SUPREME COURT OF QUEENSLAND

CITATION:	*Keswick Developments Pty Ltd & Anor v Keswick Island Pty Ltd & Ors* [2011] QCA 379
PARTIES:	**KESWICK DEVELOPMENTS PTY LTD** ACN 129 203 363 (first appellant) **QUEENSLAND MARINA DEVELOPMENTS PTY LTD** ACN 101 466 915 (second appellant) **v** **KESWICK ISLAND PTY LTD** ACN 009 998 841 (first respondent) **VINCENT HARLEY ALEXANDER** (second respondent) **KESWICK ISLAND HOLDINGS PTY LTD** ACN 101 442 175 (third respondent) **CONNIE BAY DEVELOPMENT PTY LTD** ACN 101 466 791 (fourth respondent)
FILE NO/S:	Appeal No 6431 of 2011 SC No 12924 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2011
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – APPLICATION TO LEASES – where there was a sublease of Crown land between the first appellant as sub-lessor and the fourth respondent as sub-lessee – where the sublease was for a term of over 90 years with a nominal rent – where the sublease

provided strong protection for the sub-lessee upon default – whether the first appellant was entitled to terminate the sublease for repudiation by the fourth respondent

REAL PROPERTY – CROWN LANDS – QUEENSLAND – GENERALLY – where the respondents submitted that subleases under the *Land Act* 1994 (Qld) are statutory interests and are not governed by common law doctrines – where the respondents argued on appeal that a clause in the sublease excluded the application of the common law doctrine of repudiation – where the arguments were not raised or were raised and abandoned at first instance – whether the respondents should be permitted to rely on arguments not relied on at first instance – whether the common law doctrine of repudiation is applicable to subleases of Crown land under the *Land Act* 1994 (Qld)

Land Act 1962-1981 (Qld) (repealed)
Land Act 1994 (Qld), s 238, s 239, s 301, s 302, s 323, s 327, s 328, s 330, s 332, s 335, s 336, s 338, s 339, s 339A
Property Law Act 1974 (Qld), s 115, s 124

American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd (1981) 147 CLR 677; [1981] HCA 65, applied
Apriaden Pty Ltd v Seacrest Pty Ltd (2005) 12 VR 319; [2005] VSCA 139, cited
Batiste v Lenin (2002) 11 BPR 20,403; [2002] NSWCA 316, cited
Blacksheep Productions Pty Ltd v Waks (2008) 3 BFRA 148; [2008] NSWSC 488, cited
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, considered
Dainford Ltd v Smith (1985) 155 CLR 342; [1985] HCA 23, considered
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, considered
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61, cited
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623; [1989] HCA 23, considered
Lye v Sweeney [2009] NSWSC 193, cited
May v Bloom (1949) 23 ALJ 602; (1949) 66 WN (NSW) 209, cited
Mersey Steel and Iron Co v Naylor, Benzon & Co (1884) 9 AC 434, cited
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; [1985] HCA 14, considered
Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd (1997) 42 NSWLR 462; [1997] NSWSC 473, cited
Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60, cited

Shevill v Builders Licensing Board (1982) 149 CLR 620; [1982] HCA 47, cited
Shiloh Spinners Ltd v Harding [1973] AC 691; (1973) 1 All ER 90, cited
Spettabile Consorzio Veneziano v Northumberland Shipbuilding Co Ltd (1919) 121 LT 628; [1918-19] All ER Rep 963, cited
Sweet & Maxwell Ltd v Universal News Services Ltd [1964] 2 QB 699; [1964] 3 All ER 30, cited
Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326, cited
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; [1985] HCA 28, cited
Vaswani v Italian Motors (Sales & Services) Ltd [1996] 1 WLR 270; [1995] UKPC 48, cited
Wik Peoples v Queensland (1996) 187 CLR 1; [1996] HCA 40, explained
Wilson v Anderson (2002) 213 CLR 401; [2002] HCA 29, considered
Wood Factory Pty Ltd v Kiritos Pty Ltd (1985) 2 NSWLR 105, considered
World By Nite Pty Ltd v Michael [2004] 1 Qd R 338; [2003] QSC 52, cited
Woodar Investment Development Ltd v Wimpey Construction UK Ltd [1980] 1 All ER 571; [1980] UKHL 11, cited

COUNSEL: F L Harrison QC, with C C Wilson, for the appellants
W Sofronoff QC, with K C Kelso, for the respondents

SOLICITORS: Kelly Legal for the appellants
Michael Drummond Lawyer for the respondents

[1] **MUIR JA: Introduction** The appellants, Keswick Developments Pty Ltd ("KD") and Queensland Marina Developments Pty Ltd, appeal against an order of a judge of the Supreme Court made on 27 June 2011: declaring that a sublease of Crown land on Keswick Island near Mackay between KD as sub-lessor and Connie Bay Developments Pty Ltd ("CBD") as sub-lessee is valid and enforceable according to its terms; ordering that paragraphs 34BB through 34BN of the Sixth Amended Statement of Claim be struck out and dismissing certain claims for relief in that Statement of Claim.

[2] The paragraphs which were struck out claim, in substance, that KD as the assignee of the reversion of the sublease lawfully terminated the sublease in reliance on CBD's repudiatory conduct with the consequence that KD was not obliged to purchase shares in CBD from Keswick Island Holdings Pty Ltd ("KIH") pursuant to certain put and call options over CBD's shares. The options were executed as part of a transaction which included a land sale contract by which KD acquired the head lease from Keswick Island Pty Ltd (KI), a related company of CBD.

[3] It is unnecessary for present purposes to consider the full scope of the parties' contractual dealings and the issues which they raise. The central issues for determination on this appeal are:

(a) whether CBD engaged in repudiatory conduct; and

(b) whether KD, in reliance on such conduct, duly terminated the sublease.

Should the respondents be permitted to rely on an argument abandoned at first instance?

[4] At first instance, counsel for the respondents conceded that cl 8 of the sublease did not exclude the application of the common law doctrine of repudiation. The respondents now wish to argue that it does. The appellants contend that the respondents should be held to their election at first instance and that to allow that point to be re-visited now would be unfair to the appellants and contrary to the interests of expedition, finality and justice. Reliance was placed on *Coulton v Holcombe*.[1]

[5] The respondents also seek to rely on an argument not pleaded or advanced at first instance. They wish to argue that common law contractual principles and, in particular, the doctrine of repudiation have no application to tenures granted by the Crown under the *Land Act* 1994 (Qld)[2] ("the Act").

[6] I would not permit the point based on the construction of cl 8 to be raised now. It was contended on behalf of the appellants that, had the point been raised at first instance, they could have led evidence that the form of sublease had been adopted by KD's predecessor as sub-lessor for all subleases on the island and, in particular, "for building subleases for developed lots, and the background circumstances of that adoption".

[7] I confess that I do not understand how this bears on the question of construction but, because of the view I have taken generally in relation to this matter, it is unnecessary to further consider this aspect of the appellants' argument. There are two reasons which militate against permitting the point to be raised now:

(a) the principle that a party is bound by the conduct of his case at first instance and should not, after the case has been decided against him, except in most exceptional circumstances, be permitted "to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing…"[3]; and

(b) the strong public interest in the finality of litigation.[4]

[8] It is unnecessary to explore at any length the rationale for the principle referred to in paragraph (a) above. It was discussed in *Coulton v Holcombe*.[5] In that case, Gibbs CJ, Wilson, Brennan and Dawson JJ observed that:[6]

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

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1 (1986) 162 CLR 1 at 6-11.

