



LEASES

LIKE ANY OTHER CONTRACT?

John V. Orth

LEASES OF RESIDENTIAL REAL ESTATE nowadays include an implied covenant of habitability because leases “should be interpreted and construed like any other contract”¹ and contracts for the sale of consumer goods now include an implied warranty of fitness for use.² Because they are obligated under the covenant of habitability to keep the premises “fit and habitable” throughout the term, landlords today can be held liable in tort for injuries occurring on the leased premises.³ Because contracts in violation of statutes are void, leases of premises in violation of applicable housing codes are also void, there being no reason “to treat a lease agreement differently from any other contract.”⁴ And landlords faced with an abandoning tenant have a duty to seek a replacement tenant because contract law imposes on an injured party

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¹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970).

² See U.C.C. §§ 2-314, 2-315 (1968).

³ See, e.g., *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973).

⁴ *Brown v. Southall Realty Co.*, 237 A.2d 834, 837 (D.C. 1968), cert. denied, 393 U.S. 1018 (1969).

a duty to mitigate damages and a lease is “essentially a contract rather than a conveyance.”⁵ Furthermore, if a lease is a contract “like any other,” then abandonment by the tenant can be treated as “anticipatory breach.”⁶

It was not always so. Until the middle of the twentieth century, it could be authoritatively asserted that “the tenant is a purchaser of an estate in land” and therefore “[t]here is no implied covenant or warranty that at the time the term commences the premises are in a tenable condition or that they are adapted to the purpose for which leased.”⁷ It was for the tenant to determine whether the premises were suitable or to demand an express warranty of fitness. For the duration of the lease, that is, so long as the leasehold estate continued, the landlord was not liable for injuries occurring on the leased premises. “The basic rationale for lessor immunity has been that the lease is a conveyance of property which ends the lessor’s control over the premises, a prerequisite to the imposition of tort liability.”⁸ Just as the new concept of a lease as a contract has

⁵ U.S. Nat’l Bank of Oregon v. Homeland, Inc., 631 P.2d 761, 763 (Or. 1981) (citing Wright v. Baumann, 398 P.2d 119 (Or. 1965)). See also Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 376 (Utah 1996) (finding that “principles of contract law rather than property law” govern the computation of damages for a tenant’s breach of a lease) (citing Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989)). No real “duty to mitigate” is involved; rather, the party suffering the breach is disabled to recover damages from the breaching party to the extent that action by the former could have reduced the loss caused by the latter.

⁶ See 1 AMERICAN LAW OF PROPERTY 203-204 (A. James Casner ed., 1952) (citing acceptance of the contract theory of anticipatory breach as evidence of the trend toward treating the lease as a contract as well as a conveyance).

⁷ 1 AMERICAN LAW OF PROPERTY, supra note 6, at 267. The principal forms of conveyance at common law were feoffment, lease, grant, and mortgage. 3 id. 215. Lease and release became a means of conveying a fee simple without feoffment and livery of seisin. See KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 261-62, 366-67 (5th ed. 1897).

⁸ ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 4:1, at 186 (1980). “Immunity” is an inapt term. If one person owes no duty to another who was injured, then there is no liability in tort. Ordinarily, this is not described as an immunity.

generated the covenant of habitability, so the older view of a lease as a conveyance had generated the covenant of quiet enjoyment, the landlord's duty not to interfere with the tenant's possession of the premises. By this logic, a conveyance was not illegal, although the uses to which the tenant put the premises could be. And in case of tenant abandonment, the landlord need do nothing and "may let the premises lie idle and collect rent."⁹ In fact, this would seem to be required by the covenant of quiet enjoyment, so long as the landlord did not take action to terminate the lease.

Because the lease was a transfer of control, the landlord had no duty to maintain the premises during the term of the lease. In fact, it was the tenant who had some (minimal) duty of repair, in order to keep leased structures wind and water tight, so that they could be returned to the landlord at the termination of the lease in the condition they were in at the beginning, "ordinary wear and tear excepted." Failure by the tenant was remedied by the ancient action of waste, providing in extreme cases for forfeiture of the tenancy and treble damages.¹⁰ Indeed, so thoroughgoing was the concept of the lease as a conveyance that damage to leased structures, even their complete destruction, did not relieve the tenant of the duty to pay the full rent.¹¹ With the conveyance of the estate, the tenant took the risk of loss.

