

# THE RIGHTS AND LIABILITIES OF ASSIGNEES OF LEASES, REVERSIONS AND MORTGAGES UNDER THE *REAL PROPERTY* *ACTS*: RECENT DEVELOPMENTS

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## I Introduction

A number of recent decisions in Australian appellate courts have examined the ambit of the provisions of the Torrens legislation dealing with assignments of leases and mortgages. The basic problem addressed by the relevant provisions is privity of contract for the reason that both these particular interests in land arise in contract, in the same way that the covenants they contain do. As Kevin Gray and Susan Francis Gray put it in the context of a discussion of leases, 'the lease is a curious hybrid which hovers between the worlds of property and contract'.<sup>1</sup> So when a lease or mortgage is assigned, the question arises as to whether the benefit of all the covenants in the original contract transferred to the assignee, or only some of them. An analogous question relates to the burden of those covenants.

A substantial body of statutory provisions, and case law, has more or less clarified the position where leases and mortgages are assigned at common law. But the position under the Torrens system is not quite so clear. The issue is complicated by registration. The general principle of the Torrens system is that registration confers indefeasibility of title on all registered interests. But does indefeasibility attach to all covenants in leases and mortgages, or only a sub-class of them? Moreover, dealings such as forgeries, which would be void at common law, attract the benefit of indefeasibility on registration. This raises the further difficulty as to whether the indefeasibility conferred by registration attaches to all some or any covenants in the lease or mortgage. This article commences by examining the general ambit of the enforceability of covenants under the Torrens system. It will then analyse the Torrens provisions, as interpreted in the most recent case law, that purport to render covenants enforceable by and against assignees. Finally the paper explores the solutions, as well as some of the problems, presented by the cases.

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<sup>1</sup> Gray and Gray, *Elements of Land Law*, 4<sup>th</sup> ed., Oxford University Press, 2004 at 458.

## II Indefeasibility and the Enforceability of Covenants under the Torrens System: General Principles

Leases and mortgages present very specific problems of enforceability under the Torrens system even before assignment to third parties because of the operation of the indefeasibility provisions. The basic reason for this is that leases and mortgages are nothing more than the sum of covenants contained within them. It makes little sense to talk about a lease or a mortgage without covenants; in the absence of covenants, the interest is but an empty shell. But registration of the lease or mortgage does not entail registration of all the covenants that constitute the interest. Rather, the registered lease or mortgage is a narrow snapshot of the interest, with minimal reference to the full package of rights and obligations contained in the lease itself, or in the mortgage contract. The question immediately arises, 'Are all of the rights contained in the covenants in the lease or mortgage indefeasible on registration, or if not, which ones are?' At common law, this issue is irrelevant if the dispute is between the original parties to the lease or mortgage: in such a case the covenants are enforceable as a matter of contract law.

Equally, as a matter of contract law, if the instrument creating the interest is void, then no rights are created. But the indefeasibility provisions of the Torrens system have changed this. In a line of decisions starting with *Frazer v Walker*,<sup>2</sup> certain void instruments have been nonetheless held to attract immediate indefeasibility in favour of proprietor who secured registration without fraud. So, in *Frazer*, the innocently registered mortgagee was able to enforce the mortgage notwithstanding the forged signature on the mortgage. And to the extent that the mortgage is rendered indefeasible, it follows that the covenants which give substance to the mortgagor's, the mortgagee's, the lessor's and the lessee's rights are also indefeasible. Accordingly, on breach by the mortgagor of the obligation to repay, the mortgagee was entitled to exercise its power of sale. As Hayne JA (with whom Tadgell and Brooking JJA concurred) held in *Pyramid Building Society v Scorpion Hotel*,<sup>3</sup> the indefeasibility of a registered mortgage 'plainly' extends to the mortgagor's covenant to pay, though there was no suggestion in the case that the property would be insufficient to cover the outstanding debt.

While this result is consistent with the Torrens policy of making the register as comprehensive a record as possible of all interests over the land, it might be seen to

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<sup>2</sup> *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376.

<sup>3</sup> *Pyramid Building Society v Scorpion Hotels* [1998] 1 VR 188 at 196.

be particularly unjust to the innocent mortgagor where the outstanding debt under a forged mortgage exceeds the value of the land. To address this problem, various judicial attempts are evident in the case law to draw conceptual distinctions between the contractual rights and the proprietary interest in leases and mortgages. So, where the value of the land realised on a mortgagee's sale is less than the outstanding amount secured by the mortgage, can the mortgagee rely on the covenants in the mortgage to activate other remedies?