2 Reprint 11A. Reprint 7D was in force when the parties entered into the sublease on 21 June 2004, but the parties accepted that there were no substantive changes to the relevant sections of the Act since this time.

3 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483.

4 *Coulton v Holcombe* (1986) 162 CLR 1 at 7, 8 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

5 Supra at 8 and 9.

6 Supra at 7.

[9] Not only are the respondents seeking to argue a point not argued at first instance, they wish to argue a point expressly abandoned and after an adverse determination of the general issue to which that point related. The respondents have not shown a sufficient reason why they should not be held to their election, particularly as the case was on the commercial list. The list serves the purpose of providing speedy, expert determination of commercial cases with a view to the minimisation of cost. These objectives would not be served if disappointed litigants were permitted, on appeal, to advance arguments abandoned at first instance.

The primary judge's reasons

[10] The primary judge found that:

(a) CBD was in breach of its obligations under cl 4 of the lease in that it failed to maintain a policy of insurance after a date in December 2009 and in not providing a copy of the policy of insurance after it was requested to do so on 25 September 2009;

(b) CBD was in breach of its obligation under cl 2 to contribute towards the rates. That clause was engaged because rates had been assessed "… in respect of any area other than the Property only…";

(c) CBD was in breach of its obligation under cl 2 to pay the nominal rent of $1 per annum.

[11] The primary judge found no breach by CBD of the obligation in cl 2.15 to pay outgoings for the year ended 15 February 2009. He found, implicitly, a failure to pay outgoings for the following year but also the existence of a failure by KD to notify CBD of the actual outgoings after the expiration of that year.

[12] In considering whether the sublease had been repudiated by CBD, the primary judge concluded that "the inconsistencies in the demands" by KD and "the material which KD was sending to [CBD] about rates" did not excuse CBD's breach, but were matters to be taken into account in assessing the character of its conduct. In this regard, the primary judge remarked that "[o]n the face of the correspondence, CBD had sought copies of the relevant notices which was consistent with an intention to perform its contract". In relation to outgoings, the primary judge set out the facts in some detail. It was implicit in his recitation of those facts that he found them inconsistent with repudiatory conduct. He dismissed the relevance of the failure to pay the nominal rent observing, "… this adds nothing to the strength or otherwise of KD's case".

[13] The primary judge found that the public liability insurance policy referred to in the "Confirmation of Cover" document was cancelled by the insurer on or about 9 December 2009 for non-payment of the premium of $6,886.88. It was found also that "After some requests by the broker for payment, [the Chief Financial Officer of CBD], wrote to the broker on 6 December 2009 saying that 'we are in the midst of a bit of a dispute with the new head leaseholders of the Island and one of the by products of which is the nature and type of the insurance cover required. I have sort (sic) clarification of the specifics… I am in the process of again seeking to sort it out'". The primary judge found that assertion untrue. His Honour observed "After being told by the broker that the policy would be cancelled from its inception, [the Chief Financial Officer of CBD] emailed to say that the broker would have to 'let it go' and that 'we will come back for a new policy when this is sorted'".

[14] Having considered the breaches relied on by KD, the primary judge then considered whether the conduct amounted to a repudiation. In this regard, the reasons state:

"[43] Clearly the extent and seriousness of a party's breach of a contract is relevant in assessing whether it has evinced an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with its obligations. CBD's defaults had more than one possible explanation. One was that it had decided not to make any payments to KD, at least at that time, in the context of the broader dispute between the two sides to this litigation. Another is that those controlling CBD believed that there was no commercial purpose to be served by raising funds to meet these various commitments under the Sublease, if their shares in CBD were then to pass to KD without any commensurate increase in the price for them. Yet another is that which was inferred by KD, according to its solicitors' letter of 29 April 2010, which was that CBD was then unable to make the required payments. But in all of this, there was nothing written or said by or on behalf of CBD that it would not comply with the terms of the Sublease. To the extent that CBD did respond to the various demands and correspondence, it was in terms which were consistent only with the Sublease remaining on foot and with a purported intention to comply with its terms. And there was no abandonment or threat to abandon the premises.

[44] In the passage cited above from *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*, Mason J said that it would be rare indeed that facts which fell short of abandonment would properly be seen as constituting repudiation by the lessee in a case of a lease such as this. In my conclusion this is not that rare case. One important circumstance here is the critical importance of the Sublease to the operation of the put and call options. CBD was under the same control as Holdings, the interests of which would obviously be put at further risk were the Sublease to be terminated. On an objective view, there was every reason for those who controlled CBD to avoid the termination of the Sublease. This was not a case, such as *Marshall v Council of the Shire of Snowy River*,[7] where the circumstances had made the lease, if performed according to its terms, commercially unattractive. Here there were compelling commercial reasons to keep it in place. And even apart from the potential operation of the option deeds, there was the fact that, as acknowledged within the terms of the Sublease, CBD had the advantage of paying but a nominal rent rather than what cl 2.4 indicated would have been a reasonable rental between parties at arms length.

[45] CBD's conduct in obtaining insurance is evidence of an intention to perform the contract. Its subsequent failure to pay the premium, allowing the policy to lapse, does not

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7 (1994) 7 BPR 14,447; BC 9403420.

> evidence a change in intention. Rather, it indicates at least a difficulty in performing the contract *at that time*, which CBD was not minded to overcome then because it believed that there would be no immediate consequence from its failure to do so. The same may be said of its failure to pay something for rates. On the other hand, little can be made of its conduct in relation to outgoings, in the circumstance of KD's apparent failure to comply with the Sublease in that respect.
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> [46] Given what, on an objective view, was the importance of CBD holding the Sublease, its conduct could not have reasonably conveyed the impression that it wished to give up that interest. Nor had it demonstrated an intention to continue to claim that interest but upon terms substantially different from the covenants in the Sublease. A breach of the lease, whether serious or not, does not of itself constitute repudiation. As Wilson J said in *Shevill v Builders Licensing Board*, '[r]epudiation of a contract is a serious matter and is not to be lightly found or inferred' and that '[i]n considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the contract"'.[8] In short, there was no repudiation by renunciation."

[15] The primary judge then observed that no alternative argument had been advanced of a repudiation based on an inability to perform obligations under the sublease. His Honour had earlier noted that the allegation of repudiation had not been made until the reply in which it was alleged that there was a repudiation "by the matters alleged in paragraph 34BE [of the statement of claim]".

[16] Paragraph 34BE provided:

> "CBD breached its obligations on the part of CBD under c1 2 and cl 4 of the CBD sublease pleaded in paragraph 34BD.
>
> PARTICULARS
>
> Particulars of the breaches are contained in two Notices to Remedy Breach of Covenant dated 11 August 2009 served on CBD."

