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CONTRACTUALISATION AND THE LEASE-LICENCE DISTINCTION

INTRODUCTION

THE lease-licence distinction, which is essentially one between proprietary rights to land and other (frequently contractual) rights, placed in a particularly difficult factual context, has proved remarkably resilient despite its problematical nature. Although courts in other common law jurisdictions have shown signs of weakening, Australian courts have rigidly maintained the distinction between the lease and the licence, the proprietary and the non-proprietary, the *in rem* and the *in personam.*

At the same time, however, the factor underpinning that distinction, namely the proprietary nature of the interest granted by a lease, has come under review. Leases are well known as possessing dual natures both as contracts and as conveyances of a term of years. Over the last decade or so there has been a marked trend towards the "contractualisation" of leases, namely the favouring of the contractual nature of the lease and a subversion of the proprietary side.

I will argue that in many respects the movement to contractualisation has taken place without an adequate conceptual framework to explain the subversion of property doctrines. As the law presently stands, it is difficult to see upon what basis that subversion has taken place, and hence its extent and applicability to other areas of the law which depend upon proprietary doctrines.

In particular, it is of interest to see to what extent the distinction between contractual licences and leases can survive the conversion of the latter into, essentially, a refined form of the former.

The structure of this article is as follows. First, I will outline the traditional distinction between leases and licences and highlight some interesting factors upon which that distinction is based. Secondly, I will examine the contractualisation developments, with

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especial emphasis on the interaction between the proprietary and contractual aspects of the lease. Thirdly, I will draw conclusions from that development as to the continued role of and viability of the lease-licence distinction.

THE LEASE-LICENCE DISTINCTION

It is convenient to briefly examine the nature of the distinction between a licence (normally in this context a contractual licence) and a lease, before moving on to one of the consequences of that distinction.

Exclusive Possession

The lease-licence distinction is itself based on a theoretical distinction between real property on the one hand and personal rights on the other. This grouping separates the grant of an estate or interest in land from the creation of other legal rights over land.[1] It is said that the lease estate includes exclusive possession, and therefore the lack of a grant of exclusive possession connotes a licence agreement rather than a lease, and a grant of a contractual right rather than a property right.

It initially seems odd that this single characteristic of the term of years - exclusive possession - should have come to dominate the lease-licence distinction to the exclusion of all others.[2] However, various factors have applied to the distinction to make this so, with more or less persuasive effect.

First, the subject matter of the lease and of the licence is, of course, much the same. Both involve dealings with land or the right to use it in certain ways. Allied with this is the fact that the transaction which creates a lease is the same that creates a contractual licence, namely the creation and formation of a contract, subject, of course, to formalities imposed by statute or the common law of property. These factors ensure that many of the characteristics of a lease are shared by a contractual licence, almost as a matter of definition.[3]

This factor might be illustrated by the case of *Street v Mountford*,[4] which re-established the test of exclusive possession as the sole determinant of the distinction in English law. In the leading speech, Lord Templeman said:

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1 *London and Northern Estates Co v Schlesinger* [1916] 1 KB 20; *Minister of State for the Army v Dalziel* (1943-1944) 68 CLR 261.

2 See *Radaich v Smith* (1959) 101 CLR 209 (hereafter "*Radaich*"); *Street v Mountford* [1985] 2 All ER 289 (HL).

3 For an extreme example, see the statute-avoidance cases in England such as *Street v Mountford* [1985] 2 All ER 289, *Aslan v Murphy* [1990] 1 WLR 768 and *Antoniades v Villiers; AG Securities v Vaughan* [1990] AC 417, where the aim of the parties was, generally, to include every characteristic of a lease without the arrangement being a lease.

4 [1985] 2 All ER 289.

> My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy.[5]

But frequently the only point of difference between a lease and a licence, due to the commonality of subject matter and legal formality, will be the question of exclusive possession. Factors such as intention to create legal relationships are part of both relationships and do not differentiate between the contractual licence and the lease. The most extreme cases are those of the sort with which *Street v Mountford* was concerned, namely "licence" agreements which were identical in operation and practical effect in every way to a lease, but could be distinguished from a lease only in a technical sense if at all. In such a situation, it is quite possible that the only distinction of any importance will be the question of exclusive possession rather than, for example, an intention to create legal relationships.

Secondly, many of the practical differences between leases and licences must, on the authorities, be classified as consequences of the definition of the lease, rather than being part of that definition. Factors which distinguish leases from licences in practical operation, such as revocability (or termination generally), transfer, and enforceability against third parties, are consequences of the different status of leases and licences in the eyes of real property law. The approach of the common law has been essentially to make these factors irrelevant by definition to the grant of an estate, or to refer to them only surreptitiously.

This approach was established firmly by the Privy Council when it held that:

> If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.[6]

The consequence of this view is that a grant of exclusive possession is a demise of a leasehold interest, irrespective of the intentions of the parties as to the sort of interest that might be created or the intended consequences of that transaction. Subject to a minor interregnum, this view has held sway ever since. It is accepted that, just as a lease involves

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5 At 300.

6 *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 at 408.

the grant of exclusive possession, so the grant of exclusive possession connotes the granting of a lease.

The interregnum referred to is that period of uncertainty introduced by Denning LJ (as he then was) into the law in *Errington v Errington*.[7] The view of Lord Denning insinuated itself in the logical gap between the propositions, first, that a lease grants exclusive possession, and secondly, that therefore every grant of exclusive possession must be a lease. A deduction like this has obvious limitations. It assumes at least the further propositions that nothing else with exclusive possession is a lease; or that there is no other factor relating to a grant of exclusive possession which might take it out of the category of leases.

Lord Denning qualified the position by reference to the intention of the parties - if what the parties intended was in fact a right which was of a personal nature, or a right generally inconsistent with a lease, then a lease might not be created, even if exclusive possession was given.[8] The intention of the parties is, one would assume, the intention expressed in the transaction which is inconsistent with other features of the lease, such as transferability or revocability.

This reasoning has now been abandoned in England;[9] it was never adopted in Australia.[10]

The rejection of the reasoning in relation to the intention of the parties has been based upon the creation of an objective view of the leasehold and its grant. This has most famously been put by Lord Templeman by way of analogy:

> The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.[11]

The transaction is seen as something which is real and has an objective existence independently of the wishes of the parties. One does not, therefore, look to the intention of the parties but to the rights and duties that they have in fact created.[12] The result of this objectification of the conveyance has been to exclude the parties' intentions as to the consequences of their transaction, beyond the question of the intention to create contractual relationships and the intention to grant exclusive possession.

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7 [1952] 1 KB 290. And see also the adoption of this view by the Privy Council in *Isaac v Hotel de Paris Ltd* [1960] 1 All ER 348.

8 For example, *Crane v Morris* [1965] 3 All ER 77.

9 See *Street v Mountford* [1985] 2 All ER 289.

10 *Radaich v Smith* (1959) 101 CLR 209 at 214 per McTiernan J, at 220 per Menzies J, and at 222 per Windeyer J.

11 *Street* at 294.

12 *Radaich* at 222 per Windeyer J; approved and applied by the House of Lords in *Street* at 300 per Lord Templeman.

However, the analogy used by Lord Templeman, which takes a physical object (where intention has no effect on the physical shape of the object) tends to win its point by rhetoric, not logic. If it is accepted that the lease is a real thing objectively defined, then advertence to intention is necessarily redundant once the creation (intention to create contractual relations) and shape (intention to grant exclusive possession) of that thing is ascertained. But to accept these things is to assume the point to be proved.

Further, intention not to create a lease may be expressed in terms of the lease which are just as "real" in moulding the shape of the transaction as exclusive possession is. The parties may stipulate matters inconsistent with the normal operation of a lease, such as a lack of transferability. On the orthodox view, if the parties make such a stipulation, while still granting exclusive possession, the transaction will be construed as a grant of a lease with limitations.[13] But it is difficult to see why a five-pronged digging fork with four of those prongs removed should not be considered a trowel. That is, why should other factors not be relevant to the question of whether what has been created is a lease or a licence?

The orthodox position is far from self-evident. Many transactions depend upon an ingredient of intention to differentiate between different effects and consequences. It is precisely the intention in relation to those consequences which is most critical. Hence, a simple delivery of an item to a person may vary in nature, being a bailment, a gift, a delivery of property to be held upon resulting or other trust, and so on. Critical to each of these cases is the intention of what relationship shall arise between donor and donee. Not all legal consequences must be comprehended within that intention, but some, such as revocability, will be. A gift is not complete without an intention to give, nor a trust without an intention to make the trust binding. There seems no reason why such intentions ultimately could not be a part of the lease transaction. Therefore, if parties intended to create a purely personal relationship, or a relationship inconsistent with some aspect of the operation of a lease, then they would be permitted to do it, even while granting exclusive possession.

In fact, the existence or non-existence of factors inconsistent with a lease is in practice used to decide the question of whether a lease has been granted, as one might expect. As Mahoney JA put it:

> it has been held proper to infer that the rights granted do not carry by implication the grant of exclusive possession because the rights granted are inconsistent with the right to exclusive possession. Thus a leasehold interest is an interest in land and, as such, is of its nature transferable ... If the right granted is, of its nature, not transferable or is otherwise personal to the grantee it will, as such, not be a leasehold interest: cf *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 WLR 374 at 376 ... In

13 *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 at 408.

> principle, where the rights are of their nature inconsistent with there being a lease, there will be no implication of a grant of exclusive possession.[14]

One might ask the relevance, to the question of the grant of exclusive possession, of normal characteristics of a lease such as transferability. Actually, there is no relevance except through the medium of the parties' intention to grant a lease, and only thence to grant exclusive possession. On the orthodox approach, one must exclude such factors; such inconsistencies with the nature of the lease must be explained as limitations on the full grant of that lease.

To summarise, the question as to what rights have been granted between the parties might happily have been settled by reference to many features of a lease, such as the intention of the parties as to its revocability or transferability (that intention possibly expressed in concrete terms). However, the orthodox approach has been to concentrate on only one factor, namely the grant of exclusive possession.

One way to defend this approach is, as noted above, to exclude many matters as consequences of the distinction rather than part of its definition. If one defines a thing, such as a lease, by reference to the intention to grant that thing, then there is a danger of conceptual circularity: "X is something which exists when there is an intention to grant X". Equally, if one defines a thing by reference to its consequences, then there is also a danger of circularity: "X is something that has these consequences, and if X exists, then these consequences follow".

To ask whether proprietary or personal rights were intended is to do no more than to enquire after the sort of effects and consequences of the transaction intended. These questions are themselves decided by whether an estate or merely personal rights have been granted as a matter of law. Hence, while these matters may be highly relevant in interpreting the contract between the parties,[15] they must be irrelevant to the definition of a lease, deriving as they do from the consequences of their operation rather than as a definitional matter. Tempting as it is to include intention as a further factor, all this does is to create a bridge reaching backwards from effect to cause.

However, as has been noted above, there are many transactions where an element of intention in relation to the result of that transaction is included. While it might arguably be circular to ask, in the question of whether there is a lease, whether the parties intended one, a more restricted version of intention - which merely asks whether the parties intended, say, revocable rights to exist - avoids this problem. Even then, the intention of the parties is not the sole defining factor in a lease, which further relieves the problem of circularity and self-definition.

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14 *Lewis v Bell* (1985) 1 NSWLR 731 at 735-736.

15 For example, the first stage in the two stage approach taken in *Street* [1985] 2 All ER 289 at 294.

Equally, to take the second possible circularity outlined above, an intention expressed in a transaction which is inconsistent with the normal operation of a lease might equally well be construed as an intention that there be no lease or as an intention that the operation of the lease be limited. The normal operation, or consequences, of a lease would seem to be something to which the parties might properly have turned their minds, and made a decision upon, as in any contract.

