The availability of loss of bargain damages upon termination of commercial property leases: Are New Zealand courts perpetuating an unprincipled remedial regime?

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In the recent decision of Morris v Robert Jones Investments Ltd *[1994] 2 NZLR 275, the New Zealand Court of Appeal followed the dominant Commonwealth position concerning the availability of loss of bargain damages upon cancellation of contracts of hire and lease. Focussing on commercial property leases, the author argues that this position lacks a sound foundation, and that rather than perpetuate an unprincipled remedial regime the courts should return to first principles of the law of contract.*

I INTRODUCTION

Commercial property leases, replete with covenants binding lessor and lessee, pervade the business world. Breach of covenant may give rise to a right to terminate the lease. As the lease has a split personality, being "both an executory contract and an executed demise",[1] that right to terminate may have two distinct sources.

Historically, proprietary means of termination derived from feudal tenure were considered the only means of termination. In modern times, however, it has come to be accepted that contractual principles apply to leases. As such, leases may now be cancelled in accordance with contractual principles, either pursuant to common law rights of cancellation, now codified in and modified by the Contractual Remedies Act 1979, or pursuant to an express contractual provision in the lease. From the "contractualisation" of leases springs the issue of whether loss of bargain damages are available, and if so, in what circumstances. Loss of bargain" is the loss of a defaulting party's future performance of its primary obligations under a contract terminated at the election of the innocent party. "Loss of bargain damages" are accordingly "the sum of money that will compensate the innocent party for the loss of that benefit".[2]

The established position in England and the prevailing position in Australia is that while loss of bargain damages are available where a contract is cancelled pursuant to a common law right to cancel, they are not available where cancellation is effected

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1 *Progressive Mailing House Pty Ltd* v *Tabali Pty Ltd* (1985) 57 ALR 609, 634 per Deane J (HCA).

2 B R Opeskin "Damages for Breach of Contract Terminated Under Express Terms" (1990) 106 LQR 293, 296.

pursuant to an express contractual provision alone. This distinction, compendiously labelled by one commentator as the "bifurcated principle",[3] seems to disregard fundamental principles of contract law. It overlooks the parties' intention as to the availability of loss of bargain damages, relies upon a questionable causation argument, supplants principles of compensation, and may rely on spurious policy considerations. Nevertheless, in the recent case of *Morris* v *Robert Jones Investments Ltd*[4] the Court of Appeal made it clear that the bifurcated principle prevails in New Zealand. Gallen J was quite open in stating that "[t]he question of the entitlement to recover damages for loss of bargain where a contract has been terminated ... has given rise to major conceptual difficulties in the law of contract."[5] However, with respect, his Honour failed to explore competing views on the issue, as did the other presiding judges. It would appear that the "[t]he so-called contractualisation of leases ... is ... proceeding in New Zealand without any realisation of the detailed issues involved."[6]

While of significance to contract law generally, this article is concerned with the availability of loss of bargain damages upon termination of commercial property leases, both on the basis of the current law and on the basis of what in the writer's view the law should be. The focus is on the soundness of the bifurcated principle and whether the remedial regime it sets up lacks a principled foundation. It should be noted that not all issues bearing on the availability of loss of bargain damages in the leasehold context are addressed. In particular, issues as to privity of contract inherent in some of the cases, and full analysis of the relationship between cancellation and forfeiture, must be left for another day,[7] as must the effect of registration.[8]

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3 Above n 2.

4 [1994] 2 NZLR 275.

5 Above n 4, 285.

6 D W McMorland "Proceedings for Rent – Tenant's Claim to Cancel for Breach of Covenant for Quiet Enjoyment" (1993) 6 BCB 166, 167.

7 As to concerns relating to privity of contract, see M Easton, R Mulholland and M Slatter *New Zealand Law Society Seminar: Commercial Leases* (New Zealand Law Society, Wellington, 1993) 32. As to the relationship between cancellation and forfeiture, see Easton, Mulholland and Slatter, herein cited, 33-34 (note that, with respect, Slatter seems to blend together the right to cancel with entitlement to loss of bargain damages); C Chew "Leases Repudiated: The Application of the Contractual Doctrine of Repudiation to Real Property Leases" (1990) 20 Western Australian Law Review 86, 97-101 and 121-124; K Mackie "Repudiation of Leases" (1988) 62 ALJ 53, 62; M Slatter "Leases: Contracts Through and Through?" (1993) 6 BCB 185, 187-188. In the New Zealand context, one should be aware of and work out the interrelationships between the Contractual Remedies Act 1979, ss 5, 8 and 15(g), the Property Law Act 1952, ss 107 and 118, the Land Transfer Act 1952, s 121, the Landlord and Tenant Act 1730, s 4, as well as the court's equitable jurisdiction to grant relief against forfeiture. The relationship between cancellation and forfeiture is discussed to a necessary extent below, see text accompanying notes 131-136.

8 The short answer to the effect of registration is that while the legal estate is not automatically divested upon cancellation, the parties' respective primary obligations do come to an end and the lessee holds the interest as a resulting trustee for the lessor. Equity divests the lessee of the substance of the interest leaving but a bare legal shell:

To provide the requisite historical backdrop, Part II outlines the development of the lease, from being purely personal in nature to bestowing rights in rem upon its holder. Part III explains the significance of and the renewed interest in the lease's contractual foundation. Part IV traces the evolution of the bifurcated principle in England, Australia and Canada. While of some length, this is a necessary step given New Zealand's mechanical application of precedent from the former two of those jurisdictions. Further, the courts' failure to adequately canvass relevant precedent may in part explain the confused nature of this area of the law. Part V analyses the New Zealand position. Part VI subjects the bifurcated principle to critical analysis and concludes that the distinction it creates is untenable, while Part VII proceeds to suggest means for persuading the courts to take a more principled approach. Part VIII concludes the article.

II HISTORICAL DEVELOPMENT OF THE LEASE

The lessor-lessee relationship derives from medieval land law. From the late twelfth century, leases were quite common, "but they formed no part either of the feudal system which was based on military tenure, or of the original agricultural system, which produced socage and villein tenure".[9] The lease at this time was purely personal in nature, conferring no interest in land upon the lessee. The common law viewed the lease as a simple contractual relationship.[10] Possessory remedies available to freeholders were not available to lessees. In the case of ejectment by a lessor, the lessee's only remedy was in contract – "the dispossessed [lessee] had merely an action in damages".[11]

However, from the thirteenth century onwards the courts granted new forms of action to lessees, enabling them to recover land of which they had been dispossessed.[12] By the late fifteenth century "it became accepted that a lessee ... had a right to 'possession' which was an interest in the land that he was entitled to protect against third parties".[13] This interest was protected "initially by a limited writ in ejectment ... framed in terms which restricted it to an action against a purchaser from the lessor, and subsequently by the remedies afforded under the Statute of Gloucester and by a specialised action of trespass ... which, by the end of the middle ages, gave recovery, not merely of damages, but of possession of the land."[14]

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see *Westpac Merchant Finance Ltd* v *Winstone Industries Ltd* [1993] 2 NZLR 247, 254-255.

9 M Barnes (ed) *Hill and Redman's Law of Landlord and Tenant* (Butterworths, London, 1994) A 1-2.

10 B H Davis *Introduction to Property Law* (Butterworths, Wellington, 1979) 175.

11 Above n 10.

12 Above n 10; Chew, above n 7, 91.

13 Above n 1.

14 Above n 1.

Today the lease, sometimes described as a "chattel real", is essentially a contractual-proprietary hybrid, a contract for the hiring of land or premises which confers a proprietary interest on the lessee.[15]

Despite its contractual foundation, the courts were reluctant to apply contractual doctrines to the lease. Doctrines such as frustration and repudiation were seen as inapplicable "to an executed demise under which an interest or estate in land had actually passed to the tenant."[16] Contractual obligations were seen as merely incidental to the relationship of landlord and tenant created by the demise.[17] The contractual foundation of the lease took second stage to its proprietary element.

However, the courts came to recognise that it is unrealistic to deny resort to the contractual foundation of the lease. In *National Carriers Ltd* v *Panalpina (Northern) Ltd*,[18] a four-to-one majority of the House of Lords held that the doctrine of frustration was in principle applicable to leases. Lord Simon could "see nothing about the fact of creation of an estate or interest in land which repels the doctrine of frustration."[19] The House of Lords acknowledged , however, that the doctrine would "hardly ever" apply.[20]

Ten years earlier, it was held by the Supreme Court of Canada in *Highway Properties Ltd* v *Kelly, Douglas & Co Ltd*[21] that a lessor is not limited to remedies given by the law of property, and can rely upon the contractual doctrine of repudiation. Delivering the judgment of the Court, Laskin J said:[22]

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

The above-quoted passage was referred to with approval by Lord Wilberforce in the *National Carriers* case.[23]

Both Australian and New Zealand courts have accepted the contractual approach to leases, the cases largely concerning the availability of loss of bargain damages upon termination by lessors of commercial leases.

It is opportune at this stage to explain the benefits of the contractual approach over the traditional property law approach to leases.

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15 Above n 10.
16 Above n 1.
17 *Cricklewood Property and Investment Trust Ltd* v *Leighton's Investment Trust Ltd* [1945] AC 221, 233.
18 [1981] AC 675.
19 Above n 18, 705.
20 Above n 18, 692.
21 (1971) 17 DLR (3d) 710.
22 Above n 21, 721.
23 Above n 18, 696. Cf *Johnstone* v *Milling* (1886) 16 QBD 460 (CA).

III THE BENEFITS OF TAKING A CONTRACTUAL APPROACH TO LEASES

A *The Traditional Property Law Analysis*

Under property law principles, upon termination of the lease, by re-entry and forfeiture for example, the injured party was only entitled "to damages which ha[d] accrued prior to determination of the estate".[24] As Priestley JA put it in *Wood Factory Pty Ltd* v *Kiritos Pty Ltd*:[25]

> The old law went on the footing that once the landlord was back in possession on his own account the tenant's obligations under the lease were at an end. The landlord could recover damages for breach of covenant before the termination of the lease, but nothing more.

The remedial consequences of contractual termination are, in certain circumstances, radically different. To understand the difference one must appreciate the circumstances in which one can cancel a contract and the consequences of cancellation.

B *Sources of the Right to Cancel a Contract*

At common law, "a contracting party was entitled to treat the contract as at an end if the other party wrongfully repudiated the contract, or was in breach of an essential term, or substantially failed to perform the contract."[26] However, in New Zealand, with the exception of contracts for the sale of goods, rights to terminate the performance of contracts for breach and repudiation are now governed by the Contractual Remedies Act 1979 ("CRA").[27]

A party to a contract may cancel it if another party repudiates the contract,[28] if another party to the contract breaks a stipulation in the contract,[29] or if it is clear that another party to the contract will break a stipulation in the contract.[30] As to the latter two rights to cancel, they may only be exercised if the parties have expressly or impliedly agreed that performance of the stipulation is essential to the cancelling party,[31] or if the effect of the breach or anticipated breach is (i) to substantially reduce

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24 Chew, above n 7, 96.
25 (1985) 2 NSWLR 105, 122.
26 F Dawson and D W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) 120. See further J W Carter *Breach of Contract* (2 ed, Law Book Co Ltd, Sydney, 1991) 60.
27 Under s 15(d) of the CRA nothing in the cancellation provisions of s 7 of that Act is to affect the Sale of Goods Act 1908. See further Dawson and McLauchlan, above n 26, 167-173.
28 CRA, s 7(2).
29 CRA, s 7(3)(b).
30 CRA, s 7(3)(c).
31 CRA, s 7(4)(a).

the benefit of the contract to the cancelling party, or (ii) to substantially increase the burden under the contract to the cancelling party, or (iii) to substantially alter the benefit or burden of the cancelling party under the contract from that bargained for.[32]

If a party affirms the contract with full knowledge of repudiation or breach, that party cannot cancel the contract. Further, a party's cancellation does not take effect until the cancellation is made known to the other party,[33] or, where communication is not reasonably practicable, until the cancelling party evinces by some overt means reasonable in the circumstances an intention to cancel.[34]

It is possible for parties to a contract to expressly provide for rights of cancellation. Section 7 of the CRA (which sets out rights of cancellation) has effect in place of rules of the common law and of equity governing rights to cancel a contract, "[e]xcept as otherwise expressly provided in th[e] Act".[35] Section 5 of the Act provides that if a contract makes express provision for rights of cancellation then section 7 of the Act shall have effect subject to that provision.

