Michaelmas Term
[2024] UKPC 40
Privy Council Appeal No 0109 of 2022

JUDGMENT

Ramsbury Properties Ltd (Appellant) *v* Ocean View Construction Ltd (Respondent) (St Christopher and Nevis)

From the Eastern Caribbean Court of Appeal (St Christopher and Nevis)

before

Lord Sales
Lord Leggatt
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
17 December 2024

Heard on 30 October 2024

Appellant
Maria Angela Cozier
Emmanuel Amadi
Khaila Cozier
(Instructed by McQueens Solicitors LLP)

Respondent
Leonora Walwyn SC
Hazelyn Ross
(Instructed by Walwyn Law (Nevis))

LORD BURROWS:

1. Introduction

1. This appeal raises two points of law about a lease. There is no suggestion that the law in St Christopher and Nevis differs on these two points from the law of England and Wales. The first, and short, point is the proper interpretation of a provision in the lease that the landlord was providing "sleeping accommodation only". The second is whether there was a repudiatory breach by the landlord entitling the tenant to terminate the lease. It used to be thought that the principles applicable to termination of a contract for breach did not apply to leases. But it is now generally accepted that that is not the law.

2. The facts in outline

2. The claimant and appellant is Ramsbury Properties Ltd ("Ramsbury"), a company incorporated in St Christopher and Nevis. The defendant and respondent is Ocean View Construction Ltd ("Ocean View"), a company incorporated in Nevis.

3. In May 2009, Ocean View, through its director Jesus Hinojosa, approached Ramsbury, represented by its majority shareholder, Dwight Cozier, with a view to leasing accommodation from Ramsbury. Ocean View sought accommodation for 250 of its workers, who were coming from Mexico, during their anticipated seven-month period carrying out repairs to the Four Seasons Hotel on Nevis. That hotel had been damaged by Hurricane Omar in 2008. Ocean View was the sub-contractor of DCK International SKN Ltd, which was the head-contractor for the carrying out of the repairs to the hotel.

4. On 18 June 2009, Mr Hinojosa and Andrew Carter, on behalf of Ocean View and Ramsbury respectively, signed a seven-month lease to provide accommodation for Ocean View's 250 Mexican workers. The lease was of a building, owned by Ramsbury at Pinney's Commercial Site, which Ramsbury modified in order to provide accommodation. The lease expressly excluded space in the building already rented by a third party, Leewards Media Group Ltd. The building was situated about 15 minutes' walk away from the Four Seasons Hotel site. The monthly rent payable was US$56,000.

5. The workers went into occupation of the premises on or about 20 June 2009. But on 13 July 2009, the solicitors for Ocean View informed Ramsbury by letter that it would be terminating the lease on 17 July 2009 and vacating the premises for breach by Ramsbury of the covenant of quiet enjoyment of the property, with particular reference to the workers being forbidden from eating on the premises, there being no provision for drying clothing, and the air conditioning being inadequate. The solicitor for Ramsbury

responded by letter denying breach of the agreement and warning that, if Ocean View went ahead and terminated the lease, it would issue legal proceedings claiming damages in the sum of US$280,000 representing the outstanding rent for the remainder of the seven-month period. Ocean View vacated the premises, ie their Mexican workers moved out, on 17 July 2009. Ocean View had been able quickly to find alternative accommodation for their workers at a lower monthly rent.

6. Ramsbury commenced legal proceedings against Ocean View on 29 July 2009 claiming specific performance and damages for breach of contract. Ocean View responded with a defence and a counterclaim seeking a refund of the deposit of US$56,000 it had paid to Ramsbury.

7. At first instance, in the High Court of Justice of St Christopher and Nevis (Claim No NEVHCV2009/0111), Redhead J (Ag) found that Ramsbury was in repudiatory breach so that Ocean View had been entitled to terminate the lease. Ramsbury was therefore not entitled to specific performance or damages and Ocean View was entitled to a refund of US$56,000. Ramsbury's appeal to the Eastern Caribbean Court of Appeal (St Christopher and Nevis) (SKBHCVAP2011/0020) was dismissed. The judgment was given by Baptiste JA, with whom Blenman JA and Michel JA agreed. Ramsbury now appeals as of right to the Judicial Committee of the Privy Council.