Repudiation of the sublease – The appellant's argument

[17] The primary judge erred in applying Mason J's observations in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[9] that with a long lease at a nominal rent, it would be rare to treat facts falling short of abandonment as constituting repudiation of the sublease. Mason J's obiter observation appears to have been concerned with a case where possession conferred a benefit upon the lessee, and the rent was less than a market rental, e.g. because the only consideration was a premium and a nominal rent, as opposed to the present case, where possession under the sublease did not confer any benefit on the sub-lessee. There was no evidence that CBD had other than "paper" as opposed to actual possession. Consequently, the issue of

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8 (1982) 149 CLR 620 at 633 citing *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 71 and *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 438-439.

9 (1985) 157 CLR 17 at 34.

abandonment carries little weight and, in any event, CBD's non-payment of rent and its share of rates and outgoings, as well as its failure to respond to correspondence from KD's solicitors from 18 September 2009 until 3 June 2010, is evidence of abandonment of that paper possession. CBD's conduct in relation to insurance is consistent with abandonment.

[18] The only permitted use of the property was development with a view to subdivision and sale, but any such sale would have constituted a default under the CBD share sale agreements. Consequently, occupation for development and sale (had there been occupation) would not confer any benefit on CBD.

[19] Mason J was not concerned in *Tabali* with a case in which the tenant had substantial monetary obligations in addition to the nominal rent. Furthermore, his Honour's statement was not intended as a test, but was merely a statistical observation. It is relevant to Mason J's comments that they were made only two and half years after it was settled in *Shevill v Builders Licensing Board*[10] that the doctrine of repudiation had application to leases.

[20] The test which the primary judge should have applied was whether CBD's breaches of its obligations to pay rent, rates and outgoings and to insure (which should have been regarded as fundamental)[11] showed an intention on the part of CBD not to be bound by its obligations under the sublease or to perform them only if and when, or as and when, it suited it to perform them.[12]

[21] The issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention[13] and therefore "it is of little assistance in the present case to identify reasons why [CBD] was unlikely to have subjectively desired to repudiate the [sublease]".[14]

[22] The following matters establish that application of the relevant tests should have led to the conclusion that KD was entitled to terminate the sublease:

(a) The primary judge should have concluded that CBD's non-performance of its obligations, despite demand, was intentional and formed part of a deliberate course of conduct of setting CBD's obligations to KD at nought. CBD failed to comply with notices to remedy breach of covenant. Also Mr Alexander,[15] who was CBD's governing mind, had demonstrated in relation to the principal sale contract that CBD "set little store" by its contractual obligations.

(b) This was a case in which "actions spoke louder than words". [16]

(c) Excuses made by CBD for non-payment of rent, rates and outgoings amounted to no more than a meretricious taking of spurious points. The repudiator does not have to say that it will never perform its contractual obligations and CBD could hardly be expected to be so naïve as to state its intentions in a way that the appellants could act on.

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10 (1982) 149 CLR 620.

11 *Lye v Sweeney* [2009] NSWSC 193 at [22]-[29].

12 *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 634; *Batiste v Lenin* (2002) 11 BPR 20, 403; [2002] NSWCA 316 at [36], [50]-[54]; *Lye v Sweeney* (supra).

13 *Laurinda* (supra) at 658 per Deane and Dawson JJ.

14 *Laurinda* (supra) at 657, 658.

15 The second respondent to this appeal.

16 The appellants relied on *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 136.

[23] The primary judge's conclusion that CBD would wish to avoid termination of the sublease overlooked the fact that the $9 million that KIH was to receive for the shares in CBD was to be offset by KD's substantial damages claim against Mr Alexander's interests in a sum exceeding $9 million and that KI and KIH would not be able to satisfy a judgment in a sum exceeding $9 million. The breaches suggest that Mr Alexander, the second respondent and sole director of KI and CBD, could see no commercial benefit in paying the rent, rates and other outgoings and insurance premiums.

[24] One explanation for CBD's default, to which the primary judge failed to give due weight, was "that it had decided not to make any payments to KD, at least at that time, in the context of the broader dispute between the two sides to this litigation".[17] At no stage did CBD claim it had any difficulty in paying the rent, rates, outgoings and insurance. It paid them after it failed to set aside the statutory demand and Mr Alexander did not depose that he believed that the sums were not payable. CBD's silence after September 2009 suggests there was no genuine dispute. The highest CBD put it when applying to have the statutory demand set aside was that it was unsure of the amount owing to KD.

[25] The fact that CBD paid only when compelled to do so by its failure to set aside a statutory demand which put it at risk of being wound up speaks for itself.

[26] Even if there was a basis for non-payment of outgoings, non-payment of the nominal rent supported the conclusion that CBD was determined to pay nothing under the sublease as did the non-payment of rates. Minor breaches added together may amount to a repudiation.[18]

[27] The failure to pay the premium on the insurance and allowing the policy to lapse was evidence that CBD renounced its obligations under the sublease. The primary judge erred in seeking to find excuses for CBD's deceptive conduct in that regard. The primary judge erred in finding, inferentially, that the issue of a "Confirmation of Cover" without payment of the insurance premium, which cover was subsequently cancelled on that account *ab initio*, satisfied the obligation to insure under cl 4 of the sublease. The covenant to insure was not satisfied by taking out insurance that was voidable at the option of the insurer. The inference that should have been drawn from the non-payment was that the cover was taken out for the sole purpose of deceiving KD into believing that CBD had complied with that obligation.

[28] The primary judge erred in rejecting Mr Dawson-Damer's evidence that he forwarded tax invoices 134 and 135 for $34,639.82 and $9,548.72 respectively to CBD's registered office. The evidence was unchallenged and should have been acted upon in the absence of proper reasons having been given for its rejection.

[29] The fact that CBD never sought to recover the monies paid in response to the statutory demand can be relied on as showing that there was in fact never any bona fide dispute. The primary judge failed to appreciate this. The primary judge erred in holding in paragraph [41] of the reasons that because KD did not give CBD the

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17 Reasons for judgment, para [43].

18 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 36-37; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623; *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319.

actual amounts of outgoings for a particular accounting period "promptly after [it ascertained] these", CBD was not in breach of the sublease by failing to pay the estimated outgoings for the accounting years ended 15 February 2009 and 2010. Clause 2.15 imposed an obligation to pay an estimated amount contained in an estimate notice. Such a notice was given on 7 August 2009 for each of the years commencing 15 February 2008 and 15 February 2009. The primary judge's conclusion rests on the proposition that, although CBD was obliged to pay outgoings in advance under cl 2.1(a) (adjusted if necessary under cl 2.15 and cl 2.17), CBD was not obliged to pay outgoings for an accounting period until KD had given CBD actual figures for the period in question if KD had not given CBD an "estimate notice" (see cl 2.15) before the end of that accounting period. In any event, CBD did not allege (or seek to prove) that KD had ascertained the actual amounts of outgoings for those periods which would have involved all amounts payable by KD in respect of the period being determined.

[30] The primary judge should not have made the orders he did without evidence that CBD intended to comply with its obligations for the future and without CBD first insuring in accordance with the sublease and providing an undertaking to pay outstanding arrears calculated as at the date of restoration to the register.