Be that as it may, on current authority it is difficult to dispute that a grant of exclusive possession is the sole criterion of the grant of a leasehold estate. This has occurred through a suppression of the relevance of the intention of the parties to create such an estate, and the characterisation of their contractual intentions in relation to such matters as transferability and revocability as matters going to the limitation of an estate rather than the existence of one.

Thirdly, other requirements relating to the grant of a lease have been treated on a common law analysis in such a way that their failure has not been taken to indicate a contractual licence, but rather the lack of any relationship. In contrast, the failure of the requirement of exclusive possession has led to the alternative arrangement of a licence. This effectively excludes the former matters as points of distinction between leases and licences.

An illustration of this is the law relating to the certainty of a term. The requirements of the common law in relation to the certainty of the term have been reasonably strict; the rule is that the date of expiry must be ascertainable, if not actually known. Theoretically, this could be seen as a requirement of a term of years, and the failure to specify it would lead to the mere grant of a licence rather than the creation of a term of years. The certainty requirement would therefore rank alongside exclusive possession as the touchstone of the lease in opposition to a contractual licence.

This requirement, however, has not been approached in this manner. Rather, certainty of duration appears to have been subsumed within the requirement for certainty of contract.[16] Hence the failure of the requirement of certainty does not lead to a licence agreement in default; rather, the whole contract fails.

This is a rather dubious result. The modern law of certainty in contract requires that contracts be upheld wherever possible. A contract will be upheld except in the extreme case where the language of the contract is so obscure and so incapable of definite or precise meaning that a court will be unable to attribute any particular contractual

16 See, eg, Bradbrook & Croft, *Commercial Tenancy Law in Australia* (Butterworths, Sydney, 1st ed 1990) p9, initially dealing with the topic under the heading "Certainty of agreement necessary"; see also the cases therein cited.

intention.[17] This is a far more generous test than the technical rules applied in relation to the term of a lease.[18] Therefore, a licence agreement might be far less certain about its duration than a lease agreement must be, and yet remain valid. But the emphasis on exclusive possession as the sole determining factor has no doubt led to the conclusion that an insufficiently certain term of exclusive possession is a failed lease and hence invalid *in toto*, rather than a valid contractual agreement for exclusive possession of land.

It is difficult to identify a reason for the invalidity of the latter, except for its presumed classification as a lease. As a contract, it would seem to be perfectly valid. The conundrum arises from the fact that exclusive possession is not in fact an exhaustive requirement of the term of years as opposed to a contractual licence, but has been treated as such.[19]

Exclusive possession therefore appears to have been left in sole possession of the field; even rent, as separate from consideration for the contract, is not necessary.[20] Hence, it may be concluded that: "The only necessary characteristic of any tenancy is that it should give the right of exclusive possession to the tenant for an ascertainable period of time."[21] Nevertheless, as has been noted, in many cases the exclusion of other factors which would be regarded as characteristic of a lease (as opposed to a licence) has been attended with theoretical difficulties.

The Revocability of Licences

The distinction between proprietary and contractual rights underlies the law relating to the operation of leases on the one hand and licences on the other, such as the enforceability of agreements against third parties.[22] In particular, it explains the distinction between leases and licences in relation to their revocability.

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17 *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 436-7 per Barwick CJ; *Scammell (G) & Nephew Ltd v Ouston* [1941] AC 251 at 268 per Lord Wright.

18 See Bradbrook & Croft, *Commercial Tenancy Law in Australia* pp9, 20.

19 One obvious solution, which appears more likely given the contractualisation developments discussed in this paper, is the liberalisation of the lease requirements as to certainty so as to achieve conformity with contract law: see below, "Exclusive Possession Again". An analogy might be drawn to the proprietary requirement for certainty in rent, which was replaced by a contractual process of construction: see *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 935, 947, 956 and 964; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 610 per Brennan J.

20 For example, *Ashburn Anstalt v Arnold* [1988] 2 All ER 147 (CA); cf Bradbrook & Croft, *Commercial Tenancy Law in Australia* p16.

21 Bradbrook & Croft, *Commercial Tenancy Law in Australia* p16.

22 *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54 ; *Minister of State for the Army v Dalziel* (1945) 68 CLR 261.

A term of years once granted could not be revoked except by one of the accepted categories of determination of a lease. These included reliance on the terms of the lease, breach of a condition of the lease, or re-entry pursuant to an express provision of the contract. These modes of determination will be discussed further below.

On the other hand, in relation to licences, there has traditionally been a threefold classification as to their enforceability.[23] A licence coupled with an interest is enforceable as a property right and irrevocable, possibly because it is really part of that property interest and is treated as such. A bare licence, or permission, may be revoked upon the giving of reasonable notice. Neither of these instances is of importance to the present discussion; in particular, a licence given without consideration is easily distinguished from a lease, for which consideration must be given, if only in the form of a deed.

The final category involves a licence provided by a contract. The traditional position in relation to this was that such a licence, even though valid in contract, could not be enforced. Instead, the grantor of the licence could choose to revoke the licence and suffer an order for damages, if any.

The justification for the latter result appears to be that a contractual promisee is not, as a rule, absolutely entitled to the performance of that promise; rather, the promisee is at law entitled to the performance of that promise or damages in lieu of that performance. An alternative way of saying this is that specific performance of an obligation will only be ordered where damages are inadequate as a remedy.[24] This rule may be avoided in the situation where a promisee is able to obtain specific performance of the relevant promise in the contract, or alternative remedies which enforce the promise.[25] The fact that a licence is, of its contractual nature, liable to be revoked is a ground for refusing specific performance of any of its terms, such as a promise to give access to land.[26] Specific performance of the terms of a licence will not be ordered if the licence may then be revoked in any case. Thus, the person promised access to land may have to take their remedy in damages.

English case law recognises as a special category those cases where it is a term of the contract granting the licence that that contract is not revocable, either as a matter of an express term or as a matter of implication. Seemingly, specific performance should not be granted any more of such contracts than of contracts that do not contain this provision, otherwise the contract would simply be reciting itself into sanctity. English law, however,

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23 *Wood v Leadbitter* (1845) 13 M&W 838; 153 ER 351.

24 *Hewett v Court* (1983) 149 CLR 639.

25 For instance, an injunction restraining breach of the contract: cf Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (Butterworths, Sydney, 3rd ed 1992) at para 2001.

26 See Jones & Goodhart, *Specific Performance* (Butterworths, London 1986) p93.

favours the grant of an injunction to revoke the breach of such contracts.[27] Therefore, the promise to provide access to the land would presumably be specifically enforceable to the extent that it is necessary to obtain this remedy to enforce the rights granted by the promise. Yet, these cases do not establish any proprietary interest in the land;[28] rather, they establish one of the characteristics of such an interest, namely irrevocability.

A term of years is not revocable without reliance upon a specific ground of determination. Specific performance is generally available in relation to real property interests, but this is not the true rationale for the irrevocability of the term in this situation. The true rationale is that the contract granting the term is executed rather than executory. Further performance by the promisor is no longer necessary, as it is in the case of the licensor; the contract has been performed to the extent that the term is a thing which has been passed. Refusal of the promisor to further perform is therefore irrelevant to the location of the right. In relation to agreements for leases enforceable in equity, the availability of specific performance is a necessary step to the same conclusion: the doctrine of conversion makes the contract executed rather than executory.[29]

It is for this reason that one finds it accented in the cases that a "licence" is not some species of revocable property right, but rather has no existence apart from its contractual base.[30] This is because nothing has been given, and the contract is still executory, dependant upon the continued performance of the promise by the promisor.

Equally, this temporal rationale, as opposed to a doctrine of the superiority of proprietary rights over inconsistent contractual rights, can explain why a licence might not be revocable in the face of inconsistent proprietary rights if there is some ground upon which specific performance or an injunction against revocation might be given.

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27 *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173; and, accompanying this, the denial in the discretion of an injunction to enforce the proprietary rights of the person entitled to immediate possession: *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233.

28 Hayton, *Megarry's Manual of the Law of Real Property* (Stevens, London, 6th ed 1982) pp81-82, 372; cf *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1251 per Lord Wilberforce:

> the fact that a contractual right can be specifically performed or its breach prevented by injunction does not mean that the right is any less of a personal character or that a purchaser with notice is bound by it: what is relevant is the nature of the right, not the remedy which exists for its enforcement.

29 *Walsh v Lonsdale* (1882) 21 ChD 9; *Carberry v Gardiner* (1936) 36 SR (NSW) 559, *Dockrill v Cavanagh* (1944) 45 SR (NSW) 78.

30 See Bradbrook & Croft, *Commercial Tenancy Law in Australia* p33.

CONTRACTUALISATION

It is almost de riguer to refer to a period of traditionalism in which it was established that contractual doctrines did not apply in a normal way to leases (the latter being considered conveyances) and then to refer to the supersession of that period by one in which it has come to be accepted that contractual doctrines do so apply.[31]

The position is, of course, rather more complicated than this. As many authors have pointed out, the history of the leasehold has been a varied one.[32] Beginning as a contractual relationship, it was gradually accorded a status analogous to that of real property (as a "chattel real"), and was eventually accepted as a real property interest in the modern system of registered title. This change took the lease, initially contractual in nature, out of the mainstream of contract law development. Hence, emerging doctrines of contract law, such as those relating to termination by frustration and repudiation, were not applied to leases, which were now considered to be a form of property.

The contractual basis of the lease therefore remained underdeveloped and out of date; however, it did not cease to exist. Given its origin in contract, the lease could never be purely proprietary in nature or wholly deny the application of contractual principles. Basic obligations such as the duty to pay rent were indeed subsumed into a proprietary obligation and made the complementary duty to that of providing the term of years.[33] Nevertheless, contractual doctrines necessarily persisted in their application to the relationship.

First, if it is accepted that the lease is a conveyance, the efficacy of that conveyance was based on the existence of a valid contract passing the term of years. Hence, contractual doctrines relating to, say, the formation of contracts by offer and acceptance, or the necessity for consideration, generally applied.[34]

Secondly, and related to the previous point, given that the contract defined the extent of the estate and the conditions under which it was granted, the operation of the lease was to a

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31 For example, see Chew, "Leases Repudiated: The Application of the Contractual Doctrine of Repudiation to Real Property Leases" (1990) 20 *UWALR* 86 at 86: "Until recently, the contractual principle of repudiation and contractual principles in general were excluded from the law governing real property leases."

32 Bradbrook & Croft, *Commercial Tenancy Law in Australia* p1; Bradbrook, MacCallum & Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* (Law Book Co, Sydney 1983) p119; Hayton, *Megarry's Manual of the Law of Real Property* Ch 9; Holdsworth, *History of English Law* Vol 3 (Methuen, London 1909) p213. Cf *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 51-52 per Deane J.

33 For example, *Junghenn v Wood* (1958) 58 SR (NSW) 327; but see now *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 935, 947, 956 and 964; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 610 per Brennan J.

34 See, for example, Bradbrook & Croft, *Commercial Tenancy Law in Australia* p9.

large extent dependent upon the interpretation and construction of the contract. Generally, the standard rules of interpretation applied to the contract underlying the lease, albeit sometimes in a specialised form.[35]

Thirdly, many matters outside the estate-rent equation needed to be regulated, and these were regulated by a second tier of obligations, rooted in contract law as covenants between the parties.

So the special position of leases as conveyances rather than as contracts could only be partial. Quite obviously, many contractual doctrines must apply to the lease relationship, and indeed were applied. For this reason, there might not have been a fundamental change if modern developments had simply noted that a few doctrines previously thought inapplicable to these aspects of the lease were now considered to be applicable. Rather, there would be an adjustment of the contract law of the lease to bring it into line with the contract law of other areas. In this way, a "contractualisation" of the lease would not be a revolutionary development, but instead a minor refinement of the existing law.

