

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

FIGGINS HOLDINGS PTY LTD

APPELLANT

AND

SEAA ENTERPRISES PTY LTD

RESPONDENT

Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd (M13-1998)
[1999] HCA 20
6 May 1999

ORDER

1. *Appeal allowed with costs.*
2. *Orders of the Court of Appeal of Victoria be set aside and, in place thereof, order that the appeal to that court be dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation:

A R Castan QC and G H Golvan QC with A I Strum for the appellant
(instructed by Feingold Partners Pty Ltd)

A J Myers QC with M R Pearce for the respondent (instructed by
Phillips Fox)

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CATCHWORDS

Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd

Real property - Torrens system - Unregistered lease - Variation of lease to reduce rent - Landlord in default under mortgage - Whether payment of reduced rent discharges lessee's rental obligations so as to bind purchaser following exercise of mortgagee's power of sale.

Mortgage - Torrens system - Statutory power of sale - Exercise - Nature of reversionary interest obtained by purchaser upon registration - Whether privity of title or interest exists between registered proprietor and former mortgagor or mortgagee.

Mortgage - Torrens system - Juridical nature of security interest - Comparison with old system mortgage - Rights and remedies of mortgagee under *Transfer of Land Act* 1958 (Vic), s 81.

Property Law Act 1958 (Vic), ss 135, 138, 141, 151.

Retail Tenancies Act 1986 (Vic), ss 21, 38.

Transfer of Land Act 1958 (Vic), ss 42(2)(e), 74, 77, 78, 81.

Introduction

1 This appeal from the Victorian Court of Appeal¹ (Winneke P, Brooking and Charles JJA) arises from a dispute between the present registered proprietor (the respondent) of certain land ("the Land") registered under the provisions of the *Transfer of Land Act* 1958 (Vic) ("the Transfer of Land Act") and a lessee (the appellant) under a written but unregistered lease ("the Lease"). The respondent took title to the Land in 1994 from a registered first mortgagee exercising the power of sale conferred by s 77 of the Transfer of Land Act. The Lease was granted in 1988 by the then registered proprietor before it transferred the Land in 1989 to an intervening registered proprietor. It was this party which granted the mortgage, default under which led to the exercise of the power of sale whereby the respondent became registered proprietor of the Land. The appellant, as lessee, disputes the decision of the Court of Appeal that its obligations to the lessor with respect to rent and other moneys due under certain covenants by the lessee in the Lease are not qualified by a deed of variation ("the Deed of Variation") between the lessee and the intervening registered proprietor. The Deed of Variation was entered into in 1991 after the grant of the registered first mortgage.

2 The appeal presents issues concerning the operation of the Torrens system with respect to privity between the lessee and successors in title of the lessor where there has been an intervening variation in the terms of the lease, default by the mortgagor and the exercise by the first mortgagee of its power of sale. In particular, there are issues as to the application of Div 5 of Pt 2 (ss 136-154) of the *Property Law Act* 1958 (Vic) ("the Property Law Act") and Div 9 of Pt 4 of the Transfer of Land Act (ss 74-87), particularly s 81. It is convenient to set out the text of the relevant provisions later in these reasons. Something further now should be said of the facts.

The facts

3 Since 14 February 1994, the respondent ("SEAA") has been the registered proprietor of the Land, which is that contained in Certificates of Title Vol 9530 Folio 153 and Vol 9569 Folio 716 and which is situated in the central business district of Melbourne at 167-173 Collins Street. By contract dated 23 December 1993 ("the Contract"), SEAA purchased the Land from the Commonwealth Bank of Australia ("the Bank"), which is the successor in law of the State Bank of Victoria ("the State Bank"). This successorship was brought about, with effect from 1 January 1991, by the combined operation of the

1 *SEAA Enterprises Pty Ltd v Figgins Holdings Pty Ltd* [1998] 2 VR 90.

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Commonwealth Banks Restructuring Act 1990 (Cth) and the *State Bank (Succession of Commonwealth Bank) Act* 1990 (Vic). By instrument dated 12 January 1988, the appellant ("Figgins") took a lease of two shops ("the Premises") in an arcade in premises on the Land which were known as the "Shop of Shops". The lessor was the then registered proprietor of the Land, Gembleng Pty Ltd ("Gembleng").

4 The First Schedule to the Lease specified a term of four years from 26 October 1987. Clause 4.07 provided for options to renew for successive periods of four years. The lessee covenanted to pay the rent of \$63,665 per annum calendar monthly in advance. There was a covenant to pay to or reimburse the lessor all rates, taxes and charges separately assessed in respect of the Premises (cl 2.01.02) and a covenant to pay a proportion of the wide variety of operating costs set out in the Third Schedule to the Lease (cl 2.02). The lessee was obliged by cl 4.08 to contribute each year to a fund for the promotion of the arcade. Clause 3.04 stipulated that, if any person other than Gembleng became entitled by operation of law or otherwise to receive the rent, such person was to have the benefit of all the covenants and agreements on the part of the lessee under the Lease.

5 Division 5 of Pt 2 of the Property Law Act expressly (by force of s 136) applies to leases of land under the Transfer of Land Act. Section 141 provides for the rent reserved by a lease and the benefit of the lessee's covenants, "having reference to the subject-matter thereof"², to run with the reversionary estate in the land (or in any part thereof) immediately expectant on the term granted by the lease. By this means, the benefit of the covenants by Figgins in their form at the time of the registration of the transfer to SEAA has passed to SEAA. It will be necessary further to consider this aspect of the matter later in these reasons.