So the position in New Zealand is that rights to cancel a contract arise either from the CRA or from express contractual provision. As pointed out by Hardie Boys J in *Morris* v *Robert Jones Investments Ltd*, a party may rely on the statutory and/or the contractual right to cancel if both coexist, that is, if both rights coexist it is not necessary to distinguish between them when cancelling the contract.[36]

C *Consequences of Cancellation*

At common law, cancellation of a contract discharges both parties from the obligation to perform their contractual duties, and "from the obligation to be ready and willing to perform those duties."[37] Cancellation for breach or repudiation does not, however, render the contract void *ab initio*. The contract survives. In *Moschi* v *Lep Air Services Ltd* Lord Diplock stated the position thus:[38]

> Generally speaking, the [cancellation] of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of [cancellation]. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is

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32 CRA, s 7(4)(b).
33 CRA, s 8(1)(a).
34 CRA, s 8(1)(b).
35 CRA, s 7(1).
36 Above n 4, 279.
37 Carter, above n 26, 436.
38 [1973] AC 331, 350. See further *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827, 849.

> substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces. . .

Furthermore, cancellation does not divest the parties to the contract of any rights unconditionally acquired prior to cancellation.[39]

So far as the consequences of cancellation for breach or repudiation are concerned, the CRA restates the common law position. Section 8(3)(a) of the Act provides for the discharge of primary obligations upon cancellation, section 8(3)(b) reiterates the rule relating to non-divestment of unconditionally acquired property,[40] while section 8(4) preserves the secondary obligation to compensate the innocent party for loss stemming from the failure to perform the primary obligations.

The above exposition of the consequences of cancellation reveals that the benefits of taking a contractual approach to leases include additional sources of termination of the lease[41] and, most importantly, the right to damages for loss sustained as a result of the defaulting party's failure to perform its primary obligations. By contrast with the property law analysis, contractual cancellation may give rise to a claim for loss of bargain damages. At present, the success of such a claim is determined by the bifurcated principle.

The potential availability of loss of bargain damages is of great significance for parties to commercial leases. As explained by Deane J in *Progressive Mailing*, "the general trend in this century, particularly in relation to leases of urban premises, has been away from the type of lease which can realistically be ... viewed [as analogous to a form of feudal tenure]."[42] The trend "has been towards the lease, at a commercial rental and for a shorter term, framed in the language of executory promises of widening content and diminishing relevance to the actual demise."[43] In such circumstances it is the contract and not the estate which is of primary importance. Were a lessor only able to rely upon the traditional property law approach, then in a falling rental market termination of the lease for breach of covenant would be financially imprudent, for there would be no entitlement to prospective rent payments and other outgoings, and even if the lessor could find replacement tenants the rent payments would be of lesser value. However, if a lessor is able to claim for loss of bargain damages, then the lessor may wish to cancel the lease-contract when faced with a defaulting tenant. The major advantage in doing so would be "to secure the original value of the contract while re-letting the premises and so keeping them occupied."[44]

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39 Carter, above n 26, 439.
40 See further Dawson and McLauchlan, above n 26, 134-135.
41 See further Chew, above n 7, 96.
42 Above n 1, 634-635.
43 Above n 1, 635.
44 M Easton, R Mulholland and M Slatter *New Zealand Law Society Seminar: Commercial Leases* (New Zealand Law Society, Wellington, 1993) 31.

While a lessor is subject to a duty to mitigate its loss when seeking loss of bargain damages, the duty is not demanding. The lessor is not obliged "to take any step which a reasonable and prudent [person] would not ordinarily take in the course of [that person's] business."[45] Furthermore, the onus is on the defendant to prove lack of mitigation.[46] In the absence of such proof, provided the plaintiff proves the prevailing market rental value of the premises at the time of termination,[47] the plaintiff is entitled to "the difference between the rent which would have been recoverable under the lease ... and the 'rental value' of the lease ... as at the date of breach."[48]

To sum up thus far, the availability of loss of bargain damages upon termination of commercial leases is of considerable importance to parties to those leases. The party with the option to cancel needs to know whether loss of bargain damages are available in deciding whether to exercise the option, while the party either in or considering default needs to know the extent of its liability. Further, practitioners need to be aware of the legal position in advising clients on such matters.

As already stated, the availability of loss of bargain damages is presently regulated by the bifurcated principle, such that while loss of bargain damages will be available if cancellation is effected pursuant to a common law right to cancel, they will not be available if cancellation is effected in sole reliance on a contractual termination clause. Also as already stated, that principle is of questionable validity. To understand these assertions, it is necessary to trace the evolution of the principle, and then to subject it to critical analysis. This exercise is not only of academic value. The High Court of Australia, which so ardently adopted and espoused the principle, has in recent times expressed reservations about it, and it is arguable that the Supreme Court of Canada has abandoned it. It may not be too late to persuade a full bench of the New Zealand Court of Appeal to discard the principle and to return to fundamental principles of contract law.[49]

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45 *British Westinghouse Electric and Manufacturing Co Ltd* v *Underground Electric Railway Co of London Ltd* [1912] AC 673, 689.

46 Detailed discussion of the duty to mitigate is beyond the scope of this article. The reader is referred to Easton, Mulholland and Slatter, above n 44, 35; D W McMorland "Liability of Intermediate Assignees of Leasehold Estate – Landlord's Duty to Mitigate" (1993) 6 BCB 229; and M Slatter "Abandonment of Commercial Leases" (1992) 6 BCB 65, 78. A recent decision which discusses the issue is *Innes-Jones* v *Spencer* Unreported, 15 September 1993, Court of Appeal CA 55/93.

47 *Williams* v *K F Meates & Co Ltd* (1971) 1 NZCPR 594 (CA).

48 *Benjamin* v *Wareham Associates (NZ) Ltd* (1990) 1 NZ ConvC 190,638 (HC). The courts have generally accepted the rental received on re-letting as the current market "rental value", although this may be due to the absence of serious challenge: above n 44, 35.

49 The New Zealand Court of Appeal is not bound by its own decisions. See *Collector of Customs* v *Lawrence Publishing Co Ltd* [1986] 1 NZLR 404; *Dahya* v *Dahya* [1991] 2 NZLR 150; *Attorney-General of St Christopher Nevis and Anguilla* v *Reynolds* [1980] AC 637.

IV EVOLUTION OF THE BIFURCATED PRINCIPLE

New Zealand has relied upon both English and Australian precedent in adopting the bifurcated principle. It is thus necessary to trace the evolution of the principle in both of those jurisdictions with reference to key case law relevant to the issue. An analysis of the Canadian position arguably reveals a different approach founded on a more principled basis. A chronological tracing of the principle in these jurisdictions is both necessary and desirable, for it enables one to identify junctures at which the courts may have gone astray, and indeed to understand this complex area of the law. While many of the cases concern hire-purchase agreements, a discussion of those cases is necessary, for they form the basis of many decisions on commercial property leases.

A Evolution of the Bifurcated Principle in England

An appropriate starting point is the case of *Yeoman Credit Ltd* v *Waragowski*.[50] A hire-purchaser failed to make payments under a hire-purchase agreement, and pursuant to an express provision in the contract the owners terminated the agreement and retook possession of the goods. The owners were successful in their claim for loss of bargain damages. While the facts may have supported a finding of repudiation by the hirer, there was no discussion of repudiation and it does not appear that Davies LJ, with whom Ormerod and Upjohn LJJ concurred, relied upon that state of affairs in arriving at his decision. Rather, it would appear that the hirer's breach of contract, which entitled the owners to exercise their contractual right of termination, caused the owners' loss of bargain for which the hirer was liable,[51] such liability being contemplated by the parties in their agreement.

Waragowski's case underwent modification in *Overstone Ltd* v *Shipway*.[52] As in *Waragowski's* case, the parties had entered an agreement for the hire-purchase of a motor vehicle. The hirer failed to pay its instalments, and the owners terminated the hiring and retook possession pursuant to an express term in the agreement. Under the agreement the hirer could have determined the hiring, but failed to do so. In any event, a damages clause stipulated that upon either the hirer's or the owners' valid termination, the hirer would be liable to pay two-thirds of the total amount payable under the agreement. Fearing the damages clause would be considered a penalty, the owners sued for loss of bargain damages, being the balance of the price they would have recovered under the agreement less the hirer's deposit, the resale value of the car and other related costs. While the Court of Appeal awarded loss of bargain damages, it seems to have introduced some qualifications not present in *Waragowski's* case. Holroyd Pearce LJ said that whether the principle in *Waragowski's* case applies in situations such as that before him is a question of fact, and that:[53]

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50 [1961] 3 All ER 145 (CA).
51 Above n 50, 147.
52 [1962] 1 WLR 117 (CA).
53 Above n 52, 123. See further the comments of Davies LJ, above n 52, 130.

Where ... the hirer pays no instalments and clearly does not intend to go on with the hiring, the only reasonable solution for the impasse is for the owner to retake the hired article ... . [However] [w]here the hirer is slightly in arrears and does not show that he is *not* going on with the contract, the seizure of the hired article may not be the reasonable solution of the situation, and it may well be that damage consequent on and flowing from it was not caused by the hirer's breach, but by the owner's decision to exercise his right to retake possession.

The above comments appear to suggest that the availability of loss of bargain damages depends upon the "reasonableness" of termination. The argument seems to be that while conduct in effect amounting to repudiation renders termination by the other party reasonable, termination in the face of a minor breach is unreasonable, and that where termination is unreasonable subsequent loss to the cancelling party is caused by the act of termination as opposed to the other's party's breach. The important point concerning this distinction is that the causal mechanism underpinning the distinction is regulated by the reasonableness of termination, not by the presence or absence of repudiation per se.

Waragowski and *Shipway* were both relied on in *Financings Ltd* v *Baldock*,[54] one of the most influential decisions in England, Australia, Canada and New Zealand. A hirer failed to pay instalments under a hire-purchase agreement for a lorry. The owners repossessed the lorry and terminated the hiring pursuant to an express provision in the contract, and claimed, inter alia, loss of bargain damages from the hirer. The owners failed in their claim, there having been no right to terminate at common law. Lord Denning MR, clearly articulating the bifurcated principle, said:[55]

If ... there is no repudiation, but simply ... a failure to pay one or two instalments (the failure not going to the root of the contract and only giving a right to terminate by virtue of an express stipulation in the contract), the owners can recover only the instalments in arrear, with interest, and nothing else ... . The same result can be reached by saying that, on a repudiation, it is "reasonable" for the owners to terminate the hiring: whereas on a mere non-payment of instalments, it is "unreasonable". I would prefer, however, to ask – is there, or is there not, a repudiation ... ?

Lord Denning reasoned that any loss of bargain was caused not by the hirer's breach of contract but by the owner's election to terminate. Moreover, his Lordship thought his decision met "the justice of the case".[56] Previous hire-purchase cases where loss of bargain damages had been awarded, including both *Waragowski's* case and *Shipway*, were interpreted by Lord Denning as cases where there had been a repudiation by the hirer. Any notion of the availability of loss of bargain damages depending on the reasonableness of termination was abandoned in favour of the bifurcated principle.

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54 [1963] 1 All ER 443 (CA).
55 Above n 54, 446.
56 Above n 54, 446.

Although there may have been a repudiation in each of the previous cases, it does not follow that the repudiation grounded the decision in each case. While one can perhaps argue that *Shipway* was decided on this basis, it does not appear that *Waragowski's* case was so decided. The English Court of Appeal seems to have subtly moved from a pro-owner stance in *Waragowski's* case to a pro-hirer stance in *Financings*, moving from a causal mechanism based on "reasonable termination" in *Shipway*, to the bifurcated principle in *Financings*.

Lord Denning seems to have taken on the causation distinction at least implicit in *Shipway*, which is founded upon the reasonableness of termination, and to have fundamentally altered it. Not only is the "reasonableness of termination" foundation itself questionable, for surely the exercise of an undoubted contractual right cannot realistically be considered "unreasonable", but Lord Denning seems to have replaced that foundation with a "presence or absence of repudiation" foundation. At the same time, Lord Denning relies on the causal mechanism said in *Shipway* to be regulated by the "reasonableness of termination" foundation. With respect, his Lordship's reasoning is unsound.

