubting the application of repudiation breach to leases generally, but these are, as Lloyd LJ himself notes, *obiter* statements. If they were intended to signal a clear change in direction, it is not one that has been judicially recognised. In *Grange v Quinn*,[[56]](#footnote-56) Jackson LJ clearly felt that repudiatory breach was applicable to leases, as he said, also *obiter*:

Although there were earlier indications to the contrary, it is now clear that a lease may be brought to an end by repudiation and acceptance.[[57]](#footnote-57)

At the very least, these cases collectively suggest there is a palpable sense of unease still permeating judicial acceptance of repudiatory breach as a remedy, available both to landlords and tenants, in dealing with termination of leases.[[58]](#footnote-58) This might explain the paucity of case law, legal advisors being equally unaware or uncertain of the efficacy of pleading repudiatory breach of a lease, or that may simply be a coincidence of a multiplicity of factors. Rather than engage in simple speculation, attention now turns to what else these cases have revealed about the operation of repudiatory breach within the landlord and tenant sphere and to see whether any of the implications of the action operating in the leasehold context have been addressed.

## The Impact of Repudiatory Breach

###  Landlords Claiming Repudiatory Breach By Tenants: Creating Anomalies

Assistant Recorder Sedley recognised in *Hussein* that introducing a right to terminate on behalf of the tenant meant, inexorably, that the same action would be available to a landlord. Indeed, *Abidogun* appeared to remove any doubt about this, and in so doing brought English law into line with the other jurisdictions that accept repudiatory breach as a landlord remedy. One of the issues considered in *Abiodgun* was the manner in which a landlord may bring an action for repudiatory breach. If, as with the tenant’s right to terminate by accepting repudiatory conduct by the landlord, the action is based purely on contract, would it allow the landlord to avoid or escape the requirements of forfeiture? This would give landlords an additional method of terminating leases, and one that would not allow an opportunity for any remedy by the defaulting tenant, as there is no concept of remediable breaches in the operation of repudiatory breach – it the acceptance of a repudiating act (or acts) that terminates the contractual bargain.[[59]](#footnote-59) An action in forfeiture, by contrast, activates a discretionary system of relief (equitable and statutory) against the forfeiture action, which permits the tenant to apply to court to allow him to remedy his breach without the landlord repossessing the demised premises.[[60]](#footnote-60) This is because the real purpose is to secure compliance by the tenant with his covenants, not to allow the landlord to get the demised premises back early for breaches of covenant which could be compensated through an award of damages. The attraction of a purely contractual method of termination open to the landlord would be that it avoids the complexity of the forfeiture action where the breach complained of by the tenant was sufficiently serious to merit a finding that it was repudiatory in character.[[61]](#footnote-61)

This concern would appear to have been addressed. Arden LJ made it clear in *Abidogun v. Frolen Health Care Ltd* that a repudiatory breach by a tenant through denial of a landlord’s title would only be actionable if it was brought within the forfeiture system:

If it were not so, it would be possible to bring a lease to an end by a means which is wholly outside of section 146, with significant consequences for the law of landlord and tenant and the fact that such repudiatory conduct may only arise occasionally does not seem to me to diminish the significance of the contrary conclusion.[[62]](#footnote-62)

Buxton LJ went further, and in addressing counsel’s argument that repudiatory breach operated as a purely contractual doctrine and did not operate with the forfeiture framework, said:

I can well accept the first point in [the appellant's] argument that relations between a landlord and his tenant, under a lease, are governed by the ordinary law of contract as well as by the more specific doctrines of the law of landlord and tenant. It does not, however, follow from the interaction of those two parts of the law that the protection for a tenant, as has been provided by Parliament in section 146, can be avoided by recourse to a purely contractual doctrine such as that of repudiatory breach.[[63]](#footnote-63)

It is now without doubt, that if repudiatory breach exists as an action for the landlord, it must be brought under the existing, statutory forfeiture provisions. Thus, the window of opportunity for landlords was apparently closed and the courts would appear to have found a way to make the doctrine of repudiatory breach work in a sensitive manner in the particular context of the lease.[[64]](#footnote-64)