Of course, there were almost always some contractual elements to a lease. Revealingly, promises in leases were known (and continue to be known) not as promises but as "covenants." Never true covenants, that is, promises under seal – the lease was not a sealed

⁹ 1 AMERICAN LAW OF PROPERTY, *supra* note 6, at 392.

¹⁰ Statute of Gloucester, 6 Ed. 1, c. 5 (1278). Modern versions include N.C. GEN. STAT. § 1-534ff. (2007).

¹¹ See, e.g., *Arbenz v. Exley, Watkins & Co.*, 50 S.E. 813 (W.Va. 1905). See also SCHOSHINSKI, *supra* note 8, § 10:7, at 660. In America, an exception was made in the case of destruction of upper story apartments. See, e.g., *Stockwell v. Hunter*, 52 Mass. (11 Met.) 448 (1846). The exception is not allowed in England. 1 AMERICAN LAW OF PROPERTY, *supra* note 6, at 398. See also N.C. GEN. STAT. § 42-12 (2007) (lessees may surrender where building that was "main inducement to hiring" is damaged and repair would cost more than one year's rent).

instrument – covenants in leases nonetheless resembled their sealed counterparts by being unilateral,¹² or (as it was said in the law of leases) “independent.” The independency of covenants meant that breach of a covenant by one party did not relieve the other party of the duty to perform. If, for example, a landlord failed to perform an express covenant to provide some service, such as to keep the roof in a state of good repair, the tenant was not thereby relieved of the duty to perform other covenants, but could sue for damages.¹³

In time, the tenant’s covenant to pay rent came to be thought of as an exception to the independency of covenants – dependent, that is, on the landlord’s covenant to leave the tenant in quiet enjoyment of the premises: rent for possession.¹⁴ Even a partial eviction by the landlord relieved the tenant’s entire duty to pay rent.¹⁵ But historically the payment of rent was not thought of as the performance of a promise by the tenant but rather as a sort of interest the landlord retained in the land, reflecting the old common law’s discomfort with contract and preference for property interests.¹⁶ Describing

¹² Promises under seal, known as specialties, were unilateral in the sense that they were enforceable without consideration. With the triumph of the concept of contract as a “bargained for exchange,” the enforceability of specialties was explained by the maxim “the seal imports consideration.” JOHN MAXCY ZANE, *THE STORY OF LAW* 271 (1927). The common law action to recover under sealed promises was called the action of covenant.

¹³ The theory of the independency of covenants sometimes worked in favor of the tenant. See *Foundation Devel. Corp. v. Loehmann’s, Inc.*, 788 P.2d 1189, 1193 (Ariz. 1990) (“at common law a landlord could not dispossess a tenant who failed to keep his promise to pay rent [in the absence of an express condition in the lease], and had to be satisfied with damages for the breach”) – which is why most leases convey not an unqualified term of years but a term of years subject to condition subsequent, and why states have adopted statutes allowing termination for nonpayment of rent. E.g., N.C. GEN. STAT. § 42-3 (2007).

¹⁴ See 1 *AMERICAN LAW OF PROPERTY*, supra note 6, at 278; SCHOSHINSKI, supra note 8, § 3:13, at 113.

¹⁵ See *Smith v. McEnany*, 48 N.E. 781 (Mass. 1897).

¹⁶ See 2 *FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW* 127 (2d ed. 1898) (“The landlord who demands the rent that is in arrear is not seeking to enforce a contract, he is seeking to recover a thing.”).

the historic understanding of rent, the eminent legal historians, Pollock and Maitland, concluded, “We may almost go the length of saying that the land pays it through [the tenant’s] hand.”¹⁷ The rent was “reserved” in the lease in much the same way (and in the same *reddendum* clause) that a vendor reserved an easement in a deed.¹⁸

In only one situation did the earlier law seem to take the idea of a lease as a contract seriously: the tenant’s assignment to a third party of all the remaining term. Since the tenant was a “purchaser of an estate in land” and the lease a “conveyance of property,” the law naturally recognized that the tenant had an alienable interest. (Of course, the lease could include a covenant against transfer by the tenant, although as a restraint on alienation it was subject to heightened judicial scrutiny.¹⁹) If the tenant assigned the interest, the assignee became liable to pay the rent and to perform other duties imposed by covenants running with the land.²⁰ The assignee, for want of a better term, was said to be in “privity of estate” with the landlord: when the lease terminated, possession reverted immediately to the landlord, not mediately through the tenant.²¹ But the tenant, even after the assignment, remained liable, as a surety, on all the covenants. The

¹⁷ Id. 131.