However, the possibility of fundamental change derives from the potential for a clash between two systems of law both applicable to the lease, namely contract law and property law. Obviously, if two non-identical systems apply to the same relationship in the same fact situations, there will be inconsistency between the two. Applying modern contractual doctrines to leases might not just be extending contract law, as an initial step, it may also interfere with the operation of property law principles and, more profoundly, the accepted mode of settling inconsistency between the two systems.

As to the first two of the three areas outlined above, both in a sense precede the operation of property law principles; both relate to the instrument that created the proprietary interest and regulate that existence. Given a basic principle of property law that a term of years may be created or passed by a contract, then the application of contractual principles to that area follows more or less as a matter of logic, subject to any formalities required by the law of property.[36] In the third area, too, it may be accepted that, as the covenants were basically contractual terms added on to the base of an estate-rent equation, those covenants could be governed by the law of contract. Therefore, there is not a great deal of inconsistency between property and contract law; property law, in general, permits the normal contractual operation of the contract, and hence inconsistency is avoided.

In certain areas, however, it becomes clear that the contractual principles relating to this area were historically subject to a body of principles relating to property law. The most obvious illustration of this subjection is in the determination of leases. Property law

35 Such as, for instance, the distinction drawn between conveyancing and other commercial documents made in *Mestros v Blackwell* (1974) 8 SASR 323.

36 Such as, for example, a requirement for a deed. These requirements are essentially reservations on the principle that leasehold interests may be passed by a contract.

textbooks supplied a number of areas where according to property law principle, a lease would be determined: by forfeiture, by effluxion of time, by merger, and so on. Breach of a condition of the lease could lead to determination of the lease, as would be similarly expected on contract law principles. But this was only one mode of determination of leaseholds permitted by property law. Other modes of determination had little to do with contract law.[37] Further, some grounds for termination of a contract were not included in the list of modes of determination of the lease. So, for instance, it was said that once an estate was demised to a purchaser, it could only be divested by a breach of a condition of defeasance or by a power of re-entry expressly reserved.[38] This principle seemingly excluded contract law principles which would permit termination of the contract of lease on wider grounds: for instance, fundamental breach of an innominate term, or the occurrence of a frustrating event, or an exercise of a power of re-entry which might be implied from the contract between the parties but which was not expressly given.[39]

Similarly, the issue of damages raised a clash between property law principle and contractual principles. If the law of the latter applied, a breach of the contract would entitle the innocent party to expectation losses resulting from the destruction of the bargain, subject to the duty to mitigate. Until recently, however, the law of the former was applied. This law was based upon the estate-rent equation, and from this principle derived the proposition that, if the estate were recovered, then the rent would be no longer payable. No contractual damages were available, nor if they were available might they be mitigated.[40]

Again, in relation to rent, while rent was usually stipulated as a term of the lease, and therefore seemingly as a term of the contract between the parties, until relatively recent times the law in relation to rent was governed by property law principles. Rent was treated as a thing rather than a debt, which might be recovered by distraint as opposed to mere contractual remedies, until that doctrine was abolished in many jurisdictions.[41]

The question then arises as to the significance of this exclusion of contractual principle by the law. On the one hand, it might be that this exclusion is an historical accident, and that

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37 For example, disclaimer (although with the contractualisation development, many such grounds are now rationalised as part of contract law).

38 *Doe d Dixon v Roe* (1849) 7 CB 134; 137 ER 55; cf *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 42 per Brennan J. This formulation obviously does not cover more peripheral cases such as agreement or merger.

39 The question of determination is examined in more detail below.

40 See *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 39 per Brennan J and the authorities cited; cf Bradbrook, MacCallum & Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* p126; *Vickers & Vickers v Stichtenoth Investments Pty Ltd* (1989) 52 SASR 90.

41 See the discussion of these matters by Kirby P and Brownie AJA in *Commissioner of Stamp Duties v Commonwealth Funds Management Ltd* (Unreported, NSW Court of Appeal, 14 November 1995).

one might legitimately extend the grounds of determination of a lease to correspond to various contractual grounds of termination which are of more modern origin, or replace the law of, say, the rent-charge with an equivalent in contract. On the other hand, it might be thought that a matter of principle is involved: namely the superiority of proprietary principle over contractual principle in the lease - the lease is governed initially by the law of real property, and contract law applies only to the extent that it is consistent with the law of real property. There is undoubtedly an inconsistency between the two bodies of principle, and the past approach appears to have favoured the dominance of property law. The current approach, in favouring the application of contractual doctrines, may therefore be not only extending the law of contract but also disputing this dominance.

The initial point to be made, therefore, is that at one level it is difficult to justify why any particular contractual doctrine might or might not apply to a lease. As pointed out above, there could never have been an absolute division between property and contract, both elements being a necessary part of the lease. The question of which doctrines applied was instead a matter of judicial development to meet the perceived needs and doctrines of the time. Many of those influences may no longer apply, including the influences that caused leases to leave the mainstream of contract law.[42]

Hence, the very baldest statements of wide principle in this area do run the risk of begging the question, a danger that Viscount Simon once pointed out when addressing a related question.[43] To take, as an example, the dictum of Lord Denning MR in relation to the application of the doctrine of repudiation to leases: "A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance."[44] Such a statement proves little on its own, given that there is no doubt that some contractual doctrines do apply to leases. The question is rather why a particular doctrine should or should not apply.

This is not to say, however, that there are no general points of principle. The operation of the lease depends upon both property and contract law. The principles of each have been applied to that operation. It therefore equally begs the question to reverse the statement quoted above and to state that, the lease being a contract, it should be treated as any other contract, without due consideration for its proprietary nature. If a theory has previously been applied which gives primacy to property law doctrines to the exclusion of contract law doctrines, it begs the question to consider only the initial question of whether contract law principles should, prima facie, apply. One must then go on to consider the related

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42 See, for example, Bradbrook, "The Application of the Principle of Mitigation of Damages to Landlord Tenant Law" (1977) 8 *Syd LR* 15; Bradbrook, MacCallum & Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* p118 and the articles therein cited.

43 *Leighton's Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd* [1943] KB 493.

44 *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318 at 324.

question of whether property law doctrines decree a different result, and which result should prevail in the event of an inconsistency.

It is for this reason that "contractualisation" may involve a fundamental change. Rather than consisting of an extension of contractual principle, it will necessarily involve the resolution of a priority conflict in favour of contract law. The major issue will be the justification and the extent of that resolution. For instance, will the new application of a contractual ground of termination to a lease merely indicate the creation of a corresponding ground of determination of the lease? Or, even more fundamentally, will the application of the contractual doctrine mean that a basic property law doctrine is no longer to be applied to the lease?

It will be argued that many of the modern developments amount to an extension of the contractual nature of the lease without attention being paid to the need for, and the desirability of, the corresponding alteration to the proprietary side of the lease. Further, the lack of attention paid to this point has lead to uncertainty as to the extent to which basic property law doctrines have been excluded from the leasehold relationship.

THE DETERMINATION OF LEASES

In this section, two landmark cases will be discussed, both of which illustrate the points made more abstractly above. The first, *National Carriers Ltd v Panalpina (Northern) Ltd* ("*Panalpina*")[45] concerned the possibility of the termination of a lease by the occurrence of a frustrating event. The second, *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* ("*Tabali*"),[46] concerned the application of the doctrine of repudiation to leases. These cases are the clearest examples of the extension of contract law principle.

The modern contractualisation of the lease has taken place largely in reverse - the changing nature of the lease has become evident mainly by implication from cases dealing with the termination of leases. There have been few occasions where the nature of a lease has been directly addressed as part of a controversy, say, in relation to the creation of a lease.

However, it is not surprising that the termination of leases, or indeed their cancellation by other means, should have become an area of controversy and development, as it is the area which brings most sharply into contrast the dual nature of the lease.

The case law prior to the early 1980s established a number of settled ways in which a lease might be brought to an end. These might be put broadly into the categories of surrender, merger (through acquisition of the reversion), reliance upon statutory grounds, or reliance

45 [1981] 1 All ER 161.
46 (1985) 157 CLR 17.

upon the terms of the instrument (which category includes effluxion of time, notice to quit, exercise of an option to determine, operation of a condition subsequent, or forfeiture).[47]

As noted above, some of these modes of determination were clearly consistent with the operation of contractual principles. For instance, surrender through agreement involved a contract and the reconveyance of an estate.[48] Therefore, the determination was consistent both with contractual principles (that an agreement may be ended by further agreement) and with property law principles (that property may be re-conveyed by contract). Equally, determination through operation of a condition subsequent was consistent with the principles of contract and with those of property law, which allowed an estate to be limited by condition.

Some of these modes were consistent with contractual doctrine, but were placed upon another basis. For instance, determination by merger was said to be based upon the property law principle that no person could be their own tenant;[49] this is a property law rationalisation, but the doctrine might have been explained by contract law principle (if not in so simple a form, then on the basis that the contract had ceased to have practical operation between the parties on the acquisition of the subject matter of the contract by the lessee).

Further, the list of modes of determination was a finite one, which did not necessarily include all ways in which a contract might be brought to an end. The better view was that frustration and repudiation were not matters which determined leases.[50] In frustration or repudiation situations, there was therefore a clear inconsistency between the proprietary nature of the lease, which did not allow for the determination of the lease and the re-transfer of the conveyed estate in land, and the contractual nature, which required the contract to be terminable in certain circumstances. This inconsistency was resolved by a denial that the contractual consequences of these situations applied to a lease; the lease was a conveyance rather than a normal contract. Again, the exercise of termination powers through re-entry was governed by rules of special strictness which would not necessarily have applied to a pure contract,[51] and being treated as a form of forfeiture also attracted the operation of the rules of Equity in relation to that subject.

It is against this (roughly sketched) background that the two following cases must be assessed.

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47 This categorisation was adapted from that given by Priestley JA in *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 120; cf Hayton, *Megarry's Manual of the Law of Real Property* Ch 9.

48 *Robinson v Kingsmill* (1954) 71 WN(NSW) 127 at 133; cf Bradbrook & Croft, *Commercial Tenancy Law in Australia* p233.

49 Megarry & Wade, *The Law of Real Property* (Stevens & Sons, London, 5th ed 1984) Ch 1.

50 Bradbrook & Croft, *Commercial Tenancy Law in Australia* p245.

51 See Bradbrook & Croft, *Commercial Tenancy Law in Australia* p266, citing *Doe d Lloyd v Powell* (1826) 5 B&C 308.

The *Panalpina Case*

The modern alteration of the Australian law was sparked by the English case of *Panalpina* wherein the House of Lords addressed the applicability of the doctrine of frustration to leases. Although it was decided at the outset that the facts in that case would not in any event amount to frustration, a majority of their Lordships considered that the doctrine did apply to leases generally.[52]

Various arguments were advanced which were designed to show that frustration was a doctrine which was inherently inapplicable to leases. Thus, it was said that the benefit of a lease was the grant of a term of years, and that was not a benefit which would be lost by any supposedly frustrating event, except perhaps an earthquake or the falling of the land into the sea.[53] Alternatively it was argued that it was a rule that in conveyancing contracts the risk passed to the purchaser, and hence any frustrating event should be at the risk of the purchaser and not be an occasion for the termination of the contract. Other arguments concerned the effect of termination upon third parties.