There is one further part of Lord Denning's reasoning which requires consideration. His Lordship began his reasoning thus:[57]

> [W]hen an agreement of hiring is terminated by virtue of a power contained in it and the owner retakes the vehicle, he can recover damages for any breach up to the date of termination, but not for any breach thereafter, for the simple reason that there are no breaches thereafter. I see no difference in this respect between the letting of a vehicle on hire and the letting of land on a lease. If a lessor, under a proviso for re-entry, re-enters on the ground of non-payment of rent or of disrepair, he gets the arrears of rent up to date of re-entry and damages for want of repair at that date, but he does not get damages for loss of rent thereafter or for breaches of repair thereafter.

Lord Denning's analogy between the letting of a vehicle on hire and the letting of land on a lease is problematic. His Lordship finds support for his thesis in the traditional property law analysis of remedial consequences following re-entry. However, Lord Denning is deriving assistance for his analysis of a hire-purchase contract and the remedial consequences following its termination, from a property law analysis which gives paramountcy to the lease's proprietary aspect at the expense of the lease's contractual foundation. Re-entry is a proprietary measure, and surely cannot be relied upon to explain the consequences of contractual cancellation. Furthermore, now that a contractual approach is taken to leases, the basis of his Lordship's reasoning is no longer valid.

Financings was followed in a number of later decisions, including *Brady* v *St Margaret's Trust*,[58] *Charterhouse Credit Co* v *Tolley*,[59] and *United Dominions Trust*

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57 Above n 54, 445.
58 [1963] 2 QB 494 (CA).
59 [1963] 2 QB 683 (CA).

(Commercial) Ltd v *Ennis*.[60] However, the case of *Sotiros Shipping Inc and Aeco Maritime SA* v *Sameiet Solholt (The Solholt)*[61] seems in direct conflict with *Financings*. Under an agreement for sale of a ship, the buyers had a right to cancel the contract in the event of late delivery, with the sellers being obliged to make due compensation for any loss caused to the buyers by non-fulfilment of the contract. Delivery was late, and the buyers cancelled the contract. Notwithstanding the apparent absence of any common law right of termination, the Court of Appeal held that, had the buyers taken reasonable steps to mitigate their loss, they would have been entitled to loss of bargain damages. Sir John Donaldson MR said the buyers had on the facts an unfettered right to cancel the contract, the exercise of which resulted in their suffering a loss of U.S. $500,000. His Honour proceeded to hold that "[a]s a matter of causation, this loss, unless avoidable by some reasonable *further* action, was directly attributable to the seller's breach of contract."[62] The phrase "unless avoidable by some reasonable *further* action" refers to the duty to mitigate one's loss. Accordingly, when a cancelling party fulfils that duty, loss of bargain upon termination is caused by the defaulting party's breach, not by the cancelling party's election to terminate. It would seem that the only way to reconcile *The Solholt* and *Financings* is to argue that breach of the provision requiring delivery in *The Solholt* also gave rise to a common law right to terminate the contract. For example, the provision may have been an essential term.[63] Either there was a common law right to terminate or one of the cases is wrongly decided.

The final English case requiring discussion is *Lombard North Central Plc* v *Butterworth*.[64] The defendant entered an agreement with the plaintiff to hire a computer. A term in the contract provided that punctual payment of each quarterly rental was of the essence of the contract. Upon the defendant failing to make the required timely payments, the plaintiff repossessed the computer, terminated the lease, and sued the defendant for arrears in rent and loss of bargain damages. The plaintiff succeeded in its claim. While there was no repudiation, the parties had made punctual payment of rental a condition (essential term) of the contract, breach of which gave rise to a common law right to terminate. As such, on the basis of *Financings* and similar cases, the plaintiff was entitled to succeed. Mustill LJ set out a series of propositions relevant to the case, the most important of which are as follows:[65]

5. A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.

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60 [1968] 1 QB 54 (CA).
61 [1983] Lloyd's Law Reports 605.
62 Above n 61, 608.
63 See further J W Carter "The Effect of Discharge of a Contract on the Assessment of Damages for Breach or Repudiation" (1988) 1 JCL 113, 259.
64 [1987] 1 QB 527 (CA).
65 Above n 64, 535.

6. It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

Both Mustill and Nicholls LJJ, with whom Lawton LJ concurred, expressed dissatisfaction with the result of the case. Nicholls LJ could see no practical difference between an agreement with an express termination provision, and an agreement containing a provision that punctual payment is of the essence. His Honour said:[66]

The difference between these two agreements is one of drafting form, and wholly without substance. Yet under an agreement drafted in the first form, the owner's damages claims arising upon his exercise of the power of termination is confined to damages for breaches up to the date of termination, whereas under an agreement drafted in the second form the owner's damages claim, arising upon his acceptance of an identical breach as a repudiation of the agreement, will extend to damages for loss of the whole transaction.

Nicholls LJ noted how a skilled draftsman can sidestep, and as such emasculate, the decision in *Financings.*

To sum up the English position, while the case law is not wholly consistent, at present the bifurcated principle prevails. Loss of bargain damages are only available where the right to cancel exists at common law. Cancellation pursuant to an express contractual term will not provide recourse to loss of bargain damages unless there also existed a concurrent common law right to terminate at the time of cancellation.

B Evolution of the Bifurcated Principle in Australia

The Australian position is fairly similar to that of England. The first important Australian case is *Westralian Farmers Ltd* v *Commonwealth Agricultural Service Engineers Ltd.*[67] Of importance for present purposes is the statement by Dixon and Evatt JJ that "[w]hen the parties themselves have provided for the determination of the contract on a given contingency, the consequences flow altogether from their contractual stipulation and are governed by their intention, either actual or imputed."[68] That statement reveals that, at least at one stage, Australian courts were recognising the importance of the parties' intention.

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66 Above n 64, 546.
67 (1936) 54 CLR 361 (HCA).
68 Above n 67, 379.

Westralian Farmers was adopted by Jordan CJ in *Larratt* v *Bankers and Traders Insurance Co Ltd*,[69] which concerned an alleged repudiation of an accident insurance policy. In discussing the consequences of termination, that eminent judge said:[70]

> Where [a contract] is avoided by virtue of an express right of avoidance, the consequences which flow from an avoidance depend on the intention of the parties, actual or imputed, and, in the absence of some express or implied indication of intention to the contrary, are governed by the ordinary law applicable to the avoidance of contracts for breaches of essential promises.

Unfortunately, this important principle concerning the parties' intention as to the consequences of cancellation has been overridden by the courts' adherence to the bifurcated principle. The reasoning in *Shevill* v *Builders Licensing Board*[71] is largely to blame. A lease provided that if rent was unpaid for fourteen days or if certain other events occurred (for example, default in the due and punctual performance of other covenants, or liquidation of the lessee), the lessor could re-enter the land "without prejudice to any action or other remedy the lessor has or might or otherwise could have for arrears of rent or breach of covenants or for damages as a result of any such event".[72] The lessee was persistently late in paying rent. The lessor exercised its right of re-entry and sued the lessee's guarantors for loss of bargain damages. The action failed, the High Court of Australia holding that there had been neither a repudiation nor breach of an essential term by the lessee. Gibbs CJ said it would require very clear words to bring about the result, in some circumstances quite unjust, that whenever the lessor exercised the contractual right of re-entry he could also recover loss of bargain damages – damages for failure to perform primary obligations which the lessee might have been willing to perform had the lease not been terminated.[73] His Honour also observed that "[i]t would have been easy, although inequitable, to provide that [upon re-entry] ... the lessor would be entitled to [loss of bargain damages]".[74]

Counsel for the lessors did not argue that loss of bargain damages might be available in the absence of a common law right to terminate, instead arguing that there was either a breach of an essential term or a repudiation. Nevertheless, the High Court was clearly proceeding on the bifurcated principle. In agreement with counsel for the guarantors'

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69 (1941) 41 SR(NSW) 215.

70 Above n 69, 225.

71 (1982) 149 CLR 620 (HCA). *Shevill* has been discussed in numerous later cases. For example, it was applied in *Laurinda Pty Ltd* v *Capalaba Park Shopping Centre Pty Ltd* (1988) 85 ALR 183 (in respect of its discussion of repudiation), *Amann Aviation Pty Ltd* v *Commonwealth of Australia* (1990) 92 ALR 601 (in respect of its discussion of repudiation), *AMEV Finance Ltd* v *Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564 (in respect of its articulation of the bifurcated principle); it was both considered and distinguished in *Wood Factory Pty Ltd* v *Kiritos Pty Ltd* (1985) 2 NSWLR 105; and it was explained in *Citicorp Australia Ltd* v *Hendry* (1985) 4 NSWLR 3.

72 Above n 71, 623-624.

73 Above n 71, 628.

74 Above n 71, 629.

argument, any loss of bargain was considered to have been caused by the lessor's election to terminate, not by the lessee's breach.[75]

It should be evident that the High Court's approach in *Shevill* is contrary to *Westralian Farmers*, *Larratt* and *The Solholt*. Nevertheless, the High Court has continued to take that approach.

In *Progressive Mailing House Pty Ltd* v *Tabali*,[76] there was a dispute between the parties to a lease concerning certain work to be carried out on the premises by the lessor. The lessee failed to make its rent payments and committed other breaches of covenant. The lessor exercised its right of re-entry and commenced proceedings for loss of bargain damages. The lessor succeeded, the High Court holding that there had been either a repudiation or fundamental breach of the contract, that is, there was a right to cancel at common law. The High Court clearly proceeded on the basis of the bifurcated principle. For example, Brennan J said that "[a] lessor can recover damages for loss of the benefit of the lease only where the lessee has repudiated the lease before determination of the term."[77] Further, Mason J articulated the causation argument founding the bifurcated principle, saying:[78]

Nor can it be said in the case of repudiation or fundamental breach, that loss of bargain is attributable to the innocent party's exercise of his contractual power to terminate. It is different in the case of termination for non-essential breach, as *Shevill* demonstrates, because, by terminating pursuant to the contract at that stage, the innocent party puts it beyond his power to insist on performance, thereby bringing to an end any possibility of repudiation or fundamental breach with consequential damages for loss of bargain.

Deane J's judgment is of particular interest. His Honour agreed with the decision that loss of bargain damages were available, there having been a "fundamental breach". However, his Honour observed, citing *Larratt* and *The Solholt*, that "the distinction between termination for fundamental breach and termination for a breach which the parties have agreed in advance would be such as to give rise to a right to terminate is not without difficulty".[79] Deane J appears to have distanced himself from *Shevill* and the bifurcated principle.

The next significant case is *AMEV-UDC Ltd* v *Austin*.[80] A lessee's guarantors were sued for the lessee's breaches of two chattel lease agreements. While not repudiating the agreements, the lessee had failed to pay instalments when due. Accordingly, the lessor

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75 Above n 71, 629 per Gibbs CJ, 637 per Wilson J.

76 (1985) 57 ALR 609.

77 Above n 76, 625. Brennan J seems to have been using the term "repudiation" in a broad sense, encompassing any breach of contract which gives rise to a common law right of termination in the other party.

78 Above n 76, 679.

79 Above n 76, 637.

80 (1986) 68 ALR 185 (HCA).

exercised its contractual right to terminate each hiring, and brought proceedings claiming the balance of rent payable for the contractual term, that is, loss of bargain damages. The agreement contained an agreed damages clause which was considered by the lower courts to be a penalty, and it was unclear from the pleadings whether that clause was relied on in the High Court. It was not argued that the existence of a contractual right on the part of the lessor to terminate for a breach of what was otherwise a non-essential term rendered that term a condition. The important issue facing the court was whether loss of bargain damages are available when a contract is terminated in sole reliance on an express termination clause. A three-to-two majority of the High Court[81] held that loss of bargain damages were not available.

The majority approved of *Financings* and clearly accepted the bifurcated principle. Mason and Wilson JJ said:[82]

> [W]hen the lessor terminates pursuant to the contractual right given to him for breach by the lessee, the loss which he can recover for non-fundamental breach is limited to the loss which flows from the lessee's breach. The lessor cannot recover the loss which he sustains as a result of his termination because that loss is attributable to his act, not to the conduct of the lessee. It is otherwise in the case of fundamental breach, breach of an essential term or repudiation.

