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# Damages: Highway Properties v. Kelly, Douglas & Co. — Recent Developments

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## INTRODUCTION

A major source of difficulty relating to remedies for breach of a commercial lease was the traditional view that, when a lease is no longer executory, that is, once the tenant takes possession of the leased premises, the relationship between the landlord and the tenant is governed by property law and not by contract law. Under this view, which is reflected in the decision of the Ontario Court of Appeal in *Goldhar v. Universal Sections and Mouldings Ltd.*,[1] when a tenant repudiated the lease by, for example, abandoning the leased premises, the landlord had available to it three mutually exclusive courses of action:

(1) refuse to accept the repudiation and insist upon performance of the terms of the lease on the basis that the lease continues to subsist, and sue the tenant for rent accrued and in arrears from time to time;

(2) accept the repudiation and terminate the lease, re-enter the premises, and sue for rent accrued due, or loss incurred as a result of the tenant's breach of covenants to the point of termination; or

(3) as a variation on the first option, advise the tenant that it refuses to accept the repudiation but proposes to re-lease the premises on behalf of the tenant, re-enter the premises for that purpose only, and sue for any shortfall in the rental revenue, once such shortfall occurs.[2]

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1 (1962), 36 D.L.R. (2d) 450, [1963] 1 O.R. 189 (Ont. C.A.) [*Goldhar*].

2 It would appear that, under this option, where the landlord "re-leases" the premises *on behalf of the tenant*, the new lease, being on the tenant's account, is actually a sublease with the original tenant as the sub-lessor. By contrast, under the second option, any re-leasing by the landlord after it re-enters the premises will be on the landlord's account and would not be a sublease. This distinction is alluded to in *Toronto Housing Co. v. Postal Promotions Ltd.* (1981), 128 D.L.R. (3d) 51, 34 O.R. (2d) 218 (Ont. H.C.J.), affd 140 D.L.R. (3d) 117, 39 O.R. (2d) 627 (Ont. C.A.) [*Postal Promotions*], in which Montgomery J. stated that whether the new lease is on the landlord's or the tenant's behalf is a factual issue (at p. 222 (H.C.J.)). Having noted that "[i]t was agreed [by both the landlord and the tenant] that any

Where a contract is repudiated, the acceptance of the repudiation by an innocent party results in the termination of the contract but such termination does not preclude a right to damages for prospective (that is, post-termination) loss as well as for accrued loss.[3] By contrast, under the traditional law in *Goldhar*, a non-breaching landlord was not entitled to sue for prospective damages (representing, for example, rent for the remainder of the term) under any of the available remedies. This was said to be because, if the lease continued to subsist, the landlord would not have suffered any loss until rent was accrued and was in arrears; and, if the lease was terminated, no obligation under the lease would have survived the termination of the estate in land and there would, therefore, be no basis for claiming prospective damages.

The *Goldhar* position underwent a significant change in 1971 as a result of the decision of the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*[4] In *Highway Properties*, Laskin J., writing for a unanimous Court, added a fourth alternative remedy to the three *Goldhar* remedies:

> . . . the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. Another element would be the loss, so far as provable, resulting from the repudiation of [a covenant of the tenant to carry on business in the leased premises continuously during the term of the lease].[5]

Thus, a landlord choosing the fourth remedy is entitled to damages for: (a) the rent in arrears to the date of the termination of the lease; (b) the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period; and (c) compensation for provable loss resulting from breach of a continuous operating covenant.[6]

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new tenant would enter into a fresh lease with Brentcliffe [the landlord] rather than a sublease through Postal [the tenant]" (at p. 220 (H.C.J.)), Montgomery J. found that the new lease was "not a sublease from Postal but a fresh lease" (at p. 222 (H.C.J.)). This subleasing option is not very practical, as the new tenant will usually want a direct lease from the landlord on different terms and often for a duration that would exceed the remaining balance of the lease term of the defaulted lease.

3 *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710 at p. 717 [*Highway Properties*].

4 *Ibid.*

5 *Ibid.*, at p. 716.

6 Under the subsequent case law, the landlord is also entitled to consequential damages resulting from the effort to re-lease the premises, such as legal fees, taxes, advertising charges, real estate commission, and repair costs: see *Victoria Park Avenue Associates*

Laskin J. observed that the traditional analysis regarding repudiation of a lease and its acceptance was framed by the doctrine of surrender of a lease by operation of law, which occurs when a lease is materially breached (or repudiated), and the innocent party commits an act inconsistent with the continued existence of the lease, such as re-entering and re-letting the premises; and that, when surrender by operation of law occurs, the leasehold estate is terminated and all of the terms in the lease document also cease to be effective.[7] While surrender by operation of law was said to occur regardless of the parties' intentions, in Laskin J.'s view, it would not "apply to a case where both parties evidenced their intention in the lease itself to recognize a right of action for prospective loss upon a repudiation of the lease, although it be followed by termination of the estate".[8]

In a passage that has since been quoted extensively, Laskin J. went on to state:

> There are some general considerations that support the view that I would take. 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. Finally, there is merit here as in other situations in avoiding multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engage in instalment litigation against a repudiating tenant.[9]

*Highway Properties* has been applied in numerous cases during the three-and-a-half decades since it was decided, and in many of those cases landlords were successful in obtaining the fourth remedy.[10]

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*Limited Partnership v. Magnaflex Industries Inc.* (2000), 37 R.P.R. (3d) 283, 101 A.C.W.S. (3d) 1179 (Ont. S.C.J.), at paras. 100 and 114 to 116, affd [2002] O.J. No. 4079 (QL), 116 A.C.W.S. (3d) 581 (Ont. C.A.), leave to appeal refused [2003] 1 S.C.R. xiii; *Griffin v. Cedar Lodge Society*, [2002] B.C.J. No. 1539 (QL), 2002 BCSC 507, at para. 154ff; and P.M. Perell, "Landlords' Rights to End a Commercial Lease and Claim Damages" (1993), 2 Nat'l Real P. L. Rev. 211, at pp. 231-32 [Perell].

7 *Highway Properties*, *supra*, footnote 3. For this reason, in exercising the second option above, it is crucial for a landlord to make it clear to the tenant that it does not intend to terminate the lease but that re-entry is for the purpose of re-letting only.

8 *Ibid.*, footnote 3, at p. 717. Here Laskin J. was referring to the fact that the lease in *Highway Properties* contained a covenant of the tenant to carry on business continuously during the term of the lease.

9 *Ibid.*, at p. 721.