As to these essentially subsidiary arguments, most of them would not decide the matter either way. For instance, to argue that the nature of a lease is such that it is inherently incapable of frustration, because land is a permanent thing capable of destruction only in exceptional circumstances, does not show that frustration is necessarily inapplicable to such contracts. It might just indicate that the circumstances within which frustration will be established are likely to occur only very rarely.[54] Equally, a subsidiary argument proposed that frustration could not occur because the consideration for the contract was the estate granted to the purchaser of a term of years, and that consideration was not frustrated by events relating to the failure of the purpose for which that term of years was granted.[55] Yet this must ultimately be a question of contractual intention; it could well be that the consideration or the underlying substratum of the contract is more than the mere grant of a term of years, but a commercial venture only incidentally including a grant of a lease.[56]

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52 [1981] 1 All ER 161 at 168 per Lord Hailsham of St Marylebone LC, at 170 per Lord Wilberforce, at 176 per Lord Simon of Glaisdale, at 187 per Lord Roskill; at 181 per Lord Russell of Killowen, contra.

53 Cf the judgment of Lord Russell, denying the applicability of frustration to leases, but conceding this exceptional category: at 181.

54 This point is illustrated by the practical equivalence of the judgments of Lord Hailsham and Lord Russell of Killowen. The latter denied the general applicability of frustration to leases on the grounds that frustration could almost never happen in a lease situation, and indicated that in those very rare cases frustration might exceptionally apply (at 182). In contrast, Lord Hailsham LC accepted the general applicability of frustration but noted that frustration would hardly ever occur on the facts (at 168-169).

55 At 171 per Lord Wilberforce.

56 As above; and see also Lord Russell at 181 accepting this argument as an exception to a general exclusionary principle.

Some of these arguments were dealt with more thoroughly than others. The central, and opposing, argument which appears to have appealed to their Lordships was one of conceptual uniformity: why should contractual principles not apply to all contracts? Thus Lord Roskill, after summarising the arguments favouring the exclusion of the doctrine of frustration, spoke as follows:

> But there are also formidable arguments the other way. The law should not be compartmentalised. In principle a common law doctrine ought not to be held capable of applying only in one field of contract but not in another. To preserve the dichotomy between leases on the one hand and other types of contract on the other can undoubtedly create anomalies.[57]

Lord Simon spoke in a similar vein:

> Thirdly, the law should if possible be founded on comprehensive principles: compartmentalism, particularly if producing anomaly, leads to the injustice of different results in fundamentally analogous circumstances.[58]

Lord Wilberforce articulated this point most clearly:

> In any event, the doctrine [of frustration] can now be stated generally as part of the law of contract; as all judicially evolved doctrines it is, and ought to be, flexible and capable of new applications.
>
> In view of this generality, the onus, in my opinion, lies on those who assert that the doctrine can *never* apply to leases ... Refusal ever to apply the doctrine to leases of land must be based on some firm legal principle which cannot be departed from.[59]

Lord Wilberforce then went on to consider and to dismiss the two arguments which he identified as arguments from principle, namely that the existence of an estate in land prevents the frustration of the contract and that the risk of the contract ought to pass to the purchaser.[60]

It is clear that, putting aside the subsidiary arguments, the House of Lords proceeded on the basis of general principle. First, contractual principles should generally apply uniformly. Second, there was no convincing argument in principle why they ought not to apply.

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57 At 185.
58 At 176.
59 At 170. Emphasis original.
60 At 170-171.

Returning to the first argument, dependent upon the nature of an estate, Lord Wilberforce said:

> The first [argument] is that a lease is more than a contract: it conveys an interest in land. This must be linked to the fact that the English law of frustration, unlike its continental counterparts, requires, when it applies, not merely adjustment of the contract, but its termination. But this argument, by itself, is incomplete as a justification for denying that frustration is possible. The argument must continue by a proposition that an estate in land once granted cannot be divested, which, as Viscount Simon LC pointed out, begs the whole question.[61]

The speeches of the plurality in *Panalpina* also beg the main conceptual question, posed by the first argument identified by Lord Wilberforce; or, to put it more charitably, they rely upon the "onus" suggested by Lord Wilberforce and the absence of any exploration of the conceptual argument.

The complete justification is not that an estate in land cannot be divested as a rule, which is patently absurd given the catalogue of instances in which it may be divested, corresponding to the modes of determination in the circumstances of a leasehold. Instead, the justification is the accepted interaction of property and contract law principles, which treated the lease as a real property interest and accorded supremacy to real property doctrines over inconsistent contractual doctrines.

Unhappily, this process of reasoning had not been articulated into a well-known maxim which would pass as a clear principle capable of easy identification. The closest one can come is the insistence, similar to that of Lord Denning MR quoted above, that the lease is not a contract but a conveyance.

None of this is to suggest that the development of the lease to include determination on the grounds of frustration was a bad thing; the advantages of uniformity of contractual principle may well outweigh whatever policies were behind the creation of the property law doctrines of determination. Given the instances of manifest injustice that have been produced by the refusal to apply frustration to the lease in the past, it would be difficult to argue that this extension was not justified on policy grounds.

The difficulty comes in the process of reasoning to that conclusion. The speeches of the plurality in the House of Lords address only the proposition that, as a first step, the law of contract should be applied to all contracts; they do not directly address the issue of the existence of a conflicting set of doctrines relating to the transfer of proprietary interests.

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61 As above. The reference to Viscount Simon LC refers to *Leighton's Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd* [1943] KB 493.

The result of this lack of reasoning is the corresponding lack of any guiding principle upon which the extension was constructed.

This is essentially a conceptual difficulty. Given that property law provides for certain modes of defeasance of an estate, and contract law for others for the cancellation of a contract, the difficulty immediately arises in the application of the latter to leases. Following *Panalpina*, did it become the case that the contract (constituting the lease) became subject to the doctrine of frustration, but that the estate in land somehow did not become liable to being divested in those circumstances except through one of the accepted modes of transfer? Alternatively, did the subjection of the contract to the doctrine of frustration also subject the estate to the consequences of that frustration, such that the estate might be transferred in new ways? The difference between these two approaches is one which essentially refers to the extent of contractualisation. The former ("narrow") approach admits a level of applicability of contractual principle, but only to the contractual aspects of the relationship; the limitation on the application of contractual principles to the lease is relaxed, but the proprietary aspects are still controlled by recognised property law principles as to the transfer of estates. The latter ("wide") approach would create a new mode of transfer in property law corresponding to the criteria for cancellation of a contract; that is, an estate would be divested on the occurrence of frustration such that the underlying contract would be frustrated.

The speeches of the House of Lords do not explicitly distinguish between these two possibilities. However, it appears to be assumed that the wide approach must apply, once one accepts that contractual doctrines apply to the lease. As will be shown below, this is not necessarily the case.

The initial conclusion might be that if previously an estate would not be divested because of frustration, and may now be so divested, then the contractual side of the lease has gained ascendancy, to the point where the proprietary side no longer obstructs the divesting; a defeasance will be implied wherever a contract is susceptible to termination.

The first position of several members of the House was, as has been mentioned, that the question would be decided by the general applicability of frustration to contracts, on the basis that compartmentalism is undesirable.[62] As I have pointed out, this ignores the dual nature of the lease and therefore possibly indicates an adoption of the "wide" position.

In the course of rejecting arguments that property interests may not be divested by frustration, Lord Wilberforce seems to have addressed the main issue at least indirectly:

> It was pointed out, however, by Atkin LJ in *Matthey v Curling* [1922] 2 AC 180 at 199-200, in a passage later approved by Viscount Simon LC, that as a lease can be determined, according to its terms, on the happening

62 At 171 per Lord Wilberforce, at 176 per Lord Simon, at 184 per Lord Roskill.

> of certain specified events, there is nothing illogical in implying a term that it should be determined on the happening of other events, namely, those which in an ordinary contract work a frustration. It has indeed been held, with reference to an agreement for a lease, that this can be put an end to through implication of a term (see *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 Estates Gazette 427 per Goff J). So why, in the present case, for example, should an actual lease not be determinable by implication of a term? If so, it could hardly be suggested that a lease was not capable of frustration even though the theory of frustration had shifted to another basis.[63]

This passage makes the same logical leap referred to earlier, namely from the termination of a contract to the defeasance of an estate. The example of Atkin LJ is, in distinction, supported in property law terms by the principle that a lease may be determined by the operation of a condition subsequent, or by the limitation of the granted estate. In property law terms, the granted estate is one which from its grant has been subject to divesting on the operation of a condition (or one which extends only to a certain degree and reaches its full limitation on the occurrence of a certain event). The implication of a term in the creation of the contract explains the possible divesting of the estate in property terms as well as contractual ones.

On the other hand, this principled basis for the application of frustration to a term of years does not exist for all the circumstances in which frustration would occur. That is, simply because a property interest may be divested in one way which is also consistent with contractual doctrine, this does not mean that all modes of termination by contractual doctrine are also supported by proprietary principle.

In this context, it is interesting to note that Lord Wilberforce and Lord Simon, in particular, consider the theoretical justification of the doctrine of frustration. Lord Wilberforce identifies a number of possible theories, but considers the authoritative selection of one of these theories unnecessary:

> Various theories have been expressed as to its justification in law: as a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands, as an implied term, as a matter of construction of the contract, as related to the removal of the foundation of the contract, as a total failure of consideration. It is not necessary to attempt selection of any of these as the true basis; my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration.[64]

63 At 171.
64 At 170.

Nevertheless, as noted above, the selection of the basis of the frustration is a matter of crucial importance. If termination is a matter of an implied term in the contract, then in property law terms this affects the extent of the estate granted or its liability to be divested by operation of a condition subsequent. If the doctrine is based upon a wider theory of, say, what justice demands, the removal of the basis of the contract, or the failure of consideration, then property law could not conventionally provide a basis for the divesting and reconveyance of the estate.

Lord Simon examined the matter in more detail:

> Fourthly, a number of theories have been advanced to clothe the doctrine of frustration in juristic respectability, the two most in favour being the "implied term theory" (which was potent in the development of the doctrine and which still provides a satisfactory explanation of many cases) and the "theory of a radical change in obligation" or "construction theory" (which appears to be the one most generally accepted today). My noble and learned friends who have preceded me have enumerated the various theories .... Of all the theories put forward the only one, I think, incompatible with the application of the doctrine to a lease is that which explains it as based on a total failure of consideration. Though such may be a feature of some cases of frustration, it is plainly inadequate as an exhaustive explanation.[65]

Evidently, his Lordship considered the doctrine to be applicable generally; but here, again, the vital question of the reconciliation of the doctrine of frustration with the proprietary basis of the lease is left unaddressed.[66]

The members of the plurality therefore seem to leave unaddressed the question of the integration of frustration into property law, except in so far as there is a consideration that it would not be inherently incapable of applying to the subject matter of a lease. As no argument relating to inconsistency or compatibility was advanced, presumably the "onus" identified by Lord Wilberforce carried the day.

Nevertheless, on the approach of their Lordships, it may be at least arguable to say that property law principles still have a role to play in the determination of the question of application of contract principles to leases. It may be that if one could find a clearly articulated property law principle which was actively inconsistent with the proposed contractual principle to be applied, one could argue that the contractual principle should not apply to the lease, or possibly only to the contractual aspects. The former would

65 At 176-177.

66 See also Lord Hailsham LC at 165-166, favouring the construction theory; and Lord Roskill at 188, noting the decline of the implied term theory, and favouring a "change of bargain" theory over one of construction.

prohibit expansion of the contractual doctrine to embrace the lease; the latter would correspond to the "narrow" approach outlined above. The failure of the House of Lords to provide positive reasons, rather than a conclusion by default, makes it impossible to choose between these possibilities or even the "wide" approach outlined above.

The uncertainty is not resolved by reference to wider matters of policy and history. Each member of the plurality referred to the judgment of Laskin J in the revolutionary Canadian case of *Highway Properties Ltd v Kelly, Douglas and Co Ltd,*[67] and in particular the following passage:

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.[68]

Such a statement is ambiguous; the significance of the development may be that commercial leases (at least) are to be treated as contracts as well as being treated as conveyances. On the other hand, the point may be that leases are to be treated as contracts rather than conveyances. Thus, the narrow and the wide approaches outlined above are both possible.