3. The lease

8. Given the brevity of its wording, it is helpful to set out in full the recital and all the terms of the lease that was made on 18 June 2009 between Ramsbury, the lessor, and Ocean View, the lessee.

> "WHEREAS:
>
> A. The Lessor is the owner of a property situate at Pinney's Commercial Site, Charlestown, Nevis.
>
> B. The Lessee is desirous of leasing the building situated on the property excluding the space rented by the Leewards Media Group Ltd. for the purpose of providing sleeping accommodation only for 250 workers for a period of seven (7) months.
>
> WHEREBY IT IS AGREED AS FOLLOWS:

[1.] The Lessor shall grant and the Lessee shall accept a lease of approximately 8000 square feet of space within the building situated on the property for the purpose of sleeping accommodation for 250 workers for a term of Seven (7) months beginning the 18th day of June 2009 at a consideration of $56,000.00 per month.

PROVIDED ALWAYS that the Lessee continues to enjoy the status conferred by its sub-contracting partner and pursuant to the terms and conditions governing the Lessee's ability to do business on the Island of Nevis, there shall be 250 workers arriving for sleeping accommodations only starting from the 20th June, 2009.

[2.] The consideration for the period of the Seven (7) month lease term hereby granted shall be payable monthly in advance, that is to say on the 18th day of each month with the full payment for the first month and the full payment for the final month due and payable on the day of the commencement of this lease term as a security deposit and shall be non-refundable after the commencement of the lease term.

[3.] The Lessor will at the written request of the Lessee made six weeks before the expiration of the term hereby granted and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Lessee herein contained, at the expense of the Lessee, grant to him a lease of the demised premises for a further term of Seven months from the expiration of the term hereby granted containing the like covenants and provisions as are herein contained (but with the exception of the present agreement for renewal) and at a rent to be agreed.

[4.] THE LESSEE HEREBY COVENANTS AS FOLLOWS:

(a) Not to make any alterations in or additions to the premises occupied without first obtaining permission from the Lessor in writing;

(b) To dispose of garbage, and keep the premises occupied in a clean and sanitary manner;

(c) To permit an agent of the Lessor to enter and view the condition of the premises, with reasonable notice to the Lessee in advance;

(d) To pay for electricity and water if consumed on the demised premises;

(e) To pay all bills incurred for telephone services supplied to the demised premises;

(f) Not to assign or underlet the whole or any part of the demised premises;

(g) Not to cause a nuisance on the premises and to abate any such nuisance within two (2) working days of receipt of notice requiring him to do so by the Lessor.

5. THE LESSOR HEREBY COVENANTS AS FOLLOWS:

(a) For quiet enjoyment of the space occupied by the Lessee;

(b) To provide extra accommodation space at the Pinney's Beach Resort or any other appropriate premises should the need arise.

6. PROVIDED ALWAYS AND IT IS HEREBY AGREED AS FOLLOWS:

(a) The Lessor may re-enter the demised premises on non-payment of any rent for five (5) working days or on breach of any covenant.

(b) The Lessor shall not be responsible to the Lessee or the Lessee's licensees, servants, agents or other person in the demised premises or calling upon the Lessee for any accident happening or injury suffered or damage to or loss of any chattel or property sustained on the demised premises.

(c) The Lessor shall not be responsible to the Lessee or the Lessee's licensees, servants or agents for any damage or loss of any chattel or property occurring on the demised premises.

(d) The Lessee has the right to install a security system within the demised premises for the protection of his goods. The cost of such installation shall be borne by the Lessee."

4. The judgments of the courts below

9. Although they dealt with some other matters that are not relevant to this appeal, it is helpful to consider briefly what the lower courts decided, and their reasoning, on the two points of law with which we are concerned.