6 Section 66 of the Transfer of Land Act states that the registered proprietor may lease land for any term exceeding three years, by an instrument in an appropriate approved form. It is accepted by the parties to the present appeal not only that the Lease was not registered but also that the provisions of the Transfer of Land Act did not require registration. Section 42 is one of several sections (ss 40-44) of the Transfer of Land Act dealing with the effect of registration. Section 42(2) protects certain unregistered interests and par (e) thereof provides that the land which is included in any folio of the Register or registered instrument shall be subject to:

2 This phrase imports the requirement that the covenants "touch and concern" the land: *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1 at 7.

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"the interest (but excluding any option to purchase) of a tenant in possession of the land".

The result is that SEAA holds its registered title subject to the interest of Figgins as a tenant in possession.

7 In 1989, Lamina Pty Ltd ("Lamina") purchased the Land from Gembleng and on 8 September 1989 became registered as proprietor. By instrument of mortgage dated 31 August 1989 and registered on 8 September 1989 as dealing P416358W ("the Mortgage"), Lamina granted the State Bank a first mortgage over the Land. The text of the Mortgage is not part of the record before this Court.

8 In September 1990, Lamina defaulted under the Mortgage by failure to pay an instalment of land tax. By the following December, the rents derived by Lamina from the shops in the arcade, including the Premises, were inadequate to cover its interest commitments to the State Bank. Lamina wished to be in a position to obtain vacant possession of the whole building in the hope that it and other properties might be redeveloped as a casino. With that in mind, Lamina entered into negotiations with the tenants, including Figgins. In the meantime, on 1 January 1991, the Bank became successor to the State Bank.

9 On 1 February 1991, Figgins and Lamina entered into the Deed of Variation. This instrument recited that Figgins was lessee of the Premises under the Lease and that Lamina was the successor in title to Gembleng, the registered proprietor of the Land and the lessor of the Premises to Figgins. The Deed of Variation dealt with various matters and contained mutual covenants. The effect of these provisions is to render inadequate the characterisation that the Deed of Variation did no more than replace the rent payable under the Lease with a nominal rent.

10 In the Deed of Variation, Figgins agreed to cease to carry on its business at the Premises and to vacate them on or before 8 February 1991. The instrument stipulated that Figgins would remain in possession of the Premises and, so long as it did not carry on business there, it would pay to the lessor a "new rent" of \$1 per month in place of performing its obligations to pay not only rent, but also outgoings and other amounts, under the Lease.

11 Lamina agreed (cl 2(ii)) to:

"accept the *new rent* from Figgins *in full satisfaction of the obligation of Figgins to pay rent outgoings and all other payments of every description whatsoever* under the Lease from 1st February, 1991 and for so long as Figgins does not resume the conduct of its business in the demised premises or the surrender of the Lease by Figgins to Lamina in accordance with the provisions hereof or the expiration of the term of the Lease or the expiration of the term of any renewed lease whichever first occurs". (emphasis added)

Lamina acknowledged that the Deed of Variation was made for its convenience and benefit and specifically reserved to Figgins all of its right and interest in and to the Lease and the Premises (cll 1, 3). Subject to the provisions of the Deed of Variation, the Lease was to "remain in full force and effect" (cl 10).

12 Figgins and Lamina acknowledged that they, together with two other corporations (Stebton Pty Ltd ("Stebton") and Fulham Holdings Ltd ("Fulham")), were parties to an option agreement (cl 7). It appears from the judgment of Hayne J delivered in proceedings in the Supreme Court of Victoria between the Bank and Figgins³ that the option agreement had been made on 1 August 1990 and it gave Fulham an option both to buy from Stebton the land at 14 Watson Place, which was close to the Collins Street site, and to require Figgins to surrender the Lease. The Deed of Variation contained an agreement by Figgins and Lamina that, if the option granted to Fulham by Figgins and Stebton was not exercised by Fulham by 31 July 1991, Figgins would deliver a deed of surrender of the Lease to Lamina in return for a payment by Lamina to Figgins of \$500,000 (cl 8).

13 As provided by the Deed of Variation, Figgins ceased the conduct of its business and vacated the Premises. It removed its stock but left certain shop fittings and similar items. Figgins paid to Lamina the agreed "new rent". No notice was given by the Bank to Figgins requiring it to pay any rent directly to the Bank. The Bank knew that Figgins was paying rent at the new rate and took no steps either to demand that rent be paid to itself or that it be paid at a higher or different rate.

14 The outcome of the present litigation turns upon the contention by SEAA that Figgins is liable to it in respect of the difference between the amounts in fact paid and the sums which otherwise would have been payable under the Lease as it stood

3 *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505 at 506-507. Hayne J also found (at 508) that in March 1991 the Bank "knew that the [Lease] had been varied to provide for a nominal rental and arrangements had been made for its surrender".