It should be noted, however, that while accepting the principle, Mason and Wilson JJ did not view it as beyond reproach. Following on from the above passage, they said:[82a]

> [P]erhaps in deference to *Shevill* ... it was not argued that the existence of a contractual right on the part of the lessor or owner to terminate for a breach of what is otherwise a non-essential term endowed that term with the character of a condition, though the judgment of Jordan CJ in *Larratt* ... seems to support the proposition.

The dissenting judgments of Deane and Dawson JJ reflect the growing disquiet with the bifurcated principle. Deane J decided the case on the basis that "the lessor was entitled to enforce the penal clauses [in the agreement] up to the amount of the loss proved to have been actually sustained by it on termination of each lease agreement."[83] However, his Honour proffered some further comments in the alternative. He agreed with Jordan CJ's analysis in *Larratt*,[84] and said:[85]

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81 The majority members of the Court were Gibbs CJ and Mason and Wilson JJ. Deane and Dawson JJ dissented.

82 Above n 80, 196. See also above n 80, 187-188 per Gibbs CJ.

82a Above n 80, 196.

83 Above n 80, 210. Detailed discussion of penalty clauses is beyond the scope of this article. Generally speaking, "[a]n agreed damages clause must be a genuine pre-estimate of loss or damage, otherwise it will be a penalty and unenforceable": Carter, above n 26, 456.

84 See above, text accompanying notes 69-70.

85 Above n 80, 211.

> [T]here is a prima facie assumption that the consequences which flow from the exercise of an express contractual right to terminate on breach are governed by 'the ordinary law applicable to the avoidance of contracts for breaches of essential promises'.

Here that assumption was not displaced and hence the lessor would be entitled to loss of bargain damages.

Deane J expressed difficulty with *Shevill*, saying the approach in that case "lie[s] ill with modern notions of causation and remoteness in the law of contract ... while the actual decision confounds long established practice and understanding of real property lawyers in New South Wales."[86]

An even stronger dissent is seen in Dawson J's judgment. His Honour noted the courts' adherence to the bifurcated principle, and found it hardly satisfactory to say that loss following termination pursuant to an express contractual provision flows not from the defaulting party's breaches but from the lessor's action of termination. He said that in such circumstances the lessor is doing something contemplated by the parties in their agreement, and that if the agreement can provide for the lessor to take that step, "[t]here is no reason in logic or in principle why ... it cannot, if the parties so intend, provide for the step to be taken at no loss to the lessor".[87] Dawson J also noted an absurdity of the bifurcated principle, that a lessor "may be constrained to encourage circumstances amounting to a repudiation rather than to bring an unsatisfactory situation to an end in accordance with his [or her] contractual right to do so."[88] His Honour agreed with *Westralian Farmers* and *Larratt,* and could see no reason why the law should not give effect to the parties' intention concerning the remedial consequences of termination consequent upon breach.[89]

So, in *AMEV-UDC* the bifurcated principle survives, albeit in the face of a powerful attack by the minority judges and with reservations expressed by two of the majority judges.

Further reservations were expressed about the bifurcated principle in the most recent High Court of Australia decision touching this issue, *Esanda Finance Corp Ltd* v *Plessnig*.[90] Lessees of goods failed to pay monthly instalments under a hire-purchase agreement. The owner terminated the agreement under an express termination provision, and pursuant to an agreed damages clause sought the total rent payable under the agreement, less the deposit, paid rentals, the value of the goods and a rebate of charges. The case proceeded on the basis that there had been no repudiation. It was held that the agreed damages clause was not a penalty and therefore the lessors were entitled to the sum claimed. The High Court, then, "upheld a clause that allowed, in effect,

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86 Above n 80, 211.
87 Above n 80, 216.
88 Above n 80, 217.
89 Above n 80, 218.
90 (1989) 166 CLR 131 (HCA).

recovery of loss of bargain damages even though the hire-purchase contract was terminated under a mere contractual right."[91] Brennan J (a member of the High Court in *Shevill*) said:[92]

> I take the law to accept an incongruity in holding that an owner's damages at law for a non-repudiatory breach are limited to losses caused by the breach alone while holding that a clause which imposes a liability on the hirer to pay the losses caused by exercise of a power to terminate a hiring upon breach is not a penalty. It may be appropriate to reconsider this incongruity in some later case and, if that is done, it may well be necessary to canvass the correctness of some earlier decisions of this Court.

His Honour would seem to be calling the bifurcated principle directly into question.

To sum up the Australian position, one can say that the bifurcated principle presently prevails, but its continued survival is by no means certain. At least three of the seven members of the High Court as constituted at present[93] are troubled by the principle.

C *Evolution of the Bifurcated Principle in Canada*

An appropriate starting point in Canada is *Canadian Acceptance Corp Ltd* v *Regent Park Butcher Shop Ltd.*[94] A lessee failed to pay the required rental under a chattel lease agreement. The owners repossessed the equipment pursuant to the agreement and sued for arrears in rent and loss of bargain damages. The Manitoba Court of Appeal rejected the claim for loss of bargain damages. Dickson JA canvassed existing case law and concluded that there was no uniform pattern in the decisions. Some of the cases allowed loss of bargain damages, while others did not. As such his Honour felt free "to approach the matter afresh according to [the court's] best judgment".[95] The court's "best judgment" was that *Financings*[96] stated the correct position. Like Lord Denning, Dickson JA drew the analogy between a lease of land and a chattel lease,[97] which as already stated is a spurious analogy.[98]

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91 N Y Chin "Finance Leases and Loss of Bargain: Judicial Impulses in the High Court" (1993) 23 Western Australian Law Review 279.

92 Above n 90, 147. See further the comments of Clarke JA in *AMEV Finance Ltd* v *Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564, 585-586.

93 Current members of the High Court of Australia are Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

94 (1969) 3 DLR (3d) 304.

95 Above n 94, 314.

96 [1963] 1 All ER 443 (CA).

97 Above n 94, 315.

98 See above, text accompanying notes 57-58.

In *Pacific Leasing Corp Ltd* v *Fire Valley & Cattle Co Ltd*,[99] Seaton J of the British Columbia Supreme Court took the same approach as Dickson JA, relying heavily on *Financings*.

An important case in relation to leases of land, already referred to above, is *Highway Properties Ltd* v *Kelly, Douglas & Co Ltd*,[100] where the Supreme Court of Canada held that a landlord faced with a defaulting tenant could rely on the doctrine of repudiation and recover loss of bargain damages. In addition to the sentiments expressed above,[101] Laskin J saw merit "in avoiding multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engage in instalment litigation against a repudiating tenant".[102]

The most important Canadian case is *Keneric Tractor Sales Ltd* v *Langille*.[103] A lessee of agricultural equipment advised the lessor that it would have trouble making the requisite payments, and subsequently defaulted on its payments. The lessor repossessed the equipment, sold it, and sued the lessee for loss of bargain damages. An agreed damages clause was penal and hence the lessor had to rely on recovery at common law. Wilson J, delivering the judgment of the Supreme Court of Canada, held that the lessor was entitled to loss of bargain damages. While the judgment lacks clarity and at times seems to misinterpret precedent such as the *Regent Park Butcher* case, it is arguable that Wilson J rejected the bifurcated principle.

Wilson J spent some time discussing the *Regent Park Butcher* case. With respect, her Honour completely misconstrued the decision, viewing it as authority for the blanket proposition that a lessor who terminates a chattel lease under a contractual provision is limited in his or her remedies to the rent due upon termination plus any proceeds from resale,[104] period, regardless of any question of repudiation. However, in *Regent Park Butcher* Dickson JA adopted the bifurcated principle as set out in *Financings*. It would seem that loss of bargain damages were not available in that case because there had not been a repudiation by the lessee.[105] Nevertheless, Wilson J said "the decision of this court in *Highway Properties* has intervened and shifted the jurisprudential foundation upon which the *Regent Park* decision was based."[106] Her Honour noted that *Highway Properties* concerned the right to damages flowing from the repudiation of a lease, and said an application of *Regent Park Butcher* would have defeated the claim for loss of bargain damages. With respect, Wilson J's analysis is incorrect, for *Regent Park Butcher* proceeded on the bifurcated principle. Putting aside for one moment the fact that *Highway Properties* concerned a lease of land, following

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99 (1969) 4 DLR (3d) 454.
100 (1971) 17 DLR (3d) 710.
101 See above, text accompanying notes 21-22.
102 Above n 100, 721.
103 (1988) 43 DLR (4th) 171 (SCC).
104 Above n 103, 177.
105 See further J F Varcoe "Finance Leasing – An Analysis of the Lessor's Rights Upon Default by the Lessee" (1976) 1 Canadian Business Law Journal 117, 133.
106 Above n 103, 177.

the *approach* in *Regent Park Butcher,* loss of bargain damages would have been available, as there had been a repudiation.

Having discussed *Highway Properties* at length, Wilson J said that the law as stated in that case concerning the availability of loss of bargain damages following termination consequent upon repudiation of a lease of land should also apply to chattel leases. It is suggested, however, that the law relating to chattel leases was in this state *prior* to *Highway Properties.* Wilson J continued:[107]

> The damages flowing from the breach of a chattel lease, like the damages flowing from the breach of a land lease, should be calculated in accordance with general contract principles. To the extent that *Regent Park* reflects a different approach it should not be followed.

As stated, *Regent Park* does not reflect a different approach.

Notwithstanding its faulty reasoning, all the case says thus far is that loss of bargain damages are available upon termination for repudiation of a chattel lease. However, counsel for the lessee contended that *Highway Properties* was distinguishable as there was no repudiation. In addressing this contention, Wilson J asked: "is there any reason why the rule laid down in *Highway Properties* should not logically extend to all cases involving a lawful termination by the lessor?"[108] Her Honour said that to answer this question one must go back to first principles of contract law. She said "[i]f a party ... breaches a term of *sufficient importance* the other party has the right to treat the contract as discharged from any future obligations under it,"[109] and that the same right arises upon a repudiation. The important question here is whether, in referring to breaching a term of "sufficient importance", Wilson J was referring only to common law rights of contractual cancellation other than repudiation, or whether she was referring to both common law *and* contractual rights to terminate. Again posing the question "whether the assessment of damages in a case of termination based on breach of a term of the contract should be any different from the assessment of damages in a case of termination based on repudiation,"[110] Wilson J answered "that damages should be assessed in the same way in both cases."[111] Her Honour concluded the issue stating that:[112]

> [T]here is no conceptual difference between a breach of contract that gives the innocent party the right to terminate and the repudiation of a contract so as to justify a different assessment of damages when termination flows from the former rather than the latter. General contract principles should be applied in both instances.

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107 Above n 103, 179.
108 Above n 103, 179.
109 Above n 103, 180 (emphasis added).
110 Above n 103, 180.
111 Above n 103, 180.
112 Above n 103, 180.

So, while the decision is not without difficulty, it seems that the Supreme Court in *Keneric Tractor* rejected the bifurcated principle,[113] and that this is the current position in Canada.

D Conclusion on the Status of the Bifurcated Principle in Commonwealth Jurisdictions

To sum up the status of the bifurcated principle in prominent Commonwealth jurisdictions, one can say that the principle prevails in England, has a perhaps fragile existence in Australia, and seems to have been rejected in Canada.

With an understanding of the bifurcated principle's evolution and current status, one is now well-prepared to analyse the New Zealand position.

V NEW ZEALAND'S POSITION ON THE BIFURCATED PRINCIPLE

The first significant New Zealand case is *Williams* v *K F Meates & Co Ltd*,[114] in which the contractual analysis of leases "crept unheralded into New Zealand law".[115] A lessee repudiated an agreement to lease. The lessor re-let the premises to a company, but that company failed. Three years after the original repudiation the lessor sued the lessee for loss of bargain damages. The Court of Appeal agreed with the Supreme Court "that the measure of damages was the financial loss which the appellant sustained as a result of the respondent's breach of contract."[116] However, as the lessor did not prove the rental value of the premises at the time of termination,[117] loss of bargain damages were not available.