The *Tabali Case*

The opportunity to address many of the same issues arose in the *Tabali Case* which concerned the application of the doctrine of repudiation to leases. A line of previous decisions had considered that the doctrine was inapplicable to leases because of the nature of the lease as a conveyance rather than as a contract.[69] On the other hand, other cases had applied the doctrine to leases.[70] In the principal case, the High Court considered that the doctrine applied to leases. Despite the Court's comments as to the nature of leases and the applicability of contractual doctrines to them, the ambiguity as to the extent of the application of property law principles still remains.

The leading judgment was delivered by Mason J who reviewed the authorities on the subject of the application of contractual doctrines to leases,[71] and referred to statements,

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67 (1971) 17 DLR (3d) 710.

68 At 721; cited at 167 per Lord Hailsham LC, at 177 per Lord Simon, at 187 per Lord Roskill; quoted by Lord Wilberforce at 172.

69 For example, *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318.

70 For example, *Shevill v Builders' Licensing Board* (1982) 149 CLR 620 (assuming applicability without deciding).

71 (1985) 157 CLR 17 at 27-29.

judicial and otherwise, to the effect that it was inappropriate in modern circumstances to treat leases as contracts rather than as property.[72] He concluded by stating:

> The decisions in Australia and Canada, and the speeches in *Panalpina*, reflect the point made by William O Douglas and Jerome Frank in "Landlords' Claims in Reorganizations" ... that, as the law of landlord and tenant had outgrown its origins in feudal tenure, it was more appropriate in the light of the essential elements of the bargain, the modern money economy and the modern development of contract law that leases should be regulated by the principles of the law of contract.
>
> Accordingly, the balance of authority here as well as overseas, and the reasons on which it is based, support the proposition that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases.[73]

This application of contract law principles to leases may indeed be a desirable development in legal or economic terms. Indeed, as pointed out above, the substantial exclusion of contractual doctrine from the lease was never entirely possible. But the lack of conceptual reasoning in the crucial part of the judgment of Mason J is surprising. Supposing these principles to apply normally, the judgment is silent upon the justification of the determination of a leasehold interest by the termination of the contract which vested it; it gives no guidance as to the principle that justifies the divesting of property interests, or to the strength or extent of that principle. In effect, it leaves the situation rather murkier than that which obtained after the *Panalpina case*. Is the law of leases to be regulated only by the law of contract? If property law principles are to remain in force, what is the area of their residual application?

To put the question in terms of the discussion in relation to the *Panalpina Case* above, there is no guidance given on the question of whether it is the "narrow" or the "wide" view which applies to the law on landlord and tenant.

Some assistance may be rendered by a passage later in the judgment of Mason J. Having concluded that the doctrine of repudiation applies to contracts in general, Mason J then had to examine the doctrine's application to the facts. His Honour stated:

> Repudiation or fundamental breach of a lease involves considerations which are not present in the case of an ordinary contract. First, the lease vests an estate or interest in land in the lessee and a complex relationship between the parties centres upon that interest in property. Secondly, this relationship has been shaped historically in very large measure by the law

72 At 28 (citing the *Highway Properties Case*).
73 At 29. (The article cited is at (1933) 42 *Yale LJ* 1003.)

> of property, though in recent times the relationship has been refined and developed by means of contractual arrangements.[74]

This passage shows, first, that there is no doubt that the concept of an "estate" has been retained in the modern treatment of the lease. This is despite a recognition that the law of contract is the appropriate law for the regulation of the landlord-tenant relationship. The difficulty is therefore to locate the significance of that factor, given the dominance of contract law in shaping the relationship.

Further, the "complex" relationship gives rise to special considerations in the application of the doctrine. This is because, even if the doctrinal basis of the relationship has changed, the standards historically set in relation to that relationship remain. Hence, even if all modes of determination are now to be seen as forms of contractual termination,[75] the factual basis for the application of those doctrines will be conditioned by the traditional standards. This is not an unusual situation in the common law, where changing jurisprudential bases for a doctrine are not seen as requiring instant reformulation of all standards upon which those doctrines are based.[76] In this context, the factor is similar to the acknowledgment by the members of the House of Lords in *Panalpina* that, although the doctrine of frustration applies to contracts, the occasion for its application would in fact be rare due to factors underlying the relationship.

The judgment of Brennan J is significantly clearer in that it appears to be an example of the "narrow" approach outlined above. Seemingly in line with the contractualisation approach, Brennan J held that:

> [O]rdinary contractual principles do apply to a lease, but that the character of a lease as a demise distinguishes the consequences of their application to a contract that is not also a demise.[77]

However, His Honour began with a consideration of the general principle of property law underlying this area, namely that:

> The lessee's interest in the land, once vested in him by the demise, may be divested by breach of a condition of defeasance ... or by exercise of a

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74 At 33-34.

75 For an example of this approach, see Bradbrook & Croft, *Commercial Tenancy Law in Australia* p295 (in relation to forfeiture); cf *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 144 per McHugh JA.

76 An explicit acknowledgment of this phenomenon is given by Deane J in *Pavey Matthews Pty Ltd v Paul* (1987) 162 CLR 221; cf *Angelopoulos v Spinelli* (Unreported, SA Supreme Court, Full Court, August 1995). And see also the law of frustration discussed in *Panalpina*, where the jurisprudential basis of the doctrine is considered to be almost irrelevant to the practical application of the doctrine.

77 (1985) 157 CLR 17 at 40-41.

> power of re-entry for breach of covenant expressly reserved by the lease. A lessee's contravention of the provisions of the lease does not otherwise empower a lessor to determine the lease.[78]

Brennan J distinguished the example of termination due to frustration.[79] He considered that example to refer to the implication of a term into a lease, according to which the lease would determine upon the happening of a frustrating event. In that case, rather than operating as a condition of the lease which would lead to a right to termination (and would hence fall within the ambit of the principle quoted above), the term would act as a limitation upon the estate granted, such that the estate would determine automatically upon the occurrence of the frustrating event. The doctrine, therefore, did not constitute an exception to the stated principle.

As has been seen, however, the speeches of the House of Lords do not place the application of frustration to leases solely upon the basis of an implied term. The implication of a term was used as the basis for arguing that frustration could in fact apply, but those of their Lordships who addressed the issue considered that all or most of the possible bases for the doctrine were equally applicable, and therefore presumably found the doctrine of frustration applicable whether or not it could be said that an implied term existed. Thus, it seems that the decision in the *Panalpina Case* already constituted an exception to the general principle cited by Brennan J.[80]

Proceeding from that principle, and the cases that supported it, Brennan J considered that:

> A lessor's inability to determine a lessee's interest except where it is liable to forfeiture precludes the lessor from rescinding the lease for anticipatory breach, but it does not follow that the ordinary contractual principles relating to anticipatory breach do not apply to a lease where the lessee's interest is liable to forfeiture.[81]

His Honour's reasoning[82] appears to have been that if a contract is repudiated, and this at the same time constitutes an event which would be a forfeiture of the contract, then the enforcement of the forfeiture at the same time constitutes the acceptance of the repudiation. Thus, the principles both of property law and of contract law are satisfied.

This leaves a question of why the doctrine could not apply to situations in which the doctrine of forfeiture would not apply. In this sense, contract principles are not universal,

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78 At 42.
79 At 41-42.
80 See *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 120-121, where Priestley JA treats termination by frustration as a new category of determination.
81 (1985) 157 CLR 17 at 43.
82 At 43-46, 49.

in the opinion of Brennan J, in that they apply to the extent that they are consistent with property law principle. Nevertheless, the judgment squarely raises the issue of the relationship between property and contract law in a way in which the other judgments in this case and in the *Panalpina case* do not. It is interesting to note that, despite the limited scope of the judgment, and its accent upon proprietary principles, it has been seen as nevertheless embodying a contractualisation approach because of its willingness to allow the doctrine of repudiation at least some application.[83] This phenomenon illustrates once again the ambiguity in this area; this essentially conservative and incrementally-reasoned judgment is in fact of completely different import to that of Mason J.

Wilson and Dawson JJ agreed with the judgment of Mason J without further comment upon this point. Deane J also agreed with Mason J, but added some comments of his own. He noted the difficulties which arose from the "duality of character" possessed by a lease,[84] and the modern trend towards the application of contractual doctrines to leases.[85] However, he considered that the application of doctrines should be decided on a case-by-case basis rather than by an attempt at judicial codification.[86] To this extent, Deane J takes a more restrained approach than that of Mason J. This is perhaps indicative of a narrower approach; one in which property law principles are still to play a part but which will see the striking of a new balance over time as the foundations of the lease are re-examined.[87]

FIRST STEPS

If these developments have been taken to signify, as a whole, the triumph of contract law in the regulation of leases, the question then arises as to extent of that triumph. On one side of the ledger one may cite *Tabali's Case* for the sweeping proposition that contractual principles as a whole now apply to leases; in this sense, the triumph is total. But what of the other side of the ledger, the expense to which property has been put? Given the tension between property and contract in this area, the triumph of one must mean the downfall of the other; but that downfall need not necessarily be complete. The task is now to determine the extent to which property has paid for contract: what property law principles have been sacrificed? Further, what is the prognosis for the continued distinction between leases and licences?

At the first level of development, the minimum that could be said is that contractual doctrines now apply to leases, and that therefore the nature of the lease as exclusively

83 See the approach of Priestley JA in *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105, where His Honour appears to regard the principles of the judgment of Brennan J as consistent with the plurality view.

84 (1985) 157 CLR 17 at 51.

85 At 52.

86 As above.

87 See also above, per Mason J: "It is apparent that the special rules of property law regarding chattels real are inadequate as the *exclusive* determinant of rights and liabilities under such modern leases." (emphasis added).

governed by property law has been altered. As I have pointed out above, this is not on the face of it a very significant development, given that a great many contractual doctrines necessarily applied in any case to the lease. The development merely shows an extension of contractual doctrine.

However, this extension does mark a change in the nature of the lease from being a conveyance (applying contractual principles incidentally) to a new existence as a contract which happens to deal with property as one of its terms. That is, the contract is no longer dominated by its character as a conveyance; the vesting of title no longer colours the whole transaction.

This development was without doubt logically necessary. Some of the strongest examples utilised by members of the House of Lords in the *Panalpina Case* related to contracts where it could not be said with confidence that the use of land was the sole consideration for the transaction. Rather, the lease might be part of a larger transaction, as, for instance, a security; or it might be provided only incidentally as part of a holiday contract.[88]

What these examples illustrate is that, although some contracts might be dominated by their conveyancing side, in others the vesting of an estate may be only an incidental part of a wider transaction. It would be quite inapt to describe the latter class also as "conveyances", and to exclude the operation of normal contractual principles from them altogether, merely because land is involved. On the other hand, if one accepts the application of contractual principles to this latter class of contracts, it then becomes impossible to draw a line between them and those contracts which might be seen more strictly as conveyances or "leases" as such. For that reason, it is undoubtedly better to accept the application of, say, the doctrine of frustration to the lease, while noting that the special characteristics of land may affect the application of that doctrine.

This minimum development does have several possible consequences for the lease-licence distinction. One implication relates to the issue of formalities and the availability of specific performance, and is based on an example of the sort of transaction referred to above, where the passing of title is incidental to the transfer of an interest.

Generally, it is said that an agreement which disposes of an interest or an estate in land is specifically enforceable.[89] The rationale is that because land is traditionally seen as of a special value to a purchaser, damages are not an adequate remedy.[90] In Australian law, this rule has solidified to the point where contracts for the disposition of an interest are enforceable as such, without reference to the special value or otherwise of the land.