The solution is not as sensitive to context as it at first appears. There are ‘significant consequences for the law of landlord and tenant’ in the approach adopted by Arden and Buxton LJJ, tied to the inescapable fact that repudiatory breach is also available to a tenant, while forfeiture is not. What appears to emerge are two separate actions of repudiatory breach operating in the leasehold context. First, there is tenant’s right to accept repudiatory breaches committed by the landlord, which, by necessity, must operate independently of any forfeiture system. This operates as a purely contractual right, and in the same way as repudiatory breach of any other type of contract, with the tenant electing to end the lease and the landlord having no right to make good the breach. Secondly, there is a landlord’s right to accept repudiatory acts committed by the tenant, which must be brought as an action for forfeiture so that any mechanisms for relief operate to allow the tenant to make good the breach before the lease can be terminated. The fact that the breach is sufficiently serious to amount to repudiatory conduct on behalf of the tenant does not mean that such breach would be irremediable.[[65]](#footnote-65) The landlord’s right to repudiatory breach is, in practice, little more than an additional method of forfeiture for serious breach and ‘the doctrine of repudiation adds nothing at all to a landlord's ability to recover possession from a tenant in the usual way.’[[66]](#footnote-66)

It is cold comfort to suggest that the landlord’s ability to accept repudiatory conduct from a tenant is curtailed by an existing statutory framework, particularly when it is known that the existing system of forfeiture is unnecessarily complex and in desperate need of reform. Indeed, is there any compelling reason why a tenant should have a ‘better’ right than a landlord, in the sense that that a tenant is protected by relief against forfeiture whereas a landlord committing serious breach is not? Consider a repairing obligation in a lease. If it lies with the landlord, who commits a repudiatory breach of the obligation, in theory the tenant has only to elect to end the lease to terminate it, as there are no equivalent statutory provisions for forfeiture.[[67]](#footnote-67) Where the repairing obligation is on the tenant, matters differ considerably for the landlord, who must make sure that they serve an appropriately worded s.146 notice, and the tenant will probably have the chance to make good the breach under the relief against forfeiture provisions and keep the lease, something the landlord would be denied if in breach of the same obligation.[[68]](#footnote-68)

The practical difference, of course, is that the threat of forfeiture is what might compel the tenant to remedy the lack of repair; the tenant, having no such threat would, without an action for repudiatory breach, have no way of forcing a landlord to remedy the breach, other than suing for breach of covenant. It is easy to have sympathy with the tenant, particularly in a residential context, as they have more to lose than a landlord from the loss of the leasehold estate, and repeated action for breach of covenant when premises are rendered uninhabitable seems repugnant. In the more commercial sphere, such sympathy is harder to conjure, as the playing ground is often more equal between landlord and tenant. Either the landlord or tenant may want to use the serious breach of the repairing obligation in the example provided as a trigger to end the lease for other reasons. The tenant might be a serial defaulter on rent, for example, only paying when threatened by court action or the market conditions have changed since the tenant agreed a lease, or the tenant could obtain a (re-)letting at a much lower market rent. In such situations, only the tenant would be able to end the lease by election through repudiatory breach; the landlord would not, due to the relief against forfeiture provisions.

In closing the door on potential injustice to tenants by landlords, the decision in *Abidogun* has created a quandary, however well-intentioned the motives, that the efficacy of an action for repudiatory breach, and its baseline operation, varies greatly depending on the party accessing it, and moved the injustice from the landlord to the tenant. This also takes English law further away from some of its Commonwealth cousins. In Australia, for example, the landlord’s right to accept a repudiatory breach by the tenant is seen as an alternative, contractual means of ending the lease, alternative to a right of forfeiture, in which any question of serving a forfeiture notice ‘becomes an irrelevance’.[[69]](#footnote-69)

### A Right to Prospective Damages Post-Termination for Loss of Bargain?

A second, significant issue identified with termination of lease via repudiatory breach concerns the availability or otherwise of prospective damages on the termination of the lease. This is an alien concept if the lease is viewed simply through a property lens, as once the estate terminates all future liability ceases.[[70]](#footnote-70) Prospective damages, as a secondary action for loss of bargain damages throughout the duration of the original contract, are, however, a feature of contract law, as identified above.[[71]](#footnote-71)

The attractions of prospective damages, particularly to landlords, are twofold. First, that landlords may make the tenant essentially a ‘involuntary guarantor of the rent’[[72]](#footnote-72) on ending a lease by repudiatory breach. Although the estate would have ended, the tenant has contracted for the original period of the lease, so that the secondary obligation to pay damages would remain. Hence, if the landlord was unable to relet the premises at all or for a period of time, or agreed a new tenancy at a lower rent than the original tenancy, a claim could be made in damages for the rent owing or the diminution in the value of the rent. The availability of such contractual damages was an accepted consequence in Commonwealth countries such as Canada and Australia of the application of contractual principles to leases.[[73]](#footnote-73) Secondly, and related to the first, the availability of prospective damages would avoid the landlord retaining property which could otherwise be relet, as, even where a tenant has abandoned the premises and has no intention of performing the contract, a landlord could, without the cushion of loss of bargain damages, elect to keep the lease alive and simply sue for rent as it became due.