While signifying acceptance of the contractual analysis, *Williams* does not discuss the availability of loss of bargain damages upon termination pursuant to an express termination clause, as there was a repudiation.

Williams was applied by the High Court fourteen years later in *New Zealand Newspapers Provident Association* v *Latimer Holdings Ltd*,[118] a case with similar facts and the same result due to an absence of proof of rental value.

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113 A leading Canadian commentator steadfastly adopts this view, opining that "[w]hat distinguishes the Supreme Court's approach from the well established English jurisprudence is that the Supreme Court's decision allows the lessor to recover his expectancy of damages whether or not the lessee has repudiated the agreement and whether or not he has committed a breach of an essential term of the agreement": J S Ziegel "Measuring Damages for Breach of a Chattel Lease: The Supreme Court of Canada Liberalises the Rules" [1988] Lloyd's Maritime and Commercial Law Quarterly 276, 277.

114 (1971) 1 NZCPR 594 (CA).

115 M Slatter "Abandonment of Commercial Leases" (1992) 6 BCB 65, 77.

116 Above n 114, 596.

117 See above, text accompanying notes 46-48.

118 Unreported, 3 May 1985, High Court, Christchurch Registry A266/82.

The first Court of Appeal decision directly in point is *Miller* v *Mattin*.[119] Upon a lessee failing to pay rent, the lessor exercised its contractual right of re-entry, which was "without prejudice to the rights and remedies of the landlord in respect of any antecedent breach of any covenant, condition, or provision herein contained or implied."[120] The lessor sued the guarantors for arrears in rent and future rental while the lease remained on foot. The Court held that while a changing of the locks did not on the facts amount to re-entry, the lease was subsequently terminated when a new tenant took possession of part of the premises. Delivering the judgment of the Court, Richardson J said:[121]

> There can be no doubt that the lease terminated when the new tenant obtained possession of part of the premises and for present purposes *it is not necessary to determine whether at that time the landlords accepted the repudiation of the lease ... or simply re-entered the premises.* It was then open to the plaintiff landlords to sue for damages for the loss of bargain which had been constituted by the lease. On our reading of the pleadings they fail to do so.

From these statements it would seem that the Court of Appeal implicitly rejected the bifurcated principle and, due to the wording of the re-entry clause,[122] its founding causation argument.

It is arguable that the bifurcated principle was rejected again in *Benjamin* v *Wareham Associates (NZ) Ltd.*[123] A lessor disposed of its interest to the plaintiff-lessors and the

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119 (1993) 2 NZ ConvC 191,714. Judgment in this case was delivered on 24 July 1990.

120 Above n 119, 191,716. Expressed consequences of the exercise of a termination clause are important in determining whether the breached term is a condition / essential term, which in turn is important under the bifurcated principle when determining the availability of loss of bargain damages. A condition is a term any breach of which allows the innocent party to terminate the contract and claim loss of bargain damages: Carter, above n 26, 72. It is suggested that the mere power of cancellation under a termination clause for breach of a specified term is not sufficient to render that specified term a condition. While it is correct to say that any breach of a condition gives rise to a right to cancel, it does not follow that a contract which allows cancellation for any breach of a specified term renders that term a condition, for the reason that not all of the incidents of a condition are dealt with in the termination clause. The termination clause may simply address the bare right to cancel, while saying nothing about the remedial consequences of cancellation. Where, however, the termination clause provides the right to terminate for breach of a particular term and stipulates that termination is not to affect the remedies available to the cancelling party, it is more arguable that the particular term is a condition. But even then, the reference to remedies in the termination clause may be considered a simple saving mechanism (that is, a mechanism whereby *possible* remedies are not excluded by the innocent's party's election to terminate) as opposed to a prescription of remedy. See further Opeskin, above n 2, 298-300; W Bojczuk "When is a Condition not a Condition?" [1987] JBL 353, 355-358; Chew, above n 7, 109-111.

121 Above n 119, 191,718-191,719 (emphasis added).

122 See above, text accompanying note 120.

123 (1990) 1 NZ ConvC 190,638 (HC).

defendant-lessee assigned its lease to a third party. The lease provided that if rent or other money remained unpaid for seven days or if other specified "events" occurred, then the lessors had the right to re-enter the premises, and "to have again repossess and enjoy the same as of their former estate ... but without prejudice to any action or other remedy which the lessor has or might or otherwise could have".[124] The assignee of the lease experienced financial difficulties, and the events which followed rendered each party confused as to the other's intention. In any event, the premises were ultimately re-let at a lower rental. The lessors claimed from the defendant-assignors arrears of rent up to the re-letting plus the "shortfall" (that is, loss of bargain damages) to the date of judgment. The lessors succeeded in their claims.

McGechan J noted the review of the law in *Progressive Mailing, Wood Factory Ltd,* and *New Zealand Newspapers.* However, his Honour "[did] not see it necessary to go beyond the view implicit in the decision of the Court of Appeal in *Miller* v *Mattin.*"[125] Having discussed that case, and issues of quantum and mitigation, McGechan J discussed the CRA. His Honour left open the submission that the Act cannot apply to leases given the non-divestment rule in section 8(3)(b), although, his Honour said, "such might be thought a surprising exception to create in such an indirect manner".[126] Such would indeed be a surprising exception, for generally speaking a leasehold estate is not property acquired unconditionally by the lessee. Generally the lessee's rights in the land are conditional upon the performance of various covenants, such as the covenant to pay rent.

McGechan J went on to observe that while there had been a repudiation by the lessee, the lessor did not accept it. Cancellation was effected later by re-entry pursuant to a contractual provision. The re-entry "ipso facto terminated both the leasehold estate, and the lease contract which created the leasehold estate."[127] His Honour said "[t]hat situation, by sec[tion] 5, prevailed over provisions of the Contractual Remedies Act 1979, which otherwise might apply."[128] The phraseology of the re-entry clause did not foreclose remedies in damages additional to arrears in rent, and as such loss of bargain damages were awarded.

A strong argument can be made that the High Court rejected the bifurcated principle, for loss of bargain damages were awarded in the absence of an accepted repudiation. Indeed, McGechan J agreed with *Miller* v *Mattin* over *Progressive Mailing* and focussed on the re-entry pursuant to the contract. However, given that his Honour said earlier that "[a] refusal to pay rent is a refusal by a lessee to perform perhaps the most fundamental obligation under the lease,"[129] it could be argued that loss of bargain damages were available because there was a valid ground of cancellation under section 7(3)(b) of the CRA (in terms of breach of essential stipulation), and not simply because

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124 Above n 123, 190,639.
125 Above n 123, 190,644.
126 Above n 123, 190,646.
127 Above n 123, 190,647.
128 Above n 123, 190,647.
129 Above n 123, 190,646.

there was termination pursuant to an express term. This contrary argument is bolstered by the judge's statement that he would not "accept the defendants did not consent to liability for 'fundamental breach'."[130]

Technically, McGechan J's global characterisation of covenants to pay rent as conditions or essential terms (if that is what he meant to do) may be problematic, for on a purely contractual approach any breach of such terms would entitle the innocent party to cancel the contract and claim loss of bargain damages. The covenant to pay rent is better classified as an intermediate term, such that "termination of the contract [and recovery of loss of bargain damages] will only be possible if the breach, or its consequences, go to the root of the contract."[131] However, in the leasehold context the dual contractual-proprietary personality of the lease becomes important, and practically speaking, classifying the covenant to pay rent as an essential term is of little concern. Under a contractual analysis, upon breach of condition (roughly approximate to breach of essential stipulation under section 7 of the CRA) the contract can be cancelled and loss of bargain damages can be claimed. By contrast, under section 118(1) of the Property Law Act 1952 ("PLA"), which is more concerned with principles of property law, a right of re-entry and termination for breach of condition is not enforceable:

> unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the beach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor.

So a contractual condition under a lease is modified by section 118(1) of the PLA so that its breach only gives rise to an enforceable right to cancel if the innocent party has complied with the notice requirements of that section.[132] However, section 118(7) of the same Act provides that, except where the lessee is bankrupt, section 118 "shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent". As such, if the condition or essential term in question is a covenant to pay rent, which it often will be, then one need not comply with the notice requirements of s 118(1). Section 107(b) of the PLA implies in every lease of land a power of re-entry which is

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130 Above n 123, 190,647.

131 Bojczuk, above n 120, 353. As commercial leases invariably contain a clause allowing termination for non-payment of rent, the important point is that in classifying the covenant to pay rent as an intermediate term, not all breaches of that covenant will give rise to a right to claim loss of bargain damages, at least under the bifurcated principle. In any event, in most cases New Zealand courts have classified the covenant to pay rent as an essential term.

132 The notice requirement of s 118(1) cannot be contracted out of: PLA, s 118(8). Furthermore, s 15(g) of the CRA provides that nothing in that Act shall affect ss 117-119 of the PLA. For a discussion of s 118 of the PLA see G W Hinde, D W McMorland and P B A Sim *Land Law* (Butterworths, Wellington, 1978) vol 1, 580-585; G Cain "Remediability of Breach of Covenant in a Lease" [1965] NZLJ 205; A Alston "Landlord's Remedies" [1981] NZLJ 197.

exercisable whenever the rent is in arrear for 21 days, whether legally demanded or not, and many leases contain "an express proviso for re-entry and forfeiture on non-payment of rent [which include] similar words making it clear that no formal demand for the rent need be made before exercising the right of re-entry".[133] As such, notice is not required before the right of cancellation is exercised, although under section 8 of the CRA the cancellation will not take effect until it is made known to the other party. However, even when made known to the other party, the cancellation is not immutable, for it is open to the defaulting party to apply to the court for relief against forfeiture. The basis of relief against forfeiture for non-payment of rent is equitable, and as such the granting of relief is discretionary.[134] Hinde, McMorland and Sim describes the court's jurisdiction as follows:[135]

> Equity regards the proviso for re-entry on non-payment of rent as merely a security for the rent, and therefore, provided that the landlord and other persons interested can be put in the same position as before the forfeiture, the tenant, or other applicant, is normally entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the landlord has been put.

That being the case, the right to cancel stemming from breach of a condition remains subject to the court's equitable jurisdiction to grant relief. Furthermore, this analysis would apply equally to any right of cancellation for non-payment of rent, be it under the CRA, the PLA, or pursuant to the contract. So in sum, characterising a covenant to pay rent as an essential term does not lead to oppressive consequences, for it is not the case that any breach will give rise to an unqualified right to cancel. If the right is exercised, and either the tenant fails to seek relief or a court denies relief when sought, then the position would appear to be that the cancellation becomes final and a claim for loss of bargain damages can proceed. The question still remains, however, in what circumstances will New Zealand courts allow such a claim?

The question of loss of bargain damages arose again in *Cheng* v *Heise*.[136] The lessee's obligations under an eight-year lease were guaranteed by the defendants. The lessee assigned the lease to a third party company which subsequently went into receivership, with the receivers vacating the property and abandoning the lease. The plaintiff-lessor accepted the receivers' repudiation, re-entered and re-let the premises at a lower rental. The plaintiff then claimed damages for loss of rental. Doogue J found in the plaintiff's favour and awarded loss of bargain damages. His Honour referred to *Shevill*, and then to *Progressive Mailing*, quoting a passage from Brennan J's judgment

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133 G W Hinde, D W McMorland and P B A Sim *Introduction to Land Law* (2 ed, Butterworths, Wellington, 1986) 316.

134 The court's equitable jurisdiction survives the CRA: *Eason* v *McIntosh* Unreported, 11 July 1986, High Court, Auckland Registry A1642/85.

135 Above n 133, 318. See further Easton, Mulholland and Slatter, above n 44, 25-28; *Daalman* v *Oosterdijk* [1973] 1 NZLR 717; *Guardsman Restaurant (Christchurch) Ltd* v *Victoria Square Estates Ltd* Unreported, 11 December 1987, High Court, Christchurch Registry M339/87; *Taheke Holdings Ltd* v *Harbrow* (1991) 1 NZ ConvC 191,064; *Cooper* v *Clark* (1992) 2 NZ ConvC 191,309.

