THE APPLICATION OF THE PRINCIPLE OF MITIGATION OF DAMAGES TO LANDLORD-TENANT LAW

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> It is idle to speculate whether the land or the promise is the principal element of a lease . . . . The bargain is for both. If the warp is conveyance, the woof is contract and neither alone makes a whole cloth.[1]

A. Introduction

Possibly the most significant factor in the development of the laws relating to the rights and liabilities of landlords and tenants has been the failure of the courts and the State legislatures to attempt to strike a balance between the contractual and proprietary aspects of the landlord-tenant relationship.[2] The history of this area of law shows that the present position, whereby the relationship is considered to be an estate in land with normal contractual principles generally inapplicable, was reached for reasons that have no relevance today.

The beginning of protection by the King's courts for a tenant can be traced to the thirteenth-century practice of landowners granting leases for terms of year to moneylenders in order to circumvent the church's prohibition of usury.[3] In return for a sum of money, the landowner would grant a possessory interest in the land to the moneylender for a period to enable him to use the land for profit. Thus, at that period, tenants for terms of years acquired an unsavory reputation,[4] and the law

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[1] Quinn and Phillips, "The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future" (1969-70) 38 *Fordham L. Rev.* 225 at 252.

[2] For a discussion of this issue, see H. H. Lesar, "Landlord and Tenant Reform" (1960) 35 *New York University L. Rev.* 1279; Hicks, "The Contractual Nature of Real Property Leases" (1972) 24 *Baylor L. Rev.* 443; Bennett, "The Modern Lease —An Estate in Land or a Contract" (1937-38) 16 *Texas L. Rev.* 47; R. W. Selman, "Products Liability at the Threshold of the Landlord-Lessor" (1969-70) 21 *Hastings L. J.* 458; and Note, B. B. Plevan, "Contract Principles and Leases of Realty" (1970) 50 *Boston U.L. Rev.* 24.

[3] Hicks, *supra* n. 2 at 448.

[4] T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956), pp. 572-3.

offered the tenant very little protection: the tenant was given no rights against third parties ousting him from the land, the only remedy being to sue the lessor for breach of covenant. At this stage the interests of a tenant were regarded as merely contractual, and the possessory remedy of freeholders, the assize of novel disseisin, was not given to the tenant for a term of years.[5]

The first stage in the transformation of a tenancy for a term of years into a property right occurred as early as 1235. In that year, a new action was formulated, *quare ejecit infra terminum*, which was designed to restore a tenant who had been ejected by a purchaser of the land.[6] Later, in the fifteenth century, the remedy of ejectment became available to the tenant in all situations of ouster by the formulation at law of the action of trespass *de ejectione firmae*.[7] The universal availability of an action for ejectment enabled the possessory interest of the tenant to be protected as effectively as that of a freeholder, who from the thirteenth century had available to him the action of trespass *quare clausum fregit*. Once the lessee's right of possession was afforded legal protection, the lessee became regarded as the holder of an interest in land rather than merely the holder of a contractual interest.

The impetus that led to the legal protection of the possessory interest of the tenant was the fact that by the fifteenth century mortgages rather than leases were used as the method of securing land in return for a debt,[8] and the fact that leases were commonly being used of agricultural land.[9] Thus the unsavory reputation of leases disappeared. The land leased at that time seldom contained any buildings, and the common law rule emerged that the rent issued out of the land. Provided that the tenant remained in possession of the land, he could not repudiate the lease, and any breach by the landlord of the terms of a lease not resulting in the dispossession of the tenant, although giving the tenant a right to sue in damages, was not considered sufficiently serious to enable the tenant to quit the premises. If he did quit, the landlord could sue him for the rent as it became due.

The notion today that a lease is an estate in land and that the right of possession and the duty to pay rent are coextensive has resulted in the creation of a number of injustices to both landlords and tenants. In each case, the injustice is caused by the failure of the law to apply normal contractual principles in the solution of landlord-tenant disputes. For example, the inapplicability of the doctrine of frustration means that if premises are expropriated by a government authority during the term of a lease, the tenant remains bound by his covenant to pay the rent

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[5] F. Pollock and F. W. Maitland, *History of the English Law*, Vol 2 (2nd ed., 1968), p. 36.

[6] *Id.*, pp. 107-08.

[7] Plucknett, *op. cit. supra* n. 4 p. 373.

[8] Hicks, *supra* n. 2 at 449.

[9] Lesar, *supra* n. 2 at 1280.

although the premises are incapable of occupation.[10] Similarly, if the leased premises are destroyed by fire, flood or storm the obligations imposed on both parties still remain despite the fact that the premises have become totally uninhabitable. Thus, the tenant is still obliged to pay full rent for premises that are incapable of occupation or do not even exist any longer.[11] The operation of the contractual doctrines of anticipatory breach[12] and the interdependence of covenants[13] are similarly excluded in landlord and tenant law.

The purpose of this article is to focus on the consequences of the failure of the judiciary and all the State legislatures except Queensland[14] to recognize the application to landlord and tenant law of one of the most important contractual principles, mitigation of damages. Emphasis will be given to the injustices caused to tenants by the present rule of no mitigation and the need for legislative reform.