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before the Deed of Variation. The case made by SEAA turns upon two propositions. The first is supported by the decision of Hayne J to which further reference will be made. It is that the Bank was not "bound" by the Deed of Variation in the sense that the rights which the Bank otherwise enjoyed to receive payments by Figgins under the Lease in its original form were not curtailed by the Deed of Variation. The second proposition is that, as "successor in title" to the Bank, SEAA is in the same position as the Bank and that Figgins is liable to SEAA for arrears under the Lease. Figgins disputes both propositions but, as will appear, the first proposition does not dictate the second. If the second proposition is incorrect, Figgins may succeed even if the first be correct and without the necessity to determine that question.

15 On 3 July 1991, Figgins exercised the first option to renew the Lease for a further term of four years. It did not seek any consent of the Bank to that course. Later, on 13 July 1993, the Bank appointed a receiver of the income of the building and thereafter Figgins paid the sum of \$1 per month to the managing agents appointed by the receiver. Although the terms of the Mortgage do not appear, it was accepted in the Court of Appeal that the Bank had not, through the receiver, gone into possession⁴. Rather, the receiver was to be deemed the agent of Lamina as mortgagor⁵ and the payments were not to be treated as having been made to the Bank.

16 Later in 1993, the Bank instituted proceedings against Figgins in the Supreme Court of Victoria⁶. On 18 March 1994, Hayne J made orders, the principal relief being a declaration in the following terms:

"[Figgins] hold[s] shops Nos G.19 and G.20 at 171 Collins Street, Melbourne as Tenant on the terms and conditions of the renewed term for which provision is made by the Lease dated 12 January 1988 between [Gembleng] and [Figgins], and in respect of that tenancy [the Bank] is unaffected by the Deed of Variation dated 1 February 1991 between [Lamina], [Fulham], [Figgins] and [Stebton]."

17 In the meantime, although not in possession of the Land, the Bank had exercised its rights as mortgagee and sold the Land to SEAA. The Contract,

4 [1998] 2 VR 90 at 104.

5 See *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 381-382; *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 418-419, 431-433, 452.

6 *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505.

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between the Bank as vendor and SEAA as purchaser, was dated 23 December 1993. It referred to the proceedings then pending in the Supreme Court (Special Condition 2) and stated that the Bank sold as proprietor of the Mortgage "in exercise of the power of sale conferred by the [M]ortgage and the Transfer of Land Act 1958" (Special Condition 1.1). Special Condition 2.9.2 provided:

"[T]he Purchaser authorises the Vendor to take action at the cost of the Vendor against Figgins in the name of the Purchaser for any breach of covenant or non payment of rent or any other money owing to the Vendor by Figgins or any guarantor of Figgins as at the Settlement Date. The Vendor indemnifies the Purchaser against any judgment, order or costs awarded against the Purchaser as a result of such action."

- 18 SEAA became registered proprietor of the Land on 14 February 1994. Section 77(2) of the Transfer of Land Act provided for the acceptance by the Registrar of Titles of an instrument of transfer by a mortgagee, which was expressed to be in exercise of the power of sale and which was in an approved form, as sufficient evidence that the power had been duly exercised.

Mortgages of old system and Torrens title land

- 19 The Mortgage, which was registered under the Transfer of Land Act, differed as a matter both of form and substance from a mortgage security over land as understood at common law. The principles involved are well settled but, as they provide the starting point for the particular submissions mentioned above upon which this appeal turns, it is convenient briefly to restate them.

- 20 In *Coroneo v Australian Provincial Assurance Association Ltd*, Jordan CJ said⁷:

"A mortgage at common law is a conveyance of the legal title in property from one person to another to secure the doing of some act, ordinarily the payment of money. Formerly the conveyance was expressed to be made upon the condition that if the conveyor performed the act he should be at liberty to re-enter as of his old estate; and the conveyance was thus defeasible by condition subsequent. In modern times, a conveyance contains a covenant by the conveyee to re-convey if the act, to secure which the conveyance has been made, is duly performed. But at common law the legal title is vested in the mortgagee; and he can therefore give a good common law title to it by

7 (1935) 35 SR (NSW) 391 at 394.

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executing any form of assurance which conforms with the technical requirements of common law conveyancing⁸.

The power of sale, where it occurs in a legal mortgage, is not a common law power. It is an equitable power which is inserted to enable the mortgagee to convey a title which is not only good at common law but good in equity to defeat the equitable rights of the mortgagor."

- 21 It follows that under an old system mortgage of land, the legal estate having been conveyed to the mortgagee, the mortgagee prima facie is entitled to take possession as soon as the mortgage has been executed⁹. However, where the land is under the provisions of the Transfer of Land Act, whilst a mortgage has the effect of security it does not operate as a transfer of the land to the mortgagee. Therefore the mortgage does not confer upon the mortgagee a right of possession "as an incident of a transfer"¹⁰. Section 74 of the Transfer of Land Act states:

"(1) The registered proprietor of any land –

- (a) may mortgage it by instrument of mortgage in an appropriate approved form;
- (b) may charge it with the payment of an annuity by instrument of charge in an appropriate approved form.

(2) Any such mortgage or charge shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged or charged."

- 22 Accordingly, the Mortgage had had effect as a security and had been an interest in the Land but had not operated as a transfer of the Land. In so providing, s 74(2) reflected the statement by Dixon, Evatt and McTiernan JJ in *English*

8 *Maugham v Sharpe* (1864) 17 CB(NS) 443 [144 ER 179].