136 (1990) 1 NZ ConvC 190,656.

in which that judge said that "[a] lessor can recover damages for loss of the benefit of a lease only where the lessee has repudiated the lease before determination of the term."[137] His Honour then referred to *Williams* and *New Zealand Newspapers,* noting that in both cases there was a repudiation. Satisfied that the defendants had no defence in respect of liability and that "the rental value [was] most clearly established by the rental at which the premises were let,"[138] Doogue J could see no bar to recovery of loss of bargain damages.[139] While *Cheng* was a case of repudiation, it seems implicit in Doogue J's judgment that his Honour accepted the bifurcated principle, so that had there not been a ground of cancellation independent of the contract, loss of bargain damages would not have been available.

Further acceptance of the bifurcated principle is evident in *Milne* v *Angliss.*[140] Upon a second assignee of a lease defaulting on its rent payments and going into receivership, the lessor took possession and re-let the premises at a lower rental. The new tenant vacated the premises prior to expiration of the lease term. The lessor then sought damages for unpaid rent from the guarantors of the defaulting assignee, the assignor to that assignee, and the guarantors of the original lease. In an oral judgment Master Kennedy-Grant held that there was no right to recover loss of bargain damages. Defence counsel had relied upon *Shevill* and *Progressive Mailing*, arguing that there was no entitlement here to loss of bargain damages. The Master said the argument depended on four propositions, which he proceeded to articulate.[141] Most importantly, the first proposition was unequivocally the bifurcated principle, while the second was that a covenant to pay rent is not a fundamental (essential) term. The Master agreed that *Shevill* and *Progressive Mailing* supported these propositions. However, the Master said there were "other authorities ... in which a contrary view ha[d] been taken,"[142] the most important being *Miller* v *Mattin* and *Benjamin.* It is most likely that this "contrary view" was rejection of the bifurcated principle, as opposed to provision to pay rent being an essential term, for the latter point was not discussed in *Miller.*[143] Master Kennedy-Grant considered the relevant portion of the Court of Appeal decision[144] to be obiter, and found "it appropriate to follow the Australian authority rather than the New Zealand authority".[145] It appears then that the Master accepted the bifurcated principle.

The next important case is *Auto Point Motors Ltd* v *Hollows.*[146] The plaintiff sublet property to Hollows, whose obligations were guaranteed by the defendants. Three months into the lease term Hollows advised the plaintiff-sub-lessor that it had

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137 Above n 136, 190,660.
138 Above n 136, 190,662.
139 A similar conclusion was reached in *Metcalfe* v *Waterbedroom (Dominion Road) Ltd* (1991) 1 NZ ConvC 190,756.
140 (1992) 2 NZ ConvC 191,366 (HC).
141 Above n 140, 191,369.
142 Above n 140, 191,369.
143 Cf Easton, Mulholland and Slatter, above n 44, 33; M Slatter "Leases: Contracts Through and Through?" (1993) 6 BCB 185, 188-189.
144 See above, text accompanying note 121.
145 Above n 140, 191,370.
146 (1992) 2 NZ ConvC 191,422 (HC).

ceased business but would endeavour to find a new tenant. Hollows defaulted on its rent payments. The plaintiff-sub-lessor subsequently obtained a new sub-lessee at a lower rental, and gave notice to the guarantors of its re-entry into the premises and that the lease was at an end. The plaintiff then sued, inter alia, for loss of bargain damages. Ellis J held that while there was no repudiation by Hollows, there was breach of an essential term, that is, the failure to pay rent, which "also substantially reduced the benefit of the contract of lease to the landlord."[147] Distinguishing *Shevill* on the issue of whether a covenant to pay rent is an essential term, Ellis J said "the re-entry not only terminated the lease but also cancelled the contract for good cause."[148] As such, loss of bargain damages were available. In the course of his judgment, Ellis J referred to *Shevill* and said it is important to distinguish between breach of an essential term, and breach of covenant entitling the lessor to re-enter and determine the lease. While the decision is not without difficulty, it is likely that Ellis J was referring to and accepting the bifurcated principle.

Acceptance of the bifurcated principle was unequivocal in *Haddon* v *P K & C A Bird Motels Ltd.*[149] Lessees (assignees of lease) were late with rent payments for the leased premises. Under the lease the lessor had the right to re-enter and terminate the lease if rent was in arrear or unpaid for 28 days. Re-entry and termination was not to release the lessee from any liability for rent or other moneys payable under the lease or for any breach or non-performance of any terms of the lease. The premises were locked up, the lessors invoiced the lessees for rent due, that rent was paid, and the premises were unlocked. The lessees again failed to pay rent. Again the premises were locked but no further rent was paid and the lessees did not attempt to retake possession. New tenants were subsequently found at a lower rental. The lessors brought proceedings against the assignor of the lease, claiming that the lease had not been validly assigned and that the assignor had repudiated the lease. The lessors sought, inter alia, loss of bargain damages. Greig J held that there had been a valid assignment. Further, the second locking out of the lessee was a re-entry and forfeiture which terminated the lease, but it was unlawful as it took place only 21 days after rent became in arrear. As such, there was no right to loss of bargain damages. In his reasoning, Greig J said:[150]

> The right to claim damages for loss of bargain in the form sought here depends upon a breach entitling the injured party to terminate and then to sue for restoration of its position as if the contract or bargain had been performed. A difficulty can arise in leases because they may be terminated under a clause for re-entry for breaches which would not otherwise entitle termination, that is to say for breaches which are not fundamental. Thus a single failure to pay rent in due course may entitle re-entry and termination but would not without more justify, under ... ordinary contract law, termination for breach and a claim for damages.

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147 Above n 146, 191,426.
148 Above n 146, 191,426.
149 (1993) 2 NZ ConvC 191,600 (HC).
150 Above n 149, 191,608.

His Honour proceeded to discuss *Shevill* and *Progressive Mailing*, and then cited the New Zealand authorities. Of the New Zealand authorities the judge said:[151]

> The apparent conflict in some of these decisions, expressed most clearly in *Milne* v *Angliss*, is on the point made in *Shevill's* case that failure to pay rent and re-entry thereon may not in itself be sufficient to found an action for damages for loss of bargain because it does not amount to a fundamental or essential term.

Making it clear that he agreed with the bifurcated principle, Greig J said:[152]

> It is always the case that a person is entitled to damages for breach of contract but that may be merely nominal damages unless it can be shown that there is some loss flowing from it. Where there is a trivial breach upon which the lessor elects to terminate it appears inequitable that there should then be a right to damages calculated upon the basis of the continuation of the lease for the whole of the rest of its term.

Greig J appears here to be appealing to the causation argument founding the bifurcated principle and to the principle itself. As for his reference to inequity, and as a precursor of things to come, one should ask here whether it really is inequitable for loss of bargain damages to be available in the circumstances postulated if such was the intention of the parties or if there is no evidence that it was not their intention.

The final and most important New Zealand case[153] is *Morris* v *Robert Jones Investments Ltd*.[154] The plaintiff was a head-lessee of premises who sub-let them to the second defendant, Limmershin. The first defendant, Morris, guaranteed Limmershin's obligations. A clause in the sublease from the plaintiff to Limmershin allowed the sublessor to terminate the lease and re-enter without making any demand or giving notice if rent was unpaid for 14 days or if there was any breach of covenant by the sublessee or in certain other circumstances. The sublease would then become null and void but without releasing the sublessee from payment of rent up to the date of re-entry and without releasing the sublessee from liability for any antecedent breach of any covenant, condition or agreement. Limmershin further sublet part of the buildings to other tenants. By agreement between the parties the plaintiff collected rent and other sums payable from those sub-tenants. Difficulties as to the amounts charged, accounting and documentation ensued. The first defendant-guarantor wrote to the plaintiff seeking an accurate accounting and advising that Limmershin intended to

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151 Above n 149, 191,608.

152 Above n 149, 191,608-191,609.

153 An earlier High Court decision on the issue of loss of bargain damages is not discussed, for, with respect, it provides no insight to the issue and lacks clarity: *Aspacific Corp Ltd* v *Koszegi* Unreported, 23 August 1993, High Court, Auckland Registry CP 331/93. The most recent case touching the issue is *Barclay* v *Fuji Autoparts Ltd* Unreported, 30 August 1994, High Court, Auckland Registry HC 102/94, in which Thorp J refers briefly to *Benjamin, Miller* v *Mattin* and *Morris*, but which does not warrant further discussion.

154 (1993) 2 NZ ConvC 191,570 (HC) reported as *Robert Jones Investments Ltd* v *Morris and Limmershin Holdings Ltd*; [1994] 2 NZLR 275 (CA).

assume the collection of rent and other outgoings payable by the subtenants. The plaintiff then served Limmershin with a notice under section 118 of the Property Law Act 1952 asserting that Limmershin was late in its rent payments and claiming the month's rent and an instalment of rates. It was stated that if the total was not paid by a certain date the lease "shall and will be immediately thereafter forfeited and determined without further notice".[155] The sum was not paid by the due date and the plaintiff then wrote to Limmershin forfeiting the lease. The plaintiff continued to collect rent and other outgoings from the subtenants, and brought summary judgment proceedings claiming loss of bargain damages.

In the High Court Master Williams held that loss of bargain damages were available. The section 118 notice made it clear that strict arrangements as to rent payment were to be complied with. "Timeous compliance was ... plainly made a condition of the contract remaining on foot."[156] Non-compliance entitled the plaintiff-sub-lessor to cancel the contract under section 7(3)(b) and (4)(a) of the CRA (breach of essential stipulation) and claim loss of bargain damages.

The Master traversed Australian and New Zealand authority, referring to *Shevill, Progressive Mailing, Williams, New Zealand Newspapers, Miller, Benjamin, Cheng, Metcalfe, Milne* and *Auto Point Motors.* His Honour said that:[157]

> When those two lines of authority are compared, to the extent that analysis demonstrates any intrinsic difference between them, this court adopts the line of New Zealand authority (except *Milne*) in preference to the Australian cases, especially *Shevill.*

Having further discussed *Shevill* and *Progressive Mailing*, Master Williams said that "once the ordinary law of contract is accepted as applying to leases, then the apparent difference between the Australian and the New Zealand cases largely if not wholly evaporates."[158] The Master concluded that:[159]

> *Milne* should be regarded as a decision confined to its own factual circumstances and that this court should follow the otherwise unanimous expression of the law of New Zealand on this topic as most extensively discussed in ... *Williams, Miller, Benjamin, Cheng, Metcalfe* and *Auto Point* ... .

It appears that Master Williams considered the only "intrinsic difference" between the Australian and New Zealand cases to be the difference concerning whether a covenant to pay rent is an essential term. The Master attempted to reconcile the authorities on this point and felt able to conclude that the difference largely if not wholly evaporated. However, it is suggested that the reconciliation is not so simple. The Australian cases are clearly harnessed to the bifurcated principle. However, and by contrast, it is arguable

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155 (1993) 2 NZ ConvC 191,570.
156 Above n 155, 191,584.
157 Above n 155, 191,582.
158 Above n 155, 191,582.
159 Above n 155, 191,583.

that at least some of the judges in the New Zealand cases were not content with the principle, especially the members of the Court of Appeal in *Miller* (Richardson, Casey and Hardie Boys JJ), and arguably McGechan J in *Benjamin*. It also appears that the concern with *Milne* v *Angliss* is misconceived, or at least underestimated. *Milne* has been frowned upon for its perceived adherence to the *Shevill* position concerning covenants to pay rent not being essential. But it is quite possible that *Milne* says much more than this – that *Milne* recognises that *Miller* and *Benjamin* rejected the bifurcated principle and it was for that reason that Master Kennedy-Grant in *Milne* preferred the Australian authorities, as he accepted the bifurcated principle. With respect, the New Zealand cases other than *Milne* do not unanimously express the law on the topic of loss of bargain damages.

The Court of Appeal overturned the High Court's decision, but clearly accepted the bifurcated principle. Hardie Boys J's starting point was that "[t]he measure of damages for breach of contract is the value of the promised benefit which the plaintiff has not received [and] ... [t]he loss of benefit must ... result from the breach."[160] Articulating the bifurcated principle, his Honour said:[161]

> It is only where the defendant has ... effectively renounced his contractual obligations entirely, that the plaintiff, if he accepts the position and brings the contract to an end, can be said to have thereby lost the benefit of the whole contract, and is then entitled to loss of bargain damages. This will occur where there has been actual repudiation, or a breach of a term that on an objective view is, or that the parties have declared to be, essential or fundamental to the contractual relationship, or where the effect of the breach deprives a party of substantially the whole benefit of the contract.