*Reichman* v *Beveridge*[[74]](#footnote-74)would appear to have put an end to the availability of prospective damages in English law on termination of a lease by repudiatory breach. There is a general principle that where a repudiatory breach of contract occurs, the innocent part who elects to continue with the contract is under a duty to mitigate the loss.[[75]](#footnote-75) In *Recihman*, the tenants asserted that the landlord had failed to mitigate his loss by forfeiting the lease and seeking to re-let it. Their argument thus depended on establishing that (a) if the landlord terminated the tenancy and took steps to relet, he could recover any loss by way of a claim in (loss of bargain) damages and (b) that it would be unreasonable for the landlord not to terminate the tenancy and instead continue to sue for rent as it became due. Lloyd LJ disagreed with both of these points, despite having been referred to Commonwealth authorities supporting these arguments:

There is, however, no case in English law that shows that a landlord can recover damages from a former tenant in respect of loss of future rent after termination…In those circumstances, either damages are not an adequate remedy for the landlord, or at least the landlord would be acting reasonably in taking the view that he should not terminate the lease because he may well not be able to recover such damages.

Lloyd LJ noted that a landlord would, of course, forfeit and relet where market conditions were favourable, but given that there was no right to sue the tenant for any loss of rent on a relettting at a lower rate, the landlord’s option of keeping the existing tenancy alive and suing for rent as it became due was sensible and practical. There was no duty to mitigate damages here, as rent was a debt, not damages.

Later in the same judgment, he put the matter of prospective damages beyond doubt:

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 reached that stage.[[76]](#footnote-76)

It follows that, since the action is termed in terms of repudiatory breach, loss of bargain damages for breach of a continuing covenant in a lease would also be denied to a tenant.[[77]](#footnote-77) Though Lloyds LJ’s reasoning is open to criticism,[[78]](#footnote-78) and the impact of it is that a landlord must keep alive a contract and sue for non-performance where his interest in doing so must be questionable,[[79]](#footnote-79) it has not been judicially doubted. It again places English law out of step with other common law jurisdictions, both in law and practice. The High Court of Australia, for example, reaffirmed that loss of bargain damages are available to the landlord on termination through repudiation and acceptance in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd*.[[80]](#footnote-80) The court felt it was desirable that the landlord ought to be able to determine a lease by repudiatory breach, as the ability to recover damages for a contractual action, not available on forfeiture, protected against the movement of the market.[[81]](#footnote-81)

The net effect, then, of *Reichman* is to further bolster the idea that there is little utility in an action for repudiatory breach in Anglo-Welsh law. It operates subject to forfeiture when accessed by a landlord, and it does not give a landlord a right to prospective damages, and, as a consequence, does not provide a tenant with a right to escape from the obligation to pay rent, even where they have abandoned the premises and the landlord would be happy to be rid of them. This is not just a matter of context; of contractual principles operating in a particular way to accommodate the relationship of landlord and tenant. It is, instead:

…the fashioning of an entirely new legal construct to enable one party to a contract to terminate it on breach by another and yet to deny him the right to compensation. Moreover, it would differentiate leases from all other kinds of contract, a differentiation whose existence the proponents of repudiation deny.[[82]](#footnote-82)

Here again is an example of a set of problems unresolved by the importation of contractual principles into the landlord and tenant relationship. It calls into question the very efficacy of their importation.

### Loss of Alternate Remedies

There is, as demonstrated, a disconnect between the need for repudiatory breach in English law – which was to give tenants a right to terminate on serious breach - and the impact of the operation of the doctrine. The irony of introducing the remedy has been to preclude discussion of, potentially, something better through the creation of the Tenant Termination Order Scheme.[[83]](#footnote-83) Broadly, this would introduce a right for tenants to apply to terminate the lease for persistent breach of covenant by the landlord. The right would be subject to the same relief provisions as the landlord’s order scheme, and would therefore introduce the concept of an ability to remedy a default by a landlord, which is missing from repudiatory breach. However, the scheme has been dropped from the Termination Order Bill, as, with a due sense of irony, the Law Commission felt able to abandon the Tenant Termination Order, as the availability of repudiatory breach covered the same ground.[[84]](#footnote-84) It was clear on consultation that the creation of this statutory right was met with hostility by landlord interest groups – however, given what has since happened to repudiatory breach as an action for landlords, and if that position was understood, that hostility might not be as evident if the Commission were to look at this area again.

