Loss of Future Rent on Tenant Abandonment

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General Editor

Let us assume a tenant is granted a tenancy of property (either a 12-month residential tenancy or a three-year commercial lease). In either case, after only three months of occupation, he decides that he no longer has any need for the property (because, for example, he has found cheaper premises elsewhere) and informs the landlord that he intends to vacate and stop paying rent. The tenant argues that the landlord should accept the surrender of the premises and instruct agents to market the property with a view to re-letting to a new tenant. The landlord is reluctant to accept a surrender given that the tenancy still has some time left to run. What options does the landlord have in these circumstances? Is he obliged to treat the tenancy/lease as at and end? Must he now seek to re-let the premises regardless of the state of the rental market? Can he accede to the tenant's demand and claim for loss of rent during the remainder of the term? If so, is he under any obligation to mitigate his loss by taking appropriate steps to find a new tenant?

The orthodox view

The orthodox view is that a landlord has the choice of two alternative remedies when faced with a tenant who has defaulted on the rent and seeks to abandon the premises. First, the landlord can accept the abandonment and thus retake possession in lieu of rent. In these circumstances, the covenant to pay rent for the unexpired portion of the term ceases to bind the tenant. Thus, once the lease is determined, the tenant commits no breach of covenant by reason of his non-payment of rent for that unexpired portion: *Jones v Carter* (1846) 15 M & W 718, at 726 and *Matthey v Curling* [1922] 2 AC 180, at 200. Alternatively, the landlord may refuse to accept the abandonment and sue the tenant for rent as it falls due under the tenancy. This stems from the notion that the landlord is not bound to accept possession whenever the tenant chooses to offer it but is entitled to hold the tenant liable for rent until such time as he gives a valid notice to quit or the tenancy comes to an end by surrender: *Boyer v Warbey* [1953] 1 QB 234.

The landlord's qualified election to end the tenancy

In *Reichman v Beveridge* [2006] EWCA Civ 1659, the Court of Appeal concluded that the option of electing to treat the lease as continuing and suing for rent as it falls due was subject to qualification based on strict principles of reasonableness and legitimate interest. In this case, the defendants were solicitors holding a tenancy of office premises in Yateley, Hampshire, for a term of five years from January 2000. In February 2003, they ceased to practise and had no further need for the premises. They stopped paying rent from March 2003 and, in January 2004, the claimant landlords sued for the arrears due up to then, seeking only a money judgment. The defendants responded by arguing that the claimants had failed to

mitigate their loss arising from the non-payment of rent by refusing to forfeit the lease for breach of covenant. In particular, the defendants contended that the landlords had: (1) failed to instruct agents to market the premises; (2) failed to accept the offer of a prospective tenant who wanted to take an assignment of a new lease of the property; and (3) failed to accept an offer to negotiate a payment for a surrender of the lease. The central issue, therefore, was whether the landlords were under a duty to mitigate their loss when seeking to recover the arrears of rent by applying the analogous doctrine of mitigation postulated by Lord Reid in *White & Carter (Council) Ltd v McGregor* [1962] AC 413. Significantly, the Court of Appeal acknowledged that there was a "very limited category of cases" in which an innocent party would not be allowed to enforce its full contractual right to maintain the contract in force and sue for the contract price. In the words of Lloyd LJ, at [17]:

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

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

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

The appropriate standard of the landlord's conduct

The very limited application of the *White & Carter* principle in *Reichman* prompts the question of whether the Court of Appeal may have set the bar of "wholly unreasonable" conduct on the part of the landlord too high and placed too much emphasis on the lease as

creating an immutable estate in land which must endure for the duration of the term unless there are very strong and compelling reasons to end it. For example, would the landlord be treated as acting "wholly unreasonably" if he decided to hold the tenant to its lease indefinitely because of the poor state of the rental market? One commentator, Jill Martin, in her commentary on *Reichman* (see, J. Morgan, [2008] Conv. 165, at 172) makes reference to the Scottish case of *Salaried Staff London Loan Co Ltd v Swears and Wells Ltd* (1985) SC 189 in which the tenants under a 35-year lease repudiated the lease after five years. The landlords refused to accept the repudiation and their claim for rent and service charges for almost a year after the repudiation succeeded. However, the court was reluctant to accept the suggestion that the landlords could have continued to treat the lease as ongoing for the next 29 years. According to Lord Ross, to allow the landlords to sue for rent and service charge indefinitely would be "manifestly unjust or unreasonable".