9 *Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd* (1941) 41 SR (NSW) 285 at 289. However, equity treated this right of the mortgagee "as part of his security, and not as a right to beneficial enjoyment", so that if the mortgagee did take possession of the security the mortgagee would "be called on to account with strictness for his use of it": Waldock, *The Law of Mortgages*, 2nd ed (1950) at 213.

10 *Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd* (1941) 41 SR (NSW) 285 at 289.

Scottish and Australian Bank Ltd v Phillips that under the Torrens system a mortgage¹¹:

"is the creature of statute and its incidents depend upon the provisions of the statute and *so much of the general law as is availed of by or under those provisions*". (emphasis added)

The reference to the general law in the portion of this statement which we have emphasised recognises that equitable estates and interests in some circumstances may "lie behind or beyond, the legal interests as determined by the state of the register"¹². This limited interaction between the Torrens system and the general law may be compared with that in the regimes established under the various Crown lands legislation. The statutes considered in *Wik Peoples v Queensland*¹³ are examples. However, the significance for the present appeal of the statement in *Phillips* lies elsewhere.

23 The starting point for assessment of the submissions is not what the common law (significantly supplemented by equity) provides with respect to dealings in old system title, but the identification of those statutory provisions which establish the system of "title by registration"¹⁴ and those provisions under which general law principles are adapted to that system. An example of the latter to which reference has already been made is the application to the Torrens system of Div 5 of Pt 2 of the Property Law Act, dealing with leases and tenancies.

24 In *Phillips*, Dixon, Evatt and McTiernan JJ also pointed out that "the statutory charge described as a mortgage is a distinct interest" and that it "involves no ownership of the land the subject of the security"¹⁵. The mortgage instrument may provide for the mortgagor, the registered proprietor, to attorn as tenant of the mortgagee at a rent to be accepted in or towards satisfaction of the

11 (1937) 57 CLR 302 at 323. See also the observations by Dixon J and Evatt J in *Partridge v McIntosh & Sons Ltd* (1933) 49 CLR 453 at 466, 472-473 and by Jordan CJ in *Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd* (1941) 41 SR (NSW) 285 at 289.

12 *Corin v Patton* (1990) 169 CLR 540 at 572. See generally *Barry v Heider* (1914) 19 CLR 197 at 204-208, 213-216 and, as to restrictive covenants, *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at 159-160.

13 (1996) 187 CLR 1.

14 The phrase was used by Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376 at 385.

15 (1937) 57 CLR 302 at 321.

principal or interest secured by the mortgage. The object will be to give the mortgagee the remedies of a landlord as well as those of a mortgagee. In *Partridge v McIntosh & Sons Ltd*¹⁶, a decision upon the *Real Property Act* 1900 (NSW), Starke J observed that a demise need not be express and continued¹⁷:

"[A] mere acknowledgment, such as an attornment clause, by a person in possession of land, of tenancy in another, sufficiently establishes a legal reversion in the landlord, to which the rent reserved is incident."

However, *Partridge* established that as the mortgagee of Torrens title land had no immediate right to possession, the mortgagee could not be considered as having let the mortgagor into possession¹⁸. Dixon J pointed out that there was no need¹⁹:

"to consider whether something short of an actual legal estate or interest may now afford a reversion to which a rent service may be incident, because in a mortgage under the *Real Property Act* not even a right to immediate possession can be ascribed to the mortgagee".

The attornment clause operated only to create an estoppel *inter partes* which was, as Dixon J put it²⁰, "entirely conventional". The result was that the mortgagee in *Partridge* did not have the right (which was then still enjoyed by landlords in New South Wales) to distrain upon the goods of the spouse of the mortgagor which were on the premises. In addition, whilst the attornment clause altered the legal relationship between the parties, in equity their true position remained that of secured creditor and debtor. The rent was treated in equity as paid on account first of interest, then of principal and was the subject-matter of account between mortgagee and mortgagor²¹. Nevertheless, the arrangement established by the

16 (1933) 49 CLR 453.

17 (1933) 49 CLR 453 at 461.

18 (1933) 49 CLR 453 at 468.

19 (1933) 49 CLR 453 at 470-471.

20 (1933) 49 CLR 453 at 468. See also *City Mutual Life Assurance Society Ltd v Lance Creek Meat Works Pty Ltd* [1976] VR 1 at 11.

21 *Ex parte Isherwood; In re Knight* (1882) 22 Ch D 384 at 392; *Alliance Building Society v Pinwill* [1958] Ch 788 at 791.

attornment clause may answer the description of a tenancy in legislation protective of the position of tenants²².

25 Whilst, unlike the position with an ordinary old system mortgage of land, the Mortgage had not, as an incident of a transfer, conferred upon the Bank a right of possession, par (a) of s 78(1) of the Transfer of Land Act had empowered the Bank upon default by the mortgagor to enter into possession of the mortgaged premises "by receiving the rents and profits thereof". At no stage before the exercise by it of its statutory power of sale did the Bank exercise its power under s 78(1)(a).