¹⁸ An easement had to be reserved, not excepted, because “so long as there is unity of ownership, there can be no easement,” 2 GEORGE THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 352, at 305 (1980), so it had to be created when the fee was transferred.

¹⁹ Recognizing covenants against transfer as restraints on alienation helps to explain the otherwise surprising Rule in Dumpor’s Case, 4 Co. Rep. 119, 76 Eng. Rep. 1110 (K.B. 1603) – the rule that covenants against transfer without consent are presumed to be single and entire, that is, that consent to one transfer makes consent to further transfers unnecessary.

²⁰ Covenants running with the land are an unusual type of contract, “the unique example of the possibility of one being sued as a promisor upon a promise he has not made.” RESTATEMENT OF PROPERTY: SERVITUDES, part III, intro. note 3158 (1944).

²¹ This was thought to be required by the venerable Statute Quia Emptores, 18 Ed. 1 (1290), which ended the feudal practice of subinfeudation by providing that transfer of an entire interest substituted the transferee for the transferor, eliminating intervening estates.

tenant, it was said, remained in “privity of contract” with the landlord.²²

Treating the lease as a conveyance – except in case of assignment by the tenant – had obvious benefits for the landlord, but at one time treating the lease as a conveyance had actually favored the tenant. Centuries ago, when the common law was young and there was a “highly developed land law, but no theory of contract,”²³ it was to the tenant’s advantage to be recognized as having an estate in land, even if it was not a freehold estate. So uncomfortable was the common law, or rather the common law lawyers, with interests that were not somehow property interests that leases were categorized as “chattels real,” rights derived from land and therefore in some sense real property though passing as personal property on succession at death – in any event property, not contract. Likewise, agreements for the purchase of land, while they remained executory, were treated as transferring to the purchaser an actual, if equitable, title from the moment of execution under the doctrine of “equitable conversion.”²⁴ They still are, which is why contracts for the sale of land are recordable as transfers of interests in real property.²⁵

Ironically, there arrived a time when the legal security of the tenant was actually superior to that of the owner in fee simple.²⁶

²² See U.S. Nat’l Bank of Oregon, 631 P.2d at 765 (“The tenant, by abandoning the leased premises, forfeits his estate in the real property, but remains liable for damages for breach of contract . . .”).

²³ 2 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355 (4th ed. 1936).

²⁴ An equitable title could not, of course, be recognized unless the contract was specifically enforceable. For a discussion of the logic (or “philosophy”) involved in the doctrine of equitable conversion, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 38-39 (1921).

²⁵ See, e.g., N.C. GEN. STAT. § 47-18(a) (2007) (providing for recording of contracts to convey, as well as options to convey and leases of land for more than three years).

²⁶ What is called ownership in fee simple was then more commonly called “tenancy in fee simple,” but the language of ownership is used here to conform to modern usage and to avoid confusion with tenancy under a lease.

The action of ejectment, which protected the tenant's right to possession, was much more rational and expeditious (because relatively newer) than the ancient and cumbersome procedure initiated by the writ of right to determine ultimate ownership. So, a plaintiff suing for title to Blackacre took advantage of the tenant's remedy by alleging that he had leased the land to John Doe, who had been ejected by someone claiming authority from the defendant. The caption of the case – there were thousands like it – read “Doe on the Demise [lease] of Plaintiff v. Defendant,” usually shortened to “Doe on the Dem. of”²⁷ The judges were cooperative and refused to hear the defendant's answer unless the fictitious lease and ejectment were first admitted.²⁸ To this day, ejectment is the common name for the action to try title to real property.