B. Policy Considerations

Contract law provides that if one party to a contract breaches a material part of the agreement the injured party must take reasonable steps to minimize the damages resulting from the breach. If he fails to do so, any claim for damages resulting from neglect to mitigate his loss will be disallowed by the courts.

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[10] See *Minister of State for the Army* v. *Dalziel* (1943-44) 68 C.L.R. 261, and *Thearle* v. *Keeley* (1958) 76 W.N. (N.S.W.) 48 (N.S.W. Sup. Ct.).

[11] In Queensland, the injustices caused to the tenant by the inapplicability of the doctrine of frustration to landlord-tenant law have been partially relieved by a recent statutory amendment, Section 14 of the Residential Tenancies Act 1975 (Qld.) reads:

> Where a dwelling-house the subject of a tenancy is destroyed or damaged from any cause other than the act or default of the tenant, his servant or agent or any other person in the dwelling-house with his consent so as to render the dwelling-house or a substantial part thereof unfit for occupation as such, the landlord or tenant may, at any time within one month after the date of destruction of or the occurrence of damage to the dwelling-house, give to the other of them notice in writing terminating the tenancy whereupon the tenancy shall be taken to have terminated on the date of the destruction or the occurrence of the damage but without prejudice to any right that may have accrued to the landlord or tenant prior to such termination.

For a general discussion of the doctrine of frustration in relation to landlord-tenant law, see Note, R. Smurthwaite, "Condemnation and the Lease" (1957-58) 43 *Iowa L. Rev.* 279; and Note, R. Smurthwaite "Landlord and Tenant—Destruction of Building on Leasehold" (1952-53) 32 *Oregon L. Rev.* 336.

[12] This is the effect of the decision in *Maridakis* v. *Kouvaris* (1975) 5 A.L.R. 197 (N.T.), and marks a departure from the position taken in *Hughes* v. *N.L.S. Pty. Ltd.* [1966] W.A.R. 100, in which the proposition was established that damages can be claimed despite the termination of a lease by operation of law. This part of the judgment of Ward, J. in *Maridakis* has been subjected to serious criticism: see Case Note (1975) 2 *Monash University L. Rev.* 115.

[13] See, for example, *In Re De Garis and Rowe's Lease* [1924] V.L.R. 38; *Roberts* v. *Ghulam Nabie* (1911) 13 W.A.L.R. 156; and *Taylor* v. *Webb* [1937] 2 K.B. 283 (C.A.).

[14] Section 16 of the Residential Tenancies Act 1975 (Qld.) declares that the principle of mitigation of damages is applicable to landlord-tenant law. See *infra* n. 49-52 and accompanying text for a discussion of the application of this legislation.

The problem under discussion arises when a tenant wrongfully abandons his premises before the termination of his lease and refuses to pay further rent. In this situation, the landlord is faced with three possible alternative courses of action: firstly, he may accept the tenant's abandonment and may retake possession for his own purposes; secondly, he may attempt to mitigate his damages by finding another tenant for the premises; and thirdly, he may take no steps to find an alternative tenant, but may simply sit back and sue the defaulting tenant for the rent as it accrues.

No objection either in law or policy can be made against the resumption of possession by the landlord for his own purposes. The abandonment by the tenant has been traditionally construed by the courts as an offer to surrender the lease, and the landlord's resumption of possession amounts to an implied acceptance of the offer. Alternatively, the courts have theorised that the action of the landlord in entering and using the premises for his own purpose is equivalent to an eviction.[15] This course of action seldom provokes a legal confrontation as both parties are satisfied with the outcome—the tenant is relieved from further liability to pay rent and the landlord secures the desired return of possession.

In contrast, a strong argument can be made against the availability of the landlord's third choice of action. If the principle of mitigation of damages were applicable, the landlord would no longer be allowed the choice of sitting back and suing the defaulting tenant for the rent as it accrues.[16] Instead, he would be obliged to follow the second alternative choice of action and take reasonable steps to attempt to secure an alternative tenant, or at the very least, to accept a solvent, responsible tenant who either introduces himself or is introduced by the defaulting tenant.

On first consideration it may seem strange to argue in favour of the protection of the abandoning tenant, when he is the wrongdoer. Indeed, a number of justifications have been advanced advocating the preservation of the present rule of no mitigation of damages in landlord-tenant law.

Firstly, it has been argued by some American courts that a tenant by his wrongful act should not impose on his landlord the alternative of diligently seeking another tenant or losing his remedy.[17] This proposition would seem to overstate the difficulty for the landlord, however. It should be remembered that the tenant would be obliged to shoulder the burden of proving that the efforts to relet were either non-existent

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[15] See, for example, *Bird* v. *Defonvielle* (1846) 2 Car. & Kir. 415, 175 E.R. 171.

[16] However, in certain circumstances the House of Lords decision in *White and Carter (Councils), Ltd.* v. *McGregor* [1962] A.C. 413 may limit the application of mitigation of damages to landlords. See *infra* n. 50-52 and accompanying text for a discussion of this point.

[17] See for example, *Browne* v. *Dugan* (1934) 189 Ark. 551, 74 S.W. 2d 640; and *Jordan* v. *Nickell* (1952) 253 S.W. 2d 237.

or unreasonable,[18] and the landlord would not be obliged to take any more action than other injured contracting parties to satisfy his duty to mitigate damages. Moreover, as will be shown later, there is a public interest in reletting, which the landlord should not be allowed to sacrifice arbitrarily.