10 See, *e.g.*, *Canadian Medical Laboratories Ltd. v. Stabile* (1997), 98 O.A.C. 3, 7 R.P.R. (3d) 170, 69 A.C.W.S. (3d) 367 (Ont. C.A.); *Victoria Park Avenue Associates Limited Partnership v. Magnaflex Industries Inc.*, *supra*, footnote 6; *Almad Investments Ltd. v. Mister Leonard Holdings Ltd.*, [1996] O.J. No. 870 (QL), 61 A.C.W.S. (3d) 985 (Ont. Ct. (Gen. Div.)), affd [1996] O.J. No. 4074 (QL), 67 A.C.W.S. (3d) 372 (Ont. C.A.); *615314 Ontario Ltd. v. 396380 Ontario Inc.*, [1995] O.J. No. 1518 (QL), 55 A.C.W.S. (3d) 643 (Ont. Ct. (Gen. Div.)); *607190 Ontario Inc. v. First Consolidated Holdings Corp.* (1992), 60 O.A.C. 285, 26 R.P.R. (2d) 298 (Ont. (Div. Ct.)); *759418 Ontario Inc. v. 690352 Ontario*

There are several issues that arise from *Highway Properties* that were not resolved (or at least not fully resolved) in the case. One of them is when the notice applicable to the new fourth remedy should be given. Another is whether the innocent party has a "duty" to mitigate its damages. The next two sections "Notice" and "Mitigation" address these two questions.

The question about mitigation is part of the larger question regarding the breadth of *Highway Properties*: how far does the case go in terms of viewing a commercial lease as a contract? For instance, does the decision imply that a landlord may freely terminate a lease, subject only to liability for damages to the tenant that is not in breach of the lease? This last question recently arose in a case decided by the British Columbia Court of Appeal, which is discussed in the last section of this chapter.

## NOTICE

As can be seen in the passage from *Highway Properties* regarding the fourth option reproduced earlier, Laskin J. stated that the landlord may elect to terminate the lease "but with notice" of intention to claim post-termination damages. In that passage, Laskin J. was describing the position of counsel for the landlord in the case, which had in fact given such notice. Later in his reasons, in the context of discussing the doctrine of surrender by operation of law, Laskin J. stated that he did not think the doctrine would "apply to a case where both parties evidenced their intention in the lease itself to recognize a right of action for prospective loss upon a repudiation of the lease ...".[11] This statement gives rise to the possibility that, under *Highway Properties*, what is required for the purposes of the fourth alternative remedy is the intention of the parties expressed in the lease providing for a right of action for prospective damages and, if such intention is found, notice could be dispensed with.[12]

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*Ltd.* (1992), 23 R.P.R. (2d) 16, 32 A.C.W.S. (3d) 983 (Ont. Ct. (Gen. Div.)); *411056 B.C. Ltd. v. British Columbia*, [2005] B.C.J. No. 36 (QL), 136 A.C.W.S. (3d) 946 (B.C.S.C.) [*411056 B.C.*]; *491506 B.C. Ltd. v. McElmoyle* (2004), 5 C.B.R. (5th) 145, 22 R.P.R. (4th) 237 (B.C.S.C.) [*McElmoyle*]; *283900 British Columbia Ltd. v. 579024 B.C. Ltd.*, [2002] B.C.J. No. 2016, 117 A.C.W.S. (3d) 314 (B.C.S.C.); *Okanagan Prime Products Inc. v. Henderson*, [2001] B.C.J. No. 684 (QL), 104 A.C.W.S. (3d) 1128 (B.C.S.C.); *Adanac Realty, Ltd. v. Humpty's Egg Place Ltd.* (1991), 113 A.R. 215, 15 R.P.R. (2d) 77 (Alta. Q.B.); and *United Place Inc. v. Your Financial Foundation Inc.*, 2005 ABPC 8, [2005] A.J. No. 67 (QL) (Prov. Ct.) [*United Place*]. Of some note in this regard is the observation made in *Whitewood Holdings Ltd. v. Teamco Enterprises Ltd.* (2007), 267 Nfld. & P.E.I.R. 1, 2007 NLTD 72, 156 A.C.W.S. (3d) 669 (Nfld. & Lab. S.C.T.D.), at para. 7, that aggrieved landlords rely almost exclusively on the first and fourth remedies, rendering the second and third remedies "no more than academic anachronisms".

11 *Highway Properties*, *supra*, footnote 3, at p. 717.

12 In *Highway Properties*, this intention was inferred from the tenant's covenant to carry on business in the premises throughout the term of the lease. Such a covenant is generally found only in leases involving anchor tenants. However, the intention in question can be expressed in other ways, for example, in a term like that involved in *Langley Crossing Shopping Centre v. North-West Produce Ltd.*, [2000] 4 W.W.R. 560, 217 W.A.C. 273

Some cases have in fact interpreted *Highway Properties* in this manner.[13] However, the widely-held view appears to be that, under *Highway Properties*, notice of intention to seek prospective damages (which will henceforth be called "damages notice") is required in all cases. This is perhaps not surprising given the rationale for the notice requirement, which was explained as follows in one case:

> . . . the fact that the four potential remedies are mutually exclusive require a level of precision when the landlord exercises his rights. The reason for this is clear for, depending on the landlord's election, the tenant may well have to make specific choices as to his actions which may in turn have significant impact on potential liability.[14]

The position that a damages notice is required even if the lease agreement evinces the parties' intention to permit a claim for post-termination damages is illustrated by *Langley Crossing Shopping Centre v. North-West Produce Ltd.*,[15] a 2000 decision of the British Columbia Court of Appeal. In that case, the lease contained the following provision:

> 21.02 Damages. In the event of any breach of this Lease by the Tenant, The Landlord, in addition to exercising any other remedies available to the Landlord and whether the Landlord terminates this Lease or not, may recover from the Tenant all damages it may incur by reason of such breach, including the cost of recovering the Premises, solicitor and his own client indemnity legal fees and including the worth at the time of termination of the excess, if any, of the amount of Rent and charges equivalent to Rent reserved under this Lease for the remainder of the Term over the then reasonable rental value of the Premises for the

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(B.C.C.A.), revg 20 R.P.R. (3d) 112, 83 A.C.W.S. (3d) 286 (B.C.S.C.) [*Langley Crossing*] (see *infra*, footnote 16), which is commonly included in commercial leases.

13 One of the cases in which it was held that no notice was required if the lease reveals the intention of the parties to permit a claim for prospective damages is *Veysoglu v. O'Keefe* (1989), 65 D.L.R. (4th) 96 at pp. 100-101, 81 Nfld. & P.E.I.R. 317, 19 A.C.W.S. (3d) 293 (Nfld. S.C.) [*Veysoglu*], in which the court held, based on Laskin J.'s reference in *Highway Properties* to the parties' intention, that notice was not necessary where the lease agreement specifically provided that, upon termination of the lease by the tenant, the rent for the balance of the term becomes due immediately. In the court's view, this provision indicated the parties' recognition of a right of action for prospective loss upon abandonment by the tenant. See also *United Place*, *supra*, footnote 10; *Vinet's Store (1973) Ltd. v. Video Update Canada Inc.*, [2001] 1 W.W.R. 462, 85 Alta. L.R. (3d) 266, 275 A.R. 40, [2000] A.J. No. 1153 (QL), 100 A.C.W.S. (3d) 682 (Alta. Q.B.), at paras. 48-50 [*Vinet's Store*]; and *411056 B.C.*, *supra*, footnote 10, at para. 9, in which the court observed that a damages notice may not be necessary where the lease itself gives the landlord the right to claim future rent, but that it was not necessary for the court to decide that issue because in the case before the court the plaintiff did issue written notice.