In *Vassos v State Bank of South Australia*,<sup>4</sup> the plaintiffs' signatures had been forged to an 'all accounts' mortgage, and also to an indemnity and guarantee. Hayne J held that, while the mortgagee was entitled to judgment for possession of the land and to sell it in satisfaction of the debt, it was not entitled to enforce the void guarantee and indemnity against the plaintiffs. The effect was that the mortgagee was limited to its rights of recourse against the land. In the year following *Vassos*, in *Grgic v Australian and New Zealand Banking Group Ltd*,<sup>5</sup> the New South Wales Court of Appeal held that, notwithstanding that the registered proprietor's land was charged with the moneys secured by the bank's mortgage, he was not liable to the mortgagee on the personal covenants contained in the forged mortgage.

Similarly, the New Zealand Court of Appeal in *Duncan v McDonald*<sup>6</sup> held that the covenant to pay in a forged mortgage made indefeasible on registration is enforceable only to the extent necessary to make out the mortgagee's charge on the land. Blanchard J concluded as follows:

What registration of an otherwise void mortgage gives the innocent mortgagee in these circumstances is the right of recourse to the security for such value as the land may have. The charged property is rendered liable for the debt by the registration. The covenants to pay and supporting covenants given by the registered proprietor then become operative to such extent only as is necessary to enable realisation of the security and recovery of the advance or part thereof by that means (at 682-3).

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<sup>4</sup> *Vassos v State Bank of South Australia* [1993] 2 VR 316.

<sup>5</sup> *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 at 224. See also, *Perpetual Trustees Victoria Limited v Tsai* (2004) 12 BPR 22,281 at [16]; *Chandra v Perpetual Trustees Victoria Ltd No 1* (2007) 13 BPR 24, 675 at [29]; and *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24,567 at [13]. For a fuller discussion of these decisions, see Scott Grattan, 'Recent Developments Regarding Forged Mortgages: Indefeasibility, the Personal Covenant to Pay and Remedial Options' in this collection at pp 43-66.

<sup>6</sup> *Duncan v McDonald* (1997) 3 NZLR 669.

In *Chandra v Perpetual Trustees Victoria Ltd*<sup>7</sup> Bryson J adopted a similar approach to that in *Duncan v McDonald*, where his Honour said:

A covenant in a lease is more readily seen to be part of the estate or interest in land created by the lease than a personal covenant to pay a debt in a mortgage can be seen as part of the estate or interest in land created by the mortgage. To my mind the charge of the debt on the land is an estate or interest in land, and the personal covenant to pay the debt is not, even though it is necessary to understand the personal covenant to see what is charged upon the land. The operation of a mortgage to charge a money obligation on land is recognisable without any difficulty as an interest in land; the personal obligation of a mortgagor himself to pay the debt, by means of enforcement available for debts generally and not by enforcement specifically against the land is, I think, equally clearly not an interest in land; even though it would quite frequently happen that the same personal covenant to pay a debt identifies both what debt is charged on land and what debt the mortgagor is personally liable for. In *Small v Tomassetti* [(2001) 12 BPR 22,253] the careful expressions chosen by Campbell J in stating the conclusion at [15] show, to my mind, that his Honour adverted to the need to express the effect of indefeasibility in terms limited to the estate or interest in land created by registration, notwithstanding that the covenant at [13] was, according to its terms, a personal covenant.

The distinction between the mortgage as an interest in land and the covenant to pay as a contractual obligation has other consequences. A mortgage can also be discharged without discharging the covenant to pay. The effect of the mortgage on the covenant to pay depends upon the wording of the instrument of discharge. Most recently, The High Court has determined that the mortgage security (the property right) has been held to be conceptually distinct from the personal obligation to repay (the contractual obligation), even where they are contained in the same instrument. In *Queensland Premier Mines Pty Ltd v French*,<sup>8</sup> Kiefel J, for the High Court reached a similar conclusion.

An early attempt to avoid the apparent injustice to former registered proprietors who are victims of forgery can be seen in *Grundy v Ley*,<sup>9</sup> where a discharge in the Registrar-General's approved form was held to be effective only to release the land

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<sup>7</sup> *Chandra v Perpetual Trustees Victoria Ltd No 1* (2007) 13 BPR 24,675 at [12].

<sup>8</sup> *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81; (2007) 240 ALR 234. Her Honour was citing with approval the conclusion of Maxwell P in the Court of Appeal to this effect: see *French v Queensland Premier Mines Pty Ltd* [2006] VSCA 287 at [13].