Connected with this first argument is the objection that if mitigation of damages were required, the frequency with which tenants abandon their premises would be increased.[19] In the absence of empirical evidence, it is impossible to either prove or disprove this argument, but it seems unlikely to be valid as the tenant would still be liable to pay the full rent until a substitute tenant was obtained, the difference (if any) between the original rent and the rent paid by the substitute tenant,[20] and any expenses incurred by the landlord in reletting.

A second objection sometimes made is that a lease is a personal relationship and that a landlord should not be required to accept as a tenant any person he does not wish to accept.[21] The personal nature of the landlord-tenant relationship should not be overstated, however. In modern society a lease is very much a business relationship and the legitimate concern of the landlord is the receipt of the rental, not the origin of the funds. Further, it can be argued that it is unduly punitive to require a particular tenant to pay the rent if an acceptable alternative tenant is available.[22] It should also be remembered that the principle of mitigation has been applied by Australian courts to far more personal relationships than that of landlord-tenant.[23]

Thirdly, the actions of the landlord in attempting to relet might be held to constitute a surrender by operation of law.[24] As will be shown later, this objection is valid but can easily be rectified by appropriate legislative reform.

The only other objections tend to be rather insubstantial. One argument is that since the parties to a lease could have placed a duty

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[18] In accordance with the general principle the party breaching a contract has the burden of proving that the innocent party failed to mitigate his damages: *Roper* v. *Johnston* (1873) L.R. 8 C.P. 167 at 181, *per* Brett, J.; *James Finlay & Co.* v. *N.V. Kwik Hoo Tong* [1928] 2 K.B. 604 at 614, *per* Wright, J.; *affd.* [1929] 1 K.B. 400 (C.A.).

[19] This argument was raised in *Wohl* v. *Yelen* (1959) 161 N.E. 2d 339 at 343.

[20] See *infra* n. 47 and the accompanying text for a discussion of the authorities on this issue.

[21] *Supra* n. 19.

[22] See Comment, "The Landlord's Duty to Mitigate by Accepting a Proffered Acceptable Subtenant—Illinois and Missouri" (1965-66) 10 *St. Louis University L.J.* 532 at 537.

[23] For example, it was held in *Automatic Fire Sprinklers Pty. Ltd.* v. *Watson* (1946) 72 C.L.R. 435 that a servant wrongfully dismissed must mitigate his loss by accepting a reasonable offer of fresh employment. See also *Harries* v. *Edmonds* (1845) 1 Car. & Kir. 686, 174 E.R. 991, where it was decided that the master of a ship, upon the failure of a charterer to fulfill his contractual duty to provide a cargo, should accept cargo from other persons at the best freight obtainable.

[24] See *infra* n. 42-48 and accompanying text. See also Robison, "Landlord-Tenant Legislation: Revising an Old Common Law Relationship" (1971) 2 *Pacific L.J.* 259 at 271; and C. T. McCormick, "The Rights of the Landlord Upon Abandonment of the Premises by the Tenant" (1925) 23 *Michigan L. Rev.* 211 at 212-3.

to mitigate on the landlord, the absence of such a covenant indicates a lack of desire to do so.[25] In the case of residential premises, however, the principle of freedom of contract and the implicit supposition in law that the landlord and tenant are in an equal bargaining position in the drafting of a lease is in practice theoretical rather than realistic. This is due to the almost universal use today of standard forms of lease and tenancy agreement, which are generally presented to prospective tenants on a "take it or leave it" basis.[26] Thus, it is totally unrealistic to expect tenants to bargain for the inclusion of a covenant by the landlord to mitigate his damages. The only other argument of note was that presented in the United States in the case of *Gruman* v. *Investors Diversified Services Inc.*,[27] where the judge stated that he felt obliged to follow the existing rule of no mitigation because many current leases were prepared in reliance on that rule.

In summary, it can be seen that the majority of the justifications in favour of the present rule of no mitigation can be easily countered. Moreover, a number of positive arguments in favour of applying the normal contractual principle of mitigation to leases can be adduced. Many of these arguments are based on public policy. For example, it has been argued that the welfare of the whole community is advanced by encouraging the productive use of property. As stated by Pemberton, J. in *Martin* v. *Siegley*:

> It is not in accordance with public policy to lay down a rule whereby the landlord would be required to permit the premises to remain idle over a long term and thereafter recover damages for the full amount of the rentals stipulated for the term, because it is better for the parties to the agreement as well as to the public to have property put to some beneficial use.[28]

Thus, the public interest is not served by the present law, which tacitly encourages the landlord to keep an asset out of the economy by rewarding him for so doing.

Other arguments relate to the problem of maintaining the physical condition of the property. The fact that the present law on surrender encourages landlords to neglect their property after abandonment increases the likelihood of damage through vandalism, accidental fire, deterioration

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[25] This argument was raised by Hicks, *supra* n. 2 at 517.