14 *McElmoyle*, *supra*, footnote 10, at para. 31. See also *Makhija Holdings Ltd. v. Boulevard Prescriptions Ltd.* (2005), 42 R.P.R. (4th) 142, 2005 BCSC 1720 (B.C.S.C.), at para. 13.

15 *Supra*, footnote 12.

> remainder of the term, all of which amounts shall be immediately due and payable by the Tenant to the Landlord. ...[16]

After the tenant's repudiation of the lease, the landlord sent two letters to the tenant stating that, unless the tenant remedies its breach, the landlord would be "enforcing our rights under the lease . . .". The trial judge found that these letters constituted a sufficient damages notice. However, the Court of Appeal disagreed, and held that the letters did not convey notice of an election to claim the present value of future rents. On behalf of the court Esson J.A. stated:

> Before us, there was discussion of the question whether there could be any utility in the landlord being required to give express notice in a timely way of its election to seek prospective damages. There is sound reason for requiring the landlord to make clear which of the four mutually exclusive courses it proposes to follow. If it intends to follow the first course of doing nothing other than insisting on performance of the terms, or if it intends to follow the fourth course of terminating and suing for prospective damages, it behooves those liable on the lease to take steps to rectify the situation, perhaps by securing a new tenant or applying for relief against forfeiture. The second and third courses do not create the same threat to a solvent tenant or indemnitor. For the very reason that the landlord's remedies are mutually exclusive, it is not sufficient to simply give notice of its intention to exercise its "rights" under the lease. The need for timely notice is most obvious in relation to persons who, like these appellants, played no part in the default but remained liable for the consequences of it.[17]

It appears to be widely accepted that the damages notice need not be contemporaneous with the termination of the lease, so long as the notice is given within a reasonable time. This was the holding of the Alberta Court of Appeal in *Deerfoot Mall (Calgary) Ltd. v. Burt*,[18] in which the landlord did not give notice regarding prospective damages before commencing an action for the *Highway Properties* damages. Prowse J.A., for the court, stated as follows:

> A question arises as to when the exercise of the landlord's option or election must be communicated to the tenant. A landlord when confronted with a repudiation of a lease is entitled to take a reasonable length of time to consider its position, that is, whether it is merely going to do nothing and enforce payment of the rent as it falls due, accept the

16 *Supra*, footnote 12, at para. 30 (B.C.S.C.).

17 *Supra*, footnote 12, at para. 13 (B.C.C.A.). The last sentence in this passage refers to three successive assignors of the lease, all of whom were sued along with the sub-tenant in occupation, the repudiator.

18 (1987), 37 D.L.R. (4th) 429, [1987] 4 W.W.R. 158 (Alta. C.A.) [*Deerfoot Mall*].

> surrender and sue for damages, re-let the premises on the tenant's account or terminate the lease. It follows that testing the market and negotiating a new lease, is not, in the absence of an expressed or implied intention to accept the tenants' offer of surrender, to be equated with acceptance of that offer.
>
> [The court considered authorities.]
>
> In my view, the above cases support the conclusion that the tenants' abandonment of the premises and repudiation of the lease when followed by the landlord's resumption of possession and its attempting to relet the premises, did not result in an acceptance of the offer to surrender. There was no evidence from which it could be inferred that the landlord intended to accept the tenants' repudiation. The acts of the landlord are consistent with its acting to protect its interest and are not such from which surrender by operation of law will be inferred. *So long as it is clear that it intended to look to the tenants for any damages it suffered flowing from the tenants' repudiation of the lease and that intention is communicated to the tenants within a reasonable time and so long as it does not act in a manner from which it may be inferred that it accepted the surrender of the premises, no such inference can be made.*

It follows that the appellant is entitled to damages for the unexpired term of the lease as well as for the arrears in rent that accrued due prior to the appellant's termination of the lease.[19]

In addition to holding that a damages notice is effective if it is given within a reasonable time after the termination of lease,[20] this passage also indicates that the court considered that a statement of claim was capable of serving as the damages notice. This was also the holding in *North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd.*,[21] which was considered by the court in *Deerfoot Mall*. In *North Bay*, the tenant repudiated the lease by abandoning the premises on July 9, 1982, and the landlord terminated the lease by changing the locks on July 10, 1982, which amounted to re-taking possession of the premises. The landlord's writ was issued on August 31, 1982 claiming damages including arrears of rent up to the termination date and damages for loss over the unexpired term of the lease. Rutherford J. allowed the landlord's claim, holding that a damages notice need not be

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[19] *Ibid.*, at paras. 20, 24 and 25 [emphasis added]. *Deerfoot Mall* has been cited as holding that the failure of the plaintiff to notify the defendant of the plaintiff's intention to hold the defendant responsible for damages is not fatal to the plaintiff's claim: see *722924 Alberta Ltd. v. Sinn* (2002), 309 A.R. 342, 2002 ABPC 2 (Alta. Prov. Ct.), at para. 13.

[20] Other cases expressing this view include *411056 B.C.*, *supra*, footnote 10, at para. 11, in which the court stated that "[a]ll that is necessary is that the notice be delivered at a time when the tenant's position is not so prejudiced by the landlord's possession that it becomes unreasonable for the tenant to take remedial action".

[21] (1984), 12 D.L.R. (4th) 767, 47 O.R. (2d) 588 (Ont. C.A.), affg 4 D.L.R. (4th) 88, 44 O.R. (2d) 342 (Ont. H.C.J.) [*North Bay*].

given contemporaneously with the landlord's resumption of possession of the premises, and, further, that the court saw "nothing to prevent North Bay T.V. from pursuing such a claim in this action".[22] On appeal, the Ontario Court of Appeal affirmed, stating in a short endorsement that the court agreed with Rutherford J.'s "conclusion that notice of intention to claim damages for prospective loss of rent need not be given contemporaneously with the termination of the tenancy and that the notice given by the commencement of proceedings was sufficient to found the claim for damages in this case".[23]

It seems this statement by the Ontario Court of Appeal could be interpreted as holding either: (a) that the commencement of a claim can *always* serve the role of the damages notice; or (b) that the commencement of a claim satisfied the notice requirement on the facts of *North Bay*, where the landlord acted reasonably promptly by issuing a writ less than two months after the termination of the lease. It is unclear whether the former interpretation has been adopted by any court, but the latter interpretation was adopted in *Harvey v. Burger*,[24] in which the landlord's claim for prospective damages was dismissed. The court held that, although a contemporaneous notice was not essential, *North Bay* did not apply since, in that case, the claim was commenced "a little over a month from the taking of the possession of the premises on which there was almost four years left in the lease", whereas, in the case at hand, the statement of claim was delivered over three years after the landlord re-let the premises and after the term of the lease in question expired.[25] The position in *Harvey v. Burger* is, of course, consistent with the cases holding that a damages notice must be given in a timely manner.