(1) Redhead J (Ag)

10. It is not in dispute that Redhead J (Ag) made a mistake in his analysis of the "sleeping accommodation only" point. He incorrectly said that it was only the recital that referred to "sleeping accommodation only" and that in the main body of the lease, which he properly treated as the important part, the wording was "sleeping accommodation". That is incorrect because, while the first part of the first main clause referred to "sleeping accommodation", the wording of the proviso that followed it (as well as the recital) was "sleeping accommodation(s) only".

11. Redhead J (Ag) reasoned (at para 85) that forbidding the workers from eating and doing their laundry on the premises constituted a breach of the express term (clause 5(a)) that the tenant should have quiet enjoyment of the property. He also said that, in any event, there was an implied term that the workers should be able to eat on the premises (para 84).

12. Redhead J (Ag) went on to reason that the breach of the term as to quiet enjoyment and the breach of the implied term to allow the workers to eat on the premises constituted a repudiatory breach of the lease agreement by Ramsbury (para 87). It followed (after acceptance of the repudiatory breach by Ocean View) that Ramsbury was not entitled to the relief sought and Ocean View was entitled to a refund of US$56,000 which it had paid to Ramsbury as a deposit.

(2) Court of Appeal

13. In respect of the "sleeping accommodation only" point, Baptiste JA correctly observed that the word "only" appeared in the proviso as well as in the recital. But in upholding Redhead J (Ag), he considered that the main operative part of the lease did not contain the word "only" and that it was misconceived for Ramsbury to lay stress on the word "only" (para 34).

14. Redhead J had been correct to imply a term that the workers should be able to eat on the premises – and Baptiste JA extended this to being able to do laundry there – because such a term was necessary for "practical coherence" (ie business efficacy) and/or was so obvious that it went without saying (para 36).

15. Baptiste JA went on to decide that Ramsbury's breach of the implied terms was a repudiatory breach. This was because it deprived Ocean View of a substantial part of the benefit of the lease to which it was entitled. It is helpful to set out in full why Baptiste JA reasoned that there was a repudiatory breach on these facts. He said at para 48:

> "This was a lease to provide accommodation for 250 workers for a period of seven months. It would be expected that as part of everyday living, the workers would be able to do the basics of eating and doing their laundry on the premises. At the time of repudiation, the workers were denied the ability to eat and launder on the premises. Ramsbury's position was that the lease provided for accommodation only, [and] thus excluded eating and doing laundry. There was no indication that Ramsbury would resile from that position, as clearly illustrated in its response to the letter from Ocean View's solicitor. As Redhead J [Ag] stated, and I agree, eating is such a vital aspect of one's existence, that to insist that the workers were not allowed to eat on the demised premises constituted a fundamental departure from an implied term of the lease. In my judgment, Ocean View was deprived of a substantial part of the benefit of the lease to which it was entitled. It would be unfair in the circumstances to hold it to the lease and leave it to a remedy in damages. Damages would not be an adequate remedy taking into account the nature and circumstances of the breach."

16. Baptiste JA also made clear (at para 49) that Ocean View could not be faulted by acting quickly in terminating the lease. It had to make a prompt decision lest it be regarded as affirming the contract.

5. The first point of law: the proper interpretation of "sleeping accommodation only"

17. In her oral submissions to the Board, counsel for Ramsbury, Maria Angela Cozier, chose to spend her time seeking to establish that the lease was for "sleeping accommodation only" rather than for "sleeping accommodation". In the Board's view that is not the critical question. Even assuming that Ms Cozier was correct, and that the lease was for "sleeping accommodation only", the important question is, what is the correct interpretation of that term?

18. In the Board's view, applying the well-established objective and contextual modern approach to interpreting a contract (including a lease), the words "sleeping accommodation only" do not mean that the workers were forbidden from consuming meals or doing their laundry on the premises. On the contrary, "sleeping accommodation only" included being permitted to carry out the basics of life such as eating and doing laundry just as much as being able to wash oneself and to use a toilet. Accordingly, and as the Board will return to (see para 28 below), it was unnecessary for Ocean View to rely on there being implied terms allowing the workers to eat meals and to do their laundry on the premises. Nevertheless, the Board accepts that, if one were to use an implied term analysis as Baptiste JA did, allowing the workers to eat meals and do their laundry on the premises can be regarded as implied terms because they satisfy the standard business efficacy and/or obviousness tests. Additionally, one might argue that being able to launder bedding was essential to comply with the tenant's express covenant in the lease (clause 4(b)) to "keep the premises occupied in a clean and sanitary manner".