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88 This point was admitted even by Lord Russell: see *Panalpina* at 181.

89 See, generally, Jones & Goodhart, *Specific Performance* p91; Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* at para 2008.

90 *Adderley v Dixon* (1824) 1 Sim & St 607 at 610 per Leach MR.

Hence, specific performance will still be granted even if land was to be bought or leased purely for investment purposes and damages would seemingly be an adequate remedy.[91]

However, the Privy Council has endorsed the approach that specific performance will not be granted if the contract for an interest in land was not the central part of a transaction, but was instead an incidental part of such a transaction. These circumstances arose in *Loan Investment Corporation of Australasia v Bonner*.[92] The transaction in question was a contract whereby the title in a property was passed by the defendant to the plaintiff. The defendant also agreed as part of that transaction to loan most of the purchase money back to the plaintiff for ten years at interest. The defendant repudiated the contract, and the plaintiff sued for specific performance to enforce the agreement. The availability of specific performance was denied by the Privy Council (over the dissent of Sir Garfield Barwick), on the basis that the contract was not merely for the purchase of land but was in reality a larger commercial transaction to which the grant of specific performance was not appropriate. The majority held that the transaction was:

> predominantly in the nature of a commercial bargain. The [plaintiff] company wanted the property not for their own use but for selling, letting, mortgaging and perhaps developing, and they wanted the loan to help in financing their business generally.[93]

In other words, the Privy Council found that the commercial nature of the transaction overshadowed the use of an interest in land as part of that transaction.

The Privy Council decicion might be criticised on the basis of its apparent inconsistency with authorities which deny the relevance of the intended use of land to the availability of specific performance. Yet there is no real inconsistency. The Privy Council did not rest its advice on that intention directly; rather, that intention was relevant indirectly through the light it cast on the nature of the transaction between the parties. The lack of special value of the land to the plaintiff merely assisted in characterising the transaction as predominantly a commercial loan rather than a sale.[94] In this way, the contract fell into

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91 *Pianta v National Finance and Trustee Ltd* (1964) 38 ALJR 232 at 233 per Barwick CJ. This position can be contrasted with that in Canadian cases such as *Heron Bay Investments Ltd v Peel-Elder Developments Ltd* (1976) 2 CPC 338, and other Canadian and United States cases noted by Jones and Goodhart, *Specific Performance* (Butterworths, London 1986) p93.

92 [1970] NZLR 724.

93 At 735.

94 Moreover, this appears to be the point of departure between the powerful dissent of Sir Garfield Barwick and the opinion of the majority, rather than the issue of special value. The opinion of the former appears to be predicated on the characterisation of the transaction as one for sale rather than loan. This summed up by a passage from the opinion of the former at [1970] NZLR 724 at 744: *"In my opinion, once the contract is seen as a*

that category of transactions in which an interest in land may be passed, but in relation to which that transfer is only incidental.

This is interesting given the new character of lease transactions. Instead of conveyances governed by special rules, they are contracts which may include the passing of an interest in land as a part of the transaction. They are available to all the risk and repudiation possibilities of contract law. That is, they are more easily characterised as commercial transactions, and the transfer of an estate or interest is much more easily seen as merely part of the transaction rather than the dominating feature of it (in opposition to the traditional position). This is not to say that a large number of leases will not be specifically enforceable. However, if the accent is upon the transaction as an investment rather than a hiring of an area, then it might be argued that the granting of an estate is merely an incidental (or security) feature of an arrangement rather than central to the transaction.

In practice, the analysis might be this: there is a contract for the provision of space, which might be for living in, for re-hiring, for use as a storage facility, and so on. Yet, the grant of an estate in land as part of that transaction may be really quite incidental to that transaction. It might be completely unimportant to the transaction, being essentially only the provision of a security or unimportant rights to the purchaser. In such a case, as the contract is a commercial transaction with the provision of an estate as a mere incident of it, it might be argued that the former character of the transaction prevails. It is now open to make this argument, which was probably untenable while the conveyance dominated the contract.

The results are two-fold. First, the intention of the parties as to the nature of their transaction (as a conveyance or as some other transaction which incidentally confers an estate in land) becomes quite important. Secondly, the remedy of specific performance may be less available for enforcing lease contracts than it previously has been, given the lesser importance of the demise as part of that contract. So, for instance, in relation to an agreement which provides for a lease to be entered into as one of its terms, one might not now automatically conclude that an equitable lease exists; rather, the characterisation of that transaction as a lease of land will be necessary.

A similar conclusion might be drawn outside the field of specific performance in relation to the applicability of the requirements of the Statute of Frauds equivalents of the various states. Some transactions which incidentally dispose of interests in property have been held not to attract the Statute, and hence are enforceable. The classic example of this is to be found in the partnership cases, in which the mere fact that a partnership deals in land does not mean that the various interests of the partners in partnership property must be proved in writing. That is, the transactions involved were not conveyances within the

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contract for the purchase of land on the stated terms, the case for specific performance is unanswerable" (emphasis added).

meaning of the Statute even though they incidentally involved the transfer of interests in land.[95]

Such cases obviously had potential to circumvent the application of the Statute, and it seems for that reason were confined quite narrowly.[96] However, the rule has been stated in modern times on the basis that "a contract is caught by the statute if one of its essential terms provides for the transfer or other disposition of an interest in land".[97]

In a lease as narrowly defined, that is, as a conveyance, the demise of land could hardly be disputed as an essential term. Yet if that demise is now only to be seen as one term among others in a normal contract, the proprietary nature of that term may not be essential. To apply the much-cited test of Jordan CJ,[98] it may be that the parties would have entered into the contract without being assured of strict compliance with the term granting exclusive possession; it might be that a strict agreement for exclusive possession was never part of the transaction. Hence, writing would not be needed to enforce the agreement, and a lease might be created orally.

DEVELOPMENTS

The question then arises as to the extent to which contractualisation has proceeded beyond the full application of contractual principles to the lease contract.

The first thing to note is that the dual nature of the lease has persisted to a certain minimum level.

This point was briefly raised in the taxation case of *Kennedy Holdings & Property Management Pty Ltd v Federal Commissioner of Taxation (Cth)*,[99] where it was argued that a lease was to be regarded as purely personal property. Hill J referred to a passage in the judgment of Deane J in *Tabali's Case*[100] in which is mentioned the origins of the lease in contract and the original lack of proprietary remedies to enforce the lease.[101] His Honour concluded that:

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95 *Dale v Hamilton* (1846) 5 Hare 369; *Essex v Essex* (1855) 20 Bear 442; cf the discussion of the cases by the Court of Appeal in *Steadman v Steadman* [1973] 3 All ER 977 (affirmed without addressing this point, [1974] 2 All ER 977).

96 See, for example, *Isaacs v Evans* (1899) 16 TLR 113.

97 *Steadman v Steadman* [1973] 3 All ER 977 at 993 per Scarman LJ.

98 *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR(NSW) 632 at 641 per Jordan CJ.

99 (1992) 39 FCR 495.

100 (1985) 157 CLR 17 at 51.

101 Matters which still have an echo in doctrines which state that a leasehold interest is in fact a "chattel real" rather than a real property interest as such, and consequential rules which (for instance) regard leasehold interests as personal property for the purpose of distribution under wills.

> This is, of course, true, although it is hardly an adequate description of a lease today to suggest that the benefits of a lessee depend solely upon contract and not upon the underlying estate in land which is demised. Nothing in *Tabali* suggests to the contrary. Indeed, immediately after the passage quoted by counsel for the applicant, Deane J points out that in time it had become accepted that a lessee had a right to "possession" which was an interest in the land that the lessee was entitled to protect against third parties.[102]

This, of course, implicitly disposes of the possibility that *Tabali's Case*, by its introduction of full contractual principle, has also impliedly ruled that an estate in land is not actually passed by a lease. It is apparent from each judgment in *Tabali's Case* that there is a proprietary estate vested by a lease.[103] Hence, the lease remains a conveyance in at least that elementary sense.

Bearing in mind the minimum position that the lease consists of a contract which has as one of its terms the demise of an estate in land, what is the role of property law principles in the regulation of the contract and the disposal of that estate?

As much of the development of the law has taken place in the field of the determination of leases, it is convenient to focus on this area.

Determination

The determination of a lease generally involves a defeasance of the demised estate[104] and the cancellation of various obligations between the parties relating to that estate.

The latter part of the determination is in a state of flux. The law as to the obligations of the parties arising from a determining event (or one that precedes it, such as a repudiation) is one of the areas in which the conflict of property and contract principle is being strongly litigated.[105] Just as the minimum requirement of the lease is that it is a contract which conveys an estate, the minimum requirement of a determination is that that interest is divested.

The question is as to what mechanism provides for that revesting.

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102 (1992) 39 FCR 495 at 499.

103 (1985) 157 CLR 17 at 23 per Mason J, at 51 per Deane J.

104 The defeasance and revesting of the estate is (technically) not the process when the estate reaches its fullest limit, ie determines automatically upon the happening of a certain event; equally, the determination of the lease by acquisition of the remainder by the tenant will not involve a defeasance.

105 See, for example, *Shevill v Builders' Licensing Board* (1982) 149 CLR 620; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Wood Factory v Kiritos* [1985] 2 NSWLR 105.

In many cases, reliance upon the terms of the instrument will provide the solution. Thus, a right of re-entry specified in a contract will impliedly provide for the conveyance of the estate back to the landlord. An agreement to end the lease will expressly convey the estate. The event which terminates the contract also deals with the revesting of the estate by a contractual means.

The difficulty arises where the determining event is active in contract as a ground of termination. The effect of the termination of a contract is definitively stated by Dixon J as follows:

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as is it is executory only and the party in default is liable for its breach.[106]

The position is the same in relation to the termination of contracts by frustration.[107]

Therefore, on a contractual analysis, it is difficult to explain how the term of years, once vested in the lessee, can be reconveyed on the existence of a terminating event. There is no general right to compensation or the restitution of benefits already passed under a contract, on its termination. The question is, therefore, whether a contractual analysis is adequate to explain the effects of the determination of a lease.

One possibility is to treat the lease as an executory contract. In this way, the grant of a term of years is not an executed term but rather an executory or continuous one. This argument has been put by Chew:

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106 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477; cf *Johnson v Agnew* [1980] AC 367 at 396.

107 *Hirsch v The Zinc Corp Ltd* (1917) 24 CLR 34.

> [I]t would appear that the estate in land cannot be terminated through termination under repudiation itself, but must be effected by some proprietary measure.
>
> This analysis is unsatisfactory because it fails to recognise that the lease is not an absolute grant of an interest in land unlike, for example, a conveyance of a freehold estate where, upon execution of the sale of land, the freehold estate is vested in the purchaser and the contractual relationship between the parties ends. In the case of the modern lease, there is a continuing contractual relationship between the lessor and the lessee.[108]

Chew lists three factors which are said to support this analysis: the continuing relationship between the parties because of the retention of a reversion by the lessor, the continued existence of executory obligations "which may be as important to the parties to the lease as the conveyance", and the unperformed nature of the leasehold interest.[109] The latter is said to be a term of quiet enjoyment, protected by an executory covenant for that quiet enjoyment.

Unfortunately, this convenient analysis can not be reconciled with the current authorities. In relation to the first factor, the fact that another person also has an interest in the same physical area of land does not make one's own interest any less vested. The co-existence of estates will always occur when there is an interest less than freehold, but the fact that this gives rise to a continuous relationship does not mean that the estates are in some way dependent upon each other. Property law is generally based upon the opposite conception. For example, the reversion or the leasehold is, unless otherwise specified, alienable without the need of the co-operation of the other party, and, indeed, may be successfully alienated despite a contractual restraint on this alienation. The fact that various rights and duties may be owed by one party to another does not detract from the fact that these rights have been transferred and are vested.