# CONCLUDING REMARKS: LESSONS FOR THE FUTURE

Given the forgoing re-examination of repudiatory breach, it is difficult to see the increasing contractualisation of the lease as a useful addition to the law regulating leases, and the parties to them. The use of contractual principles in these contexts has not been sensitively handled and has, in effect, caused serious anomalies in the law. It is judicial legislation, which has been occasioned to meet a perceived need, which has led to unexpected results.[[85]](#footnote-85)

It has created a bright line distinction, for no defensible reason, between the operation of the doctrine, dependent on whether it is used by a tenant against his landlord, or a landlord against his tenant. Only in the former case can it be said to operate as a contract lawyer would recognise repudiatory breach; and, even then it has proved of dubious utility and requires some complex (and fictional) legal reasoning to explain the action. In relation to landlords, the remedy adds little, other than additional complexity, to an action for forfeiture and, in denying any entitlement to loss of bargain damages following termination through repudiatory breach, there is little point in pursuing a repudiatory breach by the tenant. It also means that landlords can face termination of a lease if they are in default of a covenanted obligation such that it classes as a repudiatory breach, without any real chance to remedy that breach. However, if the same obligation sits with the tenant, the tenant will likely have a chance to remedy the breach before the lease can be terminated, thanks to the fact that a landlord’s claim to repudiatory breach must proceed by forfeiture. With the very best of judicial motives, serious anomalies have been created in the law, which it is difficult to stomach, particularly when, as is apparent, the English version of the importation of contractual principles differs greatly from that of our common law cousins.

At the very least, this re-examination of the area suggests that any fervour for contractual remedies should be receding, as the realities of the impact of their importation begin to reveal themselves through the case law; a point recognised by the Court of Appeal in *Reichman v Beveridge*. The application of contractual principles has been, with respect, an ill-advised example of law reform by the judiciary.[[86]](#footnote-86) In importing remedies, without any clear thought to how they might operate in the particular context of the landlord and tenant relationship, more problems have been created than solutions. Perhaps of greatest concern, these attempts have allowed attempts at substantive law reform to be sidestepped, as evidenced in the Law Commission’s abandonment of the Tenant Termination Order; something which would have given tenant’s a right akin to forfeiture and which would have operated in a similar way to the proposed reforms to the landlord’s right of forfeiture.

While the distinction between leases and licences as proprietary and personal rights persists, it is suggested that it is high time that English law retracted from allowing contractual remedies to terminate leases, and instead time would be better spent on reducing the complexities of the existing system. At the time of writing, it is uncertain, whether, in fact, repudiatory breach is part of English law. What is needed is a decision of the Supreme Court, once and for all, to settle the matter. It is the author’s hope that any such settlement suggests that repudiatory breach forms no part of English law.

It should go further, and reconsider the nature of the regulation of leases, and ‘contractualisation’ more generally. The proprietary nature of the lease has been much maligned, yet it does not represent archaic thinking to suggest that regulating leases primarily as property rights, not contracts. It is to be remembered that the estate is the essential element which transforms a contract into a ‘lease’. The relational contractual element is the creative subsidiary which works within the discipline of the estate, and controls the use to which the parties may put the estate. This is so, even though the contractual element may seem more important to the parties as it contains the regulatory and commercial provisions of the bargain. It is the distinction between the perceived and the legal reality of what has been created. This does not ignore the commercial realities of the leasehold transaction: indeed, it gives effect to the ultimate commercial reality, which is that the parties have agreed a lease not a licence, and as such the tenant has become the property owner for the duration of the term (something which is likely to have been reflected in the price paid by premium or rent for the grant of the lease). There is no difficulty in a licence being repudiated or otherwise terminated by any contractual means, since it is a pure creature of contract. There is no anomaly in allowing a licensee to repudiate and not a tenant – the licensee has no proprietary asset to lose. This is a central distinction between the protection of proprietary rights and personal rights. There is therefore no need to resort to contractual remedies to terminate leases; they are not the pancea they may at first appear to be.

When added to the concerns of the special context in which regulation of the landlord and tenant system operates, as demonstrated by repudiatory breach, the time has come to learn hard lessons. Those hard lessons, at heart, are that changes to regulation should really be within the purview of the legislature, not the judicial evolution of our common law system. That is an important lesson to learn, and one which may have much wider import beyond contractualisation of leases. To do otherwise is to create unforeseen anomalies, as demostrated here, or, at best, not to improve the law in any meaningful or defensible way.