19. Given the factual matrix or material background, where the parties had previously been discussing the provision by Ramsbury of meals and cooking facilities along with accommodation, it is tolerably clear that what was objectively meant by "sleeping accommodation only" was that, under the agreement which was eventually entered into, Ramsbury was not itself going to provide meals or cooking facilities.

6. The second point of law: was there a repudiatory breach by Ramsbury entitling Ocean View to terminate the lease?

(1) Further factual details relevant to analysing the breach

20. Ramsbury, through its representative Mr Cozier, had forbidden the workers to eat meals and to do their laundry on the premises. That prohibition was conveyed in more than one way. Redhead J (Ag) expressly accepted Mr Hinojosa's evidence as to the contents of a phone call from Mr Cozier to Mr Hinojosa on or about 26 June 2009 in which that prohibition was conveyed. But it is clear from two other witness statements

(not adverted to by Redhead J (Ag) but certainly not rejected by him) that Mr Cozier's relevant conduct went beyond that phone call.

21. According to Mr Hinojosa's witness statement:

> "I received a call from Mr Cozier on or about the 26th of June 2009 forbidding the workers from hanging their laundry outside, and further to forbid the workers from consuming any food on the rented premises. … I was most shocked and confused when Mr Cozier told me that the … workers could not consume any food at the camp site. I was even more appalled when Mr Cozier told me in his phone call that the rented premises was a commercial building and that the workers were not supposed to perform those activities, ie eating and doing laundry, within the housing facility. Upon hearing this, I replied that if that was the case then why did he rent it to my Company as a housing facility… He got angry and began shouting on the phone.
>
> In one of my weekly communications with one of my Company supervisors, Mr Jose Green, who was in charge of running the camp, it was reported … that Mr Cozier went to the camp site at Pinney's Industrial Site and relayed the same directives to Jose Green and the camp site security personnel.
>
> I began to get reports from my superintendents in Nevis that the workers were complaining about the lack of adequate air condition units, the lack of showers and toilets, plus the inability to consume food on the premises and wash clothes in the camp. As a result of this some of the workers requested their airline tickets back to Mexico. The defendant company could not risk this, since the mass departure of the workers could cost the company not only the airline tickets but also maybe the job at Four Seasons since the defendant company had a tight schedule and could be hurt with fines of more than US$300,000 if the work was not completed."

22. The witness statement of Jose Green, who said that he used to visit the premises every day, included the following:

> "We … used to bring the breakfast to the camp site for the guys so that they could have a hot meal before work.

> However, Mr Cozier told me that the place was not for eating … because his premise[s] at Pinneys Industrial Site was not a hotel or restaurant, it is a business place. Thus, no eating at all was permitted on the premises. Because of this, I had to bring the breakfast to the job site at the Four Seasons Resort Estate. This was very disturbing to the workers who were upset and very vocal and disgruntled. …
>
> [T]he workers complained to me that it was unfair that they were forbidden to eat their meals where they were living, and further that the building was too hot despite the air condition units and fans. The workers threatened to go back home to Mexico if conditions on the site did not improve.
>
> In or about late June or early July 2009, Mr Cozier also informed me that he did not want any washing and hanging of clothes on the lines on his premises. Our workmen were left with no alternative place to hang their clothing or do their laundry.
>
> Given the unbearable conditions in the camp and Mr Cozier's refusal to allow our workers to have their meals and do their laundry at the camp site, where they lived, Ocean View Construction was left with no choice but to find alternate living accommodation."

