

RESIDENTIAL TENANCIES (4th ed.). By Donald H.L. Lamont, Q.C. Carswell, 1983. Pp. xxvii, 339. (\$42.50)

Mr. Lamont's positive contribution to Canadian literature has already been recognized by reviewers of previous editions of his monograph.<sup>1</sup> Publication of the fourth edition is warranted by the substantial body of caselaw which has arisen in the five years since the last edition and it deserves the accolades earlier expressed. For the practitioner and teacher alike, the latest edition is a reference tool of even greater value than its predecessors.

With a wealth of judicial decisions to draw upon the author has taken the opportunity to include in his book recent and often contradictory developments in an area of the law infrequently subjected to critical comment. Unlike the fifth edition of *Williams & Rhodes, Canadian Law of Landlord and Tenant*,<sup>2</sup> this monograph defies traditional analysis in that the author expressly acknowledges the dichotomies in judicial opinion and provides solutions believed to be consistent with the purposes of the legislation.

The author's practical expertise, well recognized even beyond the boundaries of Ontario, manifests itself clearly through his easy writing style which is particularly appropriate for an unpretentious work of this nature. Mr. Lamont's ability to identify problems both potential and extant and his penchant for offering advice to both landlord and tenant cannot be underestimated. It is within this context that we find a greatly expanded volume whose simple title disguises a necessary examination of a fundamental, social and contractual relationship now largely regulated by statute.

In examining the author's treatment of the substantive law, this reviewer has singled out seven matters for comment. These are dealt with in the order they appear in the text:

1. *Repayment of Security Deposit by Assignee of Landlord*<sup>3</sup>

The conclusion that the purchaser of a reversion is responsible for the repayment of the security deposit is well-reasoned except in one important respect: it ignores the case of *Re Dollar Land Corp. and Solomon*<sup>4</sup> in which the Court reached the opposite conclusion. This is

<sup>1</sup> Second edition reviewed by S.G.M. Grange, Book Review (1973) 51 CAN. BAR REV. 715; third edition reviewed by J.R. Johnson, Book Review (1978) 56 CAN. BAR REV. 548 and M.A. Waldron, Book Review (1979) 11 OTTAWA L. REV. 537.

<sup>2</sup> F.W. Rhodes with M. Casavant, WILLIAMS & RHODES, CANADIAN LAW OF LANDLORD AND TENANT, 5th ed. Vols. 1, 2 (Toronto: Carswell, 1983).

<sup>3</sup> P. 46.

<sup>4</sup> (1963), [1963] 2 O.R. 269, 39 D.L.R. (2d) 221 (H.C.). While the third edition did refer to this case, for some unexplained reason it was omitted from the fourth edition when dealing with this issue. See p. 81 where the case is confined to the analysis of covenants *in posse* and *in esse*.

not to suggest that the author's conclusion is undermined by that decision but merely that the decision is germane to the central issue.

2. *Covenant for Quiet Enjoyment*<sup>5</sup>

In some respects this covenant is as relevant to the residential situation as is the doctrine of *interessi termini*. Originally this express or implied covenant enabled the tenant to sue the landlord for damages when the tenant was evicted by a person with paramount title. In time it was extended to cover physical interference with the tenant's possession by the landlord and, in the notorious case of *Kenny v. Preen*,<sup>6</sup> was stretched to the point where the tenant could recover if verbally harassed and threatened by a landlord desiring the tenant to quit the premises. Though the author states that this common law obligation is not presently covered by the legislation,<sup>7</sup> paragraph 121(4)(b)<sup>8</sup> in fact codifies the ratio of *Kenny v. Preen*. If the covenant for quiet enjoyment is to be of any assistance to a tenant then a careful examination of that provision is necessary.

3. *Landlord's Obligation to Repair*<sup>9</sup>

The author's analysis of the caselaw concerning what constitutes good tenantable repair and fitness for habitation is not open to criticism. The willingness of Canadian courts to embrace English precedents of the nineteenth century perpetuating the notion of class distinction is, however, questionable. For example, to maintain that premises are in a good state of tenantable repair when they are "reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it"<sup>10</sup> implies criteria for decision-making incompatible with Canadian realities. Subject to minimum health and safety standards, the age and character of the premises should be sufficient to dictate the extent of the landlord's repairing obligation.

4. *Application of the Doctrine of Frustration*<sup>11</sup>

Though the doctrine of frustration is applicable to residential leasing arrangements, the circumstances in which either party can rely on it in order to terminate a lease are more complex than those suggested by the author. Similarly, the cited case, *Caithness Caledonia Ltd. v. Goss*,<sup>12</sup> is a prime illustration of the misapplication of the doctrine and should be contrasted with the leading English decision of *National Carriers Ltd. v. Panalpina (Northern) Ltd.*<sup>13</sup>

<sup>5</sup> Pp. 47-52.

<sup>6</sup> (1962), [1963] 1 Q.B. 499, [1962] 3 All E.R. 814 (C.A.).

<sup>7</sup> P. 47.

<sup>8</sup> *Landlord and Tenant Act*, R.S.O. 1980, c. 232.

<sup>9</sup> Pp. 52-64.

<sup>10</sup> P. 60. In the text, the quotation is itself taken from *Proudfoot v. Hart* (1890), 25 Q.B.D. 42 at 55, [1886-90] All E.R. Rep. 782 at 785 (C.A.).