<sup>9</sup> *Grundy v Ley* [1984] 2 NSWLR 467.

from the charge, while leaving the mortgagor's personal liability intact.<sup>10</sup> Finally, where a lease is both void and illegal, none of the covenants are enforceable. In *Travinto Nominees v Vlattas*<sup>11</sup> the High Court considered the effect of indefeasibility on a lease declared void and illegal by statute. A majority of the Court held that though the lease itself might claim the benefit of indefeasibility, none of the covenants could be enforced because a court could not grant specific performance of an illegal covenant. Although this case concerned the original parties to the lease, the same principle applies to assignees of both the lease and the reversion.

### III Enforceability of covenants after assignment under the Torrens system: Recent Case Law

#### A Leases

The extent of indefeasibility is crucial in relation to their enforceability by or against third parties, and so the first issue to resolve is determining which covenants attract indefeasibility on registration. This matter was authoritatively determined by the High Court in *Mercantile Credits v Shell*.<sup>12</sup> A lease containing options to renew was registered before the registration of an assignment of mortgage over the demised property. On the expiry of the original term, the lessee sought to exercise the option, but the assignee of the mortgage claimed that the mortgage took priority and that therefore it was not bound by it. The High Court unanimously upheld the tenant's claim on the basis that an option to renew is integral to the lease, and that this covenant acquires the same measure of indefeasibility as the lease itself on registration. As Gibbs J concluded:

The right of renewal is so intimately connected with the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease, and on registration is entitled to the same priority as the term itself.<sup>13</sup>

It followed that the option was enforceable against the assignee of the mortgage. The covenant acquired indefeasibility on registration of the lease. By contrast, where

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<sup>10</sup> In *Groongal Pastoral Co Limited v Falkiner* (1924) 35 CLR 157, the discharge of mortgage was couched in terms that indicated a full and complete discharge of all personal obligations. See Scott, 'Indefeasibility and the Forged Mortgage' [1998] NZLR 531.

<sup>11</sup> *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1.

<sup>12</sup> *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326; 9 ALR 39.

<sup>13</sup> See also *Fels v Knowles* (1906) 26 NZLR 604; Davis, 'Options in Leases — A Further Exegesis' (1977) 9 Well LR 77; see also Whalan, *The Torrens System in Australia* (1982) pp 114–19.

covenants are of a purely personal character, and therefore do not relate to the land, registration of a transfer will not confer the rights on the transferee.

But what are the rights of the assignee who seeks to enforce the covenants in the lease? Here too, the distinction between personal covenants and those that relate to the land is decisive. In New South Wales, the relevant provisions are contained in ss 117 and 118 of the *Conveyancing Act 1919* (NSW), and ss 51 and 52 of the *Real Property Act 1900* (NSW). There are analogous provisions in other states.<sup>14</sup> By s 116, these provisions extend to land held under the Torrens system. Section 117 provides that the benefit of every covenant 'with reference to the subject-matter of the lease' is annexed to the reversion. This phrase has been interpreted to mean touching and concerning the land.<sup>15</sup>

There has been some divergence of opinion in the decisions as to whether a covenant of guarantee relates to land, or is personal. In *Sacher Investments v Forma Stereo Consultants*<sup>16</sup> a covenant of guarantee was held to be unenforceable by the assignee of the reversion in the absence of a specific assignment of the right as a chose in action. Yeldham J, in the Supreme Court of New South Wales held that the right did not attach to the land even though the guarantee was expressed to be made with 'the landlord, its successors and assigns'. On the other hand, in *Ryde Joinery Pty Ltd v Zisti* a guarantor's covenant guaranteeing the tenant's rental payments was held enforceable by the landlord's successors in title.<sup>17</sup>

The High Court had occasion to consider which rights the assignee of Torrens title land acquires in the recent case of *Gumland Property Holdings v Duffy Brothers*.<sup>18</sup> The original landlord, Transit Management Pty Ltd, was the registered proprietor of a shopping centre. It granted a lease of premises constituting approximately 20% of the centre to the respondent Duffy Bros. The lease was for a term of 15 years, and was registered. The reversion was assigned to Gumland Property Holdings, the appellant,

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<sup>14</sup> For analogous provisions to the Conveyancing Act, see *Property Law Act 1974* (Qld) ss 117, 118; *Conveyancing and Property Law Act 1884* (Tas) ss 10, 11; *Property Law Act 1958* (Vic), ss 141, 142; *Property Law Act 1969* (WA), ss 77,78. For comparable provisions to the *Real Property Act*, see *Land Title Act 1994* (Qld) s 62; *Land Titles Act 1980* (Tas), s 60; *Transfer of Land Act 1958* (Vic), s 54(2); *Transfer of Land Act 1893* (WA), s 95.

<sup>15</sup> *Showa Shoji Australia Pty Ltd v Oceanic Life Pty Ltd* (1994) 34 NSWLR 548 at 558.