23. Hector Lopez-Alencaster was a superintendent employed by Ocean View. In his witness statement he said the following:

> "Soon after our Company workers moved onto the rented property and began to engage in their day to day living, which included eating their meals, and doing their laundry, I got reports from my second in command, Jose Green who had gotten directives from Mr Cozier. As a result of Mr Cozier's directives our workmen were not permitted to eat their meals or do their laundry on the premises. ... Mr Cozier['s] directives were communicated to Jesus [Hinojosa] in one of my weekly reports to him.
>
> I had a meeting with all the workers on the work site at [the Four Seasons Resort Estate] because I began to get complaints from the workers about the deplorable conditions at the camp,

> their inability to have meals at the camp and not being able to do their laundry. The general consensus among the workers was that they wanted to go back to Mexico if they still had to live at the Pinneys Industrial camp site. I was looking at about 60 workers who were about to walk off the job."

24. While Mr Cozier denied making the alleged phone call to Mr Hinojosa, Redhead J (Ag) throughout preferred the evidence of Mr Hinojosa to that of Mr Cozier and found as a fact that that phone call took place (see his judgment at paras 61 and 73). There is no justification for the Board to go behind the findings of fact made by Redhead J (Ag) and his preference for the evidence of Mr Hinojosa. Moreover, there was no evidence from Mr Cozier denying that he had issued the directives alleged by Mr Green and referred to by Mr Lopez-Alencaster.

25. It is clear from the above witness statements that Mr Cozier had not just told Mr Hinojosa in a single phone call that the workers were not allowed to consume their meals, or to do their laundry, on the premises. On the contrary, there had been directives to the same effect given to Mr Green by Mr Cozier at the premises. Moreover, those directives were taken seriously by Mr Green and Mr Lopez-Alencaster because the workers must have been informed that they could not eat their meals at the premises – and Mr Green had stopped bringing the breakfasts to the premises – and could not do their laundry at the premises. The workers must have been so informed in order for there to have been the complaints by the workers of their not being permitted to do those things.

(2) Breach of the lease agreement

26. It follows from what we have decided about the proper interpretation of "sleeping accommodation only" that Ramsbury was committing a breach of the lease agreement – whether one views this as a breach of the express covenant of quiet enjoyment or as a breach of terms implied by fact - by forbidding the workers from eating meals and doing their laundry on the premises. Moreover, there was nothing to indicate that the breach was temporary rather than one that would last for the duration of the lease.

27. Baptiste JA in the Court of Appeal focused on there being a breach of the terms implied by fact (whether by reason of business efficacy or obviousness) that the workers should be permitted to eat meals and to do their laundry at the premises. Redhead J (Ag) had also said that there was a breach of the express term of quiet enjoyment (clause 5(a)).

28. The Board's view is that nothing turns on whether one treats the breach as a breach of the express covenant of quiet enjoyment or as a breach of the terms implied by fact. Nevertheless, we consider that Baptiste JA's implied term analysis has the marginal advantage of focusing on specific aspects of what was covered by the lease, including what the Board considers was included within the covenant of quiet enjoyment. Therefore, in going on to consider repudiatory breach, we shall focus, as did Baptiste JA, on a breach of the implied terms that the workers should be permitted to eat meals and to do their laundry at the premises.

29. There were also issues about the air-conditioning being inadequate. But ultimately neither Redhead J (Ag) nor the Court of Appeal appeared to place any real weight on this factor. While the inadequacy of the air-conditioning was an additional problem, the Board considers that this can be put to one side in reaching its decision.

(3) The law on repudiatory breach of a contract

30. The implied terms of the workers being permitted to eat their meals and to do their laundry on the premises were innominate terms of the lease (ie they were neither conditions nor warranties). It follows that, in deciding whether there was a breach that was sufficiently serious to entitle Ocean View to terminate the lease (ie whether there was a repudiatory breach), the seminal case of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 ("*Hongkong Fir Shipping*") requires one to examine the seriousness of the consequences of the breach of those terms for Ocean View.