To summarize, the case law supports the following positions regarding damages notice:

- Notice may not be necessary if a right to claim for prospective damages is found in the lease document (*Veysoglu*; *Vinet's Store*).
- Notice may be necessary even in such a case (*Langley Crossing*).
- Notice may take the form of the commencement of a claim for damages (*Deerfoot Mall*; *North Bay*).
- Notice need not be contemporaneous with the termination of the lease so long as it is given within a reasonable time (*Deerfoot Mall*; *411056 B.C.*).

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22 *Ibid.*, at p. 94 (H.C.J.).
23 *Ibid.* (C.A.).
24 [1994] O.J. No. 1175 (QL), 48 A.C.W.S. (3d) 640 (Ont. Ct. (Gen. Div.)).
25 *Ibid.*, at para. 19.

Thus, the safest course of action for a plaintiff exercising the fourth alternative remedy to take, even where the lease agreement provides for a right to claim post-termination damages, is to give clear written notice (indicating that damages will be claimed on the basis of a present recovery for loss of the benefit of the lease for the unexpired term, including all unpaid rent for the balance of the lease term)[26] as soon as possible after accepting the defendant's repudiation, or, in any event, within some reasonable time thereafter, and not to proceed on the assumption that a statement of claim will necessarily satisfy the notice requirement.

One further point of note regarding notice is that, once the landlord makes a choice among the four alternative remedies and communicates that choice to the tenant, both parties will be bound by it. That is, if, for example, the landlord notifies the tenant that, despite the tenant's repudiation of the lease, it considers the lease to be continuing in full force, and then subsequently sends another notice stating that it chooses the fourth *Highway Properties* remedy, the second notice is arguably of no effect. This follows from the general principle of contract law that an election between two inconsistent rights (such as a right to accept a repudiation and a right to consider the contract as continuing), once made, is final.[27]

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[26] It is important for the notice to state that what will be claimed is "damages" rather than "rent" (though, clearly, future unpaid rent can and usually will be a component of the damages claimed). In this regard, in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710, at p. 721, Laskin J. stated that prospective damages could be claimed "at least where the suit is for damages and not for rent as such". A more detailed discussion of this point is found in J.W. Lem, "The Landlord's Duty to Mitigate Upon a Tenant's Repudiation of a Commercial Lease: A Commentary on *607190 Ontario Inc. v. First Consolidated Holdings Corp.*" (1993), 30 R.P.R. (2d) 33 at pp. 40-42 [Lem].

[27] *Osmack v. Stan Reynolds Auto Sales Ltd.*, [1974] 1 W.W.R. 408 at p. 420, 14 N.R. 48 (Alta. C.A.), affd [1976] 2 W.W.R. 576, 14 N.R. 46 (S.C.C.), in which the Appellate Division of the Alberta Supreme Court relied on the following passage from *Scarf v. Jardine* (1882), 7 App. Cas. 345, at p. 360:

> Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case* (1), Sm. L.C. 8th ed. 47, 54, and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.
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> > "*Quod semel placuit in electionibus, amplius displicere non potest*". That is Coke upon Littleton 146a, (2), and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made.
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> The result of what is there said is that where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons, and accordingly in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final.

Other authorities on the point include *GNC Realty Products Ltd. v. Welglen Ltd.*, [1979] O.J. No. 3456 (QL) (H.C.J.), at para. 59; and *Hallbauer v. Shipowick* (1985), 38 Alta. L.R. (2d) 351, [1985] A.J. No. 574 (QL) (Alta. Q.B.), at para. 43.

However, the principle of election should have no application in cases of continuing breach by the tenant: if, for example, the tenant repudiates the lease for a second time between the first and second notices above (*e.g.*, by continuing to not pay rent despite the landlord's rejection of the initial repudiation and demand that the tenant perform its ongoing rental obligations), the second notice would be effective (although, if the landlord opts to terminate the lease in the first notice, then a subsequent notice purporting to re-affirm the lease would be ineffective in all cases as a terminated lease cannot be unilaterally revived). In addition, notice that simply states that the tenant is in breach of the lease and that, unless the breach is remedied, the landlord will exercise all rights under the lease should not limit the landlord's subsequent rights in any way.[28]

Note that the above state of the law means that, from a repudiating tenant's viewpoint, and assuming that the landlord does not send a damages notice simultaneously with its repossession of the premises, there will be a period of ambiguity regarding the landlord's intention following the termination of the lease during which it is unclear whether the landlord intends to bring a claim for prospective damages. If this period is unreasonably long in the circumstances, the tenant would be entitled to argue that the landlord in effect chose to terminate the lease without claiming for prospective damages, with the result that the landlord is only entitled to claim rent in arrears to the date of termination.

## MITIGATION

As noted earlier, in *Highway Properties*, Laskin J. held that damages pursuant to the fourth alternative course would include the present value of the unpaid future rent for the unexpired period of the lease *less the actual rental value of the premises for that period.* Therefore, where the landlord actually mitigates damages, the loss thereby avoided would be deducted from damages to which the landlord is entitled. Subsequent cases have confirmed that this is the case regardless of which of the four remedies the landlord chooses.

One such case was *Toronto Housing Co. v. Postal Promotions Ltd.*,[29] in which Postal Promotions abandoned the leased premises approximately 11 years into a 20-year lease. Nine months elapsed before part of the premises was leased to a third party for a 10-year term at a substantially higher rent than under the lease with Postal Promotions. The landlord brought a claim against Postal Promotions for arrears of rent that fell due between the date of the repudiation and the date of the new lease and for

[28] Sample letters of notice that may be used by a landlord for this purpose and for the purpose of exercising the fourth *Highway Properties* option are provided in the Appendix.

[29] (1981), 128 D.L.R. (3d) 51, 34 O.R. (2d) 218 (Ont. H.C.J.), affd 140 D.L.R. (3d) 117, 39 O.R. (2d) 627 (Ont. C.A.) [*Postal Promotions*].

repair costs, and the issue arose as to whether the difference in value between the unexpired balance of the term of the Postal Promotions lease and the new lease should be deducted from the landlord's rent arrears and repair costs claim as part of the landlord's mitigation. The landlord argued that there should be no such deduction since it had limited its claim to rent that had fallen due prior to re-letting the premises; as the landlord had not claimed prospective damages, it had no duty to mitigate. The trial judge, finding as a matter of fact that the new lease was on the landlord's behalf (rather than on behalf of Postal Promotion),[30] held that the increased value of the rent post-termination should be deducted from the landlord's claim for pre-termination unpaid rent from the date of abandonment.