26 The effect given by the governing statute to the transfer to SEAA in exercise of the Bank's power of sale is found in s 77(4) of the Transfer of Land Act²³. So far as material, this states:

"Upon the registration of any transfer under this section *all the estate and interest of the mortgagor ... as registered proprietor* of the land mortgaged ... *shall vest in the purchaser as proprietor by transfer, freed and discharged from all liability on account of such mortgage ...* and (except where such a mortgagor ... is the purchaser) of any mortgage charge or encumbrance recorded in the Register subsequent thereto except –

- (a) a lease easement or restrictive covenant to which the mortgagee ... has consented in writing or to which he is a party; or
- (b) a mortgage charge easement or other right that is for any reason binding upon the mortgagee ..." (emphasis added)

To adapt the remarks of Kitto J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liquidation)*²⁴, Lamina as "mortgagor had the legal title, not an equity of redemption, and the transfer [to SEAA] had operated to deprive [Lamina] of the legal title by virtue only of special statutory provisions".

22 *Permanent Finance Corporation Ltd v Flavel; Ex parte Flavel* [1968] Qd R 84 at 101-102; *Australian Express Pty Ltd v Pejovic* (1963) 80 WN (NSW) 427 at 431-432.

23 The application of the purchase money received on the sale was directed by s 77(3) first to the costs of the sale and secondly in payment of moneys due and owing on the Mortgage.

24 (1965) 113 CLR 265 at 275.

- 27 The title taken by a registered proprietor consequent upon the exercise of a power of sale under s 77 reflects the general proposition stated by Barwick CJ in *Breskvar v Wall*²⁵:

"The Torrens system of registered title of which the Act^[26] is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor."

The relationship between the Bank, Lamina, Figgins and SEAA

- 28 The result of the operation of s 77(4) in the present case was that the estate or interest of Lamina as registered proprietor vested in SEAA "as proprietor by transfer" and, with respect to the Mortgage, SEAA was "freed and discharged from all liability on account of such mortgage".

- 29 A further consequence is that, contrary to the submissions by SEAA, SEAA is not privy with nor does it claim under the Bank. Of the three classes of privies – of blood, of title and of interest²⁷ – only the second and third could be relevant. The registered title is not derivative of the former registered security interest of the Bank. There is no privity of title or estate between the Bank and SEAA as understood at common law. Speaking of the common law, Holmes J said²⁸:

"One who buys land of another gets the very same estate which his seller had. He is in of the same fee, or *hereditas*, which means, as I have shown, that he sustains the same *persona*."

25 (1971) 126 CLR 376 at 385-386.

26 Barwick CJ was speaking of *The Real Property Acts* 1861 to 1963 (Q) but by referring to "the Torrens system" he was identifying "the various Acts of the States of the Commonwealth which provide for comparable systems of title by registration though these Acts are all not in identical terms and some do contain significant variations": (1971) 126 CLR 376 at 386.

27 *Ramsay v Pigram* (1968) 118 CLR 271 at 279. See also *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 910.

28 "The Common Law", Lecture X, "Successions – I. After Death", reprinted in Novick (ed), *The Collected Works of Justice Holmes*, (1995), vol 3, 288 at 303.

- 30 Further, the interest of SEAA in the dispute as to the measure of the liabilities of Figgins under the Lease, with particular reference to the Deed of Variation, differs in substance and form from that position of the Bank which was the subject of the declaration made in the previous proceedings between the Bank and Figgins in the Supreme Court. SEAA does not have, to apply what was said by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*²⁹, "some kind of interest" in the previous litigation or its subject-matter. There is no privity of interest which binds SEAA to the outcome stated in the declaration made by Hayne J.

The present litigation

- 31 By letter dated 14 February 1994, the settlement date, solicitors acting on behalf of the Bank wrote to Figgins stating that the Land had been sold to SEAA and requiring all future rental payments to be made to the purchaser. Thereafter, by instrument dated 6 April 1994 ("the Notice"), the solicitors for SEAA gave a notice of dispute under s 21 of the *Retail Tenancies Act* 1986 (Vic) ("the Retail Tenancies Act"). As it then stood³⁰, Pt 3 of the Retail Tenancies Act (ss 20-22) provided for a determination by arbitration of certain disputes between a landlord and a tenant arising under a retail premises lease. An arbitrator was to be appointed after receipt of a notice of dispute in the prescribed form (s 21) and the arbitration, with qualifications not immediately relevant, was to be conducted in accordance with the *Commercial Arbitration Act* 1984 (Vic) ("the Arbitration Act"). By the Notice, SEAA sought an arbitrator's award that Figgins pay arrears of rent owing from 1 February 1991 to 14 February 1994 in the sum of \$193,615.71, arrears of outgoings owing within that period in the sum of \$55,814.56 and contributions to the promotions fund in the sum of \$6,229.43, together with interest³¹.

29 [1967] 1 AC 853 at 910. See also *Partridge v McIntosh & Sons Ltd* (1933) 49 CLR 453 at 462-463; *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (Receivers and Managers Appointed - In Liquidation)* (1993) 43 FCR 510 at 539-542; Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed (1996), §231.

30 The statute was significantly amended, with effect in full on 1 August 1995, by s 6 of the *Retail Tenancies (Amendment) Act* 1995 (Vic). The statute has now been repealed by s 50 of the *Retail Tenancies Reform Act* 1998 (Vic) but nothing turns upon this repeal: *Interpretation of Legislation Act* 1984 (Vic), s 14(2).