<sup>16</sup> *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5.

<sup>17</sup> *Ryde Joinery Pty Ltd v Zisti* (1997) NSW ConvR 55-812 at 56,379-80.

<sup>18</sup> *Gumland Property Holdings Ltd v Duffy Brothers Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; (2008) 240 ALR 1.

who became the registered proprietor. The tenant then defaulted in payment of rent. The appellant not only terminated the lease, but also sought to enforce a guarantee given by Ferdinando and Natale Pisciueneri, who had guaranteed to pay all costs for occupation of the premises or arising out of any breach of the lease agreement.

The Court noted<sup>19</sup> that the expression 'having reference to the subject matter thereof' is the same as 'touches and concerns the land' which is a necessary condition for a covenant to be one 'which runs with the land'. In order to determine whether the right to sue on a guarantee touched and concerned the land, the High Court applied the tests set out by the House of Lords in *P & A Swift Investments (a firm) v Combined English Stores Group*<sup>20</sup> where Lord Oliver of Aylmerton said that the relevant matters for consideration were:

- (1) the covenant benefits only the reversioner for the time being, and if separated from the reversion ceased to be of benefit to the covenantee;
- (2) the covenant affects the nature, quality, mode of user or value of the land of the reversioner;
- (3) the covenant is not expressed to be personal (not being given only to a specific reversioner or in respect of the obligations only of a specific tenant);
- (4) the fact that a covenant to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on, to or in relation to the land.

In applying these tests the Court found that the covenant, as was the case with the guarantee in *P & A Swift Investments*, touched and concerned the land because it met all four of the above requirements. It added that *Sacher Investments* was weakened as authority because no argument had been advanced in that case that the guarantee touched and concerned the land.<sup>21</sup> Further, the Court concluded (at [101]), citing Lord Templeman in *Swift*<sup>22</sup> that there is a 'more direct' way to establish that guarantees touch and concern the land: 'A covenant by a surety that a tenant's covenant which touches and concerns the land shall be performed and observed must itself be a

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<sup>19</sup> At [67].

<sup>20</sup> *P & A Swift Investments (a firm) v Combined English Stores Group Plc* [1989] AC 632 at 642.

<sup>21</sup> *Ryde Joinery Pty Ltd v Zisti* (1997) 7 BPR 15,233 at 15,237.

<sup>22</sup> *P & A Swift Investments (A Firm) v Combined English Stores Group plc* [1989] AC 632 at 637 (Lords Keith of Kinkel, Roskill and Ackner concurring).

covenant which touches and concerns the land'. Therefore *Sacher* is not good law now.

A further hurdle that the appellants needed to clear in *Gumland* was presented by their reliance on the right to sue for loss of bargain damages in the lease. As a long line of case law establishes, contractual remedies are now applicable to leases. Where the lessee, or even lessor, breaches a fundamental term of the lease, the lease can be terminated by the innocent party and loss of bargain damages awarded. But are contractual remedies available to assignees, with whom there is no privity of contract? This conceptual question is not expressly addressed in ss 117 and 118, and had not been answered by the courts prior to *Gumland*. The High Court's solution was based on the tests of touching and concerning in *P & A Swift Investments*. If the covenant that expressed the contractual remedy could be construed as being annexed to the land, it would pass in accordance with s 117 of the *Conveyancing Act 1919* (NSW). By reference to the first test in *Swift*, insofar as the covenant relating to payment of rent was intended to benefit the reversioner for the time being only, it would cease to be of benefit to the covenantee if separated from the reversion. This was because in the definitions clause of the lease, 'Lessor' was defined as 'the Lessor, its successors and assigns' and 'Lessee' is defined as 'the Lessee and the executors, administrators, successors and permitted assigns of the Lessee'.

The second test in *Swift* was satisfied because breach of a covenant to pay rent which is an essential term, can diminish the value of the reversion without recourse to loss of bargain damages:

if the right to sue for loss of bargain damages were held not to touch and concern the land, so that the transferee of the reversion could not sue under s 117, the diminution in the value of the land, whether it takes place just before completion or earlier, will be uncompensated. That there is a diminution in value of the land if the covenant is not enforceable by a transferee of the freehold supports the conclusion that a covenant to pay rent which is an essential term is in truth a covenant which affects the value of the land (at [76]).

Thirdly, the covenant was not expressed to be personal as it was not given only to a specific reversioner, nor in respect of the obligations of a specific tenant. Fourthly, although the covenant in relation to which the right to sue for loss of bargain damages arises, is a covenant to pay sums of money, and although it is not connected with anything to be done with or to the land, those factors do not prevent it from touching and concerning the land, because the first three conditions are satisfied.