On appeal, the result in the trial decision was upheld. Lacourcière J.A. stated that the issue was "not whether the landlord had an obligation to mitigate its damages but whether it had, in fact, mitigated them", and that it was therefore not necessary to decide whether the landlord was under a duty to mitigate.[31] Lacourcière J.A. went on to say:

> In my view, the *Highway Properties* case at p. 576 S.C.R., p. 721 D.L.R., specifically preserves for the parties to a commercial lease the "... full armoury of remedies ordinarily available to redress repudiation of covenants ..." and thus *the measure of the appellant's damage is not limited by his election of remedy*. The damages include the present value of unpaid future rent for the unexpired period of the lease and should be decreased by the actual rental value for the same period, whether or not there was a duty on the appellant to mitigate. In my opinion the *Highway Properties* case is the complete answer. It needs to be expanded only to the extent of giving the tenant the same access as was given to the landlord to the full range of contractual remedies and defences. *Once it is established that the subsequent transaction — the new lease — arises out of the consequences of the breach in the ordinary course of business, the landlord's abandonment of a claim for prospective rent should not have the effect of limiting the common law defences based on the fact of mitigation whereby any loss has been successfully avoided.*
>
> In my view, when damages are calculated on the basis of breach of contract, the distinction between rent accrued and prospective rent, or damages for other breaches of covenant, are unimportant, the calculation being directed at placing the plaintiff in the same position as he would have been if all the covenants had been performed. The appellant in this case had been made whole.[32]

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30 This indicates that the landlord's claim was based on the second option in *Goldhar*, that is, termination of the lease without a claim for post-termination damages.

31 *Supra*, footnote 29, at p. 118 (C.A.).

32 *Ibid.*, at p. 119 [emphasis added].

*Postal Promotions* has not been overruled and appears to be good law on the issue of whether actual mitigation must always be credited in computing the quantum of the landlord's claim, even in the absence of a claim for prospective damages.[33] However, *Postal Promotions* does not address the issue of whether, upon the tenant's repudiation of the lease, the landlord is obliged to mitigate after exercising the first remedy (that is, keeping the lease alive and suing for rent that accrues over the balance of the lease term due from time to time) or the fourth remedy.[34] While there appears to be some confusion in the case law on this point, the most widely accepted position seems to be that the landlord does not have a duty to mitigate when choosing to keep the lease alive, but the duty to mitigate will be triggered if the landlord chooses the fourth course in *Highway Properties*.[35]

A case standing for the proposition that a landlord choosing to keep the lease alive has no duty to mitigate is *Almad Investments Ltd. v. Mister Leonard Holdings Ltd.*,[36] in which the Ontario Court of Appeal stated:

> In this case the respondent landlord elected to do nothing to alter the relationship of landlord and tenant but simply insisted on performance of the terms of the lease and sued for rent on the footing that the lease remains in force. In these circumstances, the decision of the Supreme Court of Canada in [*Highway Properties*] confirms that the landlord has no duty to mitigate. Although the question of a duty on the landlord to mitigate has been the subject of comment, *Highway Properties* has not been overruled on this point.[37]

To the same effect is *Transco Mills Ltd. v. Percan Enterprises Ltd.*,[38] in which the British Columbia Court of Appeal held that there is no basis on which a landlord of commercial premises can be required to mitigate its loss where it maintains the lease in existence and claims for rent due.

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33 *Postal Promotions* was cited recently by Perell J. in a case involving the sale of land as an authority for the proposition that "[w]here the plaintiff mitigates his or her losses then the plaintiff must give credit for the recovery": *Shapiro v. 1086891 Ontario Inc.* (2006), 39 R.P.R. (4th) 246, 145 A.C.W.S. (3d) 523 (Ont. S.C.J.), at para. 140. In *Country Style Food Services Inc. v. 1304271 Ontario Ltd.* (2005), 200 O.A.C. 172, 7 B.L.R. (4th) 171 (Ont. C.A.), at para. 116, Cronk J.A., for the court, remarked that *Postal Promotions* took a "liberal approach" to mitigation that "focused on placing the plaintiff-landlord in the same position it would have been [in] if all the covenants of the repudiated lease had been performed".

34 The issue of a duty to mitigate will not arise if the landlord chooses to terminate the lease without claiming for prospective damages.

35 For earlier authorities on this point, see Lem, *supra*, footnote 26, at p. 49; and *B.G. Preeco 3 Ltd. v. Universal Explorations Ltd.* (1987), 42 D.L.R. (4th) 673 at p. 682, [1987] 6 W.W.R. 127 (Alta. Q.B.).

36 [1996] O.J. No. 4074 (QL), 67 A.C.W.S. (3d) 372 (Ont. C.A.).

37 *Ibid.*, at para. 2.

38 (1993), 100 D.L.R. (4th) 359, 76 B.C.L.R. (2d) 129, supplementary reasons 100 D.L.R.

In respect of the duty to mitigate arising under the fourth remedy, in *Victoria Park Avenue Associates Limited Partnership v. Magnaflex Industries Inc.*,[39] in which the landlord's action for damages was allowed, Sutherland J. held that, "[a]s damages are payable to the plaintiff the issue of want of reasonable mitigation arises".[40] Finding that the landlord failed to mitigate adequately, the court reduced damages by the corresponding amount.[41]

In *Canadian Medical Laboratories Ltd. v. Stabile*,[42] the Ontario Court of Appeal had occasion to comment on whether a sale could be mitigation of loss of a lease. Carthy J.A. stated that it could be. Declining to disturb the trial judge's finding that the tenant proved a failure to mitigate in respect of periods after the termination of the lease during which time efforts were directed solely to a sale of the property, Carthy J.A said that it was "fair to conclude that the ultimate leasing opportunity was postponed by an equivalent period of time". Carthy J.A went on to state:

> It is my view that in appropriate circumstances a sale could be mitigation for loss of a tenant, and in those circumstances efforts to sell could be considered as satisfying the duty to mitigate. If an owner cannot afford to hold the building without a tenant, a sale may be the only alternative, and the sale price may reflect the loss when compared to a valuation assuming a tenancy. . . . However, where the basis for assessment of damages put forward by the owners is the loss of rentals, there can be no pretence of mitigation of rental loss if efforts were not directed to seeking tenants.[43]

In the result, damages were reduced by the amount corresponding to the postponement period.

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(4th) 375, 83 B.C.L.R. (2d) 254 (B.C.C.A.). See also *607190 Ontario Inc. v. First Consolidated Holdings Corp.,* (1992), 60 O.A.C. 285, 26 R.P.R. (2d) 298 (Ont. (Div.Ct.)); and *First Place Tower Inc. v. Borneo Gold Corp.*, [2000] O.J. No. 4294 (QL), 101 A.C.W.S. (3d) 152 (Ont.S.C.J.), at paras. 18-21.

39 (2000), 37 R.P.R. (3d) 283, 101 A.C.W.S. (3d) 1179 (Ont. S.C.J.), affd [2002] O.J. No. 4079 (QL), 116 A.C.W.S. (3d) 581 (Ont. C.A.), leave to appeal to S.C.C. refused [2003] 1 S.C.R. xiii.

40 *Ibid.*, at para. 106 (S.C.J.).