1. \* School of Law & Social Justice, University of Liverpool. My thanks are due to Dr David Capper, Dr Juanita Roche and Professor Nicolas Hopkins for their questions and comments at the Conference, which have undoubtedly improved the quality of this paper and led to an alteration of the title in consequence. Any errors or omissions remain mine alone. [↑](#footnote-ref-1)
2. *National Carriers Ltd* v *Panalpina (Northern) Ltd* [1981] 2 AC 45. [↑](#footnote-ref-2)
3. *Hussein* v *Mehlman* [1992] 2 EGLR 87. [↑](#footnote-ref-3)
4. One of the reasons might be that there has been a marked increase in the number of tenants going into liquidation or being made bankrupt, with liquidators and trustees in bankruptcy disclaiming leases as ‘onerous property’ under ss 178-182 or ss 315-321 of the Insolvency Act 1986. [↑](#footnote-ref-4)
5. No lesser persons than Lords Millet and Neuberger have clashed on the desirability of repudiatory breach as a remedy for landlord and tenant in the Blundell lectures 2000 (Falcon Chambers). [↑](#footnote-ref-5)
6. S Bright *Landlord and Tenant Law in Context* (Oxford, Hart, 2007) pp 30 -33. [↑](#footnote-ref-6)
7. The ‘non-estate’ or ‘*Bruton*’tenancy, is considered below. [↑](#footnote-ref-7)
8. Not only must letting agents now declare all fees upfront (s 83), but the unfair contract terms approach (Part 2) now applies to individually negotiated terms in leases or licences for occupation of property, which used to fall outside the remit of unfair contract terms. Similarly, lettings of furnished premises may well fall within the definition of a contract for the hire of goods (Part 1, Chapter 2, s 3(2)(a)), which may lead to the implication of terms as to quality and fitness for a specified purpose (ss 9 -14). [↑](#footnote-ref-8)
9. This received Royal Assent on the 18 January 2016, and was based on, ‘Renting Homes in Wales’ (Law Com No 337, published 9 April 2013), following ‘Renting Homes: The Final Report (Law Com No 297, published 2007). English law has not adopted these changes. [↑](#footnote-ref-9)
10. One reason for focussing on repudiatory breach is that, at the time of writing, an actionable case of frustration of a lease has yet to be recorded in the law reports, and the particular issues that arise from such an action have already been explored elsewhere – see W Barr, ‘Frustration of Leases - The Hazards of Contractualisation’ [2001] 52 *Northern Ireland Legal Quarterly* 82. [↑](#footnote-ref-10)
11. While the approach in Anglo-Welsh law will be contrasted to key developments in other commonwealth jurisdictions, where appropriate, it is not within the ambit of this paper to consider what lessons might be learnt from the treatment of repudiatory breach in other jurisdictions: that has been done elsewhere – see W Barr ‘Repudiation of Leases: A Fool’s Paradise’ in P Jackson and D Wilde (eds) *Contemporary Property Law (*London, Ashgate, 2000).; M Pawlowski and M Brown. ‘Contractual termination of leases: lessons from the Commonwealth: Part 1’ (2009) *Landlord & Tenant Review* 145, ‘Part 2’1’ (2009) *Landlord & Tenant Review* 182, ‘Part 3’(2009) *Landlord & Tenant Review* 216. [↑](#footnote-ref-11)
12. See Barr, ‘Repudiation of Leases: A Fool’s Paradise’ in *Contemporary Property* Law (above n 11). More generally, see J Morgan ‘Leases: Property, contract or more?’ in *Modern Studies in Property Law: Volume 5* (M Dixon ed) (Hart Publishing, 2009). [↑](#footnote-ref-12)
13. *Linden Garden Trusts Ltd v Lenesta Disposals Ltd* [1993] 3 All ER 417. [↑](#footnote-ref-13)
14. *National Carriers Ltd v Panalpinia (Northern) Ltd* [1981] 2 AC 45, per Lord Roskill. [↑](#footnote-ref-14)
15. *Johnston & Sons Ltd* v *Holland* [1988] 1 EGLR 264 at 267j per Nicholls LJ (talking, in that case, about the concept of non-derogation from grant). [↑](#footnote-ref-15)
16. The presence of an estate did not impress their Lordships in *National Carriers v Panalpina* (above n 14), though no actual consideration of the nature of the estate was undertaken by the majority in reaching their decisions. See Barr ‘Frustration of Leases - The Hazards of Contractualisation’ (above n 9). [↑](#footnote-ref-16)