31. The test for the required degree of seriousness has been expressed in slightly different ways by different judges. In *Hongkong Fir Shipping*, Diplock LJ's formulation, at p 70, was that the breach must deprive the innocent party of "substantially the whole benefit which it was intended that he should obtain from the contract". In what is probably the more commonly applied test (see *Chitty on Contracts*, 35th ed (2023), para 28-043), Upjohn LJ, in *Hongkong Fir Shipping* at pp 63-64, spoke of whether the breach went "to the root of the contract". In *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 ("*Decro-Wall*") Buckley LJ said, at p 380, that the test was whether the (threatened) breach deprived the innocent party of "a substantial part of the benefit to which he is entitled under the contract." In *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* (*The Nanfri*) [1979] AC 757 at 779*,* Lord Wilberforce said the following:

> "The difference in expression between [the formulations of Diplock LJ and Buckley LJ] does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in

> other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract."

32. Two further points must be borne in mind. First, the burden of proving that the breach was a repudiatory breach lies with Ocean View. Secondly, the time for assessing whether the breach was repudiatory or not was at the time of Ocean View's termination, taking into account what had then happened and what was likely to happen: see *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377, especially at para 64.

(4) Does the law on repudiatory breach apply to a lease?

33. As flagged in para 1 above, it was at one time thought that the contractual law on repudiatory breach did not apply to leases (see, eg, *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, 324 ("*Total Oil*")). It would appear that the principal reason for this was that a lease is not just a contract but also creates a proprietary interest in land (a legal estate) conferring the right to exclusive possession. That reasoning was linked to the decision of the Court of Appeal in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1943] KB 493 that the contractual doctrine of frustration cannot apply to a lease. The House of Lords, on the further appeal in that case, was split 2-2 on that question (Lord Porter preferring to express no opinion): see [1945] AC 221. But in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 ("*Panalpina*"), the House of Lords (Lord Russell dissenting) departed from the *Cricklewood* case and held that, in exceptional circumstances, a lease can be frustrated albeit that there was no frustration on the facts.

34. This paved the way for a reconsideration of whether repudiatory breach can apply to leases. The turning point was a masterly judgment given in the Wood Green County Court by Stephen Sedley QC in *Hussein v Mehlman* [1992] 2 EGLR 87. In rejecting what had been said on the point in *Total Oil*, he referred not only to the importance of *Panalpina* but also to a line of nineteenth century authorities, which he set out in some detail, accepting that there could be a repudiatory breach of a lease. As a matter of principle, he forcefully reasoned that the proprietary aspect of a lease did not mean that the normal contractual principles on repudiatory breach were inapplicable. He recognised that care must be taken not to contradict express or statutory remedies conferred under the lease, in particular a landlord's right of forfeiture and the established limits on that right. But that was not a good reason for denying that, in principle, the contractual doctrine of termination following repudiatory breach is applicable to a lease. He went on to decide that, on the facts of the case before him, the tenant had been entitled to terminate the lease for the landlord's repudiatory breach comprising very serious failures to carry out its repairing obligations.

35. Subsequently the Court of Appeal in *Chartered Trust plc v Davies* [1997] 2 EGLR 83 assumed, without any discussion of the point, that the law on repudiatory breach applied to a lease. It upheld the decision at first instance that, in the circumstances, the breach of the landlord's implied covenant not to derogate from grant, by failing to restrain a nuisance by another tenant in a shopping mall, entitled the tenant to terminate the lease.

36. In *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1991] 1 EGLR 7, at p 12, Judge Weeks QC, sitting in the High Court, expressed himself as being content to follow *Hussein v Mehlman*. But on the facts he held that, applying *Hongkong Fir Shipping,* the breach (allowing others to park on a forecourt in an industrial estate in such a way as to interfere with the tenant's parking rights) had not been sufficiently serious to entitle the tenant to terminate the lease.

37. In *Grange v Quinn* [2013] EWCA Civ 27, [2013] 2 EGLR 198, at para 70, Jackson LJ, in obiter dicta, said that, "[a]lthough there were earlier indications to the contrary, it is now clear that a lease may be brought to an end by repudiation and acceptance…".

