CASE NOTES

MARIDAKIS v. KOUVARIS[1]

It was yet another triumph for landlords when the Supreme Court of Western Australia in *Hughes* v. *N.L.S. Pty. Ltd.*[2] allowed the plaintiff landlord to recover damages for loss of rent from the tenant who had abandoned his lease.[3] Hitherto, lawyers acting for landlords were extremely cautious about advising their clients to re-enter, accept the key from the tenant, re-let or do any of the things which landlords would normally want to do to protect rented property abandoned by their tenants. This was because of their apprehension that the landlords' conduct might bring about a surrender by operation of law.[4] Until the *Hughes* decision, a claim for damages for loss of rent was unheard of. The *Hughes* decision in effect laid down the rather novel proposition that damages would be claimable notwithstanding that the lease had been terminated by operation of law.[5]

The recent decision by Ward J. in *Maridakis* v. *Kouvaris* has undoubtedly caused some chest-beating amongst landlords and their lawyers. This is because His Honour in effect rejected the notion that damages for loss of rent could be recovered from a former tenant after his lease has been determined by a surrender at law.

The material facts in *Maridakis* are typical in an abandonment situation. The tenant took a two-year lease of certain premises at a weekly rental of $100, the lease to commence on 21st April 1972. Some time in May 1972 he decided to withdraw from the lease. He indicated his intentions to the landlord who declined to accept the proposal. Unfortunately for the tenant, he and the landlord then sought advice from the solicitor who had drawn up the lease for the landlord. Whether the tenant would have been differently advised if he had consulted his own solicitor is now a matter for conjecture. The fact remains that he was actually advised to the effect that he was "tied to the lease" because the landlord insisted on its performance. Like many clients who do not get the advice they wish to hear from their solicitors, the tenant in our case nevertheless decided to abandon the lease. He packed up his belongings onto a truck and gave

1 (1975) 5 A.L.R. 197. Supreme Court of the Australian Capital Territories; Ward J.

2 [1966] W.A.R. 100.

3 The case went on appeal to the High Court, *N.L.S. Pty. Ltd.* v. *Hughes* (1966) 40 A.L.J.R. 292, on different points which do not concern our present discussion.

4 *Lyon* v. *Reed* (1844) 13 M. & W. 285; 153 E.R. 118. See generally, R. Brooking and A. Chernov, *Tenancy Law and Practice in Victoria* (Sydney: Butterworths, 1972) 174 *et. seq.*; H. A. Hill and J. H. Redman, *Law of Landlord and Tenant* (15th ed., London: Sweet and Maxwell, 1970) 502 *et. seq.*

5 The decision purported to be based on an early High Court decision in 1906, *Buchanan* v. *Byrnes*, as to which see the discussion below.

the landlord the keys to the premises. The landlord thereafter locked up the premises and made various efforts at re-letting. He failed to get a suitable substitute-tenant until 4th August 1973 when the premises were again rented out for 12 months at the reduced weekly rental of $70. The substitute-tenant too abandoned the lease and the premises were again re-let from 7th December 1973 to 21st April 1974 at the same reduced rental of $70 weekly.

The landlord then brought an action to recover approximately $7,500 from the first and original tenant who had caused him such financial loss. That sum consisted of two major items, *viz.*, $6,500 being arrears of rent for every week that the premises were left vacant until 4th August 1973 and $1,000 being damages representing the landlord's loss of rent in consequence of his re-letting at a lower rental. Ward J. allowed the landlord's claim for arrears of rent but not the claim for damages.

We are not presently concerned with the question whether Ward J. had correctly applied the law when he held that the tenant was fully liable for arrears of rent on the ground that no surrender by law had arisen until the re-letting on 4th August 1973.[6] All that need be noted here is that this is the most direct Australian authority for the principle that the landlord of abandoned premises is legally entitled to do nothing about the abandonment and yet he may subsequently sue the abandoning tenant for arrears of rent in full.[7]

Our focal point is Ward J.'s rejection of the landlord's claim for damages for loss of rent on the ground that no such damages could be recovered once a surrender by operation of law has arisen. His Honour's decision on this point is in direct conflict with the *Hughes* decision and raises the interesting question as to which of these two decisions will be followed in a future case in which the same issue is raised.

Both decisions are not without their weaknesses when analysed at the purely technical level. To begin with the case of *Maridakis*, Ward J., strangely enough, based his decision on no other authority than the decision by the Ontario Court of Appeal in *Goldhar* v. *Universal Sections and Mouldings Ltd.*[8] Apparently unknown to His Honour at that time, *Goldhar's* case had already been overruled by the Supreme Court of Canada in *Highway Properties Ltd.* v. *Kelly, Douglas and Co. Ltd.*[9] As though designed to improve its embarrassment value for Ward J., the Supreme Court in the *Highway Properties* case cited an early decision of the High Court of Australia in *Buchanan* v. *Byrnes*[10] as a commendable

6 See *Dodd* v. *Acklom* (1843) 6 Man. & G. 672; 134 E.R. 1063. See generally, Brooking and Chernov, *op. cit.*, 174-5; *Woodfall's Law of Landlord and Tenant* (27th ed., London: Sweet and Maxwell, 1968) Vol. 1; C. M. Updegraff, "*The Element of Intent in Surrender by Operation of Law*" (1924) 38 Harv. L.R. 64.