41 Damages were similarly reduced on the basis of a failure to mitigate in *Griffin v. Cedar Lodge Society* , [2002] B.C.J. No. 1539 (QL), 2002 BCSC 507 (B.C.S.C.), at para. 168, in which four months was allowed for repairing and re-renting the premises; and *Adanac Realty, Ltd. v. Humpty's Egg Place Ltd.* (1991), 113 A.R. 215, 15 R.P.R. (2d) 77 (Alta. Q.B.). An interesting decision in this regard is *Falwyn Investors Group Ltd. v. GPM Real Property (6) Ltd.* (1998), 22 R.P.R. (3d) 1, 84 A.C.W.S. (3d) 567 (Ont. Ct. (Gen. Div.)), at para. 50, affd [2000] O.J. No. 2877 (QL), 103 A.C.W.S. (3d) 402 (Ont. C.A.), in which it was held that, even though the replacement lease was for a shorter term than the original lease, the landlord was entitled to recover only up to the end of the new lease term because the new tenant was paying a higher rent and the rental market was strong.

42 (1997), 98 O.A.C. 3, 7 R.P.R. (3d) 170, 69 A.C.W.S. (3d) 367 (Ont. C.A.)

43 *Ibid.*, at para. 34.

Damages have also been reduced based on *anticipated* mitigation. For example, in *Grant Park Shopping Centre v. San Francisco Gifts Ltd.*,[44] where the possibility existed that a new tenant might move into the premises abandoned by the defendant tenant, and that this such replacement tenant would be obtained in consequence of the defendant's breach and in the ordinary course of business, damages were reduced based on the probability of such mitigation actually occurring.

As this case indicates, in order for damages to be reduced by the loss avoided by mitigation, the alleged avoided loss must have been a consequence of the breach. This principle was affirmed by the Supreme Court of Canada in the context of landlord-tenant law in *Apeco of Canada, Ltd. v. Windmill Place*.[45] In that case, the tenant under an agreement to lease repudiated the agreement (before taking possession) and the landlord sued for damages representing rent which the tenant would have paid under the agreement. The landlord had ultimately leased the premises that were the subject-matter of the agreement to another party at a time when the building was more than half empty, and the issue arose as to whether the rental under that lease should be deducted from damages. Ritchie J., writing for the Court, found that the new lease could have been "concluded even if the [tenant] had not breached the original agreement and that it was an independent transaction which in no way arose out of the consequences of the breach by the [tenant]".[46] Therefore, Ritchie J. held, the rental received from the new tenant was not to be deducted as mitigation of the damage suffered by the landlord.[47]

*Apeco* was applied in *759418 Ontario Inc. v. 690352 Ontario Ltd.*,[48] in which the tenant leased a unit in a building containing a total of eight rental units. Only three of the units were occupied during the relevant period. After the defendant tenant abandoned the leased unit, another tenant, United Way, moved into that unit. However, the plaintiff's evidence was that, had the defendant remained in the unit, the plaintiff would have rented one of the other vacant units to United Way. Kovacz J. held that the United Way lease did not count toward mitigation, that is, that damages should not be reduced by the rents collected under that lease. Kovacz J. reasoned:

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44 [2004] M.J. No. 176, 2004 MBQB 109, 130 A.C.W.S. (3d) 1205 (Q.B.) , at paras. 82-86. See also *Canadian Medical Laboratories Ltd. v. Stabile*, *ibid.*, at para. 40, in which Carthy J. stated that under the fourth alternative in *Highway Properties*, damages would be assessed based on a projection of likely net rental recovery after "expected mitigation".

45 [1978] 2 S.C.R. 385, 82 D.L.R. (3d) 1 [*Apeco*].

46 *Ibid.*, at p. 3.

47 However, agreeing with the lower court, Ritchie J. held (at p. 4) that some consideration should be given to the hope that the landlord's loss may eventually be mitigated, and reduced the damages on that basis.

48 (1992), 23 R.P.R. (2d) 16, 32 A.C.W.S. (3d) 983, supplementary reasons 34 A.C.W.S. (3d) 577 (Ont. Ct. (Gen. Div.)).

> . . . I am satisfied that the "United Way" lease, entered into by the plaintiff when its building was about half empty, was not a transaction arising out of the consequences of the defendant's breach. On that basis I cannot take into account the lease of the demised premises to "United Way" in mitigation of damages, because that lease to "United Way" did not arise "out of the consequences of the breach". . . of the defendant. The "United Way" lease arose, because the plaintiff's building was substantially vacant, not because of the breach of the defendant.[49]

To summarize, no duty to mitigate arises if the landlord chooses to insist upon performance under the terms of the lease on the basis that the lease continues to subsist. However, under the fourth option in *Highway Properties*, damages will be calculated in accordance with the ordinary rules governing damages for breach of contract, and accordingly, the duty to mitigate will arise. This means that, if the landlord fails to mitigate, then the amount corresponding to reasonable mitigation will be deducted from damages. In addition, if there is a possibility of a replacement tenant, the avoided loss will be calculated based on the probability of that possibility being realized. However, the defendant will not have the benefit of the loss allegedly avoided in mitigation if the loss "avoided" was not a result of the defendant's breach.

## LANDLORD'S ABILITY TO TERMINATE THE LEASE IN THE ABSENCE OF TENANT'S BREACH

*Highway Properties* resulted in the law of commercial lease remedies becoming a combination of property and contract law, in that:

- the decision retained the three *Goldhar* remedies based on the traditional conception of the lease as property;
- at the same time, the decision added a fourth remedy, based on the principles of remedies for breach of contract;
- however, a notice requirement, which would not exist if the lease were an ordinary contract, was attached to the fourth remedy.[50]

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[49] *Ibid.*, at para. 24. A different finding was made in *365 Bay New Holdings Ltd. v. McQuillan Life Insurance Agencies Ltd.* (2007), 55 R.P.R. (4th) 117, 155 A.C.W.S. (3d) 683 (Ont. S.C.J.), revd on other grounds 233 O.A.C. 299, 64 R.P.R. (4th) 44 (Ont. C.A.), involving the repudiation by the tenant of an executory lease. Perell J. distinguished *Apeco* on the basis that the leased premises in the case before him were unique and non-fungible, and that, therefore, even though the landlord had other vacant premises, the subsequent lease of the premises in issue did constitute mitigation. This point was not addressed by the Court of Appeal.

[50] For an in-depth "hybridization" analysis of *Highway Properties*, see J. Brock & J. Phillips, "The Commercial Lease: Property or Contract?" (2000), 38 Alta. L. Rev. 989 [Brock & Phillips]; and Lem, "The Landlord's Duty to Mitigate upon a Tenant's Repudiation of a Commercial Lease: A Commentary on *607190 Ontario Inc. v. First Consolidated Holdings Corp.*" (1993), 30 R.P.R. (2d) 33, at p. 50.