In the case of void instruments which are registered without fraud, a similar analysis applies to the question as to which covenants are enforceable, both initially on registration, and subsequently on assignment. This is evident from the New South Wales Court of Appeal decision in *Karacominaakis v Big Country Developments Pty Ltd*,<sup>23</sup> where Giles JA (Handley and Stein JJA agreeing) concluded that upon registration, those covenants that represent the essential elements of the lease will be enforceable:

Payment of the agreed rent is an essential part of the transaction between the lessor and lessee. The lessor gives the lessee an estate or interest in land in return for the lessee giving the lessor rent, rent being 'a sum issuing out of the land demised payable by the lessee to the lessor for the right to occupy that land and all that went with it': *Junghenn v Wood* [1958] SR (NSW) 327 at 330 per Owen J. The covenant to pay rent, to adopt the words of Blanchard J in *Duncan v McDonald*, is a condition upon which the leasehold interest is held and intimately related to the lessee's title created upon registration; taking up concepts found in *Travinto Nominees Pty Ltd v Vlattas* and in *Mercantile Credits Pty Ltd v Shell Co of Australia Ltd*, because of its connection with the continuance of the lessee's interest in the land, it delimits or defines that interest (at 18,247).

In this case, the respondent lessor, Big Country Developments (BC) leased premises to a lessee, W. The land was under the provisions of the *Real Property Act 1900* (NSW). Before the lease was registered, the lease was assigned to A1, and the assignment was then registered. Later, A1 assigned to Karacominaakis (K), the appellant, and this assignment was also registered. Later again, K assigned to Chadlace (C). This assignment was not registered. C later defaulted in the payment of rent, and BC brought an action for arrears of rent and damages for repudiation against W, A1, K and C. The original lessee and assignees brought actions seeking indemnities. The lease in this instance was rendered void by the rule in *Pigot's Case*<sup>24</sup> because it had been materially altered by one party after execution. However, on registration it became indefeasible, but the Court concluded that only those covenants that represent the essential elements of the lease can be enforced by assignees of the landlord and tenant respectively.

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<sup>23</sup> *Karacominaakis v Big Country Pty Ltd* (2000) 10 BPR 18,235.

<sup>24</sup> *Pigot's Case* (1610) 11 Co 26b; 77 ER 1177.

The Torrens statutes in each state contain provisions which replicate those of the *Conveyancing Act 1919* (NSW).<sup>25</sup> For instance, section 51 of the *Real Property Act 1900* (NSW) provides that:

Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which the transferee would have been subject and liable if named in such instrument originally as mortgagee, chargee or lessee of such land, estate, or interest.

This provision applies to leases as well as mortgages. Section 51 has a partner provision, s 52 (1) which provides that:

By virtue of every such transfer, the right to sue upon any mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof.

The fundamental common law requirement that covenants must touch and concern the land to be binding upon successors in title where the relationship of privity of estate exists, or where the reversion has been assigned, is not evident in the wording of these two provisions. And this is confirmed as a result of the New South Wales Court of Appeal's 2000 decision in *Karacominakis v Big Country Developments Pty Ltd*.<sup>26</sup>

In the context of Torrens land, this required the application of s 51. Significantly, s 51 contains no such phrase as 'relating to land', but rather is expressed in unqualified terms: 'all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee'. Equally, the transferee is subject to 'all and every the same requirements and liabilities to which the transferee would have been liable if named in such instrument originally ...'. It would appear that the restrictions present in ss 117 and 118 of the *Conveyancing Act* confining the obligations that touch and concern the land do not apply.

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<sup>25</sup> For comparable provisions to the *Real Property Act*, see *Land Title Act 1994* (Qld) s 62; *Land Titles Act 1980* (Tas), s 60; *Transfer of Land Act 1958* (Vic), s 54(2); *Transfer of Land Act 1893* (WA), s 95.

<sup>26</sup> *Karacominakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18,235.

In his discussion of the liability of the assignees under this provision, Giles JA (with whom Handley and Stein JJA concurred) considered the ambit of s 51. His interpretation is a very broad one, making no reference to any requirement that the obligations relate to the land in the sense of touching and concerning the land:

The effect of s 51 is that the transfer of a lease creates privity of estate and privity of contract between the lessor and the transferee of the lease: *a statutory replication of the privity of contract co-existent between the lessor and the original lessee* ... In my opinion, s 51 subjects the transferee of a lease to the lessee's obligations only while the transferee is registered as proprietor of the lease, so that following further transfer the transferee is no longer liable under the lease ... [emphasis added] (at [135] and [141]).