[31] CBD's pleadings did not seek restoration to the register and counsel for CBD specifically eschewed claiming such relief. KD is entitled to have the orders set aside as having been made in denial of procedural fairness. If, despite its breaches and conduct, CBD is held not to have repudiated, it should not be restored to the register except on terms.[19]

The relevant provisions of the sublease

[32] Under the sublease, the commencement date of which was 1 July 2004, CBD was required to pay:

(a) Rent and Outgoings;[20] and
(b) Rates.[21]

[33] The rent, while CBD was the sub-lessee, was $1 per annum, payable on demand.[22]

[34] Clause 2.5 of the sublease provided:

"**Outgoings**

The Outgoings are calculated using this formula:

$$O = \frac{3}{TRL} \times (SLO\text{-}CAO)$$

where:

CAO = the total amount of Charges and Taxes recoverable by us for the Head Lease Year under leases of non-residential lots on the Island.

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19 *c.f.* The practice in cases of relief against forfeiture: *World By Nite Pty Ltd v Michael* [2004] 1 Qd R 338 at 341-344; [2003] QSC 52; and *Shiloh Spinners Ltd v Harding* [1973] AC 691.

20 Sublease, cl 2.

21 Sublease, cl 2.9, 2.10 and 2.11

22 Sublease, cl 2.4.

O = the annual Outgoings payable under this sub-lease.

SLO = the total of the Charges and Taxes payable by us for the Head Lease Year which includes that Rent Payment Date.

TRL = the total number of residential lots on the Island as at the last preceding Rent Payment Date.

However, you do not have to pay Outgoings to the extent that the relevant costs are recovered from you through the Association. For example, if you pay levies to cover costs payable by the Association for the provision of Declared Facilities, then your share of these costs will not be recovered from you as Outgoings."

[35] Clause 12 of the sublease referred the reader to cl 2.5 which contained no express definition of "Outgoings". "Outgoings" were made up of "Charges" and "Taxes". "Charges" were defined in cl 12 of the sublease as follows:

"**Charges** means all amounts paid or payable by us for a Head Lease Year in connection with the Island for:

(a) insurance for the Island which we reasonably consider is appropriate; and

(b) gardening and landscaping of the Island; and

(c) maintenance, repair and development of the Island; and

(d) caretaking services and regulating traffic; and

(e) supplying, maintaining, repairing and replacing Services and upgrading them to comply with requirements of authorities and all laws; and

(f) charges for the supply of Services except those which are separately metered to you; and

(g) all management and administration (including consultants' fees, wages, superannuation contributions, long service leave payments and taxes paid because we have employees); and

(h) any auditor's fees for any audits of Outgoings which we conduct."

[36] "Taxes" were defined as:

"**Taxes** means all taxes (except land tax, income or capital gains tax), imposts or deductions, withholdings and duties imposed by any government authority in connection with the Property, the Island, the State Leases or this sub-lease."

[37] Clause 2.1 provided:

> "2.1 You must pay the Rent and Outgoings to us:
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> (a) annually in advance on each Rent Payment Date; and
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> (b) at our address specified in this sub-lease or as we direct."

[38] "Rent Payment Date" was defined as meaning "each 16 February during the Term, beginning on the first 16 February immediately following the Commencement Date". The commencement date was 1 July 2004.

[39] Clause 2.11 provided for the calculation of the monies payable on account of rates where rates were assessed in respect of an area other than the land itself. As the primary judge found, the subject rates were so assessed.

[40] Clauses 2.15 and 2.16 of the sublease provided:

> "2.15 We may give you an estimate notice stating our reasonable estimate of the Rent and/or Outgoings payable for any year of the Term. You must pay the estimated amounts to us on the relevant Rent Payment Date. We must notify you of the actual amounts of Rent and Outgoings promptly after we ascertain these.
>
> 2.16 If we have not calculated the Rent or Outgoings for a particular year of the Term, and we have not given you an estimate notice under clause 2.15, you must continue to pay us Rent or Outgoings for the previous year of the Term, until we notify you of the changed Rent or Outgoings."

The parties' dealings relevant to the repudiation question

[41] On 7 August 2009, the solicitors for KD sent to the solicitors for CBD a letter enclosing a notice requiring payment of rent, outgoings and rates. It asserted that:

- Rent of $1 was owing for each of the periods 16 February 2008 to 15 February 2009 and from 16 February 2009 to 15 February 2010.
- Outgoings of $8,454 were owing for the period 16 February 2008 to 15 February 2009 and outgoings of $8,680.65 were owing for the period from 16 February 2009 to 15 February 2010.
- The following sums were owing on account of rates.
  "Total rates payable for Keswick Island for the following periods:-

1 January 2008 to 30 June 2008	=	$48,378.10
1 July 2008 to 31 December 2008	=	$48,378.10
1 January 2009 to 30 June 2009	=	$48,378.10
Total	=	$145,134.30

  Your share thereof calculated at 358/1000 = $51,958.08"

[42] The total amount claimed by the notice was $69,094.73.

[43] In another letter dated 7 August 2009 to CBD's solicitors, the solicitors for KD requested that CBD provide evidence of the policies required to be in place under the sublease and confirmation that CBD had complied with "all policy terms".

[44] CBD's solicitors wrote on 10 August 2009 asserting that:

- CBD had not received any invoices from KD and could not pay monies "purportedly owed to [KD] until [KD] particularizes (sic) same in the proper form (ie tax invoice)";
- CBD was not required to effect the insurances referred to in clause 4(a), (c) and (d) of the sublease and "has been covered under Keswick Island Pty Ltd's umbrella policy for public liability insurance (evidence of same is being obtained)";
- CBD was not "aware of any issue regarding clause 4.6 of the sublease" and had "never received any remedy notice from [KD] in this regard".

[45] The letter stated that CBD rejected KD's assertion that the sub-lease "can be terminated as it has never received a Notice to Remedy… (as required by clause 8.1 of the sublease)". On 10 August 2009, KD's solicitors provided CBD with a tax invoice of that date for $51,960.28 in respect of rent and rates and a tax invoice, also of that date, for $18,848.12 in respect of outgoings. The requirement, "Payment must be received strictly 30 days from invoice date" was printed in bold at the foot of each tax invoice. On 10 August 2009, the solicitors for CBD, responding to a request from KD's solicitors, provided the contact details of CBD's accountant stating "my client's accountant is available at any time".

[46] On 11 August 2009, KD's solicitors faxed CBD's solicitors a letter together with a notice to remedy breach of covenant, purportedly under s 124 of the *Property Law Act* 1974 (Qld), alleging breach of the covenant to pay rent and outgoings and requiring that the breach be remedied by payment of $18,850.32 on account of rent and outgoings plus GST within 28 days. Another such letter and notice to remedy breach of covenant was faxed in respect of an alleged breach of covenant to pay a contribution to rates as required by clauses 2.10 and 2.11 and requiring that that breach be remedied by payment of the sum of $17,319.36 within 28 days. A third such letter and notice related to an alleged breach of "the covenant… to give evidence of insurance policies… on demand".

[47] Each s 124 notice contained the note:

> "The lessor will be entitled to re-enter or forfeit the lease in the event of the lessee failing to comply with this notice within a reasonable time - *see* section 124 of the *Property Law Act 1974*".