The fact of the matter, of course, is that the lease is both a conveyance and a contract, or, if one prefers, “A lease is a contract which contains both property rights and contractual rights”²⁹ – with all the complications and confusions the combination produces. That it remains a conveyance is most noticeable in the fact that it is recordable in the local registry of deeds.³⁰ Fairly typical is the California statute: “Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose con-

²⁷ In a few states such as New Jersey and North Carolina the name of the fictitious tenant mutated to Den, so the caption became “Den on the Dem. of” See, e.g., *Den on the Dem. of Bayard v. Singleton*, 1 N.C. 5 (1787), a landmark case on judicial review, briefly discussed in JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 7, at 67-68 (1993).

²⁸ 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 199-206 (1768). For more on the creative power of legal fiction, see John V. Orth, “Fact & Fiction in the Law of Property,” 11 *GREEN BAG* 2d 65-80 (2007).

²⁹ *Strader v. Sunstates Corp.*, 500 S.E.2d 752, 756 (N.C. Ct. App. 1998).

³⁰ See *Chandler v. Cameron*, 47 S.E.2d 528, 531 (N.C. 1948) (recording a personal contract, even if included in a recordable contract for the sale of land, does not give constructive notice because a personal contract is not “of a class which is authorized . . . to be recorded”) (quoting 45 AM. JUR. *Records and Recording Laws* § 107).

veyance is first duly recorded.”³¹ A lease, in other words, is a conveyance and if for a term of more than one year eligible for the protections afforded by the California recording act.

That a lease is (or has become) a contract is evident in the modern confusion surrounding the application of the Statute of Frauds. The drafter of the seventeenth-century English original, the root of all modern American versions, obviously thought leases and contracts were different things and dealt with them in distinct clauses.³² Although both were subject to the memorable requirement of a “writing signed by the party to be charged therewith,” the English statute applied to leases for a term of more than three years “from the making thereof,” while contracts were addressed in the so-called *infra annum* clause, covering agreements not performable within one year “from the making thereof.” American versions continue to treat leases and contracts separately, although many shorten the lease term to one year and omit the phrase “from the making thereof.”³³

The modern problem arises because of the almost inevitable practice in leasing of executing a lease at one time to commence at a later date, *in futuro*. Must such a lease satisfy the *infra annum* clause as well as the lease provision? The traditional understanding, not recognizing the lease as a contract, was that the tenant acquired a property interest, an *interesse termini* or “interest in a term,” on execution of the lease and a non-freehold estate when the term eventually commenced. Some courts continue to adhere to this view and, particularly if the limiting phrase “from the making thereof” has been omitted from the section on leases in their jurisdiction, hold

³¹ CAL. CIV. CODE § 1214 (2001).

³² See 29 Car. 2, c. 3, § 3 (leases), § 4 (contracts) (1677). See generally CAUSTEN BROWNE, A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS (1st ed. 1857).

³³ E.g., VA. CODE ANN. § 11-2 (2006). Some statutes, while omitting the phrase “from the making thereof,” preserve the three-year period for leases. E.g., N.C. GEN. STAT. § 22-2 (2007).

that the one-year period refers only to the term of the lease.³⁴ Other courts, convinced that leases are contracts (“like any other”) as well as conveyances, take the view that a lease must satisfy the *infra annum* clause as well as the lease provision and hold that an oral lease for one year to commence *in futuro* is an invalid contract, if not an invalid conveyance, under the Statute of Frauds.³⁵

Whenever an oral lease is invalid, what is to be done when the parties nonetheless attempt to perform? The parties, for example, orally agree to a lease for a term of five years and the “tenant” takes possession. It seems obvious that the “lease” makes the entry permissive, not trespassory. Subsequent payment of rent and its acceptance by the landlord mean that some kind of tenancy must be recognized. The historic solution was the periodic tenancy, a non-freehold estate measured by the period for which rent was reserved and terminable by either party with notice to the other measured by the rental period, but never more than one year.³⁶ While not achieving all that the parties intended to accomplish, this result at least gave both sides legal rights, and the tenant some security of tenure. Ironically, periodic tenancies are exempt from the Statute of Frauds; yet, unless timely notice is given, the tenancy may actu-

³⁴ E.g., *Bell v. Vaughn*, 53 P.2d 61 (Ariz. 1935), noted in 20 MINN. L. REV. 833-34 (1935).