[26] Evidence of the gross imbalance in the bargaining powers of the landlord and the tenant can be seen from one of the findings of a survey questionnaire prepared jointly by the writer and the Fitzroy Ecumenical Centre and submitted in 1974 to the Australian Government Commission of Enquiry into Poverty. The questionnaire was administered by trained interviewers employed by the Fitzroy Ecumenical Centre to a sample of 242 tenants in the Melbourne suburbs of Fitzroy and Collingwood. The response indicated *inter alia* that out of the 76 of the sample of 242 who had written leases, only twice was the tenant involved in drawing up the terms of the agreement. See A. J. Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (A.G.P.S.: Canberra, 1975), App. I.

[27] (1956) 247 Minn. 502, 78 N.W. 2d 377.

[28] (1923) 212 P. 1057 at 1059.

in appearance and decline in value. In extreme cases, this may lead to the surrounding neighbourhood declining in desirability, resulting in a fall in local property values.[29]

Several further miscellaneous arguments can be made. Emotions often run high in landlord-tenant disputes and the landlord may refuse to mitigate his damages merely out of spite or anger. Some courts in the United States have declared that the rule of no mitigation in landlord-tenant law amounts to a violation of the normal policy of contract law against awarding punitive damages.[30] Finally, in the case of commercial premises, it has been argued that the usual reason for a tenant to abandon his premises is lack of profitability in the place the business is located; if, in moving to new premises he also has to pay full rent for the abandoned premises until the termination of the lease his costs will be substantially increased and will be passed on to his consumers in the form of higher retail prices.[31]

C. The Present Law

Unfortunately, the recent case of *Maridakis* v. *Kouvaris*[32] in the Supreme Court of the Northern Territory has confirmed that Australian landlords can still arbitrarily refuse to seek or to accept any alternative tenant, and can insist on suing the original tenant for the full amount of the unpaid rent.

In *Maridakis,* the plaintiff had sublet the premises to the defendant for a two-year term commencing April 1972 at the weekly rental of $100. In May 1972 the defendant abandoned the premises and refused to pay further rent. The premises remained vacant until August 1973 when they were eventually relet to another tenant for twelve months at $70 per week. The plaintiff sued the defendant for arrears of rent until the lease expired. In response to the defendant's argument that the plaintiff had failed to mitigate his damages by not taking a new tenant at a similar rent much earlier than he did, Ward, J. held that there was no duty on a landlord to do anything at all in mitigation. The learned judge followed *Boyer* v. *Warbey,*[33] an English Court of Appeal decision, in which Romer, L.J. stated:

> A tenant who goes out of possession without giving due notice has no right to dictate to his landlord how he shall deal with his property; and why the landlords here should have disposed of the flat in a manner disadvantageous to themselves merely in order to

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[29] See Case Note (1970) 45 *Washington L. Rev.* 218, at 224.

[30] See, for example, *Long* v. *Pierce County* (1900) 22 Wash. 330, 61 P. 142; and *Anderson* v. *Andy Darling Pontiac, Inc.* (1950) 257 Wis. 371, 43 N.W. 2d 362.

[31] See Comment, *supra* n. 22 at 537.

[32] (1975) 5 A.L.R. 197. Presumably this decision is inapplicable in Queensland by virtue of the Residential Tenancies Act 1975 (Qld.), s. 7: See n. 49 and accompanying text.

[33] [1953] 1 Q.B. 234.

save the tenant from the full consequences of his wrongful act, I am at a loss to conceive.[34]

The hardship caused to the defaulting tenant by the failure to apply the principle of mitigation of damages is compounded by the present law and practice in Australia on the right of the tenant to assign or sublet his interest. At common law, in the absence of a special agreement to the contrary, a tenant has the right to dispose of his interest to a third party, either by assigning his term or by creating a sublease without obtaining the consent of the landlord.[35] However, special agreements to the contrary are invariably included in covenants in the standard forms of residential lease and tenancy agreement currently in use, as the landlord has a vested interest in ensuring that persons he might consider unreliable or undesirable do not take possession of the premises.[36] The existence of a covenant against subletting or assigning without consent has been construed by the courts as giving the landlord an absolute right to refuse his consent, however arbitrary or ill-motivated this refusal might be.[37]

Although State legislation on this matter has been enacted it is only in New South Wales and Queensland that the position of the tenant is adequately protected. For example, section 133B of the Conveyancing Act 1919-1972 (N.S.W.), which adopted the existing relevant U.K. legislation,[38] provides:

> (1) In all leases . . . containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant, condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject —
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> (a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld . . . .[39]

The legislation in Victoria and Western Australia differs slightly: In all leases containing a covenant, condition, or agreement against assigning, underletting or parting with the possession . . . , such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that such consent shall not be unreasonably

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[34] *Id.*, at 247.

[35] See, for example, *Doe d. Mitchinson* v. *Carter* (1798) 8 T.R. 57, 101 E.R. 1264; *Church* v. *Brown* (1808) 15 Ves. Jun. 258, 33 E.R. 752; *Commonwealth Life (Amalgamated) Assurance Ltd.* v. *Anderson* (1945) 62 W.N. (N.S.W.) 240; and *Fink* v. *McIntosh* [1946] V.L.R. 290.

[36] An assignment in breach of covenant is effective to assign the lease, but the landlord can frustrate the purpose of the assignment by electing to terminate the lease. See *Massart* v. *Blight* (1951) 82 C.L.R. 423.

[37] *Tredegar* v. *Harwood* [1929] A.C. 72.

[38] Now enacted in Landlord and Tenant Act 1927 (U.K.), s. 19(1)(a).