17. Similarly, some commentators feel that the lease/licence distinction creates problems – see H Carr, ‘The Sorting of Forks from the Spades: an Unnecessary Distraction in Housing Law?’ 107 in Cowan (ed), *Housing: Participation and Exclusion* *(*London, Ashgate, 2000), which argues that differentiating occupation agreements (and their legal consequences) creates a great deal of confusion for housing providers, to the detriment of vulnerable groups. This, of course, is no longer a distinction contained in Welsh housing law. [↑](#footnote-ref-17)
18. [2000] 1 AC 406. [↑](#footnote-ref-18)
19. [2006] 2 WLR 570 [↑](#footnote-ref-19)
20. This has been classed as a ‘non-estate’ tenancy by Lord Scott in *Kay*, and it is clear that, whatever the limits of this type of contractual tenancy, the ability to bind parties outside of the contracting landlord and tenant is no different to a contractual licence. [↑](#footnote-ref-20)
21. See, for example, J Hill, *‘*The Proprietary Character of Possession’inE. Cooke (ed) *Modern Studies in Property Law, Volume 1* (Oxford, Hart, 2001); K Lewison, ‘The nature of a lease and the applicability of principles of repudiation and acceptance’ (2007) *Landlord and Tenant Bulletin* 2, who argues, that ‘the creation of the relationship of landlord and tenant will always create an estate in land, but one which may not bind a person having a better right. There is no such thing as a “non-estate tenancy”; but the estate may be a precarious one’. [↑](#footnote-ref-21)
22. [2011] UKSC 52 at [62]. [↑](#footnote-ref-22)
23. A Baker, ‘Bruton, licences and a fiction of title’, [2014] *Conv* 494. [↑](#footnote-ref-23)
24. See *Roberts v Swangroves Estates* [2007] EWHC 513 (Ch). [↑](#footnote-ref-24)
25. A Baker, above n 22, 506. [↑](#footnote-ref-25)
26. Three, broad methods have been suggested. Viewing the lease as executory, on the basis of the implied covenant of quiet enjoyment (see C Chew, ‘The Application of the Contractual Doctrine of Repudiation to Real Property Leases’ (1990) 20 *Western Australia Law Review* 86; the use of a fiction of implied surrender (repudiatory conduct supplies the offer, election to terminate would supply the acceptance) and the implication of a condition subsequent, that on the happening of a substantial failure of performance the innocent party may elect to bring the lease to an end (P Luxton ‘Termination of Leases: From property to contract’ in J Birds, R Bradgate and C Villers (eds), *Termination of Contracts* (London, Wiley Publishing Ltd, 1995). All of these depend on legal fictions, and are unsatisfactory. See W Barr ‘Repudiation of Leases’ (above n11) pp 331-334. [↑](#footnote-ref-26)
27. W Barr, ‘Repudiation of Leases’ (above n11); W Barr ‘Frustration of Leases’, (above n 10). [↑](#footnote-ref-27)
28. M Pawlowski & M Brown. ‘Contractual termination of leases: lessons from the Commonwealth: Part 3’(2009) *Landlord & Tenant Review* 216 [↑](#footnote-ref-28)
29. B McFarlane, *The Structure of Property Law* (2008, Hart Publishing, Oxford) pp 697-8, [↑](#footnote-ref-29)
30. Ibid. [↑](#footnote-ref-30)
31. See *Eminence Property Developments Ltd* v *Heaney* [2010] EWCA Civ 1168 (CA), where the facts sensitive nature of repudiatory breach was emphasised in deciding whether the contract breaker in a renunciation case had demonstrated, objectively, that he or she had refused to perform a contact. [↑](#footnote-ref-31)
32. *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26at 66 per Diplock LJ. [↑](#footnote-ref-32)
33. See, H Beale et al (eds) *Chitty on Contract*, 32nd ed (London, Sweet & Maxwell, 2015) Volume 1, Chapter 24, 24-001 – 24-017. [↑](#footnote-ref-33)
34. See eg the facts and decision in *McDonald v Davy Lascelles Ltd* (1933) 48 CLR 457. [↑](#footnote-ref-34)
35. *Hussein* (above n 1). [↑](#footnote-ref-35)
36. Barr, ‘Repudiation of Leases’ (above n 11) [↑](#footnote-ref-36)
37. *Panalpina* (above n 1). See also Barr ‘Frustration of Leases’ (above n 9). [↑](#footnote-ref-37)
38. Their Lordships expressly approved of the reasoning in *Highway Properties Ltd v Kelly, Douglas & Co Lt* 17 DLR (3d) 710 at 721: ‘It is no longer sensible to pretend that a commercial lease, such as the one before the 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’. [↑](#footnote-ref-38)
39. On the facts, the landlord’s breaches of the statutory covenant to repair (s 11 of the Landlord and Tenant Act 1985) had been severe: there was no heating, the ceiling of one bedroom collapsed, water pipes had burst, a flat roof extension was leaking and there was damp in the hall. There had clearly been a substantial failure in performance so as to justify termination through repudiatory breach. [↑](#footnote-ref-39)