It follows from this interpretation that not only does s 51 secure a statutory privity of estate between assignee and original landlord or tenant, but it puts assignees in the shoes of the original contracting parties. This means that all of the obligations in the original contract, whether they touch and concern the land or not, are enforceable by and against the registered assignee, for as long as there is privity of estate between the assignee and the landlord. Also, although s 51 refers to transfers of leases, but not reversions, the High Court has held that the provision applies equally to landlords and tenants: *Measures v McFadyen*.<sup>27</sup> It follows that where a covenant is personal only, such as the obligation to pay compensation to the tenant in the event that the landlord exercises a right not to grant an option to renew, as in *Re Hunter's Lease*, the assignee landlord will continue to be liable on registration of the transfer of the reversion.

But s 51 has been restrictively interpreted in respect to the question of pre-assignment breaches. The High Court in *Measures v McFadyen* the assignee of a reversion sought to sue the tenant for pre-assignment breaches of the lease. In the case of old system land, the English Court of Appeal in *Re King*<sup>28</sup> held that the right to sue for pre-assignment breaches passes to the assignee of the reversion, and by parity of reasoning, to the assignee of the lease. Of course, this right can be assigned back to the assignor as a chose in action.<sup>29</sup> However, in *Measures* the High Court held that no such right passes to the assignee of an interest in Torrens land because there was no legislative intent to confer such a right on the assignee. It follows that in the absence of the specific assignment of the right by the assignor of the reversion, the assignee can only sue for post-assignment breaches.

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<sup>27</sup> *Measures v McFadyen* (1910) 11 CLR 723.

<sup>28</sup> *Re King* [1963] Ch 459.

<sup>29</sup> For the formal requirements for assigning the right, see s 12 *Conveyancing Act 1919* (NSW). The requirements were carefully considered in *Ashmore Developments v Eaton* (1992) Qd R 1.

Another issue that arises after *Karacominakis* is the position of equitable assignees. Privity of estate is a common law principle. It follows that if the assignee requires the assistance of equity to establish his or her title, as where the original lease is equitable, or the assignment of a legal lease is enforceable only in equity: *Cox v Bishop*,<sup>30</sup> there is no privity of estate between them, and the covenants in the lease will not run. In this case neither party can sue on the lease. Of course, if the assignee enters and pays rent an implied tenancy at common law may arise, but this will be a separate source of rights. If not, the landlord's only remedy will be to sue the original lessee in contract. However, in *Boyer v Warbey*<sup>31</sup> the English Court of Appeal held that since the *Judicature Act 1873* (UK) and the fusion of law and equity, covenants would not only run in respect of legal leases and legal assignments but also in the case of equitable leases and equitable assignments.

It now appears, particularly after *Karacominakis*, that this is not the law in Australia. In *Chronopoulos v Caltex Oil (Aust) Pty Ltd*<sup>32</sup> Fox J doubted that it was, so that a landlord could not enforce a covenant (a rent review clause) against an equitable assignee of a lease. It is implicit from *Karacominakis* that there is still an important difference between assignments effective at law and in equity. In the context of the Torrens system, this means the difference between unregistered and registered assignments. As the facts of *Karacominakis* show, the final assignee Chadlace could not be sued in respect of pre-assignment breaches. Section 51 would only operate after an assignment. The reasoning in *Chronopoulos* would therefore appear to be of greater significance under the Torrens system after *Karacominakis*: in order to get the benefit of the statutory right, the assignment must be registered. There is no equitable doctrine to assist in bringing an action against an assignee where the assignment is effective only in equity.

One further question that emerges from *Karacominakis* is whether, if the assignment in question were of the reversion, which of ss 51 or ss 117 of the *Conveyancing Act* would have applied. This point will be explored below.

## B Mortgages

The latest instalment in the unfolding interpretation of ss 51 and 52 of the *Real Property Act 1900* (NSW) is the unanimous 7-member bench of the High Court ruling

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<sup>30</sup> (1857) 8 De G M & G 815.

<sup>31</sup> [1953] 1 QB 234.

<sup>32</sup> (1982) 45 ALR 481.

in November of 2007 in *Queensland Premier Mines Pty Ltd v French*.<sup>33</sup> The case concerned the rights of an assignee of a registered Torrens system mortgage, and the extent of the rights that the registered assignment will secure. Are those rights limited to what is specifically set out in the mortgage, or will they include amounts in ‘collateral’ documents executed at the same time?