[39] Section 121 of the Property Law Act 1974-1975 (Qld.) is identical. See also Residential Tenancies Act 1975 (Qld.), s. 15.

> withheld and that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent.[40]

This form of legislation is much weaker than the New South Wales and Queensland legislation inasmuch as the landlord is able to exclude its operation by the inclusion of an appropriately worded covenant in the lease. As it is customary in Victoria and Western Australia for each standard form of lease and tenancy agreement to contain a clause expressly excluding the operation of this section, the legislation in these States would seem to be worthless to the tenant.

South Australia does not even go this far: the sole restriction on a landlord's discretion to consent to assignment is the power of the court to relieve against forfeiture where consent has been vexatiously or capriciously withheld.[41]

The problems of the defaulting tenant are further worsened by an indirect effect of the doctrine of surrender by operation of law. This doctrine has been defined by Baron Parke in *Lyon* v. *Reed* as:

> an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist.[42]

Baron Parke added significantly that "the surrender is not the result of intention. It takes place independently and even in spite of intention".[43] Later courts have rationalized surrender as a branch of the law of estoppel, and have stated that it is a question in every case whether the acts of the landlord have been inconsistent with the continuance of the lease.[44]

Applying the effect of surrender by operation of law to the issue under discussion, it can be seen that in certain circumstances the doctrine may cause an unwary landlord to lose completely his right of action against his defaulting tenant. This can arise if a landlord attempts to mitigate his damages by seeking a new tenant, because in so doing he may be held to have resumed possession inadvertently and thus impliedly to have accepted the tenant's abandonment.[45]

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[40] This is the wording of the Property Law Act 1958 (Vic.), s. 144(1). The Property Law Act 1969-1973 (W.A.), s. 80(1) differs marginally from the Victorian legislation in wording, but its substance is identical.

[41] Landlord and Tenant Act 1936 (S.A.), s. 12(4).

[42] (1844) 13 M. & W. 285 at 306; 153 E.R. 118 at 127.

[43] *Ibid.* Note, however, that the claim that surrender by operation of law takes place independent of intention has been challenged: see C. M. Updegraff, "The Element of Intent in Surrender by Operation of Law" (1924) 38 *Harvard L. Rev.* 64. See also the ancient cases of *Roe* v. *Archbishop of York* (1805) 6 East 86, 102 E.R. 1219, and *Stone* v. *Whiting* (1817) 2 Stark. 235, 171 E.R. 631, where the courts appeared to lay emphasis on the importance of the element of intention.

[44] See, for example, *Re Marlow Rolls Theatres Ltd., Ex parte Empire Theatres Ltd.* (1934) 51 W.N. (N.S.W.) 193.

[45] *Lyon* v. *Reed* (1844) 13 M. & W. 285, 153 E.R. 118. See generally H. A. Hill and J. H. Redman, *Law of Landlord and Tenant* (15th ed., 1970), p. 502 *et seq.*, R. Brooking and A. Chernov, *Tenancy Law and Practice in Victoria* (1972) p. 174 *et seq.*

The landlord may also be unjustly penalized if, in order to mitigate his damages, he accepts a new tenant at a reduced rent. Although a sense of equity would suggest that in this situation the landlord should be entitled to recoup as damages from the defaulting tenant the balance between the rent reserved in the original lease and the rent paid by the substitute tenant, the courts have traditionally regarded the act of reletting as an eviction, automatically relieving the defaulting tenant of any further obligations under his lease.[46]

This problem has been partially rectified by judicial acceptance of the proposition that if a landlord, before reletting the premises, notifies the defaulting tenant that he is doing so on the tenant's behalf and no objection is made by the tenant, there is no surrender and the landlord's right to recoup as damages the deficiency in reserved rent until the end of the repudiated term is preserved.[47] However, the position is still unsatisfactory. The existence of this safeguard for the landlord is generally unknown outside the legal profession; thus, unless a landlord seeks legal advice at an early stage after the abandonment, he may already have done acts sufficient to constitute a surrender by operation of law. A further problem is that the precise application of this safeguard is still doubtful at law, and a landlord who attempts to invoke it may be challenged by the defaulting tenant.[48]

Thus, far from encouraging the landlord to mitigate his damages by seeking to relet the premises, the law, by jeopardizing the right of the landlord to recoup any deficiency in the reserved rent from the defaulting tenant, tacitly encourages the landlord to sit back and sue the defaulting tenant for the rent as it accrues.

D. The Reforms and Their Implementation

Once it is accepted that the present rule of no mitigation should be reversed, the next issue is to consider the form in which the principle should be introduced. There would seem to be three alternative types of reform capable of implementation by legislation: firstly, statute law could impose a general duty on the landlord to mitigate his damages; secondly, the duty to mitigate could be limited to cases where the tenant

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[46] See, for example, *Wallis* v. *Hands* [1893] 2 Ch. 75; *Johnston* v. *Simeon* [1884] N.Z.L.R. 2 S.C. 216; *Armytage & Jones Pty. Ltd.* v. *Jones* (1952) 69 W.N. (N.S.W.) 299; and *Hall* v. *Burgess* (1826) 5 B. & C. 332, 108 E.R. 124.