40. Indeed, statutory efforts to introduce a parallel system of tenant forfeiture have been abandoned: see n 78 below. [↑](#footnote-ref-40)
41. See eg *British Anzai (Felixstowe) Ltd. v International Marine Management Ltd.* [1980] QB 137. Tenants may also have been able to negotiate express break clauses in leases, allowing him or her to escape the lease at an earlier time than the stated expiry date. These are not commonly included in leases. See generally Woodfall *The Law of Landlord and Tenant*, Chapter 17, Section 14, 17.285 – 17.301. [↑](#footnote-ref-41)
42. Law Commission, *Forfeiture of Tenancies* (No 142, 1985) para 17.11. [↑](#footnote-ref-42)
43. This may now be part of English law, however obliquely, through the Consumer Protection Act 2015 – see n 8. [↑](#footnote-ref-43)
44. See further Barr, ‘Repudiation of Leases’ (above n 11). In *Highway Properties Ltd* (above n 37) for example, the landlord brought the action against a tenant who had abandoned the lease of a unit in shopping premises. [↑](#footnote-ref-44)
45. *Hussein* (above n 2) at 90H. [↑](#footnote-ref-45)
46. [1997] EWCA Civ 2256. [↑](#footnote-ref-46)
47. [1999] 1 EGLR 7. [↑](#footnote-ref-47)
48. [2000] EGLR 120 (Ch). [↑](#footnote-ref-48)
49. This was a successful, international chain store, founded in 1976, specialising in selling music and video products to the public, and was a familiar flagship store in many British city centres. The Virgin Megastore group has ceased trading in most of the world, but continues to trade in the Middle East and North Africa. [↑](#footnote-ref-49)
50. [2001] EWCA Civ 1821 [↑](#footnote-ref-50)
51. Ibid at [43]. [↑](#footnote-ref-51)
52. [2007] EWCA Civ 638. [↑](#footnote-ref-52)
53. [2006] EWCA Civ 165. [↑](#footnote-ref-53)
54. Ibid at [10]. [↑](#footnote-ref-54)
55. Ibid at [42]. [↑](#footnote-ref-55)
56. [2013] EWCA Civ 24, which considered the quantum of damages recoverable following unlawful eviction of the tenant. [↑](#footnote-ref-56)
57. Ibid at [70]. [↑](#footnote-ref-57)
58. Chitty (above n 32) itself is unhelpful here – see 24.001, fn 2, where it is said that repudiatory breach ‘would appear to apply to leases’. It is worth noting that in Wales, in residential leases, the Renting Homes (Wales) Act 2016, s 154 permits a tenant to sue for repudiatory breach by the landlord without a possession claim where the breach has lead the tenant to give up possession of the home. This is in line with the adoption of ‘occupation contracts’ to replace the multiplicity of statutory and common law concepts applicable to leases (and licences) of the home. [↑](#footnote-ref-58)
59. The fact that the breach is one of sufficient seriousness to be classed as ‘repudiatory’ does not mean that such a breach is, by its very nature, irremediable – see n 64 below. [↑](#footnote-ref-59)
60. Forfeiture is also complex and stands and need of reform, as, for example, in the need for a landlord to determine whether a breach is remediable or irremediable in serving a valid s 146 Law of Property Act 1925 notice on a tenant for breach of any covenant other than rent. The question is not one, as in repudiatory breach, of whether the breach is sufficiently serious as to go to the ‘root’ of the contract. If an incorrect determination is made, the notice may be invalid – see, for example, *Akici v LR Butlin Ltd* [2006] 1 WLR 201*; Anders v Haralambous* [2013] EWHC 2676 (QB). [↑](#footnote-ref-60)
61. See further Barr, ‘Repudiation of Leases’ n12 at pp 323 – 329. [↑](#footnote-ref-61)
62. [2001] EWCA Civ 1821 at [49]. [↑](#footnote-ref-62)
63. Ibid at [52]. [↑](#footnote-ref-63)
64. See in support, M Pawlowski, ‘Denial of Landlord’s Title: Forfeiture or Repudiatory Breach’[2002] *Conv* 399. [↑](#footnote-ref-64)
65. The question of whether a breach is remediable or not is not simply a question of seriousness In essence, the issue is whether the harm that has been done to the landlord by the relevant breach is, for practical purposes, capable of being retrieved within a reasonable time - *Savva v. Hussein* [1996] 47 EG 138. See, further, Woodfall (above n 30) para 17.132. [↑](#footnote-ref-65)