The facts of the particular case are somewhat unusual. In essence, a mortgage was executed over land owned by the appellant to a company called ‘17th Febtor’ (17F). A separate loan agreement worth about \$4 million had been executed by QPM in favour of 17F. The mortgage said that it secured the ‘Secured Moneys’, which were in effect defined as all money owing from the mortgagor to the mortgagee. 17F then transferred the mortgage and the benefit of the loan agreement to Mr French. Later a company associated with QPM, Marminta, got an agreement from Mr French to transfer the mortgage to it for a sum far less than that secured by the loan agreement. Having got the mortgage, Marminta discharged it, and then claimed that the transfer of the mortgage implied a transfer of the amount owing under the loan agreement (which of course it would then forgo.) Mr French, on the other hand, claimed that all he had agreed to transfer was the mortgage, the security over the land, and that he could still sue for the amount left under the loan agreement.

A unanimous High Court agreed with Mr French. The wording of the provisions of the statute suggested that on the transfer of a mortgage, the transferee received only what was specified in the mortgage instrument, but not the benefit of related documents. At [55]-[56] Kiefel J concluded as follows:

The primary concern of the Act, as reflected in s 62(1), is to convey the rights of the transferor in relation to their interest in “the lot”, which is defined to mean land. In the case of a mortgage that interest arises from the instrument of mortgage. Sub-section (4) should be read with sub-s (1), since it is intended to further define the “rights” there referred to. It may then be inferred that it is concerned with rights arising from the instrument which creates the interest in land the subject of statutory transfer. The instrument of mortgage is the source of that interest and of the rights to sue for and recover moneys owing under it. The latter is confirmed by the words “under the mortgage” in sub-s (4). The word “under”, with respect to an obligation “under this lease”, has been held to refer to an obligation created by, in accordance with, pursuant to, or under the authority of the lease<sup>34</sup>. Likewise the words “under a contract” in a statute

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<sup>33</sup> *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53 (15 November 2007).

<sup>34</sup> *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249.

may direct attention to the source of the obligation in question<sup>35</sup>; and a decision “under an enactment” to the statute to which the decision sought to be reviewed owes, in an immediate sense, its existence<sup>36</sup>. The two rights, to sue for and to recover a debt, arise from the same source. The words of the section provide no warrant for a construction which extends it to the right to recovery of a debt merely collaterally secured by the mortgage.

Her Honour went on to conclude that:

The words of the section are plain. Neither the historical reason for the provision nor its purpose, of effectuating a transfer of both the security interest and the right to moneys arising from the mortgage transaction, supports a construction which extends the section to obligations arising otherwise than under the terms of the mortgage. It is no part of the purpose and function of a statute such as the *Land Title Act* to rewrite the bargain between transferor and transferee.

The High Court reached its decision despite the fact that at the time of execution of the mortgage it would have been quite clear to both parties what sums of money were referred to by the term ‘Secured Moneys’. The effect of the decision seems to be that, unless a specific sum is named in the mortgage document, the mortgage does not secure monies owed under a collateral instrument if the mortgage alone is transferred. Kirby J supported this result explicitly for the additional reason that it is consistent with the philosophy of the Torrens System to have as much information open on the Register as possible, rather than concealed in side agreements: see [13]-[15].

*Measures v McFadyen* was cited with approval in *Queensland Premier Mines*. Kiefel J emphasised that the decision was consistent with the principle that the *Real Property Acts* are directed at protecting title to land in ways that do not interfere with the normal operation of common law doctrines. Not only is the general approval of *Measures* but also this general rationale would appear to be at odds with the broader interpretation of Giles JA of the provision in *Karacominakis*, an interpretation that entails a more radical repeal of the common law than *Measures*.

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<sup>35</sup> *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 537 [42].

<sup>36</sup> *Griffith University v Tang* (2005) 221 CLR 99 at 128 [80].

The High Court also approved the earlier interpretation of these provisions in relation to mortgages in *Consolidated Trust v Naylor*.<sup>37</sup> The latter case concerned the right of an assignee of a mortgage to sue a guarantor. Dixon and Evatt JJ offered the following general analysis of the provisions:

In relation to transfers of mortgage secs 51 and 52 should be understood as dealing only with rights, powers, privileges, debts and sums of money affecting the mortgage transaction as between mortgagor and mortgagee (at 435).

A surety's obligation, albeit one arising from a covenant contained within the mortgage, was regarded by their Honours as merely collateral to the mortgage transaction, not directly or indirectly affecting the land, and not part of the dealing contemplated by the legislation. In the same case, Starke J added that the purpose of the provisions is to transfer the mortgage itself including any rights, powers and privileges relating to the debt secured by the mortgage. 'But the provisions do not, I think, extend to collateral obligations, such as guarantees, given by strangers to the mortgage transaction' (at 432).