³⁵ E.g., *Shaughnessy v. Eidsmo*, 23 N.W.2d 362, 366 (Minn. 1946) (“An oral lease of real estate for a term of one year, to commence *in futuro*, is within the statute of frauds.”).

³⁶ WILLIAM GELDART, INTRODUCTION TO ENGLISH LAW 84 (D.C.M. Yardley ed., 9th ed. 1984) (“at common law a lease which ought to be made by a deed but is not will not completely fail of effect, if possession is taken and rent paid under it; the tenant will be treated as tenant from year to year upon the terms of the lease so far as they are applicable to such a tenancy”). At common law the period of notice equaled the rental period but could not exceed six months. 1 AMERICAN LAW OF PROPERTY, *supra* note 6, at 374. This is sometimes shortened by statute. See, e.g., N.C. GEN. STAT. § 42-14 (2007) (“A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days.”).

ally endure for as long as (or even longer than) the term of the un-enforceable oral lease.

Latterly, as leases are increasingly re-conceptualized as contracts, it has been held that the contract theory of part performance may also be applicable to leases.³⁷ Pioneered in the case of contracts for the sale of goods³⁸ and extended to cover contracts for the sale of land,³⁹ part performance permits an exception to the Statute of Frauds if a significant change of position has occurred and if it is solely referable to the existence of an oral agreement. In such case, a court can enforce the oral contract despite the absence of a signed writing, consoling itself with the reflection that the spirit if not the letter of the statute is satisfied since there is reliable evidence of the parties' intention.

If leases are indeed contracts, then the covenants in leases ought to be "dependent," just as the promises in contracts are, and – rather predictably – the dependency of covenants has now been solemnly proclaimed by case and statute.⁴⁰ But despite the blithe assurance that leases are contracts "like any other," rules developed in the context of contracts for the sale of goods sometimes prove poor guides in the case of leases of real property. The covenant of habitability, the paradigm case of treating leases like contracts, is (more or less) easily implied in residential leases, particularly of urban apartments. But what, if anything, is required beyond the

³⁷ E.g., *Corder v. Idaho Farmway, Inc.*, 986 P.2d 1019 (Idaho Ct. App. 1999).

³⁸ The original Statute of Frauds, 29 Car. 2, c. 3, § 17, expressly provided for a type of part performance in contracts for the sale of goods, but not for leases or contracts for the sale of land.

³⁹ Actions such as a change in possession, payment, and the making of improvements are usually required. See ZECHARIAH CHAFEE, JR. & EDWARD D. RE, *CASES AND MATERIALS ON EQUITY* 549-50 (5th ed. 1967).

⁴⁰ E.g., *Richard Barton Enterprises, Inc.*, 928 P.2d at 378 ("the lessee's covenant to pay rent is dependent on the lessor's performance of covenants that were a significant inducement to the consummation of the lease"); N.C. Residential Rental Agreements Act, N.C. GEN. STAT. § 42-41 (2007) ("The tenant's obligation to pay rent under the rental agreement or assignment and to comply with [this Act] and the landlord's obligation to comply with [this Act] shall be mutually dependent.").

standards imposed by the relevant housing code? And if the covenant to pay rent is just a promise, dependent on the landlord's (implied) promise to keep the premises "fit and habitable," then what happens to the rent if the landlord breaches (or is alleged to have breached) the promise? May the tenant simply cease paying rent while retaining possession – or abate the rent to the extent of the breach, perhaps paying for the needed repairs out of the difference?⁴¹

If the covenant of habitability in residential leases is simply a specific instance of the more general contract rule concerning warranties of fitness for use, then it should be equally implied in commercial leases, which are (on that theory) equally contracts, yet here the courts have hesitated – for the very good reason that the parties are usually the best judges of whether certain premises are suitable for the intended use.⁴² Here the old idea of the lease as a conveyance seemingly still has some appeal.

That landlords should not be immune from liability in tort is an attractive enough proposition, particularly if the proximate cause of an injury was a condition of the premises known to (or knowable by) the landlord but not obvious to the tenant. Traditional law handled the problem with the concept of "latent defect," an exception to the landlord's so-called "immunity." But whether "premises liability" should be extended to all injuries occurring on the leased premises is not so simple. After all, it is the tenant who has possession, and the landlord who is obligated under what is left of the covenant of quiet enjoyment to leave the tenant alone. Landlord liability for criminal acts of third parties resulting in injuries to the

⁴¹ See *Javins*, 428 F.2d at 1083 ("the trial court may require the tenant to make future rent payments into the registry of the court . . ."); N.C. Residential Rental Agreements Act, N.C. GEN. STAT. § 42-44(c) (2007) ("The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.").