[47] *Goldhar* v. *Universal Sections & Mouldings, Ltd.* (1963) 36 D.L.R. (2d) 450, cited with approval in *Maridakis* v. *Kouvaris* (1975) 5 A.L.R. 197 at 200. See also *Walls* v. *Atcheson* (1826) 3 Bing. 462, 130 E.R. 591.

[48] There are at least two possible sources of challenge available to a defaulting tenant whose landlord invokes this safeguard. Firstly, a tenant may argue that the conduct of the landlord relating to the abandoned premises *before* he notified the tenant that he was planning to relet on his behalf was sufficient to constitute a surrender by operation of law. Secondly, it is unsettled whether the landlord has to wait for a reasonable period of time after notifying the landlord that he plans to relet on the tenant's account before actually reletting to see whether the tenant makes an objection to the reletting. If no period of time is allowed, it is submitted that it is open to the tenant to claim that the lease has been surrendered by operation of law.

presents a suitable subtenant or assignee; and thirdly, the duty to mitigate could be limited to cases where a lease prevents the tenant from subletting or assigning.

Several different forms of legislation have been used overseas to implement a general duty on landlords to mitigate. The Residential Tenancies Act 1975 (Qld.), which is the only statute in Australia to impose a duty on landlords to mitigate their damages, copies the form of legislation introduced in recent years in a number of Canadian provinces. Section 16 reads:

> A landlord or tenant entitled to claim from the other damages for loss caused by a breach of a tenancy agreement or provision of this Act has the same duty to mitigate his damage as that which applies generally under the law of contract.[49]

The main problem inherent in this form of wording is that the Queensland legislature has failed to avoid possible difficulties in the interpretation of the section caused by the existing case law on mitigation of damages. The major authority is *White and Carter (Councils), Ltd.* v. *McGregor*.[50] In this case, the House of Lords, by a majority of three to two, followed earlier English decisions[51] and held that there is no duty on a plaintiff to mitigate his damages before there has been any breach which he has accepted as a breach: he is only under a duty to mitigate if he accepts the repudiation and sues for breach of contract.

If this case were to be applied in the case of landlord-tenant law, it would be possible for landlords to circumvent the operation of the Queensland legislation merely by refusing to accept the tenant's abandonment of the premises and failure to pay rent as a repudiation of the lease and by suing for the rent as it accrues. Although this issue has yet to be resolved, it is submitted that this argument by landlords would be unlikely to succeed as the decision in *White and Carter (Councils), Ltd.* v. *McGregor* presupposes the existence of the doctrine of anticipatory breach, which is still inapplicable to landlord-tenant law in Queensland as well as in the rest of Australia.[52] Nevertheless, it would seem desirable for the other Australian States to avoid the difficulties inherent in the Queensland legislation by introducing more detailed legislation.

An alternative form of legislation is employed in the California Civil Code. Section 1951.2(a)(2) reads:

> The landlord is permitted to collect the amount of rent that would have been earned between the time of the termination of the lease

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[49] *C.f.* Landlord and Tenant (Amendment) Act 1970, Stats. B.C., c. 18, s. 45; Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 92.

[50] [1962] A.C. 413. For a critical discussion of this case, see A. L. Goodhart, "Measure of Damages When a Contract is Repudiated" (1962) 78 *L.Q.R.* 263; and P. M. Nienaber, "The Effect of Anticipatory Repudiation: Principle and Policy" [1962] *Cambridge L.J.* 213.

[51] See, for example, *Shindler* v. *Northern Raincoat Co. Ltd.* [1960] 2 All E.R. 239; *Tredegar Iron and Coal Co. Ltd.* v. *Hawthorn Bros. & Co.* (1902) 18 T.L.R. 716.

[52] *Supra* n. 12.

and the day of the judgment, less any amount which the tenant proves could have been reasonably avoided by the landlord.

The clarity of the Californian legislation would seem to make it preferable to that of its Queensland counterpart. However, a fundamental objection can be made to the wording of s. 1951.2(a)(2). The statute speaks of the rent that would have been earned between the time of the termination of the lease and the day of the judgment. This seems incomprehensible, as no rent whatever can accrue after the termination of the lease. The only possible explanation for this problem is that the drafters of the Californian legislation intended to deal with the rent which would have accrued after the wrongful abandonment of the lease and the day of the judgment, but expressed themselves badly.

The best solution might be to adopt the Californian legislation subject to the substitution of the phrase "of the termination of the lease" by the clause "that the tenant wrongfully abandons the premises". Alternatively, the following draft legislation could be adopted:

> If the tenant breaches the lease by abandoning the premises it shall be the duty of the landlord to make reasonable attempts to minimise his financial loss including the taking of reasonable measures to relet the premises.

The suggestion that the landlord's duty to mitigate might be made subject to the condition precedent that the defaulting tenant tender a suitable subtenant or assignee is based on the decision of the First District Appellate Court of Illinois in *Wohl* v. *Yelen*.[53] The court reasoned that while it is unreasonable for the tenant by his own wrongful action in abandoning the premises to impose on the landlord a duty to mitigate, the duty should arise if the tenant takes the reasonable and proper step of introducing a substitute tenant: the introduction of a substitute tenant can be regarded as an alternative means of paying damages.[54] The same court later confirmed this decision in *Scheinfeld* v. *Muntz T.V. Inc.*[55] where it argued on policy grounds that a landlord may not arbitrarily reject a suitable subtenant and yet continue to hold the tenant liable for the whole rent.