31 Clause 2.39 of the Lease was a covenant by the lessee:

"[t]o pay to the Lessor interest on any moneys due and unpaid pursuant to this Lease (including rental) at the rate per annum equal to four percent (4%) higher than the
(Footnote continues on next page)

32 On 30 January 1995, the arbitrator, Professor M C Pryles, published an award to the effect that Figgins was not liable to pay SEAA any further rent, outgoings or other payments in respect of the period between 1 February 1991 and 14 February 1994. Section 29(1)(c) of the Arbitration Act required the arbitrator to include in the award "a statement of the reasons for making the award". Detailed reasons were furnished by the arbitrator.

33 Section 21(4) of the Retail Tenancies Act provided that a dispute to which s 21 applied was not justiciable in any court or tribunal. However, s 22(1) subjected the conduct of the arbitration to the provisions of the Arbitration Act. Part 5 of that statute³² comprises ss 38-49. The substance of s 38 is that, subject to the effect given to an "exclusion agreement" by s 40, an "appeal" lies, by leave, to the Supreme Court of Victoria "on any question of law arising out of an award". Sub-sections (2) and (4) of s 38 so state. Section 38(3) provides that on determination of an appeal under s 38(2) the Supreme Court may by order confirm, vary or set aside the award (par (a)) or remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration (par (b)).

34 An "appeal" against the award was taken by SEAA, by leave, to the Supreme Court of Victoria. On 20 December 1995, Harper J delivered his reasons for dismissing it. An appeal by SEAA to the Court of Appeal was successful³³. The Court of Appeal set aside the award of the arbitrator in favour of Figgins and in place thereof made an award in terms reflecting those sought in the Notice. It is from those orders of the Court of Appeal that the present appeal is brought by Figgins.

The submissions

35 Figgins accepts that the "new rent" reserved by the Lease as varied by the Deed of Variation and the benefit of the other relevant covenants therein contained go with "the reversionary estate" in the Land within the meaning of s 141 of the Property Law Act. Figgins also accepts that, the Land being registered under the Transfer of Land Act, "the reversionary estate" is to be understood as the interest now held by SEAA as registered proprietor. Further, with respect to the relationship between Figgins and Lamina and the payments made of the "new rent"

rate for the time being fixed under Section 2 of the Penalty Interest Rates Act 1983 computed from the date on which such payment became due".

32 As amended, before the award in this case, by the *Commercial Arbitration (Amendment) Act* 1993 (Vic), with effect from 1 July 1993.

33 *SEAA Enterprises Pty Ltd v Figgins Holdings Pty Ltd* [1998] 2 VR 90.

by Figgins to Lamina, Figgins relies upon s 138 of the Property Law Act. This states:

"No lessee shall be prejudiced or damaged by payment of any rent to any grantor transferor or assignor of any reversion or by breach of any condition for non-payment of rent before notice shall be given to him of such grant transfer or assignment by the grantee, transferee or assignee."

Such notice was given to Figgins on the date of settlement, 14 February 1994. The issue between SEAA and Figgins concerns whether, during the currency of the Mortgage, Figgins obtained a good quittance by dealing with Lamina and complying with the Deed of Variation rather than the covenants of the Lease in its original form.

36 At common law, between a lessee such as Figgins and an assignee of the reversion such as SEAA, in general there would have been privity of estate but no privity of contract³⁴. Without privity of contract, Figgins would not have been liable to SEAA on its covenants with Gembleng and with Lamina³⁵.

37 The benefit of the lessee's covenants did not run with the reversion except in the case of covenants for payment of rent or the rendering of services in the

34 Helmore, *The Law of Real Property in New South Wales*, (1961) at 115.

35 *Rhone v Stephens* [1994] 2 AC 310 at 316-317.

nature of rent³⁶. The effect of the *Grantees of Reversions Act* 1540³⁷ was to give to the grantee of the whole reversion the same remedies by action against the lessee in respect of other covenants and conditions in the lease as the lessor had had, provided the conditions or covenants touched and concerned the land within the rules in *Spencer's Case*³⁸. It was later said by Wilde CJ that the Henrician statute "annexes, or rather creates, a privity of contract between those who have privity of estate"³⁹.

38 The effect of s 141 of the Property Law Act, to which reference has been made earlier in these reasons, is to apply this regime in Victoria but with the relaxation of the requirement that there must be an assignment of the reversion in the whole of the land.

39 Whilst the quantum of those obligations is disputed, SEAA accepts that it has succeeded to the rights of the lessor under the Lease without the need for any attornment by Figgins. This follows from the application of s 151 of the Property Law Act to leases of land under the Transfer of Land Act. Section 151(1) states:

"Where land is subject to a lease –

- (a) the conveyance of a reversion in the land expectant on the determination of the lease; or
- (b) the creation or conveyance of a rentcharge to issue or issuing out of the land –

shall be valid without any attornment of the lessee.

36 *Vyvyan v Arthur* (1823) 1 B & C 410 at 414, 415 [107 ER 152 at 154].

37 32 Hen 8 c 34 s 1. This provision "was passed on the dissolution of the monasteries, in order to preserve the remedies on leases of their forfeited lands; but though primarily designed for the benefit of grantees from the Crown, it was made to apply to grantees of reversions generally (see Co Litt 215a, resolution 1)": *Halsbury's Laws of England*, 1st ed (1911), vol 18, "Landlord and Tenant", par 1123, n (q).

38 (1583) 5 Co Rep 16a [77 ER 72]. See also *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at 162-163, 167-168.