⁴² JOHN E. CRIBBET ET AL., *CASES AND MATERIALS ON PROPERTY* 434 (8th ed. 2002) ("A significant majority of states has refused to extend the doctrine of implied covenants to commercial tenancies . . .").

tenant or to licensees or invitees of the tenant has proven particularly problematic.⁴³

Illegal leases, like illegal contracts, should confer no rights, but what if the tenant under an illegal “lease” takes possession and even pays “rent”? Is this simply the creation of another periodic tenancy, or would that too be “illegal”? Could a tenant under an illegal lease conceivably be a trespasser?⁴⁴ In property cases, unlike contract cases, one does not have the luxury of simply “leaving the parties where you found them” because in the case of an illegal lease they will have quite literally changed position, with the “tenant” in possession and the “landlord” out.

From contract law comes the duty of a non-breaching party to mitigate damages in case of breach by the other; in leases, the duty of the landlord when faced with an absconding tenant. As applied to leases, the duty raises difficult questions when the landlord has multiple vacancies to fill, when the lease to the replacement tenant is for a longer term, and particularly when the second lease is for a higher rent.⁴⁵ Must the landlord reduce the rent if that is necessary in order to fill the space? Or, if the landlord is able to rent for more, must the landlord turn over the increment to the misbehaving tenant?⁴⁶ And if the contract theory of anticipatory breach is also

⁴³ Compare *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (holding landlord liable for failure to safeguard tenants from foreseeable criminal acts), with *Vera v. Five Crow Promotions, Inc.*, 503 S.E.2d 692 (N.C. Ct. App. 1998) (holding that lessor and sublessor have no duty to protect sublessee’s invitees from the criminal acts of third parties).

⁴⁴ See *William J. Davis, Inc. v. Slade*, 271 A.2d 412 (D.C. 1970) (holding that in the District of Columbia a tenant under an illegal lease is a tenant at sufferance rather than a trespasser and can remain in possession for at least 30 days following a proper notice to quit).

⁴⁵ See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.1, cmt. i (“A reletting may be for the benefit of the tenant even though it is for a term shorter or longer than the term in the original lease, and even though it is for a rent lesser or greater than the rent reserved in the original lease. Furthermore, the reletting may be for the benefit of the tenant even though various other terms of the original lease are not carried over in the lease to the new tenant.”).

⁴⁶ *Id.* (answering Yes).

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carried over to leases, the calculation becomes immeasurably more difficult.

In contract law, the duty to mitigate is not waivable, although contracts may include a provision for liquidated damages – so long, of course, as it is not simply a disguised penalty. But what about leases? In particular, what about commercial leases? Should a commercial landlord be allowed to enforce a lease provision waiving the duty to mitigate? Some cases have so held, ironically relying on a theory of “freedom of contract.”⁴⁷

In fact, leases are not “like any other contract” – or like anything else except themselves. The lease is a conveyance of a time-limited interest in real property that usually incorporates contractual elements. There is no reason to abandon the concept of a lease as a conveyance, just as there is no reason to deny that modern leases include a variety of promises in the form of covenants, or to pretend that the law always did a good job when dealing with these contractual elements. But simply to assimilate leases to contracts is to oversimplify, and – what’s worse – to sow confusion. However helpful contract rules may be in resolving some cases, rules made for contracts are an imperfect fit when applied to leases for the very simple reason, one known to the law for a very long time, that every parcel of land is unique. Land, even in the form of residential apartments or office or retail space, is unlike the proverbial widget or bushel of wheat for which contract rules were framed. The law of leases should remain true to itself and not be misled by a simile.



⁴⁷ See, e.g., *Sylva Shops Ltd. P’ship v. Hibbard*, 623 S.E.2d 785 (N.C. Ct. App. 2006) (holding that a clause in a commercial lease relieving the landlord of its duty to mitigate damages is not against public policy and is enforceable).