<sup>11</sup> Pp. 79-80.

<sup>12</sup> (1973), [1973] 2 O.R. 592, 34 D.L.R. (3d) 640 (Small Cl. Ct.).

<sup>13</sup> (1980), [1981] 2 W.L.R. 45, [1981] 1 All E.R. 161 (H.L.). This case is discussed at length in J.T. Robertson, *Frustrated Leases: "No to Never — But Rarely if Ever"* (1982) 60 CAN. BAR REV. 619. For a more recent application of this doctrine and one which is sound in law, see *Turner v. Clark* (1983), 49 N.B.R. (2d) 340, 30 R.P.R. 164 (C.A.).

5. *Covenants in Posse and in Esse — The Option to Purchase*<sup>14</sup>

The author discusses the conflict in judicial opinion (both Canadian and English) as to whether a purchaser of a reversion is bound by an option to purchase contained in a lease; however, is not the true issue here whether the lease is required by statute to be registered? A purchaser may be willing to take the chance that an unregistered lease of one year will bind him except in the case of an option which undermines the very purposes of the initial purchase.

6. *Mitigation of Damages*<sup>15</sup>

The most controversial aspect of this monograph lies in Mr. Lamont's conclusion that, notwithstanding section 92 of the *Landlord and Tenant Act*, a landlord is under no duty to make reasonable efforts to re-let premises following abandonment by the tenant. Although this conclusion was questioned by a reviewer of the second edition,<sup>16</sup> the author remains steadfast in his original opinion. Yet, after *Highway Properties Ltd. v. Kelly, Douglas and Co.*,<sup>17</sup> it would be the supreme irony if the Supreme Court of Canada were in future to hold that there is no duty to mitigate. If the debate is to be properly argued, consideration should also be given to cases such as *Toronto Housing Co. v. Postal Promotions Ltd.*<sup>18</sup> and *APECO of Canada Ltd. v. Windmill Place*<sup>19</sup> which indicate that any reasonable landlord would attempt to mitigate his loss as did the landlord in *Highway Properties*.<sup>20</sup>

7. *Accelerated Rent*<sup>21</sup>

Closely related to the issue of mitigation is the issue of the legal effect of an acceleration clause. While a right of reinstatement is available to a tenant under subsection 97(1) of the *Landlord and Tenant Act*, that provision does not rule out a claim for accelerated rent nor does it diminish the argument that such a clause is penal in nature. The issue is not so much whether the clause is valid but rather the quantum of damages that may be recovered in the factual situation.<sup>22</sup> Even if one were willing to assume that there is no duty to mitigate, the prospect of a landlord recovering rent for the remainder of the term and then re-letting raises a question of double recovery. As to the penal nature of this clause, it should be remembered that there is a marked difference between a mortgage clause accelerating a principal sum already

<sup>14</sup> Pp. 80-2.

<sup>15</sup> Pp. 91-5.

<sup>16</sup> See S.G.M. Grange, Book Review, *supra*, note 1 at 715.

<sup>17</sup> (1971), [1971] S.C.R. 562, 17 D.L.R. (3d) 710 [hereinafter *Highway Properties*].

This case enabled a landlord to recover damages for prospective loss.

<sup>18</sup> (1982), 39 O.R. (2d) 627, 140 D.L.R. (3d) 117 (C.A.).

<sup>19</sup> (1978), [1978] 2 S.C.R. 385, 82 D.L.R. (3d) 1.

<sup>20</sup> *Supra*, note 17.

<sup>21</sup> P. 155.

<sup>22</sup> See *H.F. Clarke Ltd. v. Thermidaire Corp.* (1974), [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385 and *Elsley v. J.G. Collins Ins. Agencies Ltd.* (1978), [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1.

advanced and a clause which claims future rent. On this issue, Mr. Lamont's analysis is one-sided and may be criticized further for suggesting that a landlord may be able to defeat the tenant's right of reinstatement with a properly drafted contractual provision. This advice is inconsistent with the prevailing view that the Act is to be interpreted liberally and thus achieve "a fairer balance of rights and obligations between landlords and tenants".<sup>23</sup>

In addition to the foregoing comments there are two editorial matters which might be addressed because of the obvious relevance of the text to readers from provinces other than Ontario. It would be convenient if the relevant statutory provisions were incorporated into the text, thereby avoiding the necessity of turning to the statute reproduced in an appendix. Also, the sheer volume (over 23%) of unreported decisions presents a difficulty which may be unavoidable, but which may be cured in part by reproducing portions of major decisions such as *Fulton v. Eascan Holdings Ltd.*<sup>24</sup>

Putting aside criticisms that might be offered of Mr. Lamont's monograph, his text remains one of two Canadian efforts which attempts to unravel the complexities and ambiguities in legislation of this nature. The other is Professor Klippert's work<sup>25</sup> and, though neither can be characterized as the definitive tome, both achieve the differing objectives set by the respective authors.

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<sup>23</sup> P. 3.

<sup>24</sup> (14 Feb. 1975), (H.C.) [unreported], *aff'd* (21 May 1976), (C.A.) [unreported]. See p. 22.

<sup>25</sup> G.B. Klippert, *RESIDENTIAL TENANCIES IN BRITISH COLUMBIA* (Toronto: Carswell, 1976).

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