[48] On 7 September 2009, CBD's solicitors faxed KD's solicitors a copy of a letter from them of that date enclosing a copy of a document in which Strathearn Insurance Brokers confirmed that KI and CBD held public liability insurance to the extent of $10 million with QBE Australia Pty Ltd. That was sent within the 28 day period specified in the 11 August 2009 notices to remedy breach of covenant. Another letter from CBD's solicitors to KD's solicitors, also sent by facsimile transmission on 7 September 2009, asserted that the notice to remedy breach was defective "in that it claims that [CBD] is in breach of clause 2.1 of the sublease". It noted that the tax invoice required payment of rent to be made within 30 days "from invoice date". The letter asserted that the notice to remedy breach should be withdrawn. It requested, in relation to the invoice in respect of rent and rates, that KD particularise how the rates contribution was calculated and that copies of the rates notices be provided. The letter asserted, "Upon receipt of this information, my client will be able to confirm its actual liability and will attend to payment of same".

[49] The 7 September letter made a similar request in respect of the invoice for outgoings. In that regard, KD was requested to provide "copies of the Charges and Taxes and other source documents… relied on in calculating these Outgoings". The letter concluded that upon receipt of the information, CBD would be "able to confirm its actual liability and will attend to payment of same". In a third letter of 7 September to KD's solicitors, CBD's solicitors alleged that the notice to remedy breach of clauses 2.10 and 2.11, in respect of an alleged failure to pay rates, was defective and asserted that it should be withdrawn.

[50] Copy rates notices for the periods 1 July 2008 to 31 December 2008 and 1 January 2009 to 30 June 2009 were sent by KD's solicitors to CBD's solicitors by facsimile transmission on 8 September 2009. The rates notices were in respect of land which included the subject land. No copy notice for any period prior to 1 July 2008 was provided although rates had been demanded for the first half of 2008.

[51] On 25 September 2009, KD's solicitors wrote to CBD's solicitors enclosing documents which contained "information as to the current outgoings calculations" and "budgeted outgoings for July 2009 to June 2010". One of the documents was headed "Levy Assessment – OUTGOINGS – July 2009-June 2010". Each of the sums listed in the document appeared in a column headed "BUDGET" and against the total appeared the words "12 month budget".[23] The letter, which was sent by facsimile transmission, denied any obligation on the part of KD to provide particulars and stated that it was written without prejudice to KD's rights "as a consequence of the various breaches" by CBD.

[52] On 25 September 2009, KD's solicitors asked CBD's solicitors for a copy of the policy referred to in the "Confirmation of Cover".[24] CBD's solicitors did not respond.

[53] Two further tax invoices dated 5 February 2010 were issued by KD to CBD, one for $34,639.82 in respect of rent from 16 February 2010 to 15 February 2011 and rates for the periods 1 July 2009 to 31 December 2009 and 1 January 2010 to 30 June 2010, and the other for outgoings of $9,548.72 including $868.07 GST for the period from 16 February 2010 to 15 February 2011. The primary judge was not persuaded that the invoices were sent. That finding was challenged.

[54] On 29 April 2010, KD's solicitors wrote to CBD's solicitors noting *inter alia* that:

(a) a copy cover note for insurance was provided with CBD's solicitor's letter of 7 September 2009, but no copy of the policy was provided;
(b) further information in relation to the calculation of charges was provided by KD's solicitors on 25 September 2009;
(c) in a letter of 25 September 2009 KD's solicitors requested a copy of the insurance policy, but one had not been received;
(d) a total of $114,996.94 remained outstanding in respect of outgoings, rent and rates;
(e) CBD remained in breach of the sublease in that regard and had been aware of the breach since at least 7 August 2009; and
(f) CBD remained in breach of clause 4.2 of the sublease by failing to give evidence of insurance policies as requested.

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23 Record 906-909.
24 Record 929.

[55] The letter asserted that KD could "only infer" that CBD was unable to pay the rent and that it would be unable to pay it for the foreseeable future, that it was "unable to pay the amount payable to effect insurance as required by the sublease" and that KD would "therefore act accordingly". On 13 May 2010, KD's solicitors sent a document under cover of a letter of that date to CBD in which it purported to accept CBD's repudiation of the sublease. A statutory demand by KD for payment of $114,996.94 was served on CBD on 17 May 2010.

The repudiation argument – Consideration

[56] Repudiation of a contract is "a serious matter, not to be lightly found or inferred".[25]

[57] The existence or otherwise of repudiatory conduct is to be determined by reference to:[26]

> "…objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor's conduct 'would be reasonably calculated to have upon a reasonable person'… It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it."

[58] A contract may be repudiated also if a party "shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way".[27]

[59] It was contended by the appellants that *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[28] and *Wood Factory Pty Ltd v Kiritos Pty Ltd*[29] were authority for the proposition that it is "more difficult to establish repudiation of a lease than it is to establish repudiation of an ordinary contract". The authorities support that proposition, at least where the term of the lease is long and its terms and conditions are favourable to the lessee.

[60] Mason J, in *Progressive Mailing House Pty Ltd v Tabali*,[30] after rejecting the submission that abandonment of possession was necessary to constitute a case of repudiation by a lessee, said:

> "On the other hand, it should be acknowledged that it would be rare indeed that facts which fell short of abandonment would properly be seen as constituting repudiation by the lessee in the case of a long lease at a rental which was either nominal or but a fraction of the amount which could be obtained in the market place."

[61] Deane J, in a passage relied on by the appellants,[31] confirmed that, as a general proposition, ordinary principles of contract law are applicable to contractual leases. He added the qualification that:

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25 Per Lord Wright in *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 71 in a passage referred to with approval in *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd* (1997) 42 NSWLR 462 at 479 and *Lombok Pty Ltd v Supetina Pty Ltd* (1987) 14 FCR 226 at 234.

26 *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 658.

27 *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625, 626 per Gibbs CJ, with whose reasons Brennan J agreed.

28 (1985) 157 CLR 17 at 53 per Deane J and per Mason J at 34.

29 (1985) 2 NSWLR 105 at 131.

30 *Tabali* (supra) at 34.

31 At 53.

> "… the further one moves away from the case where the rights of the parties are, as a matter of substance, essentially defined by executory covenant or contractual promise to the case where the tenant's rights are, as a matter of substance, more properly to be viewed by reference to their character as an estate … in land with a root of title in the executed demise, the more difficult it will be to establish that the lease has been avoided or terminated pursuant to the operation of the ordinary principles of frustration or fundamental breach. Indeed, one may reach the case where it would be quite artificial to regard the tenant's rights as anything other than an estate or interest in land (e.g., a ninety-nine year lease of unimproved land on payment of a premium and with no rent, or only a nominal rent, reserved). In such a case, it may be difficult to envisage circumstances in which conduct of the tenant short of actual abandonment would properly be held to constitute repudiation or fundamental breach or in which anything less than a cataclysmic event such as the 'vast convulsion' referred to by Viscount Simon L.C. in *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* would warrant a finding of frustration." (citations omitted)

[62] The respondents submitted that considerations which supported the primary judge's findings were:

(a) the sale price of the shares in CBD, $9 million, could be justified only by the continued existence of the sublease;

(b) the continued existence of the sublease had been contractually warranted by KIH to KD as part of the share sale agreement;

(c) for the above reasons, there was objectively a strong reason for CBD not to renounce the sublease. There had been no abandonment of the sublease;

(d) the breaches of covenant occurred in the context of a wider dispute between the parties who were communicating through their respective solicitors;

(e) the wording of the correspondence was consistent only with an intention to keep the sublease on foot.