A question immediately arises as to the position of guarantors of the obligations of lessees, when contrasted with guarantors of mortgagors under these provisions. Has the High Court after *Gumland v Duffy Brothers* effectively adopted an inconsistent stance in relation to the interpretation of the provisions, depending on whether the guarantee relates to a lease or a mortgage? The answer was provided by the Court in response to an argument by the respondent precisely to this effect. The respondent contended that consistent with the reasoning in *Consolidated Trust v Naylor*, the guarantee in the lease should no more run with the reversion than a guarantee of a mortgagor's obligations should run with an assignment of the mortgage.

The response of the High Court was to rely on earlier dicta drawing conceptual distinctions between debts arising from leases on the one hand, and mortgages on the other. Specifically, they approved the conclusion of Macpherson JA in *Simmons v Lee*<sup>38</sup> that

Unlike rent, a mortgage debt is not something that issues out of, or is an incident of, the mortgagee's interest in the land; and a guarantee of such a debt cannot in that particular be in a stronger position than the debt itself (at [104]).

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<sup>37</sup> *Consolidated Trust v Naylor* (1936) 55 CLR 423.

<sup>38</sup> *Simmons v Lee* [1998] Qd R 671at 675-676.

Rather, the defining feature of a mortgage is that the debt is the principal feature of the mortgage, with the interest in land an accessory to it. The relationship of rent to the lease, by contrast, is one of inextricability as the rent 'issues out of' the land.

#### **IV Unresolved Problems after Karacominakis, Queensland Premier Mines, and Gumland**

Despite the emergence of the above principles in recent case law, and the clarification that they have provided of the relevant complex provisions in relation to assignments of leases and mortgages of Torrens title land, a number of difficulties arise in relation to the alignment of the *Conveyancing Act 1919* (NSW) provisions and those of the *Real Property Act 1900* (NSW). As noted above, by s 116 of the *Conveyancing Act*, ss 117 and 118 are expressed to apply to land held under the provisions of the *Real Property Act*. As a later Act, these provisions would normally take precedence over the earlier statute, the *Real Property Act*. So, do ss 117 and 118 repeal pro tanto the earlier Act?<sup>39</sup> This is not clear. The argument in *Karacominakis* did not raise this question, and there was no reason to do so, as the case concerned the assignment of a lease, not the reversion. But the unambiguous wording of s 116 suggests that the provisions are in direct conflict.

The apparent conflict between the provisions is significant in two cases. The first is where the covenant in question does not touch and concern the land. From *Gumland* it appears clear that s 117 is confined to cases where the covenant touches and concerns the land. But s 51 is not so restricted, and *Karacominakis* is authority for the proposition that a 'replication' of privity of contract between original party and assignee occurs where the assignment of the lease, or the reversion, is registered. The High Court expressly declined to explore the interrelationship between the two statutes though counsel for the appellant sought to demonstrate that s 51 covered the case.

The second divergence between the provisions relates to the right to sue for pre-assignment breaches. From *Ashmore Developments Pty Ltd v Eaton* the Full Court of the Queensland Supreme Court followed *Re King* and concluded that s 117 of the *Property Law Act 1974* (Qld) the assignee of the reversion, not the assignor, retains the right to sue for pre-assignment breaches. By contrast, as we have seen, *Measures v McFadyen* reached the opposite conclusion when interpreting the ambit of s 51 of the

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<sup>39</sup> For a discussion of this matter, see Peter Butt, *Land Law*, 4<sup>th</sup> ed., LawBook, Sydney, 2001 at 332; Edgeworth, Rossiter, Stone and O'Connor, *Sackville and Neave: Australian Property Law*, 8<sup>th</sup> ed., 2008 at 811-13.



*Real Property Act*. The High Court in *Gumland* did not attempt, or need, to reconcile these two provisions, given that they held that appellants were successful under s 117. Moreover, the tenor of the reasoning in *Karacominakis* – which made no reference to *Measures v McFadyen* – as well as the result in the case, is that all breaches, both pre and post-assignment, will be enforceable against assignees because of the effective ‘replication’ by the operation of s 51 of the contractual rights of the original parties whenever a registered assignment of the interest occurs. Presumably, given the High Court’s strong endorsement of *Measures v McFadyen* in *Queensland Premier Mines*, *Karacominakis* is no longer authority on this point.

## **V Conclusion**

Resolution of this legislative uncertainty awaits further judicial scrutiny and elaboration. Given the fallout of the current financial crisis, we are not likely to have to wait long for appellate courts to have occasions to conduct this exercise. Let us hope that in doing so they will strike a fair balance between needy mortgagors and tenants, and their lenders and landlords. And if this balance can be agreed across the Australasian jurisdictions, so much the better.