7 For overseas cases on this point, see e.g., *Boyer* v. *Warbey* [1953] 1 Q.B. 234, 246-7; *Goldhar* v. *Universal Sections and Mouldings Ltd.* (1963) 36 D.L.R. (2d) 450.

8 [1963] 1 O.R. 189, 36 D.L.R. (2d) 450.

9 (1971) 17 D.L.R. (3d) 710, [1971] S.C.R. 562. *Goldhar's* case was brought to His Honour's notice through a reference in the *English and Empire Digest*, Vol. 31(2), 1973, re-issue, 862 and in *Woodfall's Landlord and Tenant, op. cit.*, 869. Needless to say. these two references had not included the *Highway Properties* case at the time when they were cited to the court.

10 (1906) 3 C.L.R. 704.

decision which cut through "artificial barriers to relief that have resulted from over-extension of the doctrine of surrender".[11] The Supreme Court of Canada also noted that the *Buchanan* decision had been applied by the Supreme Court of Western Australia in the *Hughes* case. Both these references made it rather awkward for Ward J. who had failed to even refer to either "local" case. On this basis alone, His Honour's decision can hardly be regarded as the last word on the issue.

A number of technical difficulties also arise from the *Hughes* decision. In the first place, it was not strictly based on any application of the High Court's ruling in *Buchanan's* case. In that case the tenant had repudiated an important covenant before any surrender of his lease had occurred. That covenant was to the effect that he would continuously carry on the hotel trade in the premises for the full duration of the 15 year lease.[12] The landlord's claim for damages for loss of rent was based on the tenant's breach of this important clause. The High Court sustained the claim because the breach of covenant occurred before any surrender of the lease could have taken place.[13] The *Hughes* case is different in that the reported facts do not show such covenant to be part of the lease. Moreover, Jackson J. in that case proceeded on the basis that the repudiation of a *lease* was no different from the repudiation of a *covenant* in the lease, a proposition for which the *Buchanan* decision is not authority. The *Hughes* decision must thus be considered on its own merits even though it purported to be an application of the *Buchanan* ruling.

Secondly, although judicial observations in a number of cases[14] appear to recognize the contractual concept of repudiation and acceptance thereof as a distinct mode of determining a lease, they do not support the view that damages are claimable after a surrender has taken place.[15] In none of these cases were the Courts concerned with the recovery of loss of rent in the form of damages after a lease had been determined by an implied

11 (1971) 17 D.L.R. (3d) 710, 721. The Supreme Court of Canada actually based its decision on the broad and rather bold ground that the contractual doctrine of repudiation and acceptance thereof should apply to leases because it was "no longer sensible to pretend that a commercial lease such as the one before this Court, is simply a conveyance and not also a contract". Ibid.

12 This covenant is unknown to residential leases of short duration. It was, however, an important covenant in the lease in that case because it was designed to ensure that the tenant did nothing that would cause the forfeiture of a victualler and publican's licence granted to the proprietor of the premises in question.

13 The High Court proceeded on the basis that it was immaterial to its decision as to whether a surrender by operation of law took place. This was because the breach of that covenant occurred and the landlord's consequent right of action accrued long before any such surrender could have arisen: (1906) 3 C.L.R. 704, 714, 718, 720-1. The Court was thus applying the well-known rule that a tenant remains liable for breaches of covenant occurring before a surrender: *Richmond* v. *Savill* [1926] 2 K.B. 530.

14 E.g., *Schilling* v. *Riley* [1946] V.L.R. 73; *Payne* v. *Parsons* [1945] V.L.R. 34; *Elder* v. *Gray* (1891) 10 N.Z.L.R. 107.

15 But see, Brooking and Chernov, *op. cit.*, 181-8. A passage of Griffith C.J.'s judgment in *Lamson Stores Service Co. Ltd.* v. *Russell Wilkins and Sons Ltd.* (1906) 4 C.L.R. 672, 684, does say that a landlord who has accepted his tenant's abandonment may sue for "breach of covenant" and recover damages representing loss of rent. His Honour's observations, however, must be understood in the context of *Buchanan's* case in which he was a member of the Court. Seen in that context, the reference to "breach of covenant" clearly meant the covenant upon which the landlord in *Buchanan's* case had successfully brought his action.

surrender. As such, these judicial utterances no more support the decision in *Hughes* case than the mere description of the lease as a contract would.