[63] There were four aspects of the alleged repudiatory conduct: non-payment of rent; non-payment of outgoings; non-payment of rates and breach of obligations in relation to insurance.

[64] Although the rent was payable on demand, as the primary judge pointed out, it was a nominal sum only and failure to pay it on demand as required by the terms of the sublease was unlikely to evidence an intention by CBD not to be bound or to perform its obligations only if and when it suited it to do so. The demand in the tax invoice of 10 August 2009 required payment, not immediately, but within 30 days from the invoice date. The notice to remedy breach dated 11 August 2009 claimed payment of $18,850.32 for both rent and outgoings plus GST "as per invoices 84 and 85 dated 10 August 2009"and was sent the day after the tax invoice which required payment within 30 days of the invoice date. Invoice 84 was in respect of rent and rates. Invoice 85 was in respect of outgoings: $8,454 for the period 16 February 2008 to 15 February 2009 and $8,680.65 for the period 16 February 2009 to 15 February 2010.

[65] Under cl 2 of the sublease, the outgoings were payable annually in advance on each "Rent Payment Date". Where rent or outgoings were not calculated by KD "for

a particular year of the Term" and "an estimate notice" under cl 2.15 had not been given, CBD was required to continue to pay the rent or outgoings for the previous year of the term until notified of the changed rent or outgoings.[32] No "estimate notice" in respect of rent and/or outgoings had been given under cl 2.15 in respect of the period ending 15 February 2009. The tax invoices dated 10 August 2009 did not purport to be estimates for that period, but could be taken to be estimates for the period ending 15 February 2010. Consequently, by its conduct, KD was intimating that for the earlier of the two periods it was seeking the rent and outgoings calculated in accordance with cl 2.16, but, as the primary judge found, it did not appear to be the case that CBD was made aware of what was payable under that clause.

[66] Also, as the primary judge found, the period ended 15 February 2010 had expired before the purported termination of the sublease on 13 May 2010, but KD had not complied with its obligation under cl 2.15 to notify CBD promptly of the actual figures once these were known.[33] This did not remedy any breach by CBD in relation to outgoings but was another matter against which its conduct was to be judged.

[67] The primary judge's finding that "[t]here was no apparent basis for declining to pay the proportion of the rates as fixed by cl 2.11" was not challenged.

[68] A sub-lessee's failure to pay insurance would normally be regarded as a serious breach of the sublease. However, the subject land was vacant land and it was not suggested that any activities were occurring on it or were likely to occur in the immediate future. It was not shown that the primary judge erred in failing to infer that there was never any intention on the part of CBD to pay the premium for the policy, the existence of which was notified to KD on 7 September 2009. Moreover, as the primary judge pointed out, KD's case in relation to the insurance was restricted to the allegation that there had been, relevantly, a breach of the obligation under cl 4.2 of the sublease to "give evidence of the [insurance] policies… on demand". That breach had been remedied by provision of the "Confirmation of Cover" document on 7 September 2009. The fact that the premium was unpaid and the cover was cancelled does not mean that the provision of the document did not satisfy the demand: it was not shown that at the time of provision of the 7 September 2009 document no policy of insurance was on foot.

[69] CBD's argument makes much of the inefficacy of the s 124 notices. It was argued that because the s 124 notice in respect of the rates was given before any obligation to pay had arisen and was thus ineffectual, any failure to pay rates could not constitute a breach of the contractual obligation and could not support an argument that CBD's conduct had been repudiatory. It does not appear to me that this argument, which applied also to the failure to pay charges and taxes under cl 2.5, is sound. The effect of s 124 of the *Property Law Act* 1974 (Qld) is to prevent a right of re-entry or forfeiture arising under a provision in a lease from being enforceable until the requirements of s 124(1) have been met: it is not to deem a breach of a term of a lease not to have occurred. That is not to say, however, that the giving of ineffective s 124 notices was irrelevant to the question under consideration. CBD, it may be inferred, understood that KD was not in a position to enforce any right of re-entry. Once it had informed KD of the defects in the s 124 notices and

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32 Sublease cl 2.16.

33 Reasons para [41].

no further notices were given, CBD was entitled to take the view that the issues of rent, rates, outgoings and insurance were not of pressing concern to KD. While this did not alter CBD's obligations under the sublease, it was relevant to any assessment of whether CBD's conduct manifested an intention not to be bound by its obligations under the sublease or to perform them only if and when, or as and when, it suited it. Also relevant in this regard is the general confusion and debate generated by the notices, which, apart from the matters already mentioned, wrongly asserted an entitlement to forfeit the sublease in the event of non-compliance.

[70] As the primary judge found, it was relevant to the question of repudiation that the sublease was for a term of some 92 years with a nominal rent. Moreover, cl 8 not only gave the sub-lessee the right to remedy default after written notice by the sub-lessor in that regard, but the sub-lessor's rights were limited under cl 8 to re-entry and the sale of the sublease for market value. Clause 8.4 provided that entry into possession did not terminate the sublease. These provisions, which offer unusually strong protection to the sub-lessee, the term of the sublease and the nominal rent, are distinctive features of the background against which CBD's conduct must be assessed.

[71] Also relevant to the evaluation of the conduct relied on by KD to constitute repudiation, as the primary judge found, was the broader contractual dealings of CBD and KD and their respective related interests. The primary judge explained in paragraphs [43], [44] and [46] of his reasons, quoted above, why there were compelling commercial reasons for keeping the sublease on foot.

[72] For the reasons given above, the appellants failed to establish that the primary judge erred in finding that there had been no repudiation of the sublease by CBD. It was not shown that, viewed objectively, CBD's conduct would have conveyed to a reasonable person in the situation of KD, that CBD had manifested an intention not to perform its obligations under the sublease or to perform them only if and when it suited it to do so.

The application of the doctrine of repudiation to subleases under the Act – The respondents' new argument

[73] On appeal, the respondents, by a Notice of Contention filed on 10 October 2011, sought to rely on a ground not argued at first instance. It was that subleases under the Act are statutory interests owing their existence and character to the operation of the Act and that common law contractual doctrines do not operate to determine the rights and obligations of the parties to such subleases. The respondents' argument was developed in the following way.

[74] Reference was made to *Wik Peoples v Queensland*,[34] in which the High Court considered the nature of leases and legislation in Australian States concerning the disposition of Crown land.

[75] One of the passages relied on, in particular, was the following from the reasons of Gaudron J,[35] who, having said that pastoral leases were not creations of the common law, observed:

> "That they are now and have for very many years been entirely anchored in statute law appears from the cases which have

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34 (1996) 187 CLR 1.