The Commonwealth experience is also of interest in this context. In *Tangyne v Calmonton Investments Ltd* (1989) 51 DLR (4th) 593, the Alberta Court of Appeal held that the burden was on the tenant to prove that the landlord had failed to mitigate his loss. Significantly, the test was whether a reasonable but conservative person in the landlord's position, knowing only the facts then known, might have made the same choice. In particular, the landlord was obliged to exercise "due" or "reasonable" or "ordinary" diligence, or "reasonable" effort in finding a substitute tenant. Thus, the landlord was not obliged to accept a new tenant who is a financial risk or proposes to occupy under terms that vary from the existing lease. However, the landlord had a duty to "seek out" prospective tenants by appropriate advertising and listing the property with an estate agent in accordance with local rental practice for similar properties. The duty could also extend to accepting an eligible tenant sought out and found by the existing tenant and offered to him.

Loss of future rent and mitigation

In the Canadian case of *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d), the landlord took possession of the demised property following the tenant’s repudiation of its lease (by abandonment of possession) and attempted, without success, to re-let them for the unexpired term. The landlord subsequently claimed damages not only for the loss suffered to the date of acceptance of the repudiation but also (and mainly) for prospective loss resulting from the tenant’s failure to carry on its business at the premises for the full term of the lease. The Supreme Court of Canada, allowing the claim, had no difficulty in applying the doctrine of anticipatory breach to a contractual lease, notwithstanding that the lease was partly executed and that the estate in the land had been terminated.

A similar contractual approach has been taken in Australia. In *Buchanan v. Byrnes* (1906) 3 CLR 704, the High Court of Australia concluded that, upon abandonment by a tenant (in breach of covenant) of hotel premises the subject of a 15-year lease, the landlord was entitled to claim damages over the unexpired term subject to a duty to mitigate his loss. Subsequently, in the landmark case of *Progressive Mailing House Property Ltd v Tabali Property Ltd* (1985) 157 CLR 17, the landlord was held entitled to recover damages for the loss of the benefit of a lease where the tenant had repudiated the lease (the repudiation consisting of a failure to pay a significant amount of rent) before determination of the term. In effect, the High Court of Australia applied the contractual doctrine of anticipatory breach in order to

permit the landlord to accelerate its right to recover for future rent subject to its duty to mitigate. In this connection, it was assumed that a period of approximately six months would elapse before the landlord would succeed in re-letting the premises and upheld an award of $85,000 for breach of the tenant's covenant. Similarly, in *Vickers v Stichtenoth Investments Property Ltd* (1989) 52 SASR 90, the Supreme Court of South Australia, applying *Progressive Mailing*, recognised that the landlord should be subject to a duty to mitigate his losses. Here, however, as with the Canadian experience, the landlord has the option of treating the lease as continuing despite the tenant's default and claiming the rent as it falls due: *Tall-Bennett & Co Property Ltd v Sadot Holdings Ltd* (1988) NSW Conv Rep 57.

Landlord's duty to accept abandonment?

Certain Canadian statutes have restricted the landlord's options on tenant abandonment in the specific context of residential tenancies. Thus, in Ontario, for example, the option of the landlord doing nothing and claiming rent as it falls due was prohibited for residential leases under s.90 of the Landlord and Tenant Act RSO 1990. More recent legislation, however, provides that, if the landlord believes that a tenant has abandoned a rental unit, he may apply for an order terminating the tenancy: see, s.79 of the Residential Tenancies Act 2006. Similarly, in British Columbia, s.48(6) of the Residential Tenancy Act 1984 (repealed in 1992) placed the landlord of residential premises under a duty to re-let them at a reasonable economic rent when a tenant terminated the lease or vacated or abandoned the premises.

The question arises, therefore, as to whether a distinction should be drawn between residential and commercial lettings which would require the landlord of residential premises to accept the tenant's abandonment with no option as to whether or not to treat the tenancy as continuing and claiming rent as it falls due. Such an approach would be premised on policy grounds, namely, that there is a shortage of residential housing in this country and it would be economically inefficient for the property to be left empty once the tenant has indicated that he is moving out. There is also the potential for economic imbalance between landlord and tenant in the residential sector which would justify a blanket prohibition on the landlord's election whether or not to treat the tenancy as at an end. It is generally accepted that commercial tenants possess a greater degree of bargaining power than residential tenants. However, it also true that not every commercial lease will be negotiated arm's length. Small and inexperienced commercial tenants may also be potential victims of a standard (one-sided) form of tenancy agreement. Moreover, the policy of keeping land at its most efficient and productive use (by not allowing it to remain vacant after abandonment) would presumably apply equally to commercial and residential leases.