The third suggested alternative form of legislation is based on a provision of the California Civil Code. Section 1951.4 reads:

> (a) The remedy described in this section is available only if the lease provides for this remedy.
>
> (b) Even though a lessee of real property has breached his lease and abandoned the property, the lease continues in effect for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following:

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[53] (1959) 161 N.E. 2d 339.
[54] *Id.*, at 343.
[55] (1966) 67 Ill. App. 2d 8, 214 N.E. 2d 506.

(1) Sublet the property, assign his interest in the lease, or both.
(2) Sublet the property, assign his interest in the lease, or both, subject to standards or conditions, and the lessor does not require compliance with any unreasonable standard for, nor any unreasonable condition on, such subletting or assignment.
(3) Sublet the property, assign his interest in the lease, or both, with the consent of the lessor, and the lease provides that such consent shall not unreasonably be withheld.[56]

If this Californian legislation were introduced in Australia, it can confidently be expected that it would have the beneficial side-effect of securing the abolition of the customary clause in current standard forms of residential lease and tenancy agreement giving the landlord an absolute right to refuse to consent to any subletting or assignment, and in the case of Victoria and Western Australia, waiving the operation of the relevant State legislation providing that any covenant against subletting or assigning shall, unless the lease contains an express provision to the contrary, be deemed to be subject to the proviso that the consent will not be unreasonably withheld.[57]

It is clear that the adoption of any one of these three alternative reforms would achieve a more fair and realistic balance between the rights and liabilities of a landlord and his defaulting tenant than the present law. The personal preference of the writer would be the introduction of a general duty to mitigate. Although this alternative represents the most radical change from the *status quo*, the adoption of either of the other two alternatives, while improving the position of the abandoning tenant, would still involve giving landlords preferential treatment over all other injured contracting parties. The need to avoid this preferential treatment has long been recognised by many courts in the United States. As long ago as 1937, one U.S. legal commentator observed:

> Our courts are coming more and more to a realization that there is no justification for distinguishing the lease from the ordinary executory contract.[58]

Lest the adoption of the proposed reform seems too favourable to the defaulting tenant, it should be remembered that the principle of mitigation does not amount to a defence of the person who caused the damage but rather a penalty against the injured party by denying recovery of any damage which could have been avoided.

If a general duty to mitigate is introduced, consideration must be given to the standard to be applied in determining whether the landlord has satisfied his duty. While it would be possible to introduce statutory guidelines to direct the courts in their decisions, there would seem to be

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[56] This Californian legislation is discussed by Robison, *supra* n. 24 at 269-70.
[57] Property Law Act 1958 (Vic.), s. 144(1); Property Law Act 1969-1973 (W.A.), s. 80(1).
[58] Bennett, "The Modern Lease—An Estate in Land or a Contract" (1937-38) 16 *Texas L. Rev.* 47 at 62.

no reason why this matter could not be left entirely to judicial discretion. If this were done, there would be the advantage of consistency, as the issue of mitigation of damages in contract law has traditionally been left to the courts.

It would not be reasonable for too heavy a standard of duty to be imposed on the landlord, as this is a situation where a party already in breach of contract is demanding positive action from the injured party. However, the courts in the case of other disputes over breach of contract have shown an awareness of this fact and have not lightly reduced the damages awarded to innocent parties for failure to mitigate.[59]

In those jurisdictions in the United States where a duty is already imposed on landlords to mitigate damages, the duty is never stated to be greater than that of the reasonable man in negligence cases. In some jurisdictions the standard of duty is less. For example, in the 1968 Californian case of *Green* v. *Smith*,[60] the court stated:

> The standard by which reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law . . . . It is sufficient if he acts reasonably and with due diligence, in good faith.[61]

Other courts have adopted this standard of "due diligence",[62] or have preferred the phrases "reasonable effort",[63] "ordinary diligence",[64] or "reasonable diligence".[65] In only one case on mitigation of damages can it be reasonably argued that the United States' courts, in attempting to protect the defaulting tenant, have acted unjustly towards the landlord. In this case, *Vawter* v. *McKissick*,[66] the Iowa Supreme Court extended the operation of the principle of mitigation to require a landlord, in an action for rent due, to plead and prove a *bona fide* effort to relet as a condition precedent to the right to *any* recovery of rent from a tenant who abandons his premises. The relevant facts of this case were that the landlord's only attempt to relet the premises after abandonment was the placing of a "For Rent" sign in a window of the premises, and this became apparent only on cross-examination. On these facts the court denied the landlord any damages.[67]

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[59] See, for example, *Pilkington* v. *Wood* [1953] Ch. 770; and *Finlay (James) & Co.* v. *N.V. Kwik Hoo Tong H.M.* [1929] 1 K.B. 400 (C.A.).

[60] (1969) 261 Cal. App. 2d 392.

[61] *Id.*, at 397.

[62] See, for example, *Waffle* v. *Ireland* (1927) 86 Ind. App. 119, 155 N.E. 513.

[63] See, for example, *Hershorin* v. *La Vista, Inc.* (1964) 110 Ga. App. 435, 138 S.E. 2d 703; and *Wright* v. *Baumann* (1965) 239 Or. 410, 398 P. 2d 119.