38. That there can be repudiatory breach of a lease is also supported by judgments of the highest courts in Canada and Australia: see *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710 and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17. In her written submissions, our attention was also drawn by Leonora Walwyn SC, counsel for the respondent, to the apparent acceptance in the British Virgin Islands that there can be repudiatory breach of a lease: see the judgment of Ellis J in *Emperor International Holdings Ltd v James Young Harbour View Marine Centre Ltd* (BVIHCV 2015/023), paras 155-175.

39. The development of the law in this area is summarised in *Woodfall: Landlord and Tenant* at para 17.314 (footnotes omitted):

> "In England it has been held that a lease is not capable of determination by repudiation and acceptance. Part of the reasoning which led the court to this conclusion was that a lease is not capable of determination by frustration, and that consequently contractual remedies available in other cases do not apply. But it is now clear that, in principle, a lease is capable of being frustrated. Thus the foundation of the reasoning has been eroded.
>
> Further, in other Commonwealth jurisdictions, it has been held that a lease may be terminated by repudiation and acceptance.

> This is the law in Canada, and Australia. It is considered that there is no reason in principle why the law should be any different in England.
>
> In any event, it may be that the law of England has always been that a lease is capable of determination by repudiation and acceptance. And it has been so held in at least two recent cases [*Hussein v Mehlman* and *Chartered Trust plc v Davies*], the latter in the Court of Appeal."

40. To similar effect, and with additional helpful insights, is *Megarry and Wade, The Law of Real Property*, 10th ed (2024), para 17-106 (footnotes omitted):

> "One result of the emphasis on the contractual nature of a lease is the recognition, both in this country and in other jurisdictions in the Commonwealth, that in appropriate circumstances, a party to a lease may terminate it following breach of its terms by the other party. Although there was authority against this view, it was based on the now discredited assumption that a lease could not be frustrated; and there was in any event an earlier body of authority in which it had been accepted that a lease could be terminated for breach. … To have this result, the breach must probably be one which [applying the words of Stepen Sedley QC in *Hussein v Mehlman,* at p 91] vitiates "the central purpose of the contract of letting". Clearly both the length and the terms of the lease will be relevant to whether there has been a breach that will justify treating it as terminated. The longer the lease, the more artificial it is to regard it other than as an estate in land. It is therefore only in relation to shorter lettings that an allegation that a breach justifies termination is normally likely to be successful."

See also Susan Bright, "Repudiating a lease – contract rules" [1993] Conv 71; Charles Harpum, "Leases as Contracts" [1993] CLJ 212; Mark Pawlowski, "Acceptance of repudiatory breach in leases" [1995] Conv 379.

41. At para 17-108 *Megarry and Wade* goes on to make clear, as Stephen Sedley QC had stressed in *Hussein v Mehlman*, that particular care must be taken not to allow termination by a landlord, for repudiatory breach by a tenant, to undermine the protections that the tenant has in respect of the landlord's right of forfeiture.

42. In the light of these developments, the Board accepts that there can be a repudiatory breach entitling the innocent party (here the tenant) to terminate a lease. In principle, there is no good reason why that should not be possible.

43. Nevertheless, in determining whether there has been a repudiatory breach of a lease, it is of importance that one is concerned with a lease that confers a proprietary interest in the land. The right to exclusive possession under a lease, especially where the lease is long-term, means that it may be rare for there to be a repudiatory breach of a lease entitling the tenant to terminate. In any event, a tenant is likely to have a right to give notice under the lease so that it will often be unnecessary to terminate for breach.

(5) Was there a repudiatory breach on the facts of this case?

44. Ramsbury had committed a breach of the relevant implied terms and had made clear that it would continue to do so. There was nothing to indicate that Mr Cozier, representing Ramsbury, would withdraw his directives banning the eating of meals and the doing of laundry on the premises. The purpose of the lease agreement from Ocean View's perspective, and as known by Ramsbury, was to accommodate the Mexican workers so that the hotel repair work that Ocean View was contractually bound to carry out could be fulfilled. The consequence of the breach (allied with complaints about the temperature inside the accommodation) was that Ocean View was faced with general dissatisfaction among the workers and the immediate prospect of some 60 of their workers (out of 250) going back to Mexico (see paras 21-23 above). If Ocean View could not complete its hotel repair contract on time, it faced the prospect of having to pay substantial damages for breach of that contract and would possibly suffer other loss, for example, loss of reputation.