35 At 149.

> considered the legal character of holdings under legislation of the Australian States and, earlier, the Australian Colonies authorising the alienation of Crown Lands. Thus, for example, it was said of such holdings in *O'Keefe v Williams* that '[t]he mutual rights and obligations of the Crown and the subject depend, of course, upon the terms of the Statute under which they arise'." (citations omitted)

[76] Reference was also made to a passage from the reasons of Kirby J, in which his Honour said:[36]

> "Pastoral leases give rise to statutory interests in land which are sui generis. Being creatures of Australian statutes, their character and incidents must be derived from the statute.
>
> …
>
> It is a mistake to import into the peculiar Australian statutory creation, the pastoral lease, all of the features of leases in English leasehold tenures dating back to medieval times. Unless such importation is necessary, either for reasons of the language or imputed purpose of the statute, it is much more appropriate to give content to the statutory pastoral lease by reference to the statute, unencumbered."

[77] Leases of Crown land (head leases) can only be created under Part 3 of the Act and no legal interest is created until "a document" is registered.[37] Section 302 of the Act refers not to registration of a "lease" but to registration of "a document expressed to… create an interest in land". Until such a document is registered, no interests have been created. And the interest, thus, owes its existence to the fact of registration. Upon registration of such a document, the interest is created in accordance with the document and vests an interest in land in the person identified in the document.[38]

[78] The Act provides for the termination of such interests and forfeiture of statutory interests cannot be affected or determined by common law rules relating to forfeiture. The Act's provisions in that regard may be contrasted with common law rules concerning forfeiture. For example, s 238 prevents forfeiture for breach of a condition of a lease without the intervention of the Supreme Court. A decision of the Supreme Court to forfeit the lease does not effect a forfeiture, but confers a statutory option upon the lessee.[39]

[79] Section 327 of the Act provides that surrender requires ministerial approval and under s 330(b) no surrender is possible without the consent of a sub-lessee. The Act, in Chapter 6 Part 4 Division 1, makes provision for transfers and, in Chapter 6 Part 4 Division 4, for mortgages. Sections 302(2) and 338 govern priorities between persons who have interests in land under the Act. Even the definition of "lease" in Schedule 6 of the Act shows that "lease" is used in the sense of the statutory interest created under the Act:

> "***lease*** means the interest in land comprising a lease held under this Act, as shown by the current particulars of the interest in the appropriate register…"

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36 At 242-244.

37 *Land Act* 1994 (Qld), s 301.

38 *Land Act* 1994 (Qld), s 302(1).

39 *Land Act* 1994 (Qld), s 239. The submission mistakes the effect of the section.

[80] Since a lease is entirely a creature of statute, it follows that no common law sublease can be created. Subleases of land under the Act are also statutory interests created under the Act. They cannot be created without the Minister's specific or general consent.[40] Under s 335 of the Act, subleases must be registered and upon registration of the "document expressed to… create an interest" that interest comes into existence.[41] The only way in which such registered interests may come to an end is by registration of a request for re-entry.[42]

[81] At common law, the surrender of a head lease would effect a merger of the leasehold interest and the reversion.[43] In Queensland, s 115 of the *Property Law Act* 1974 (Qld) was enacted to protect the position of a sub-lessee. None of these considerations can apply to subleases under the Act and, indeed, a surrender of a head lease cannot even occur without a sub-lessee's consent.[44]

[82] It is fundamental to common law leases that they originate in a contract between the parties. For that reason, it was held in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[45] that the common law doctrine of repudiation applied to leases. It was because of the contractual nature of common law leases that Deane J observed, in the course of considering whether such a lease could be repudiated:[46]

> "One cannot however ignore the fact that the clear trend of common law authority is to deny any general immunity of contractual leases from the operation of those doctrines of contract law." (citations omitted)

[83] It was only when the contractual (and commercial) basis for leases came to be more significant than the English doctrine of land tenures that the applicability of the principles of repudiation of contract was accepted as applicable to leases. The result was *Tabali's* case. Common law doctrines applicable to contracts can have no place in determining the rights of persons, such as sub-lessees, who enjoy wholly statutory rights. The parties to a sublease are free to decide the covenants to be included as part of the statutory tenure, but those rights are not contractual in nature: they are statutory and are constituted by the covenants contained in the registered document. The parties may include a covenant that the sublease is terminable upon the happening of an event or upon the election of one of the parties. Upon termination of the sublease, the sub-lessor would ordinarily obtain a right of re-entry. At common law, the act of re-entry terminates the lessee's interest.[47] But by reason of s 339 of the Act, the interest of the sub-lessee, which is created only at the moment of registration and by the act of registration, only ends upon the further registration of the document referred to in that section. Nor does the common law doctrine of merger of estates intrude to imperil the interest of a statutory sub-lessee because, again, before a surrender of the head lease can be affected, the sub-lessee must give approval to a surrender.[48]

[84] The words in s 339, "If a sublessor under a registered sublease lawfully re-enters and takes possession under the sublease…" directs attention to the terms of the

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40 *Land Act* 1994 (Qld), s 332.
41 *Land Act* 1994 (Qld), s 302.
42 *Land Act* 1994 (Qld), s 339.
43 *May v Bloom* (1949) 66 WN (NSW) 209.
44 *Land Act* 1994 (Qld), s 330(b).
45 (1985) 157 CLR 17.
46 (supra) at 52.
47 Bradbrook, Croft & Hay, *Commercial Tenancy Law* (2009, 3rd ed) at [17.8] et seq.
48 See s 330(b).

sublease itself which alone can furnish the conditions which confer the right of re-entry. The sublease "was expressed on Form 7, a document which was expressed to be 'subject to the covenants and conditions contained in the attached Schedule'". Clause 8 of the sublease made provision for a right of re-entry in the event of default. That right did not arise on the facts. It was conceded at first instance that the provision in cl 8.3 limiting the sub-lessor's rights in the event of default to its "rights under this clause if an Event of Default occurs" left open the right to terminate in reliance upon repudiatory conduct. It is unnecessary for that concession to be withdrawn as the doctrine of repudiation has no application to subleases under the Act.

The application of the doctrine of repudiation to subleases under the Act – Consideration

[85] The respondents' argument relies heavily on observations in *Wik Peoples v Queensland*,[49] to the effect that the *Land Act* 1962 (Qld) and its predecessors in Queensland and counterparts in other States, created statutory interests in land, the rights and obligations under which were to be determined by reference to the statute creating the interest. *Wik* did not decide that common law principles were irrelevant to such statutory tenures. In particular, *Wik* did not impugn the authority of *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd*.[50] In that case, the High Court held that the absence of a provision in Part XI of the *Land Act* 1962-1981 (Qld) conferring power upon a sub-lessee to assign his interest did not exclude his right to assign or otherwise deal with his interest at common law. It was held that Part XI did not operate as a code.

[86] Mason J, with whose reasons the other members of the Court agreed, observed:[51]

> "The general rule is that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is manifested according to the true construction of the statute. This rule certainly applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to common law principles respecting property rights.
> At common law periodical tenants have the right to assign, sublet or otherwise dispose of an interest in a lease.
>
> The question, then, is whether the Act on its true construction is intended to operate as a comprehensive and exclusive code so as to deny to a sublessee of land let under Pt XI of the Act the right to dispose of his interest in the land.
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> It must be said at once that Pt XI does not have the appearance of a code. It does not contain a detailed exposition of the rights and obligations of lessees and sublessees of a reserve, an exposition of the kind that would indicate an intention to formulate a comprehensive and exclusive code thereby displacing existing common law principles regulating property rights. Indeed, as we have already seen, s. 347 proceeds on the footing that the common

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49 (1996) 187 CLR 1.
50 (1981) 147 CLR 677 at 682, 684.
51 At 682-684.