Hardie Boys J expanded further on the principle, referring to *Financings*, *Lombard*, *Shevill*, *Progressive Mailing*, *Williams* and *Miller*. As to *Miller*, his Honour said "the Court should not be taken to have held that loss of bargain damages were available on re-entry in the absence of such conduct."[162] As the discussion of *Miller* shows, that view is debatable.

Hardie Boys J reached the conclusion that "[i]n any given case, the question for decision will therefore be whether the lessee's breach of contract amounts to repudiation or fundamental breach in terms of s 7 of the [CRA]."[163] His Honour said that in this case there was not, on the defendant's evidence, a refusal to pay rent but a dispute as to what was owed; that while a lessor can make time of the essence, the giving of notice does not turn a non-fundamental term into a fundamental term; and that "[a] notice making time of the essence must make it clear that this is its purpose, and that non-compliance may result in cancellation ... [whereas] [t]he notice in this case purported to be no more than one under s 118 of the Property Law Act, warning only of forfeiture."[164] Allowing the appeal, Hardie Boys J said "the issue is ... whether it is a

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160 [1994] 2 NZLR 275, 277.
161 Above n 160.
162 Above n 160, 279.
163 Above n 160, 279.
164 Above n 160, 281.

Shevill or a [*Progressive Mailing*] type case, which ... cannot be determined on the affidavit evidence before this Court."[165]

Gallen J observed that this is a difficult area of the law, and proceeded to narrate the facts and holdings of *Financings, Lombard, Shevill, Progressive Mailing, Williams, New Zealand Newspapers, Miller, Benjamin, Cheng, Auto Point, Metcalfe* and *Milne*. With respect to *Miller*, His Honour noted counsel's contention that that case enabled the lessor to claim damages regardless of whether there had been a repudiation. While accepting the case was capable of that construction, Gallen J disagreed, saying:[166]

> The Court ... dealt with the matter largely in passing because the pleadings did not give rise to a claim in damages. There is no discussion in the decision of the point, nor any reference to the authorities in England and Australia. I do not accept that the law in New Zealand differs from that which pertains in both the United Kingdom and Australia and do not accept that it was the intention of the Court in *Miller* ... to make such a fundamental change.

With respect, the Court's lack of reference to English and Australian authorities in *Miller* could have been a blessing in disguise. Furthermore, one should ask whether the Court of Appeal in *Miller*, if rejecting the bifurcated principle, was really making a "fundamental change" or whether it was simply proceeding on long established principles of contract.

To sum up the New Zealand position, it can be said that *Williams* marks the birth of the contractual analysis of leases in New Zealand, that case being followed some time later in *New Zealand Newspapers*. *Miller* may signify an early rejection of the bifurcated principle by the Court of Appeal, as may *Benjamin* by the High Court. *Cheng* and possibly *Metcalfe* lean towards the bifurcated principle, while *Milne* positively agrees with it. *Auto Point Motors* and *Haddon* appear to accept the principle, while the Court of Appeal in *Morris* make it clear that the bifurcated principle prevails in New Zealand.

The New Zealand position is in line with that of England and the dominant Australian view, while being out of line with the Canadian position. As such, in New Zealand at present a lessor cancelling pursuant to section 7 of the CRA, or under a contractual provision with a co-existing ground under section 7, will be entitled to loss of bargain damages unless excluded by the contract, whereas generally a lessor cancelling in sole reliance on a contractual termination clause will not be so entitled. Is this distinction legally acceptable? Are New Zealand courts perpetuating an unprincipled remedial regime? To answer such questions properly, one must subject the bifurcated principle to further analysis.

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165 Above n 160, 282.
166 Above n 160, 289.

VI CRITICAL ANALYSIS OF THE BIFURCATED PRINCIPLE

In arriving at and adopting the bifurcated principle, the courts have failed to address the parties' intention as to the availability of loss of bargain damages and in that regard to consider applicable precedent; largely in reliance upon a spurious causation argument they have departed from fundamental compensatory principles of contract law; and they may have relied upon policy considerations of questionable validity.

A *The Parties' Intention as to the Availability of Loss of Bargain Damages*

The starting point as to the availability of loss of bargain damages upon cancellation should be the parties' intention. Generally speaking, "the parties to a contract may themselves specify in their contract the remedy available to the innocent party following the other's breach."[167] If the parties in some way provide for recovery of loss from the non-performance of future obligations following termination, then loss of bargain damages are prima facie recoverable.[168] Furthermore, Opeskin argues that even when no specific intention can be ascertained as to the availability of loss of bargain damages, they should still be available if their award is in line with first principles of contract, namely principles of compensation, causation and remoteness.[169]

In England, consideration of the parties' intention probably formed part of the decision in *Waragowski*,[170] but, with the exception of *The Solholt*, came to be subordinated by the bifurcated principle. In Australia the point was clearly articulated in *Westralian Farmers*[171] and *Larratt*,[172] but likewise came to be subordinated by the bifurcated principle, only recently being reconsidered by some members of the High

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167 A G Guest (ed) *Chitty on Contracts* (26 ed, Sweet & Maxwell, London, 1989) 1115. See further Opeskin, above n 2, 304; J W Carter and J C Phillips "The Liability of Debtors and Guarantors Under Contracts Discharged for Breach" (1992) 22 Western Australian Law Review 338, 341; Carter, above n 63, 252.

168 Opeskin, above n 2, 304. There is room for argument as to whether one can rely on an agreed damages clause deemed to be a penalty in establishing intention as to recovery for lost future performance. See above n 2, 305-306; Carter and Phillips, above n 167, 355; J W Carter "Termination Clauses" (1991) 3 JCL 92, 120-121.

169 Above n 2, 306-308. Opeskin says that "[w]hen nothing in the nature or terms of the contract assists in ascertaining what remedial consequences the parties intended to flow from the exercise of a termination clause, there is no *a priori* reason for assuming that damages for loss of bargain are or are not recoverable. ... If... there is no reason in logic to prefer one interpretation rather than the other, there is no substantive rule of law that bars recovery of loss of bargain damages by distinguishing between the different sources of the right to terminate. The absence of such a rule is critical because it allows the question of the recoverability of loss of bargain damages to be decided on the basis of first principles."

170 See above, text accompanying notes 50-51.

171 See above, text accompanying notes 67-68.

172 See above, text accompanying notes 69-70.

Court, particularly in *Progressive Mailing*[173] and *AMEV-UDC*.[174] In Canada the Supreme Court in *Keneric Tractor* seems to have reoriented the law's focus towards the parties' intention by holding that general contract principles should apply regardless of the source of the right to cancel. But in New Zealand, as in England and Australia, the parties' intention has been subordinated by the bifurcated principle. Arguably the re-entry and termination clause in *Morris* manifested an intention that loss of bargain damages be available,[175] but that intention was stifled by the bifurcated principle. The result is that unless a contractual provision is unequivocal in providing for recovery for future performance lost upon termination, loss of bargain damages will probably not be available when cancellation is effected in sole reliance on an express termination clause. Despite the view of Jordan CJ in *Larratt* to the contrary,[176] the bifurcated principle dictates that loss of bargain damages are only available when cancellation is effected pursuant to section 7 of the CRA, or in England and Australia pursuant to a common law right.

It is apparent then that the bifurcated principle has whittled down the role of the parties' intention, in contravention of freedom of contract. It also denies recovery of loss of bargain damages when there is no discernible intention either for or against their recovery. In both instances, the principle depends primarily upon a causation argument which enables it to assume an air of consistency with compensatory principles of the measure of damages in contract. But if the argument is flawed, then, in the absence of some other valid limitation on recovery, the principle is untenable and loss of bargain damages should be available.

B The Compensation Principle, Causation and Remoteness

The principle of compensation underlies an award of damages in contract. As stated in the seminal case of *Robinson* v *Harman*:[177]

> [W]here a party sustains a loss *by reason of a breach of contract,* he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

The italicised portion of the above passage is the means by which the bifurcated principle is justified in the cases on causation grounds. It is said that while loss of bargain following cancellation pursuant to a common law right or ground under the CRA is caused by the party in default, where cancellation is effected in sole reliance on

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173 See above, text accompanying note 79.

174 See above, text accompanying notes 82a-89.

175 See above, text accompanying notes 153-155.

176 See above, text accompanying note 70.

177 (1848) 1 Exch 850, 855 (emphasis added). See further *Ryan* v *Hallam* [1990] 3 NZLR 184, 191 (CA); Opeskin, above n 2, 308-309; G H Treitel *An Outline of the Law of Contract* (4 ed, Butterworths, London, 1989) 320-321; *Chitty on Contracts*, above n 167, 1116; J Orsborn "Expectation Damages for Breach of Contract and the Principle of Restitutio In Integrum" (1993) 7 AULR 305.

a termination clause it is the innocent party's election to terminate that causes the loss of bargain.

The causation argument seems to originate from the 1926 unreported decision of Salter J in *Elsey* v *Hyde*.[178] The relevant statement in that case was *obiter dictum*, and was made both in the absence of precedent and "in the course of ... reasoning toward a conclusion concerning an aspect of the law of penalties which itself was later overruled."[179] Nevertheless, having been referred to in *Cooden Engineering Co Ltd* v *Stanford*[180] and *Shipway*, it was adopted by Lord Denning in *Financings*, and has prevailed ever since. But is the argument persuasive? Questions of causation are anything but simple, but it is suggested that the causation distinction grounding the bifurcated principle as articulated by Lord Denning in *Financings* and by subsequent cases is untenable.

In *Chitty on Contracts* it is pointed out that the courts have avoided prescribing formal causation tests, relying instead "on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the plaintiff's loss."[181] The question here is whether an innocent party's intervention in terminating the contract pursuant to a termination clause is such that there is an insufficient link between the other party's breach and the innocent party's loss of bargain. In critiquing the bifurcated principle, Opeskin addresses this question, and observes that in both contract and tort cases the answer depends on the reasonableness of the plaintiff's intervention – "if ... reasonable in the circumstances or non-negligent, the causal relation between the breach and the loss is not negatived."[182] This approach may explain the court's "reasonableness of termination" analysis in *Shipway*. Opeskin concludes this point saying that "[t]ermination is not a negligent act and can rarely, if ever, be considered unreasonable."[183] Indeed, it should be noted that in the contract cases on causation the plaintiff's intervention has not been an election to terminate, but some other conduct unrelated to the specific terms of the contract. If the parties to a contract have agreed upon a right to cancel on the occurrence of certain events, then why should the plaintiff be required to consider the reasonableness of her conduct in cancelling? The Court in *The Solholt* clearly thought that a plaintiff is not so required, stating that the right to cancel was unfettered.[184]

As if the above argument were not enough to cast serious doubt on the causation argument, Carter offers some enlightening observations which put it to rest:[185]

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178 K Nicholson "Loss of Bargain Damages for Breach of Non-Essential Term" (1988) 1 JCL 63, 68.
179 Above n 178.
180 [1952] 2 All ER 915, 923.
181 Above n 167, 1129.
182 Opeskin, above n 2, 318.
183 Opeskin, above n 2, 320.
184 Above n 61, 607-608.
185 Above n 63, 262-263.

> The suggestion that the plaintiff ... cause[s] his own loss attributes to the plaintiff an amount of business acumen which is less than plentiful, if not entirely non-existent. There can only be two reasons for termination of a commercial lease of land or sale of goods contract on a market which has moved adversely to the plaintiff. Either the plaintiff is recklessly bloody-minded or there are genuine commercial doubts as to the ability of the defendant to discharge his or her obligations. The purpose of having a contractual right which is activated by an easily identifiable event, and capable of being justified in court, is to avoid recourse to the often problematic case law on conditions, fundamental breach and repudiation. To say that in the absence of proof of such matters the loss of the bargain must be regarded as having been caused by the plaintiff's own act pays insufficient regard to commercial realities, and merely adds to litigation costs by ensuring that the trial of the action will be much longer than necessary.