There is another, more fundamental, point to make here. A blanket prohibition imposing a duty on the landlord to end a residential tenancy may be seen to be inherently unfair on the landlord allowing a tenant to simply walk away from his residential tenancy whenever he felt like it (possibly for no legitimate reason), leaving the landlord with no choice but to accept possession and endeavour to re-let regardless of the state of the market. If the rental market has fallen, why should the burden now fall on the innocent landlord to try and find a replacement tenant at the same rent? And if he can only re-let at a lower rent, why should he bear the loss given the tenant is at fault in repudiating the tenancy? One approach, therefore, is to give the courts flexibility in allowing the tenant to walk away only in circumstances

where the landlord, in the *White & Carter* sense, is acting "wholly unreasonably" (or "unreasonably", if one accepts a more relaxed standard) in refusing to accept the abandonment. This reflects the notion that there should be some mechanism (both in the residential and commercial rental sector) which determines the legitimacy of the parties' actions. Whatever standard is adopted, however, it seems appropriate to permit the landlord to claim for any loss of future rent (subject to mitigation) if the tenancy is prematurely ended. This, of course, would necessitate a reconsideration of the *Reichman* ruling on the issue of recovery of damages on tenant abandonment.

Was Reichman correct?

Despite the Court of Appeal's insistence that recoverability for loss of future rent does not represent English law, the writer would venture to suggest that there are, at least, three English decisions (not cited in *Reichman*) which support the proposition that a landlord may recover damages for loss of rent on termination of a lease: *Marshall v Macintosh* (1898) 78 LT 750; *Gray v Owen* [1910] 1 KB 622 and *Williams v Lewis* [1915] 3 KB 493. All three of these decisions formed the basis of the judgment of the Court of Appeal in the Northern Ireland case of *Rainey Brothers Ltd v Kearney* [1990] NI 18 which was also not referred to in *Reichman*.

In *Rainey* itself, the landlord had forfeited the lease for non-payment of rent and later re-let the premises but at a lower annual rent. He then sought damages for the loss of rent between the termination of the lease and the date of the granting of the new lease and for the loss arising thereafter by reason of the difference between the rent under the former lease and the rent under the new lease. Significantly, the tenant argued that the landlord had an election either to decide not to terminate the lease (which would allow it to continue suing the tenant for the rent as it became due during the term) or to terminate the lease and regain possession with no right to claim compensation for any loss suffered by reason of the non-receipt of rent following determination. Hutton LCJ emphatically rejected this approach holding that the submission was "unsound in law". In his view, the English authorities (i.e., those referred to above) were to the opposite effect allowing a landlord to recover for loss of future rent which would have been payable under the lease had the lease not been terminated.

Conclusion

As we have seen, in *Reichman*, the Court of Appeal was emphatic in concluding that "there is no English case which decides that the landlord can recover damages of this kind": at [19] and [26]. This conclusion, in the writer's view, is unfortunate given the existence of at least three English decisions, albeit at first instance, which have allowed damages for loss of future rent.

On a broader note, there is also the point here that, in the context of a landlord's repudiatory breach, the tenant may recover damages for breach of contract representing removal costs and expenses, the cost of temporary accommodation until new housing arrangements are made, as well as (in appropriate cases and subject to mitigation) the difference between the original rent and any higher rent payable by the tenant in respect of his new accommodation: *Hussein*

v Mehlman [1992] 32 EG 59; *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7 and *Chartered Trust plc v Davies* [1997] 2 EGLR 83. In terms of mutuality, therefore, a corresponding entitlement to contractual damages should, it is submitted, be available to the landlord on his acceptance of the tenant's abandonment of the premises. It is submitted, therefore, that recovery for loss of future rent may not be so out-of-step with English law principles as to justify its rejection out of hand. It is hoped, therefore, that the matter may be the subject of further judicial scrutiny at Supreme Court level in the not too distant future.

The article is based on an earlier article published in the Conveyancer and Property Lawyer: M Pawlowski and J Brown, "Landlord's Choice of Remedies on Tenant Abandonment – Time for a Rethink?" (2019) 83 Conv 355.

The law is stated as at 16 June 2022.