[64] See, for example, *Cooper* v. *Aiello* (1919) 93 N.J.L. 336, 107 A. 473; and *Steinman* v. *John Hall Tailoring Co.* (1917) 99 Kan. 699, 163 P. 452.

[65] See, for example, *Roberts* v. *Watson* (1923) 196 Iowa 816, 195 N.W. 211; and *Friedman* v. *Colonial Oil Co.* (1945) 236 Iowa 140, 18 N.W. 2d 196.

[66] (1968) 159 N.W. 2d 538. For a useful discussion of this case, see Case Note (1970) 45 *Washington L. Rev.* 218.

[67] The Iowa Supreme Court later affirmed its decision in *Vawter* v. *McKissick* in *De Waay* v. *Muhr* (1968) 160 N.W. 2d 454, and *Simpson* v. *Iowa State Highway Commission* (1972) 195 N.W. 2d 528.

Vawter v. *McKissick* would seem to be a case of judicial over-reaction to the need for mitigation of damages in landlord-tenant law. Not only does the decision in that case unnecessarily penalise the landlord, but more importantly it extends mitigation of damages from a principle relating to the quantification of damages into one completely denying relief to the injured party based on his actions after the wrongful abandonment.

Provided that the decision in *Vawter* v. *McKissick* is rejected, there is no reason to doubt that if the principle of mitigation of damages is established in landlord-tenant law by legislation, the Australian courts could develop a satisfactory test to determine whether a landlord has satisfied his duty. Hopefully, the standard of conduct demanded of landlords by the courts to satisfy the duty to mitigate would be similar to that demanded of all other innocent contracting parties where a breach of contract has occurred.

One other legislative reform must be considered in this context. The difficulties caused by the doctrine of surrender by operation of law to the landlord who attempts to relet the premises and the ambiguities surrounding the present operation of the doctrine have already been noted. If, in order to do justice to the tenant, the principle of mitigation is introduced by legislation, then, in order to do equal justice to the landlord, statute law should intervene to remove the justifiable fear of the landlord than in attempting to mitigate his damages he may lose his entire cause of action by virtue of surrender by operation of law. The following draft form of legislation would seem to deal adequately with this problem:

> Efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to a judgment for damages.[68]

E. Conclusion

The adoption of the principle of mitigation of damages into Australian landlord-tenant law would undoubtedly rank as an important step in the development of a fair and sensible balance between the legal rights and liabilities of landlords and tenants. However, despite the importance of the issue and the fact that it has not been seriously canvassed before by any Australian legal commentator, it should not be thought that this idea of reform is novel. Over fifty years ago it was confidently predicted in the United States that:

> the logic . . . which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, will yield to the more realistic notions of social advantage which in other fields of the law have forbidden

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[68] This suggested legislation is a modified version of section 1951.2(d) of the California Civil Code.

a recovery for damages which the plaintiff by reasonable efforts could have avoided.[69]

The failure of the Australian courts to recognize these "realistic notions" even after fifty years gives some indication of the antiquity of our landlord-tenant laws. Moreover, the problem goes even deeper. As mentioned earlier, the present rule of no mitigation is just one of many anomolies caused by the failure of the law to encompass changing patterns of life-style and to recognize that in today's society it is far more realistic to regard a lease as a contract for services rather than merely the grant of an estate in land. In the rural society of the fifteenth century, privity of estate, which involves the notion that a lease is an estate in land and that the right of possession and the duty to pay rent are coextensive, made sense. The average tenant was a handyman and would expect to do any repairs himself to any building that was erected on the land. He would also expect to provide any amenities, such as the supply of heat or water, for himself. Thus, a tenant would seldom have any complaints unless his possession of the land was interfered with. However, the notion of a lease being an estate in land is far removed from reality today. The modern urban tenant, especially if he is living in a flat, is far more concerned with the condition of the building and the provision of services than he is with the land itself. In addition, the modern tenant does not expect and is unable to do the sort of repairs that his fifteenth century counterpart used to do. Indeed, in a multi-unit dwelling, for example, in many cases it would be impossible for a tenant to make structural repairs without trespassing upon the premises of other tenants.

Thus, in summary, the injustices caused by the rule of no mitigation should not merely be seen in isolation but rather as illustrative of the more widespread injustices caused by the present adherence of the courts and State legislatives to the principle of privity of estate. Before a comprehensive reform of our landlord-tenant laws can be achieved, the application of this time-honoured principle will have to be abolished. The strength of the case for this reform can best be judged from the following commentary:

> Long after the realities of feudal tenure have vanished and a new system based upon a theory of contractual obligation has in general taken its place, the old theory of obligations springing from the relation of lord and tenant survives . . . . If one turns from a decision upon the conditions implied upon a contract for the sale of goods in instalments, to one upon the obligation of the parties to a lease, one changes from the terms and ideas of the twentieth century to those of the sixteenth. The notion of "privity of estate" and its attendant rights and duties appears as quaint and startling as a modern infantryman with a cross-bow.[70]

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[69] C. T. McCormick, "The Rights of the Landlord Upon Abandonment of the Premises by the Tenant" (1925) 23 *Michigan L. Rev.* 211 at 222.

[70] *Id.*, at 221-2.