39 *Bickford v Parson* (1848) 5 CB 920 at 930 [136 ER 1141 at 1145].

Nothing in this sub-section –

- (i) shall affect the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to him by the person entitled thereunder; or
- (ii) shall render the lessee liable for any breach of covenant to pay rent, on account of his failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee."

40 Section 151 is the representative in the law of Victoria of a piece of law reform in England which is of some antiquity. At common law, a transfer of an estate of freehold in reversion upon the right of present possession enjoyed by a lessee could be achieved by livery and seisin or by grant together with the attornment of the tenant⁴⁰. The attornment was held to be "of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession"⁴¹.

41 It was to this situation that the Statute of Anne⁴² was addressed. The effect of ss 9 and 10 thereof was said by Wise J, sitting in the New South Wales Full Court, in *Mate v Kidd* to be⁴³:

"[Section 9] says that no attornment shall be necessary; and that grantees of the reversion shall be in the same position without attornment as they would have been before the statute if there had been an attornment, except in cases protected by the proviso in the 10th section. That section provides that no such tenant shall be prejudiced by payment of any rent to any such grantor."

40 In Victoria, s 51(1) of the Property Law Act now provides that "[a]ll lands and all interests therein shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale ...". With certain exceptions (s 52(2)), conveyances of old system land must be made by deed (s 52(1)).

41 *Thursby v Plant* (1669) 1 Wms Saund 230 at 234, n 3 [85 ER 254 at 257]. See also *Doe d Were v Cole* (1827) 7 B & C 243 at 247-248 [108 ER 714 at 715-716].

42 (1706) 4 Anne c 16.

43 (1864) 3 SCR (NSW)(L) 196 at 200. See also *Moss v Gallimore* (1779) 1 Doug 279 at 282 [99 ER 182 at 183-184]; and the notes to the report of that case in *Smith's Leading Cases*, 6th ed (1867), vol 1, 561 at 567-573.

The ancestry of s 151 of the Property Law Act in ss 9 and 10 of the Statute of Anne will be apparent.

42 Section 151 (like s 141) is an example of the general law which expressly is availed of in the operation of the Torrens system maintained by the Transfer of Land Act. Despite the attention given to them in the submissions, these provisions are not determinative of the basic issue in the present appeal. This issue is the correctness in law of the decision by the Court of Appeal, favourable to SEAA, that, as between SEAA and Figgins, there had been, in respect of the period before 14 February 1994, whilst the Mortgage was on foot, no effective discharge to Figgins of its obligations to make the payments which fell due if the Lease was to be construed in the form it took before the Deed of Variation.

43 So far as presently relevant, s 81 of the Transfer of Land Act states:

"(1) In addition to and concurrently with any rights and powers aforesaid a first mortgagee shall, *until* a discharge from the whole of the money secured or *a transfer upon a sale* or an order for foreclosure *has been registered*, have the same rights and remedies at law and in equity as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee with a right in the mortgagor of quiet enjoyment until default in payment of any principal or interest or a breach in the performance or observance of some covenant.

...

(3) A mortgagor shall not, either before or after default or breach as aforesaid, commence in his own name any action for or in respect of any cause of action for which a first mortgagee may sue under the foregoing provisions of this section without obtaining the consent in writing of such mortgagee or his agent to such action, which consent may be obtained whether before or after the commencement of the action; and after the giving of such consent such mortgagee shall not be entitled to bring in his name any action in respect of such cause of action." (emphasis added)

44 In this Court, SEAA supported the reasoning of the Court of Appeal and sought to adapt the case law⁴⁴ which grew up in England around the Statute of

44 Contained in such authorities as *Moss v Gallimore* (1779) 1 Doug 279 [99 ER 182]; *Pope v Biggs* (1829) 9 B & C 245 [109 ER 91]; *Burrowes v Gradin* (1843) 1 Dowling & Lowndes 213 at 218-219. See also *Wyse v Myers* (1854) 4 ICLR 101 at 113-114; Waldoock, *The Law of Mortgages*, 2nd ed (1950) at 218-223.

Anne to the regime established by s 81 of the Transfer of Land Act. This body of authority proceeded on the footing identified as follows by Warrington J in *In re Ind, Coope & Co Ltd. Fisher v The Company. Knox v The Company. Arnold v The Company*⁴⁵:

"[T]hat the rent payable under a lease bearing date anterior to a mortgage is only received by the mortgagor in possession by leave and licence of the mortgagee; that the mortgagee is the reversioner expectant on that lease, and if by going into possession he puts an end to the leave and licence under which the mortgagor collects and receives the rents, he is entitled to the rent payable in respect of the mortgaged premises; whether that rent became due prior to or after the date of his going into possession it is payable to him as reversioner."

The cases also involved such matters as the respective legal rights and obligations of lessor, lessee and mortgagee where the mortgage postdated the lease and the lessee obtained a good discharge by paying rent to the lessor before notice was given by the mortgagee to the lessee, as contemplated by s 10 of the Statute of Anne.