66. A Oakes ‘Repudiatory breach in the leasehold context: some unresolved issues’ (2012) *L&T Review* 95 at 97. [↑](#footnote-ref-66)
67. The breach must, of course, be sufficiently serious to amount to a repudiatory breach, and simple breach of a repairing obligation would not fulfil that requirement, otherwise tenants would be walking away from their tenancies in droves. There is no evidence to suggest this is the case. [↑](#footnote-ref-67)
68. If the breach is remedied, the landlord suffers no loss in a sense. A breach of repairing obligation may serious enough to be classed as a repudiatory breach, but still be classed as remediable in terms of forfeiture, as the harm can be made good within a reasonable period of time – see n 64 above. [↑](#footnote-ref-68)
69. *Marshall v Council of the Shire of Snowy River* (1994) 7 BPR 14 at 447, per Meagher JA. See also A Dowling ‘Case Comment: Contract Law and the termination of leases’ (2006) *Landlord and Tenant Review* 12. [↑](#footnote-ref-69)
70. This is the effect where the landlord accepts an offer of surrender of the lease by a tenant, or successfully terminates the lease through forfeiture action. [↑](#footnote-ref-70)
71. See n 33 above. [↑](#footnote-ref-71)
72. T Effron. ‘The Contractualisation of the Law of Leaseholds: Pitfalls and Opportunities’, 14 *Monash University Law Review* 83 at 90. [↑](#footnote-ref-72)
73. See eg *Highway Properties v Douglas & Co* [1971] 17 D.L.R. (3d) 710; *Progressive Mailing House Property Ltd v Tabali Property Ltd* (1985) 157 C.L.R. 17. These cases are considered in W Barr, ‘Repudiation of Leases’ (above n 11) at pp 324–327. See also *Gumland Property Holdings Ltd* v *Duffy Bros Fruit Market (Campbelltown) Property Ltd* [2008] 82 ALJR 576. [↑](#footnote-ref-73)
74. *Reichman* [2006] EWCA Civ 165. [↑](#footnote-ref-74)
75. See, generally, Chitty(above n 32) ch 26. [↑](#footnote-ref-75)
76. *Reichman* [2006] EWCA Civ 165 at [27]. [↑](#footnote-ref-76)
77. K Lewison (above n 21) 3. [↑](#footnote-ref-77)
78. See eg A Dowling. ‘Case Comment: Contract Law and the termination of leases’ (2006) *L&TR* 12, who argues that there are at least three English decisions which support the proposition that a landlord could recover damages for loss of bargain on the termination of a lease, which were themselves considered and approve in the Northern Ireland case of *Rainey Brothers Ltd* v *Kearney* [1990] NI 18; none of which were cited in *Reichman*. [↑](#footnote-ref-78)
79. J Morgan [2008] *Conv* 165 at 173. [↑](#footnote-ref-79)
80. (2008) 244 ALR 1. [↑](#footnote-ref-80)
81. Ibid at [64]. See, however, D McGill, ‘Anti-shevill clauses and statutory protection of tenants from forfeiture: What’s left after *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd*?’ (2009) 17 Australian Property Law Journal 326. [↑](#footnote-ref-81)
82. K Lewison (above n 21). [↑](#footnote-ref-82)
83. Law Com No 303 (2006) *Termination of Tenancies for Tenant Default*. [↑](#footnote-ref-83)
84. See Law Com No 223 (1994*) Landlord and Tenant Law: Termination Of Tenancies Bill*; Law Com Consultation Paper: *Landlord and Tenant Law: Termination of Tenancies by Physical re-entry*; *Landlord and Tenant Law: Termination of Tenancies by Physical re-entry*. [↑](#footnote-ref-84)
85. This type of action is not unknown in English property law. Lord Templeman’s intervention in *Street v Mountford* [1985] 2 WLR 877 to establish an objective approach to the creation of leases is a case in point. This was designed to address issues caused by landlords seeking to avoid rent protection legislation by creating licences instead of tenancies. The need for intervention was removed shortly after by the removal of rent protection from most residential lettings via the Housing Act 1988, yet the impact of the decision is still being felt for those seeking to create licences rather than leases for perfectly defensible purposes – see, for example, W Barr ‘Charitable lettings and their legal pitfalls’ in E Cooke (ed) *Modern Studies in Property Law: Property 2000* (Oxford, Hart) 239. [↑](#footnote-ref-85)
86. This is to be contrasting with legislative intervention, as has happened in Wales with Renting Homes, which follows careful consideration of operational issues and context, arising from the work of the Law Commission. [↑](#footnote-ref-86)