One can conclude that the causation argument is weak if not untenable. As such, in accordance with the compensation principle loss of bargain damages should be available regardless of the source of the right of cancellation, unless a contrary intention is apparent in the contract or unless the loss is too remote or in some other way justifiably limited.

Are damages for loss of bargain stemming from cancellation pursuant to a termination clause too remote?[186] In the absence of an explicit provision in the contract dealing with the assessment of damages, "the law supplies a standard test which specifies the extent of responsibility implicitly undertaken by the promisor."[187] The classic statement of the test of remoteness is that laid down in *Hadley* v *Baxendale*, in which Alderson B said:[188]

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

That test has undergone interpretation and restatement.[189] The current New Zealand position is stated in *McElroy Milne* v *Commercial Electronics Ltd.*[190] Cooke P said

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186 Remoteness and causation are often intertwined. Causation has been discussed separately from remoteness due to the bifurcated principle's strong dependency on it.

187 *Chitty on Contracts,* above n 167, 1133.

188 (1854) 9 Exch 341, 354-355.

189 See *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1949] 2 KB 528 (CA); *Koufos* v *C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL); *Chitty on Contracts,* above n 167, 1134-1141.

190 [1993] 1 NZLR 39 (CA). See further R Ahdar "Remoteness, 'Ritual Incantation' and the Future of Hadley v Baxendale: Reflections from New Zealand" (1994) 7 JCL 53.

"there is no such thing as a rule, as to the legal measure of damages, applicable to all cases,"[191] and ventured to proffer the following comments:[192]

> [I]n the *C Czarnikow Ltd* v *Koufos* speeches the test "not unlikely" perhaps represents the nearest approach to a consensus, although it would apparently mean that *Hadley* v *Baxendale* was wrongly decided. It is clear at least that reasonable foresight or contemplation, which appear to be interchangeable terms, are always an important consideration. Factors including directness, "naturalness" as distinct from freak combinations of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability, are not necessarily to be ignored in seeking to establish a just balance between the parties.

Generally speaking, it must be within the reasonable contemplation of commercial parties that provided the innocent party terminating a contract takes reasonable steps to mitigate its loss, loss of bargain damages will be available. In other words, it must be reasonably foreseeable that the innocent party ought to be able to exercise its undoubted contractual right at no loss to itself. This position must be all the stronger when the parties provide that termination on re-entry shall not release the party in default from any liability for breach.[193] Further, the loss is directly caused by the defendant's breach, which can rightly be considered a *conditio sine qua non* of the innocent party's loss, and in the commercial sphere that loss can be considered both likely and "natural" given the reasonable expectation that commercial parties will be held strictly to their obligations. Damages for loss of bargain are not too remote.

C Limitation on Policy Grounds

The final question is whether recovery for loss of bargain is justifiably limited on policy grounds. The most complete analysis of policy considerations which may underlie the bifurcated principle is that undertaken by Opeskin.[194] He identifies four such considerations.

The first consideration Opeskin refers to as "avoidance of gain by double recovery". By this he means that the innocent party, if entitled to loss of bargain damages, is not only compensated for lost future performance, but also gets the goods or land in question, free to sell or re-lease or enjoy. However, as Opeskin observes, the argument is misconceived, for it ignores the innocent party's duty to mitigate. Furthermore, if valid, would the argument not apply equally to loss arising upon cancellation pursuant to a common law right or ground under the CRA (assuming the argument to be independent from the causation argument)?

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191 Above n 190, 41.

192 Above n 190, 43.

193 As an example, the Auckland District Law Society Deed of Lease (3 ed) provides in cl 29 that termination upon re-entry is "without prejudice to the rights of either party against the other".

194 Above n 2, 320-325.

The second consideration is "avoidance of gain by early receipt", which basically refers to the concern of an award of loss of bargain damages now, prior to expiration of the agreed upon term, being worth more than the individual payments staggered over the term. But this argument also falls down, for damages awards can be discounted. As Ellis J said in *Auto Point Motors*, "loss of rental from the date of judgment to [the end of the term] involves some assessment of contingencies".[195]

The third consideration is an analogy with penalty clauses, the argument being that if an agreed damages clause is penal, loss of bargain damages, similar in magnitude to the agreed amount, should not be available. Again, this argument is misconceived. In a nutshell, "[f]ar from precluding recovery of loss of bargain damages, the policy underlying the doctrine of penalties rather suggests that loss of bargain damages should be recoverable as the true damnification following breach and termination."[196]

Finally, Opeskin identifies judicial paternalism as a ground for denying loss of bargain damages when the "hapless consumer ... breach[es] his or her contract in a minor way".[197] However, as the author points out, such intervention is better left to Parliament.[198] Furthermore, one may ask whether it is realistic to call commercial lessees "hapless consumers".

Opeskin also identifies two policy considerations favouring abolition of the bifurcated principle and thus allowing recovery of loss of bargain damages when cancellation is effected pursuant to an express term. These are that the abolition avoids both arbitrary distinctions, and the multiplicity of actions otherwise necessary to recover continual arrears in rental by keeping the lease on foot for the duration of its term.[199]

D Conclusion on the Soundness of the Bifurcated Principle

The foregoing analysis reveals that the remedial dichotomy of the bifurcated principle is untenable. In the absence of a contractual term exhaustively prescribing the remedial consequences following cancellation, the correct approach is to fall back on first principles of the law of contract. Doing so does not mean that loss of bargain damages will always be available, but does tend to suggest that they will frequently be available upon cancellation of leases in the commercial arena regardless of the source of the right to cancel.

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195 Above n 146, 191,428.

196 See further Opeskin, above n 2, 321-322.

197 Opeskin, above n 2, 323.

198 Unless existing legislation can validly be used to develop the common law by analogy with statute. On this topic see G N Gunasekara "Judicial Reasoning by Analogy with Statutes: The Case of Contributory Negligence and the Law of Contract in New Zealand" (1993) 14 Statute Law Review 84.

199 Opeskin, above n 2, 324-325.

The final pressing question is whether the New Zealand Court of Appeal, or the Privy Council for that matter, can be persuaded to abandon the bifurcated principle and return to first principles.

VII PERSUADING THE COURT TO RETURN TO FIRST PRINCIPLES

With only one Court of Appeal decision clearly adopting the bifurcated principle, the day may not have yet dawned on the possibility of persuading the Court to alter its approach, as opposed to requiring legislative reform or leaving the law in a state of unprincipled disarray. Admittedly the bifurcated principle can be circumnavigated by arguing that in all the circumstances breach of covenant amounts to breach of an essential stipulation or gives rise to one of the other grounds of cancellation under section 7 of the CRA, or by specifically drafting leases to this effect. However, such circumnavigation may not always be possible, and in any event it is desirable that the law be returned to a principled foundation before further damage is done.

The Court will likely feel constrained by precedent, but precedent is not sacred. As Thomas J observes, "[p]ast cases should be accepted as authorities and followed in a later case when, and only when, the judge consciously and sensibly determines that they accord with sound principle".[200] The time has come to avoid ritualistic adherence to precedent forming the bifurcated principle. Fortunately, New Zealand courts can do so in this instance not only by following the Supreme Court of Canada's lead in *Keneric Tractor*, but also by resorting to a statutory provision not yet pleaded in the loss of bargain cases. That provision is section 9(2)(b) of the CRA.

Section 9(1) and (2)(b) of the CRA provide as follows:

> **9. Power of Court to grant relief**–(1) When a contract is cancelled by any party, the Court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section.
>
> (2) An order under this section may--
>
> . . .
>
> (b) Subject to section 6 of this Act, direct any party to the proceedings to pay to any other such party such sum as the Court thinks just:

While section 9(2)(b) was probably only intended to provide for restitutionary relief,[201] the courts have interpreted it broadly, enabling them to diverge from established case law on damages. The leading case in this area is *Newmans Tours Ltd* v

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200 E W Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 VUWLR Monograph 5, 75.

201 See F Dawson and D W McLauchlan "*Gallagher* v *Young:* The Contractual Remedies Act 1979" (1982) 10 NZULR 47, 53; New Zealand Law Commission Report No 25 *Contract Statutes Review* (NZLC, Wellington, 1993) 85-87; D W McLauchlan "The 'New' Law of Contract in New Zealand" [1992] NZRLR 436, 457-458.

Ranier Investments Ltd.[202] In that case Fisher J said that section 9(2)(b) can vindicate restitution, reliance and expectation interests,[203] and that under the provision courts are "freed from the rigidity of established common law rules relating to damages [such as] ... accepted heads of damages, remoteness, mitigation and contributory negligence."[204] His Honour observed, however, that while not binding, traditional principles of the common law "will usually be applied ... because experience has proved that in the great majority of cases the principles concerned will produce the just and logical result,"[205] adding nevertheless that the principles will only be borrowed where they do produce such a result. Fisher J's approach has received the imprimatur of Cooke P and Anderson J in *Thomson* v *Rankin*,[206] and arguably all presiding members of the Court of Appeal in the *Newmans* case.[207] It should be noted, however, that in the recent case of *Crump* v *Wala*,[208] Hammond J expressed dissatisfaction with Fisher J's approach, emphasising that section 9 was intended to be a relief and not a remedy provision.

A broad interpretation of section 9(2)(b) of the CRA further enables the courts to abandon the bifurcated principle, and to return to sound established principles of the law of contract. Were the Court of Appeal to be made aware of the evolution of the bifurcated principle and its untenable foundations, it is conceivable that the Court would conclude that rigid adherence to precedent does not produce the "just and logical result" in many cases concerning the availability of loss of bargain damages upon cancellation of commercial leases. The courts should focus on the parties' intention and the compensation principle, and be realistic in their approach to issues of causation and remoteness in this area.

If in extreme cases the courts consider a full award of loss of bargain damages "unjust", because, for example, there is evidence that the "innocent" party exercised its contractual power of cancellation oppressively, it is open to the courts under a broad interpretation of section 9(2)(b) to reduce the award accordingly.[209] Should the courts wish to be informed by policy considerations, then perhaps they could embark upon an analysis analogous to that in negligence. Under such an analysis, providing first principles of contract do not dictate otherwise, upon cancellation there could be a

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202 [1992] 2 NZLR 68 (HC). Prior cases on the issue are *Gallagher* v *Young* [1981] 1 NZLR 734 (HC); *Young* v *Hunt* [1984] 2 NZLR 80 (HC); *Burch* v *Willoughby Consultants Ltd* [1989] 3 NZELC 97,582; *Brown* v *Langwoods Photo Stores* [1991] 1 NZLR 173 (CA).

203 Above n 202, 88-92.

204 Above n 202, 89.

205 Above n 202, 94.

206 [1993] 1 NZLR 409.

207 Unreported, 7 April 1993, Court of Appeal CA 341/91. See further B Coote "Remedy and Relief Under the Contractual Remedies Act 1979 (NZ)" (1993) 6 JCL 141, 154-155.

208 [1994] 2 NZLR 331, 335 and 341 (HC).

209 Section 10 of the CRA provides that a party is not precluded by the granting of relief under s 9 from recovering damages for repudiation or breach. It is suggested that a reduction under s 9 is not inconsistent with s 10 provided there is an award of damages.

presumption of the right to loss of bargain damages, and that presumption could be bolstered or weakened by a balancing of policy considerations. The writer reserves judgment as to whether such initiatives are appropriate means to deal with perceived injustice, for they could reduce certainty in commercial dealings and prolong litigation. But whatever approach the courts take, the starting point should be sound established principles of the law of contract, not some superficial and baseless construct such as the bifurcated principle.

VIII CONCLUSION

The shift in focus from the proprietary aspect of the lease to the contractual carries important implications for parties to commercial property leases. Most important is the remedial regime operating upon cancellation. The prevailing regime in England, Australia and New Zealand is that dictated by the bifurcated principle. But that principle, enduring as it has been, lacks a sound foundation. Not only is the reasoning supporting the principle without substance, but it contravenes first principles of contract law. While the Canadian Supreme Court has returned to first principles, and there are signs that the High Court of Australia may follow suit, English and New Zealand courts adhere to the principle without adequately justifying its existence. By resort if necessary to section 9(2)(b) of the Contractual Remedies Act, the New Zealand Court of Appeal would do well to return to first principles, thereby putting an end to the perpetuation of an unprincipled remedial regime.