> law right of the lessee to transfer, mortgage or sublet remains on foot. In this respect s. 347 conforms with the other important operative provisions in Pt XI which contain prohibitions and modifications of common law rights and powers. The statutory scheme does not consist of a statement of new rights, powers and obligations; instead it assumes the existence of those arising under the general law and it proceeds to modify them to the extent considered necessary.
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> …
>
> Section 344(b) appears to recognize that the parties may include in the lease any covenants, subject to two immaterial exceptions. But Parliament can scarcely have intended to displace the principles of the common law regulating implied covenants on the part of the lessor and the lessee; for example, the implied covenant for quiet enjoyment and the implied obligation to use the premises in a tenant-like manner. It could not have been Parliament's intention that leases under Pt XI should expressly set out the usual implied covenants. It follows that s. 344 could not have been intended to completely replace the common law." (citations omitted)

[87] In his reasons, Brennan J observed:[52]

> "By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act. The incidents of those interests are the incidents of corresponding interests at common law modified by the relevant provisions of the Act."

[88] In *Wilson v Anderson,*[53] Gleeson CJ said:

> "… as the joint judgment in the present case demonstrates comprehensively, the history of perpetual leases of Crown land in New South Wales shows a strong affinity between the interests granted under such leases and freehold estates. There is nothing surprising or novel about a conclusion that the incidents of a statutory lease are not exhaustively defined by statute, and may include the incidents of a lease as provided by the common law."

[89] The Chief Justice referred to *Wik* in this context, explaining:[54]

> "*Wik* does not deny the relevance of the use by the statute of the term 'lease'. But it requires a court to look further."

[90] Plainly enough, statutory provisions must be applied irrespective of their conflict with common law principles if, as a matter of construction, the application of the common law principles is expressly or impliedly excluded by those provisions. There is nothing in the Act, relating to leases, which suggests that, unlike Part XI of the *Land Act* 1962-1981 (Qld), it is intended to operate as a comprehensive and exclusive code. However, it is unnecessary for the purposes of determining the question under consideration to dwell on the rights and obligations under leases

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52 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 686.

53 (2002) 213 CLR 401 at [19].

54 At [21].

granted under the Act. The terms and conditions of leases under the Act, to the extent that they are not prescribed by the Act, are fixed by the Crown. It is abundantly plain, and the respondents' accept, that the Act contemplates that a lessee and sub-lessee, subject to the provisions of the Act, will be free to determine the terms and conditions of the sublease. The sublease, in legal character, is a contract between sub-lessor and sub-lessee even though it does not create a **legal interest** in land until registered.[55] There is, of course, nothing remarkable in a legal interest in land arising out of registration under a real property statute of an instrument dealing with an interest relating to that land. In the absence of some statutory provision to the contrary, as a general proposition, at least, the contractual rights and obligations of the parties to such an instrument arise and may be enforced by one party against the other irrespective of registration.

[91] There are few provisions of the Act which relevantly deal with subleases. Section 323 provides that if a sublease is transferred, the transfer must be registered. Section 328 provides that a "registered sublease may be wholly or partly surrendered by operation of law or by registering an instrument of surrender…". Section 332 provides that a lease issued under the Act may be subleased only with the written approval of the Minister or where the lessee holds a general authority to sublease. The sub-lessee must be a person who is eligible to hold the sublease under the Act. Section 335 requires subleases to be registered. Section 336 provides that a registered sublease may be amended by registering the amendment of the sublease. Section 339 provides:

> "**339 Re-entry by sublessor**
>
> (1) If a sublessor under a registered sublease lawfully re-enters and takes possession under the sublease, the sublessor may lodge a request for the chief executive to register the re-entry.
>
> (2) The interest of the sublessee ends on the registration of the request for the re-entry."

[92] Section 339A makes provision for mediation of disputes between parties to a sublease if the dispute cannot be dealt with under a dispute resolution process under another Act that specifically provides for dealings with disputes of that type and the sublease does not include a dispute resolution process that is capable of being used to resolve the dispute. Significantly, the Act is silent as to the terms and conditions of subleases.

[93] The respondents also rely on ss 301 and 302 which relevantly provide:

> "**301 Interest in land not transferred or created until registration**
>
> A document does not transfer a lease or licence or create a legal interest in a lease until it is registered.
>
> **302 Effect of registration on interest**
>
> (1) On registration of a document expressed to transfer or create an interest in land, the interest —
>
> (a) is transferred or created in accordance with the document; and

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55 *Land Act* 1994 (Qld), s 302.

(b) is registered; and

(c) vests in the person identified in the document as the person entitled to the interest.

(2) The person holds the interest subject to —

(a) all other interests in the land previously registered; and

(b) all rights and interests of the State in the land, other than interests subsequently registered."

[94] Section 301 would not appear to be particularly relevant for present purposes as "lease" is defined in Schedule 6 of the Act to include "sub-lease" for the purposes of Chapter 6, Part 4, Division 11A, which does not include s 301.

[95] It is impossible to discern in the provisions of the Act relating to subleases any intention to exclude the parties' freedom of contract or the application of common law principles relating to contracts beyond those which necessarily arise from the operation, in particular, of ss 302, 328, 332, 335, 336 and 339 of the Act. As counsel for the respondents submitted, s 332 assumes the existence of a right to sublease, subject to Ministerial approval, and the reference to lawful re-entry in s 339(1) is a reference to a right arising from a source other than a provision of the Act, namely a right under the terms of the sublease. Sections 332 and 339 assume that a sublease may contain terms in addition to those required by the Act or contained in the head lease.

[96] The fact that the interest of the sub-lessee under a registered sublease, by operation of s 339, continues in existence until the registration of the request for the re-entry, does not necessitate the conclusion that contractual rights and remedies are excluded: they operate subject to s 339. As counsel for the respondents pointed out in their written submissions, s 339 broadly follows Torrens Title legislation by which a registered interest continued in force until expiration as a result of notification.[56]

[97] For the above reasons, I am unable to accept that the doctrine of repudiation has no application to subleases of land under the Act and it is unnecessary to decide whether the respondents should be given leave to raise their new argument. Counsel for the appellants submitted that, had the point been raised at first instance, evidence could have been led "of the negotiations and terms of the agreement for sublease, and the terms of the ministerial approval under s 322 … of the sublease". This was said to bear on the proper characterisation of the sublease as either an agreement dealing with a statutory interest in land or a commercial transaction. The argument was not explained orally and I will content myself with the observation that the remarks of Gummow, Heydon and Bell JJ in refusing special leave in *Western Export Services Inc v Jireh International Pty Ltd*[57] would not seem to offer much encouragement for the appellants' argument.

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56 *Real Property Act* 1861 (Qld), s 72 and *Real Property Act* 1900 (NSW) explained in *Blacksheep Productions Pty Ltd v Waks* [2008] NSWSC 488 at [14].

57 [2011] HCA 45.

Conclusion

[98] As no ground of appeal has been made out, I would order that the appeal be dismissed with costs.

[99] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the order proposed by his Honour.

[100] **CHESTERMAN JA:** I agree with Muir JA.