45. In the Board's view, those were sufficiently serious commercial consequences of the breach by Ramsbury as to entitle Ocean View to terminate the lease. Although it is true that the workers could still sleep at the accommodation, the actual and prospective breach of the implied terms by Ramsbury went to the root of the contract. It deprived Ocean View of a substantial part of the benefit to which it was entitled under the contract (to use the formulation in *Decro-Wall*) and, in the Board's view, it also deprived Ocean View of substantially the whole of the benefit of the contract (to use the formulation in *Hongkong Fir Shipping*). The purpose of the contract, as contemplated by both parties, was for the housing of a workforce of 250 who would be working to enable Ocean View to fulfil its hotel repair contract. It was likely that that purpose would be defeated if almost a quarter of the workforce went back to Mexico as they were immediately threatening to do; and in any event the breach of the implied terms was causing more widespread dissatisfaction among the workers. Additionally, it may be that some of Ocean View's loss would be hard to assess (for example, reputational loss) and, arguably, damages would be inadequate for that reason. It follows that the

Board essentially agrees with para 48 of Baptiste JA's judgment which has been set out in para 15 above.

46. It is clear on the facts that Ramsbury's prohibition against eating and doing of laundry on the premises was seriously maintained and represented its settled position in relation to the enforcement of what it regarded as the terms of the lease. Therefore, Ocean View was reasonably entitled to understand that, if it failed to comply with Ramsbury's instructions, Ramsbury would promptly take steps to exercise its rights as landlord to forfeit the lease and re-enter the property. So Ocean View was faced with a choice of complying with Ramsbury's prohibition, with the consequent undermining of the purpose of the contract, or trying to resist Ramsbury's demands and running the risk of being exposed to any self-help measures which Ramsbury might seek to take (such as changing the locks) and/or being caught up in expensive and time-consuming litigation for what would inevitably have been the whole period of the lease.

47. Ocean View had contracted to receive premises which afforded accommodation for its workers with them having the right to eat and do their laundry there without disturbance, not an absence of premises or major litigation throughout the term of the lease as the price for exercising its contractual rights. In the circumstances of this case Ocean View was entitled to take Ramsbury's implied threat of action entirely seriously and did not have to wait to see if it would in fact carry it out if Ocean View refused to submit. As was said by Lord Campbell CJ in *Hochster v De La Tour* (1853) 2 E & B 678, 690 (a seminal case on anticipatory repudiation), "it is surely much more rational … that, after the renunciation of the agreement by the defendant [by indicating that he would not comply with his obligations in future], the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it."

48. What about the fact that we are here dealing not just with a contract but with a lease? The Board considers that, even taking account of the proprietary interest conferred by the lease (ie Ocean View's right to exclusive possession), the circumstances of the breach in this case were so exceptional as to amount to a repudiatory breach which Ocean View was entitled to accept as terminating the lease. It is important that this was only a short-term lease of seven months. Ocean View was not obtaining a long-term interest in the land. But above all, it was the effect of the breach (and continuing breach) of the relevant implied terms on Ocean View's workers, including the threat by nearly 25% of them to return immediately to Mexico, that makes the facts of this case so exceptional.

49. It is important to add, lest there by any doubt, that the Board is not suggesting that, whenever a landlord incorrectly informs a tenant that the tenant is not, and will not, be permitted to do something on the leased land, this will constitute a breach of the

covenant of quiet enjoyment, let alone that in such a situation the tenant can terminate the lease for a repudiatory breach. The facts of this case are exceptional.

7. Conclusion

50. For all these reasons, the Board will humbly advise His Majesty that the appeal should be dismissed.