As to the second factor, the existence of other obligations, of a contractual and executory nature, is neither here nor there in determining the executed or executory nature of the grant of the estate in land.

As to the third factor, nothing in the nature of the right to quiet enjoyment makes that right incapable of being vested, even if future quiet enjoyment itself cannot be. A contractual promise to quiet enjoyment might be executory, but a contractual promise to grant the (proprietary estate of a) right to a term of quiet enjoyment is executed.

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108 Chew, "Leases Repudiated" (1990) 20 *UWALR* 86 at 100.
109 At 100-101.

The ultimate point is that the proprietary analysis has been retained by the High Court, in that it is still recognised by the Court that a lease involves the vesting of proprietary rights.[110] Once that is accepted, there cannot be a solely contractual analysis of those rights; and from this it may be deduced that the grant of the estate in land will be executed rather than executory.

The retention of the concept of the vesting of an interest is an important point given the discussion above of the revocability of licences and its distinction from the revocability of leases.[111] If the reason that licences are revocable relates to their executory nature, and the irrevocability of leasehold interests relates to their vested or executed nature, then that distinction would be broken down by a purely contractual analysis of the termination of the lease, or at least one which regarded the term granting the estate as executory rather than executed.

However, it is impossible to regard that as an option which is open on authority, requiring as it does by implication the abandonment of the proprietary nature of the lease in toto. It seems that the retention of the vesting of proprietary rights requires that a proprietary mechanism be retained for the determination of leases.

The Distinction between Conditional and Terminable Estates

An alternative argument with more prospect of success, which is consistent with the minimum level of proprietary principle described above, is a reformulation of the principles governing the extent of an estate.

Property law has traditionally drawn a distinction between determinable and conditional interests. The grant of an estate may be made determinable on a certain event happening, or alternatively it might be made subject to a condition subsequent such that if that condition takes place the estate may be divested: "A limitation marks the bounds or compass of the estate, a condition defeats the estate before it attains its boundary."[112]

The main practical difference is that, if an estate reaches its boundary, it naturally comes to an end; on the other hand, a condition must be enforced in order for the estate to be brought to an end. This distinction is applicable not only to leases but also to other areas of property law.[113]

Its application to leases is illustrated in *Tabali's Case* in the judgment of Brennan J. Brennan J denied the validity of an analogy between termination by frustration and

110 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 23, 31.
111 See "The Revocability of Licences", pp220-222 above.
112 Megarry & Wade, *The Law of Real Property* p69.
113 See Sackville & Neave, *Property Law: Cases and Materials* (Butterworths, Sydney, 5th ed 1994) pp209-212.

termination by repudiation, commenting that the first took place automatically and the second by the election of the wronged party (that election being the acceptance of the repudiation). These alternatives were seen by His Honour as indicating that the first event was in the nature of a limitation of the estate, and the second as being in the nature of a condition which might determine the estate on enforcement.[114]

The above is an important distinction for the purposes of explaining the defeasance of an estate. In the case of automatic termination, the estate could be said to have come to an end; it has reached its fullest extent and expired. There is no need for a further mechanism to explain the return of the estate to the lessor on determination by this method.

On the other hand, the breach of a condition is a property law method of divesting an estate. Upon the breach of the condition, the estate may be reclaimed by the remainderman (the lessor in this case), subject of course to rules as to relief from forfeiture and so on. If this process is instead seen as a purely contractual one, it becomes difficult to see why the property interest should come to an end. If repudiation leads to the creation of contractual secondary rights in the promisee, these do not include a right to divest existing property rights (as opposed to a right to terminate a contract or obtain a judgment). It is the exercise of the property remedy which leads to a revesting of an estate.

The distinction between determinable and conditional interests is a dubious one. It has been described as "little short of disgraceful to our jurisprudence".[115] At the theoretical level one can see why this is so; the distinction between an event which marks the boundaries of an estate, and another which terminates it before it reaches its boundary, is logical nonsense. There are only two boundaries in each case, being the maximum extent of the estate when the relevant event does not occur, and the extent of the estate when terminated by the relevant event. Only the relevant event is different; in one case it is "event X", and in the other, "the promisee relying on event X". The theoretical equivalence of the two notions is illustrated by the practical difficulty in separating the two; as Megarry and Wade note, the difference is really one of words.[116] This test will usually reduce to the construction of the words of the grantor of the estate in order to discover on which side of the "fine distinction" the particular case lies.[117]

The practical significance of the distinction lies in the question of whether, as has been noted, the grantor must bring an action to re-enter or whether the estate determines

114 (1985) 157 CLR 17 at 41-2.
115 *Re King's Trusts* (1892) 29 LR Ir 401 at 410; cf Megarry & Wade, *The Law of Real Property* p70.
116 Megarry & Wade, *The Law of Real Property* pp69-70.
117 See, for example, *Zapletal v Wright* [1957] Tas SR 211.

automatically upon the happening of the specified event. This is of some significance in the law of leases.[118]

It is submitted, however, that this question is in fact better decided upon the basis of the intention of the parties as to the event which will determine the lease, as opposed to the employment of a dubious theoretical distinction. In practice, this appears to be the normal approach. The question is as to whether the estate will be determined automatically or whether a condition must be exercised - which is essentially the orthodox approach in reverse. This approach is seen in the judgment of Brennan J in *Tabali*. There, His Honour labelled two events as limitations and conditions on the basis of the consequence of the distinction (namely, the mode of determination which must be used) rather than the construction of any words of grant.[119]

An interpretation or construction approach has the advantage of dispensing with a theoretically untenable distinction and replacing it with a theoretical basis which delimits the estate upon an event specified by the parties. That event might include the election of a party, pursuant to the occurrence of another event, to terminate the contract.

The elimination of the condition/limitation distinction can explain the determination of a leasehold interest in any case where termination of the lease contract results from the breach of a condition. Equally, it could explain termination based upon an implied term, that term limiting the estate granted. The theoretical structure need only be that a certain estate was granted by the contract; that estate is limited in its extent by the happening of certain factors, as a matter of construction of the contract in determining what was granted to the lessor.

Nevertheless, theoretical problems still remain. For instance, the theoretical bases of some rights to terminate are still uncertain and possibly inconsistent with the breach of a condition or application of an implied term theories. As noted above,[120] termination by frustration has been placed on a number of bases, not all of which are reconcilable with the limitation of an estate. Equally, the existence of a right to terminate arising from fundamental breach of an innominate term has also sometimes been placed upon the basis of inadequate compliance with a condition, but may also be placed on other bases possibly incompatible with that theory.[121]

These further bases cannot be dispensed with while retaining contract law as a sole explanation of the termination of the lease. This is because some bases of a doctrine might

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118 See, for example, *Doe d Lockwood v Clarke* (1807) 8 East 185; 103 ER 313; cf Bradbrook & Croft, *Commercial Tenancy Law in Australia* (Butterworths, Sydney, 1st ed 1990) pp230-231.

119 (1985) 157 CLR 17 at 41-42.

120 See "The *Panalpina Case*", pp228-235 above.

121 See Carter, *Breach of Contract* (Law Book Co, Sydney, 2nd ed 1991).

be capable of supporting a conclusion that the lease was to be given a limited extent, while other bases might be completely inconsistent with that idea.

It seems therefore that to retain the minimum of vested title compels the retention of a separate proprietary mechanism to explain the divesting of that title.[122]

CONCLUSIONS ON CONTRACTUALISATION

The conclusion thus far is that contract law on its own cannot give a satisfactory explanation of the operation of the lease. There must be a co-operative relationship based upon the grant of an estate and the divesting of that estate upon determination of the lease. The difficulty is in determining the priority and consistency of principle between the imperatives of the different systems.

As has been noted, it is clear that property law is no longer the exclusive governor of lease contracts, in the sense of being a superior body of law which applies to the lease as a real property interest. Beyond this basic conclusion, there are a number of alternatives.

The narrowest approach would accept that contract law applies, but only in so far as it is consistent with clear property principle. Therefore, one might accept that the doctrine of repudiation applies to leases; however, the application of that doctrine is limited by the need for conformity with the determination of the lease interest. This is the view of Brennan J expressed in *Tabali*, where His Honour would accept the application of the doctrine only where the same act constituting the acceptance of a repudiation was also an act which would divest the term of years.

This approach is little different from that which previously prevailed. It does not accept repudiation as a new mode of terminating contracts. It is, in fact, different only in that it provides a contractual analysis to accompany the proprietary one. The need for the former is not at all clear given that the latter predominates to the point of governing the applicability of contractual doctrines.[123] Nor could this approach convincingly explain the application of new and appropriate modes of determination such as termination by frustration.

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122 None of the foregoing excludes the possibility of the operation of rescission of the lease contract on the basis of fraud. This is because rescission operates to place the parties in the position that they would have been had the transaction never taken place, once it is accepted that the transaction has now been cancelled. In the case of equity, a fraudulent transaction may also give rise to a constructive trust of the leasehold procured by that fraud, thus explicitly providing a property transfer mechanism.

123 On this point it is interesting to note that in *Wood Factory v Kiritos* [1985] 2 NSWLR 105 Priestley JA regards the judgment of Brennan J as being consistent with the leading judgment of Mason J in that case, and applies the principles laid down by Brennan J. This is, with respect, an odd deduction; cf *Vickers and Vickers v Stichtenoth Investments Pty Ltd* (1989) 52 SASR 90 at 99 per Bollen J.

A wider approach promotes the effectiveness of contractual doctrines, in that they control the termination of leases. In order to sustain this doctrine it is necessary, as has been shown, to provide for a proprietary analysis which would account for the divesting of the term of years upon termination of the lease contract. It may be that whenever a contractual principle would apply to terminate the lease contract there is to be a corresponding ground of determination of the term of years at property law. This would appear to be the approach adopted by Mason J in *Tabali's Case*, in the recognition that all contractual principles are equally applicable to the lease. The property law modes of determination are to be modelled exactly on the grounds of termination of the contract granting the relevant estate.

This approach may not be very different in practice from the narrow approach adopted by Brennan J. As Mason J notes, even though a doctrine might apply prima facie to a lease contract, the historical background to that contract conditions the significance of various actions. One need not simply abandon the previous grounds of determination; rather, they may now be rationalised as corresponding to various contractual categories of termination.[124]

Here is seen, one last time, the theoretical difference and practical equivalence identified in relation to the judgments in *Panalpina*, in a slightly more sophisticated form. Brennan J would limit the applicability of, say, repudiation, to leases; Mason J would uphold the applicability of the doctrine, but condition that application by reference to special features of the lease. One is reminded of the practical equivalence of the views of Lord Hailsham and Lord Russell.[125]

However, the modes of determination will obviously change as they are placed on a different theoretical footing; thus, for instance, a contractual right to terminate was found in both *Shevill* and *Tabali* which was supplementary to the traditional remedy of re-entry provided for in the contract.[126]

CONSEQUENCES FOR THE LEASE-LICENCE DISTINCTION

Some consequences for the lease-licence distinction have already been noted.

The removal of property law as the dominating feature of a leasehold transaction has meant that the conveyance of an estate is only one term in a wider contract. Applying contract law principles, it may be possible to argue that various lease contracts should no

124 Cf Bradbrook & Croft, *Commercial Tenancy Law in Australia* p295 (undertaking such an exercise of rationalisation in relation to forfeiture); cf *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 144 per McHugh JA.

125 See "The *Panalpina Case*", pp228-235 above.

126 *Shevill v Builders' Licensing Board* (1982) 149 CLR 620; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.

longer be regarded as "conveyances" as such, and within the purview of the Statute of Frauds, or that specific performance should not be available in relation to many such contracts.