For this reason, it has been observed that *Highway Properties* can be interpreted in different ways: under a broad reading, a commercial lease is primarily, or even purely, a contract; under a narrow reading, *Highway Properties* modified the traditional law regarding leases only to the extent of adding a fourth remedy arising upon the tenant's repudiation, and no more.[51] There are also other interpretations of the case between these two opposing views — for example, that a lease "is a conveyance in the sense that it operates to create an interest in land, but is subject to all principles of contractual law, insofar as those contractual principles do not conflict with the basic interest in land".[52]

There is some suggestion in the cases that the broad reading has sometimes been adopted. For example, in *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.*,[53] the British Columbia Court of Appeal stated: "[r]ather than construe [the leases in issue] as demises of real property, I would prefer to construe them as commercial contracts".[54] However, given that Laskin J. left undisturbed the three traditional remedies in *Goldhar*, it would seem difficult to support such a view.[55] The better view seems to be that *Highway Properties* brought about what has been called "a hybridization importing a mix of contract rules into what is still a property-dominated paradigm",[56] or along the same lines, "a supplementation (rather than a displacement) of property law with contract".[57] This view appears consistent with the general tenor of the case law.

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51 These two interpretations were discussed in N.H. Schipper, "Damages: Implications of the Kelly, Douglas Case" in H.M. Haber, ed., *Shopping Centre Leases* (Toronto: Canada Law Book Ltd., 1976) 655, at p. 658 [Schipper].

52 G. Sustrik, "Highway Properties — Look Both Ways before Crossing" (1986), 24 Alta. L. Rev. 477, at p. 481 [Sustrik]. As Sustrik's thoughtful discussion shows, the debate regarding the interpretation of *Highway Properties* in this regard results from the fact that in *Highway Properties* Laskin J. did not directly deal with the issue of precisely how a lease should be characterized, leaving the subsequent courts to "work backwards" to determine that issue based on Laskin J.'s conclusion regarding damages.

53 (1989), 59 D.L.R. (4th) 1, [1989] 5 W.W.R. 481 (B.C.C.A.) [*Lehndorff*].

54 Similarly, in *491506 B.C. Ltd. v. McElmoyle* (2004), 5 C.B.R. (5th) 145, 22 R.P.R. (4th) 237 (B.C.S.C.), at para. 41, the court said: "*Highway Properties*, in my view, is a decision of general application that decided that contract law principles and not property law concepts apply in situations where breaches of leases are alleged".

55 Similar observations are made in Lem, *supra*, footnote 50, at p. 36; and Schipper, *supra*, footnote 51.

56 Brock & Phillips, *supra*, footnote 50, at para. 19. Lem, *supra*, footnote 50, at p. 36, similarly states that *Highway Properties* was "much more a supplementation (rather than a displacement) of property law with contract".

57 Lem, *supra*, footnote 50, at p. 36. See also P.M. Perell, "Landlords' Rights to End a Commercial Lease and Claim Damages" (1993), 2 Nat'l Real P. L. Rev. 211, at p. 215, in which the author notes that *Highway Properties* did not eliminate the concepts of forfeiture, surrender, or surrender by operation of law; rather, the court stopped the "dogmatic application of surrender irrespective of intention" (*Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710, at p. 718).

If this assessment is correct, other aspects of the traditional law regarding a lease as property remain generally valid. One such aspect concerns the fact that the landlord cannot terminate the lease in the absence of the tenant's repudiation or breach of a condition (as opposed to a mere covenant) in the lease.[58] However, the validity of this law may now be in some doubt: in *Evergreen Buildings Ltd. v. IBI Leaseholds Ltd.*,[59] the British Columbia Court of Appeal appears to have held that a landlord's breach of lease by unjustified re-entry could, in appropriate circumstances, be effective to terminate the lease, leaving the innocent tenant solely with a remedy in damages for breach of lease. The facts of the case were as follows — Evergreen owned a 10-storey office building in which IBI, an architectural design firm, was a tenant occupying one of the floors. IBI held a lease for a term of five years beginning in 2003, with a right of renewal for a further five years; the lease contained no "demolition" clause or any other clause providing for a right of re-entry while IBI was not in breach of the lease. In 2004, for economic reasons, Evergreen decided to demolish the building and replace it with a high-rise residential tower, and informed the tenant of its decision. IBI, which was not in breach of the lease, asserted its right to remain in possession. In 2005, Evergreen commenced proceedings for re-entry and sought a declaration that damages were the appropriate remedy. IBI then applied for an interim injunction to prevent Evergreen from breaching the landlord's covenant of quiet enjoyment.

At first instance, Evergreen submitted that its breach of the lease was an "efficient breach" having the purpose of pursuing a more economical business plan, that IBI was entitled only to damages, and that, accordingly, the interim injunction sought should not be granted. Burnyeat J. granted IBI's application, finding that the test for an interim injunction in *RJR-Macdonald Inc. v. Canada (Attorney General)*,[60] was met. However, the interim injunction expired shortly after the decision, and the parties went back to court, this time before Kelleher J., who ruled that the interim injunction granted by Burnyeat J. should be extended until the date of decision in the matter. Dealing with Evergreen's argument that a lease is a contract, Kelleher J. said:

> The difficulty faced by the plaintiff in the present case is that the converse is also true. The relationship between Evergreen and IBI is not only a contract. It is also a lease. A lease is a conveyance or demise of real property for a determinate time. What the plaintiff seeks to do here is to

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58 See B. Ziff, *Principles of Property Law*, 4th ed. (Toronto: Carswell, 2006), at p. 282.

59 (2005), 262 D.L.R. (4th) 169, [2006] 3 W.W.R. 616 (B.C.C.A.), leave to appeal granted [2006] 1 S.C.R. x, but appeal discontinued [2006] S.C.C.A. No. 43 (QL) [*Evergreen*].

60 [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

> derogate from the grant of property and pay damages. This is stated to be based on the theory of efficient breach.[61]

Kelleher J. went on to hold that, as the execution of the lease conveyed an interest in land, and the plaintiff had no right to re-enter and re-take possession, the theory of efficient breach did not operate to enable Evergreen to take back the leasehold interest in the land granted to IBI.[62]

On appeal to the British Columbia Court of Appeal, Kelleher J.'s decision was reversed. Prowse J.A., for the court, noted that in *Lehndorff*, the court expressed its preference for describing commercial leases as commercial contracts,[63] and went on to reason as follows:

> Evergreen seeks to support what it refers to as an "incremental" movement in the law in this case by reference to a similar movement in relation to the remedies available for breach of a contract for the purchase and sale of land where, historically, the almost invariable remedy for breach of contract by the vendor was specific performance in favour of the innocent purchaser. In that regard, Evergreen refers to the decision of the Supreme Court of Canada in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415. At para. 21 of that decision, Mr. Justice Sopinka, speaking for the court, stated:
>
> > It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value. In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach, V.C., stated (at p. 240):
> >
> > > Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money

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61 *Evergreen Buildings Ltd. v. IBI Leaseholds Ltd.* (2005), 48 R.P.R. (4th) 308, 2005 BCSC 1907 (B.C.S.C.), at para. 54.

62 *Ibid.*, at para. 59.