Thirdly, it is respectfully submitted that the concept of the lease as an estate in land is too well-established in our law to allow Jackson J. to assume that the "repudiation" of a lease is the same thing as the repudiation of a covenant. As the Court of Appeal in England recently re-emphasized, neither the contractual doctrine of frustration nor repudiation and acceptance can bring a lease to an end.[16]

Finally, the *Hughes* decision—if correctly decided—would have the indirect effect of obliterating the long established concept of a surrender by operation of law. This arises from Jackson J.'s tacit assumption that the landlord's act of re-letting constituted both an acceptance of the tenant's repudiation as well as a surrender by operation of law.[17] His Honour thus suggested that it is no longer meaningful to focus attention on the estate aspect (i.e., a surrender) of what is essentially a repudiation of contract by a tenant. It is submitted that something more than such an accident is called for before we can rid our jurisprudence of a well-known principle of law.

Notwithstanding reservations along the lines previously outlined, however, the *Hughes* decision would represent a welcome development of the law when it is viewed from the detached stand-point of a jurist.[18] This is largely because, unlike the *Maridakis* decision, it reflects the fact that the modern lease is in reality a contract and no longer shackled to feudal tenure. Any subsequent decision following the *Hughes* analysis would thus be regarded, for this reason, as an enlightened approach to what is basically a branch of law still scandalously encrusted with incredibly medieval notions.

It is nevertheless to be hoped that a superior court considering the issue at some future time will not confine its deliberations to the level of pure legal analysis. Account should also be taken of its implications on the everyday legal relationship between landlord and abandoning tenant. Under the present legal framework no impartial observer can fail to note that all the odds are stacked against the abandoning tenant and in favour of the landlord. The legal system has given the landlord a range of remedies including, *inter alia*, the power to sit back and allow the premises to lie idle while he collects arrears of rent from the abandoning tenant, to forfeit the lease, to re-let on the abandoning tenant's behalf and to discharge the lease on terms favourable only to himself.

16 *Total Oil Great Britain Ltd.* v. *Thompson Garages (Biggin Hill) Ltd.* [1971] 3 All E.R. 1226.

17 His Honour would be guilty of indulging in legal metaphysics if he in any way suggested that the acceptance of repudiation could exist at an earlier (or later) point of time than the implied surrender. Such semantical juggling would mean, for instance, that the lease as a contract would be extinguished and yet that same lease as an estate in land would continue to exist until subsequently determined by the operation of an implied surrender. No mind-boggling analysis of that kind can be seriously sustained.

18 See generally, Charles T. McCormick, "*The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*" (1925) 23 Mich. L.R. 211.

The abandoning tenant, on the other hand, is almost completely remediless and at the landlord's mercy. If the landlord chooses to hold him to it he will be legally bound to the lease for the residue of its term. It is inconsequential that he has the most laudable reason in the world to prematurely terminate the lease. Nor does it matter that he has done all he could to safeguard the landlord's interest as, for instance, by seeking out and offering a good substitute-tenant to the landlord. However ill-motivated he may be the landlord is within his legal rights to reject the substitute-tenant.

Any decision following the *Hughes* approach will only be but another remedy to add to the landlord's already more than adequate armoury. It will not in any way provide compensatory allowance to the highly vulnerable position of the abandoning tenant because nothing in that approach requires the landlord to mitigate the tenant's losses. It will in fact give rise to the anomaly that whilst a contractual remedy (favouring the landlord) is immediately made part of landlord-tenant law its twin concept, the obligation to mitigate losses (favouring the tenant), is not applicable until when it becomes too late.[19]

On the other hand the *Maridakis* approach, if followed, will serve as a mere palliative to the abandoning tenant. It will provide him some relief only in the sense that the landlord may, by his own conduct, cause a surrender by operation of law to arise and thereby terminate all the tenant's prospective liabilities under the unwanted lease.[20]

Whichever line of approach eventually prevails will only be of momentary significance. It seems abundantly clear that a complete re-adjustment of the rights and obligations of landlord and tenant is urgently called for as a long-term solution to what is yet another inherently maladjusted feature in today's landlord-tenant law.

GIM L. TEH*

271 WILLIAM STREET, PTY. LTD. v. THE CITY OF MELBOURNE[1]

This case is yet another which highlights the dilemma confronting the Courts in analyzing and applying the concepts involved in town planning legislation.

19 The obligation to mitigate losses arises only at the point when acceptance of repudiation has occurred: *Buchanan's* case (1906) 3 C.L.R. 704, 714, 718, 720-1. As the facts in the *Maridakis* case showed, that may occur only after the premises have been left lying idle for many months and at great expense to the abandoning tenant.

20 The concept of an implied surrender was probably introduced into the common law as a device to safeguard landlords from committing trespass when they re-enter or re-let premises abandoned by their tenants: see C. M. Updegraff, "*The Element of Intent in Surrender by Operation of Law*" (1924) 38 Harv. L.R. 64. However, this landlord-oriented rule has ironically turned out to be of some advantage to the tenant: see Charles T. McCormick, *op. cit.*

* Mr Teh is a Lecturer in Law at Monash University.

1 [1975] V.R. 156; Harris J.