The means of differentiating between those contracts which are centred around the grant of an interest in land, and those to which the grant of an interest in land is merely incidental, must always be the intention of the parties, as expressed in the transaction or as otherwise relevant. The intention of the parties, therefore, may emerge as the governing factor in matters such as those of specific performance.

However, there are other conclusions that may be drawn. These will flow from the fact that a lease is now seen predominantly as a contract, and hence to be interpreted and applied as one.

Intention Again

The difficulties which arise from the exclusion of the parties' intentions as a relevant factor have already been adverted to. A particularly troublesome area is where the absurdity of a pure "exclusive possession" test is more obvious, namely, the area where a person grants to another sole possession of land with absolutely no intention of a landlord/tenant relationship arising, and in respect of which such a relationship would be highly inappropriate.

This difficulty is highlighted in a well-known passage from the speech of Lord Templeman in *Street v Mountford*. Having just asserted the primacy of exclusive determination, Lord Templeman is at once compelled to qualify that test by reference to other relationships:

> My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession may be referable and which would or might negative the grant of an estate or interest in land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy.[127]

127 [1985] 2 All ER 289 at 300.

It is clear from this passage that Lord Templeman is not merely acknowledging factual circumstances in which it may be thought unlikely that the parties would have agreed on a grant of exclusive possession; rather, he refers to other relationships to which such a grant is referable.

This is a significant gap in the rule of exclusive possession, and one which is made greater by the process of contractualisation. If the exclusive possession test only applies to the situations where a landlord and tenant relationship (whether referable to licence or lease) was envisaged, then this approach begs some serious questions. However, the dominance of the contract in the leasehold relationship also makes it difficult to find a differentiation between the leasehold relationship on the one hand and the buyer in possession or employment situations. They are also contracts which give a grant of exclusive possession; that grant is only one term of a contract, rather than being the dominant characteristic of the contract such that the contract is properly regarded as a real property conveyance.

Presumably it is the intention of the parties which must control and distinguish these situations; if there is an employment situation, where exclusive possession of an area has been given, then what was the intention of the parties in relation to that exclusive possession? To determine this, the term of the contract (and the contract as a whole) must be read in the light of normal principles of interpretation, to discover whether the parties intended to grant an interest or only personal rights. Thus the requirement of intention forces its way in once more.

Intention Again, Again

The effect of contractualisation has been to attribute many of the lessor's and lessee's rights to a contractual provenance. This leaves the content of the leasehold interest rather gutted. What might once have been described as a "bundle of rights"[128] may look more like a single twig. One consequence of this may be the further narrowing of the distinction between leases and contractual licences.

Presumably, the basic right conferred by the estate is exclusive possession for a term (and the remedies that protect that) but the contract between the parties may regulate the way in which that right may be held or enforced. It can also be presumed that if theories of contractual interpretation are allowed to hold full sway, then all matters may be regulated by that intention.

Here again, the intention of the parties as to the effect of their relationship emerges as an important factor. Given that the estate may be regulated, the parties may presumably regulate the manner of its holding, revocation, transferability and so on; in fact, all

128 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233.

incidents of the relationship between the parties may be regulated in terms of the grant of the estate.[129] That is, after contractualisation the determinative factor in the relationship is that which is at present partly excluded, namely, the intention of the parties, which may include their intentions as to the status of the relationship between the parties. It appears therefore that on contractual principle there is no good reason for excluding the intention of the parties as to the status of the interest granted. For example, if exclusive possession is granted, then the intention of the parties that it be of a nature personal to the lessee will condition that grant; it will be identical, at least between the parties, to a licence, that being the intention of the parties. The interest will therefore be intended to be revocable, non-transferable, and so on.

Exclusive Possession Again

Following from this analysis, if contractual intention is the over-riding factor in determining the relationship between the parties, then exclusive possession may be established as the sole criterion of the grant of a lease. That is, a grant of exclusive possession will give exactly that, and be an estate in land; but the contractual intention of the parties will mould that estate.

This is because matters such as certainty of intention and revocability will be subsumed under the rubric of contractual principle. To take certainty first, the certainty of a term will be determined by the application of contractual doctrines, rather than proprietary ones. That is, if the contractual term granting exclusive possession is sufficiently certain under contractual doctrine, it will be given effect to. The old property law rule requiring ascertainability must be rationalised into the wider contractual structure.

Similarly, a difficulty pointed out earlier occurs when the parties have intended something said to be inconsistent with the nature of a lease (such as a right of a personal nature), and yet have granted exclusive possession. However, the nature of the lease is no longer arcane; it is simply what the parties have contracted it to be. Matters such as the revocability or transferability of that grant might be regulated by the contract with no internal contradiction. For instance, one might find that exclusive possession was indeed granted, but that the intention of the parties in relation to that possession was that it be a right of a nature which is not transferable.

Obviously, there might be a presumption that certain types of operation were intended, corresponding to the normal operation accorded to a grant of an interest; but this is merely to mould the application of principles of construction to traditional property law principles in the same way that the High Court has suggested that the application of contractual principles of termination will be moulded. Here, the issue will always remain one of contractual intention.

129 Relations with third parties are briefly discussed below.

Therefore, one can postulate a model where the intention of the parties to grant exclusive possession is coupled with an enquiry as to whether the parties intended that possession to be revocable, transferable, and so on. That is, the nature of the right to exclusive possession is determined by the intention of the parties.

Hence, the difficulty of exclusive possession is cleared up. The grant will give rise to an estate, but that estate may be conditioned by contrary intention, as with any other contract, and in the light of the traditional relationship between the parties where appropriate.

Revocability Again

It was noted earlier that the non-revocability of a lease derives from its vested nature, as a right already passed rather than an obligation continually owed, whereas a licence is revocable because of its purely contractual and ongoing nature. However, it was also noted that a special category of licence exists where the parties have either expressly or impliedly agreed that the licence is not to be revocable, or to be revocable only on certain terms.

It is interesting to analyse this possibility. Upon repudiation of a contract, no rights and obligations as between the parties are ended merely by that action. Rather, the same rights remain in place unless the repudiation is accepted:

> A promisor cannot, by repudiating his obligations, unilaterally alter the legal relationships between himself and the promisee. Until the promisee accepts the repudiation, the rights and obligations arising from the partial execution of the contract and causes of action arising from its breach continue unaffected.[130]

That is, as far as contract law is concerned, contractual rights are not revocable even though, as noted above, their enforcement might be in damages only.

How does this situation reflect upon the intention of the parties? It might be argued that the irrevocability of contractual rights arises as a matter of what Lord Diplock characterised as "secondary obligation"; that is, through the way contract law regulates obligations upon the breach of a contract.[131] Therefore, the irrevocability of contractual rights arises not as a matter of the intention of the parties but as a matter of contract law, although (like all secondary obligations) it may be conditioned by the parties' intentions.[132]

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130 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR at 48 per Brennan J, citing *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477.

131 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848 per Lord Diplock.

132 As above.

However, this is not a convincing analysis. Revocation need not necessarily be a breach; the question must surely be as to the nature of the original right, rather than the consequences attached by the law to its breach. Further, if it was intended by the parties that a right be tenable only to the point it was revoked by the other party, that could be provided for; and the failure to provide for such a revocation might indicate a contrary intention.[133] That is, the irrevocability of particular contractual rights must generally be seen as a matter of the intention of the parties.

This highlights the difficulty with that special category of licences which are said to be irrevocable because the parties have intended them to be so. Even though the remedy for the breach of a contractual right may normally be damages only, the usual intention attributed to the parties, in the event of a repudiation, is that the term of the contract repudiated not be revocable merely by that act of repudiation.

Hence, it is difficult to find a licence which is not, impliedly, irrevocable, except as the parties have provided or except as is provided for by the normal processes of contractual termination. It will be rare that the parties will turn their minds to the effects of a repudiation of the licence, and the effects which should follow from such a repudiation.

If it is accepted, however, that a licence which is intended to be irrevocable may be protected by injunction,[134] then the ultimate question controlling revocability will be the intention of the parties as expressed in the contract. As shown above, this will also be the controlling factor as to the revocability of a grant of exclusive possession, that is, did the parties intend that grant to be personal and revocable, or irrevocable? The positions of the lease and the licence are both controlled by contractual intention.

Transferability

One remaining point of practical distinction between the lease and the licence (or other contractual arrangement) after the process of contractualisation could be the applicability of rights against third parties, and their transferability to third parties.

The reallocation of leasehold rights by contractualisation is from rights applicable against the world (as proprietary rights) to ones applicable between parties only (as contractual rights). Rights which once were proprietary in nature and therefore applicable against transferees will now be contractual. However, this will not have much of a practical effect, given that covenants touching and concerning the land will run against third parties.

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133 Subject to the presence of standard contractual rights of termination; cf *Shevill v Builders' Licensing Board* (1982) 149 CLR 620; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.

134 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233.

However, covenants not associated with a lease but granted instead as a part of a licence do not so run, not qualifying even as "equities" for the purpose of applying priority rules. Licensees therefore will be more vulnerable to third parties than lessees.[135] This is a point of practical distinction, but it might be queried if it can stand in the light of the contractualisation process. If the lease is now a contract regulating rights between the parties, and the proprietary content of that lease amounts only to exclusive possession, with the characteristics of that possession the subject of contractual intention between the parties, there is little difference between the two arrangements. That is, the lease grants a right to exclusive possession which is recognised by the law as applying to exclude all other persons; the lease grants a right to possession which is enforceable only between the parties. It is possibly time, however, that the latter was recognised as akin to a form of proprietary estoppel which might run with the land against third parties, or a wider form of covenant, which would run with the land and be applicable against third parties, than the purely restrictive sort recognised by equity.[136] It is difficult to justify the practical distinction between the lease and the licence on any but the most theoretical ground.

CONCLUSIONS

The lease-licence distinction teems with difficulties. However, the process of contractualisation has the potential to revolutionise that distinction by its accent on the contractual nature of the lease and the minimisation of the proprietary nature.

Even though the exact degree of contractualisation which has been achieved is very uncertain, and not, seemingly, the result of principled analysis, various implications have been discerned in relation to the distinction. The conclusion may be summarised generally as follows: given that the lease is now a contract like any other, and that it will be interpreted and treated in a primarily contractual way, the only point of distinction between the lease and the licence is the fact that there is a vested, proprietary right to possession granted by the former contract. Yet the consequences of that grant are, of themselves, quite minimal. While they may lead to a presumption that various attributes were intended in relation to that right (such as its irrevocability), the scope of the right, and hence the existence of those attributes, will ultimately be a matter of interpretation of the contract between the parties, and hence of contractual intention. In that way, the attributes and operation of the lease will be determined in the same way as those of a contract.

The only remaining differences between the leasehold interest and the licence will be those attributes which apply to property rights as such but not to contractual ones. Thus, specific performance may continue to be more readily available in relation to leases, more so than

135 Cf the position in England, described by Moriarty, "Licences and Land Law" (1984) 100 *LQR* 376.

136 See the (heretical) views of Lord Denning MR in *Binions v Evans* [1972] Ch 359 at 369; *DHN Food Distributors v Tower Hamlets* [1976] 1 WLR 852. Cf *Re Sharpe* [1980] 1 WLR 219 at 226 per Browne-Wilkinson J.

it is in relation to licences, despite implications of the contractualisation process for that area. The nature of the right to exclusive possession as vested makes the determination of the lease problematic compared to the termination of a licence, necessitating the retention of proprietary doctrine to explain that determination. Further, proprietary rights are still accorded operation against third parties where licences are not.

The process of contractualisation places these remaining distinctions in doubt as to their practical utility and justification, even if their theoretical foundation remains. The advancement of contractualisation should hopefully see these distinctions swept away.