63 *Supra*, footnote 59, at para. 26 (B.C.C.A.). Prowse J.A. also noted at para. 29 that *Evergreen* had been unable to point to any authority standing for the proposition that, where the tenant is not in breach of the lease, a landlord under a commercial lease can unilaterally purport to terminate its lease and re-enter in the absence of the lease providing for a right of re-entry, subject only to liability for damages. In the appeal, Evergreen abandoned its argument based on "efficient breach".

> value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.
>
> In this case, after reviewing the relevant law, the chambers judge appears to have been of the view that he had to choose between remedies related to the lease as a demise and remedies related to the lease as a contract. In effect, he treated these remedies as if they existed in water-tight compartments. He opted in favour of viewing the lease as a demise and concluded that because Evergreen had no right of re-entry it was unnecessary to discuss whether damages were an adequate remedy. . . . In the result, he declined to grant a declaration that damages, rather than specific performance, would be an effective remedy for the stipulated breach of the lease for, in his view, the question of damages never arose.
>
> In my view, before determining the appropriate remedy, the chambers judge should have considered the equities between the parties, including any factors relating to the "uniqueness" of the property demised and the relative hardship, if any, of holding the landlord to the strict terms of the lease. There was an abundance of evidence before him in that regard. What he did instead was to reject damages out of hand and to impose injunctive relief tantamount to an award of specific performance. In adopting that approach, he erred.[64]

In the result, the court set aside Kelleher J.'s decision, reinstated the interim injunction pending settlement between the parties or further order of the court, and remitted the issue of remedy to the lower court. The tenant successfully sought leave to appeal this decision to the Supreme Court of Canada, but subsequently discontinued the appeal.

It would seem that the result in *Evergreen* is essentially that, unless the tenant can establish that the leased premises satisfy the requirements for specific performance of a contract (such as the uniqueness of the subject-matter of the contract), a landlord will be able to terminate the lease unilaterally in the absence of any tenant default subject only to liability to the tenant for damages. In this sense, at least in British Columbia, *Evergreen* appears to have made new law, bringing the commercial lease closer to a contract than it was before the decision.[65] As a result, until other appellate courts or the Supreme Court of Canada rule otherwise, parties to a commercial lease (in British Columbia at least), and especially the

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64 *Ibid.*, at paras. 30-32.

65 As of the end of 2007, *Evergreen* has not been considered by any court outside British Columbia. It was referred to by the British Columbia Supreme Court in two cases, including *472448 B.C. Ltd. v. 343554 B.C. Ltd.* (2006), 150 A.C.W.S. (3d) 1108, 2006 BCSC 1075, in which the plaintiff tenant applied for an interlocutory injunction to restrain the defendant landlord from continuing with its renovations to the building in which the leased premises were situated. The application was dismissed on the basis, *inter alia*, that any loss sustained by the plaintiff "can be adequately compensated for by an award of damages" (at para. 30).

landlord, may have more freedom than they did before *Evergreen* in dealing with the lease and with each other. It remains to be seen whether *Evergreen* is an anomalous decision or a bellwether for future developments in which leases will be generally regarded as contracts rather than property.

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## APPENDIX

### 1. Letter reserving landlord's various remedies following tenant abandonment, without immediate election of remedy

[date]

By • [*insert method of delivery specified in notice provision of Lease plus any other methods of speedy or assured communication such as fax, email etc.*]

[*insert tenant name and address and copy letter to indemnifier/guarantor if there is one*]

**Subject: Lease dated • from • ("Landlord") to • ("Tenant") of [***insert description/address of leased premises***]**

We are solicitors for the Landlord in respect of the above-noted Lease which does not expire until [date].

We understand that on [date], without prior notification to or the consent of the Landlord, you closed your [store/office, etc.] and abandoned the leased premises.

[At the time of your abandonment, there were rent arrears owing for the period from • to in the amount of $•, as set out in the enclosed statement of account]. [*if Lease so provides add*: By reason of your abandonment, three months' accelerated rent immediately became due and payable and is recoverable as rent arrears pursuant to paragraph • of the Lease, which amount is also set out on the enclosed statement of account].

By reason of [your failure to pay rent when due and] your abandonment, you are in default of your obligations under the Lease. Unless your defaults are remedied forthwith, the Landlord will exercise the remedies available to it under the Lease or otherwise at law.

You should contact the Landlord at • to make arrangements to remedy your defaults including payment of the rent arrears and accelerated rent now due and owing.

The Landlord expressly reserves all of its rights and remedies in consequence of your abandonment and other defaults.

This notice is being copied to [name of indemnifier or guarantor] as [indemnifier/guarantor]. The Landlord is not bound to exercise or exhaust its remedies against the Tenant or any other persons before exercising its rights against the [indemnifier/guarantor].

Govern yourself accordingly.

Yours truly,

**2. Letter exercising the fourth *Highway Properties* remedy following tenant abandonment**

[date]

By • [*insert method of delivery specified in notice provision in Lease plus any other methods of speedy or assured communication such as fax, email, etc.*]

[*insert tenant name and address and copy letter to indemnifier/guarantor if there is one*]

**Subject: Lease dated • from • ("Landlord") to • ("Tenant") of [***insert description/address of leased premises***]**

We are solicitors for the Landlord in respect of the above-noted Lease which does not expire until [date].

We understand that on [date], without prior notification to or the consent of the Landlord, you closed your [store/office, etc.] and abandoned the leased premises.

[At the time of your abandonment, there were rent arrears owing for the period from • to • in the amount of $, as set out in the enclosed statement of account]. [*if Lease so provides add*: By reason of your abandonment, three months' accelerated rent immediately became due and payable and is recoverable as rent arrears pursuant to clause • of the Lease, which amount is also set out on the enclosed statement of account].

In consequence of your abandonment, and in accordance with its rights under clause • of the Lease and at law, the Landlord has re-entered the leased premises and is exercising its right to terminate the Lease effective [date]. You remain liable for all rent arrears and accelerated rent owing to the date of termination as set out in the enclosed statement of account, together with damages for loss of the benefit of the Lease over its remaining unexpired term, including loss of future rent and additional rent for the

unexpired balance of the Lease term and all costs, fees and expenses incurred by or on behalf of the Landlord in consequence of your abandonment, including legal and other professional fees.

The Landlord reserves all of the additional rights and remedies to which it may be entitled under the Lease or at law.

You should contact the Landlord at ●, to make immediate arrangements to retrieve your belongings left behind at the leased premises and satisfy your liability, failing which the Landlord will exercise its further legal remedies without further notice to you and the Landlord will assume that all property remaining at the leased premises has been abandoned by you to be dealt with as the Landlord sees fit.

[*If there is an indemnifier or guarantor, add the following:*]

This notice is being copied to [name of indemnifier or guarantor] as [indemnifier/guarantor]. The Landlord is not bound to exercise or exhaust its remedies against the Tenant or any other persons before exercising its rights against the [indemnifier/guarantor].

Govern yourself accordingly.

Yours truly,