45 SEAA submitted that the Bank had not been bound by variations made to the terms of the Lease by Lamina and Figgins. In *Burrowes v Gradin*⁴⁶, the lessor and lessee agreed to pay an increased rent and, after notice to the lessee, the mortgagee sought in the Queen's Bench to recover rent at the new rate. Wightman J held that the mortgage had had the effect of a conveyance of the reversion with an attornment by the tenant to the mortgagee, that the alteration made with respect to the amount of rent had not destroyed the tenancy but that the tenant still held of the mortgagee as before⁴⁷. However, the mortgagee was at liberty to adopt the dealing by the mortgagor and recover rent at the higher rate. In the present litigation, the dealing expressed in the Deed of Variation was rejected rather than adopted by the Bank when it instituted the proceedings heard by Hayne J.

46 In the Court of Appeal, Brooking JA identified as follows the footing upon which the appeal was argued by SEAA⁴⁸:

45 [1911] 2 Ch 223 at 231.

46 (1843) 1 Dowling & Lowndes 213; 12 LJQB 333; 1 LT(OS) 318.

47 (1843) 1 Dowling & Lowndes 213 at 217-219.

48 [1998] 2 VR 90 at 95.

"[W]hen on 6 September 1990 Lamina defaulted under the [M]ortgage by failing to pay an instalment of land tax the term created by the implied re-demise resulting from the provisions of s 81(1) automatically came to an end and ... Lamina thereupon became either a tenant at sufferance or a person in a position similar to that of such a tenant."

His Honour continued⁴⁹:

"On this analysis, what took place was as follows, in contemplation of law. Upon the grant of the [M]ortgage, the State Bank took the [L]and subject to the interest of Figgins as a tenant in possession, by force of s 42(2)(e) of the Transfer of Land Act. As a result of s 81(1), the [State Bank] was to be taken to have the legal estate in the mortgaged land vested in it but to have granted a lease of the mortgaged land to [Lamina] for a term which was to endure only until default under the [M]ortgage. As regards that part of the mortgaged land which was the [P]remises the subject of the [L]ease to Figgins, that implied re-demise by the [State Bank] to [Lamina] was a concurrent lease, that is, a lease of the reversion immediately expectant on the [L]ease to Figgins. ... When, upon default under the [M]ortgage, that concurrent lease automatically came to an end, [Lamina] became a tenant at sufferance, or a person in a position similar to that of a tenant at sufferance."

47 The position of Lamina as a tenant at sufferance was determinative of the conclusion reached by the Court of Appeal. This was stated by Brooking JA in the following passage⁵⁰:

"[A]fter default under the [M]ortgage [Lamina], as tenant at sufferance, had no power to vary the [L]ease. It could give [Figgins] a particular discharge by accepting payment made (by any means recognised by the law) of any particular amount of rent which fell due under the [L]ease before notice to pay given by the [State Bank] to [Figgins]. Its ability to give the discharge was derived from s 138 and s 151(1) of the Property Law Act ... But what took place on each rent day after the [Deed of Variation] did not constitute payment of the instalment of rent due under the [L]ease. Each time the amount of one dollar was tendered and accepted, the parties were not professing to pay and accept the amount of rent due under the [L]ease; they were paying and accepting the amount due under the [Deed of Variation]."

49 [1998] 2 VR 90 at 95.

50 [1998] 2 VR 90 at 96.

The result was that Figgins could not rely upon the Deed of Variation as supporting its resistance to the claim of SEAA.

48 Harper J had approached the matter by identifying a "power of management" held by Lamina as a mortgagor in possession and as tenant at sufferance and concluded that this power authorised Lamina to enter into the Deed of Variation as it was "making allowances" to its lessee, Figgins. Further, his Honour had reasoned that Figgins obtained a good discharge in respect of the periodical payments of rent which fell due after the date of the Deed of Variation because Figgins was protected in making payments to Lamina before intervention by the Bank⁵¹.

49 The Court of Appeal disagreed with that reasoning. In addition, Brooking JA pointed out that the protection in respect of payments before notice was given as contemplated by the Statute of Anne (and its derivatives such as s 151(1) of the Property Law Act) was concerned only with payments of rent⁵². In s 18(1) of the Property Law Act, "rent" is defined as including "a rent service or a rentcharge, or other rent toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land" but not including mortgage interest. The obligations in respect of which SEAA had sought the award were not confined to payments in the nature of rent.

The construction of s 81

50 The true construction of s 81 is crucial to the outcome of this appeal and, as will appear and contrary to the approach taken in the Court of Appeal, this construction does not turn upon the case law which grew up in England around the Statute of Anne.

51 Provision to the effect of s 81 of the Transfer of Land Act was made by ss 93 and 94 of the *Transfer of Land Statute* 1866 (Vic), sections which were considered by the Victorian Full Court in *The Commercial Bank v Breen*⁵³. These sections, like the present s 81, were among a number of provisions dealing with the remedies

51 [1998] 2 VR 90 at 96.

52 [1998] 2 VR 90 at 96, 103.

53 (1889) 15 VLR 572. See also *Griffin v Dunn* (1878) 4 VLR(L) 419; *Louch v Ball* (1879) 5 VLR(L) 157; *Taylor v Wolfe & Co* (1892) 18 VLR 727; *Farrington v Smith* (1894) 20 VLR 90; *Burwood Land Company, etc, and Knox v Tuttle* (1895) 21 VLR 381.

given under the Torrens system to mortgagees. Delivering the judgment of the Full Court in *Breen*, Holroyd J said⁵⁴:

"The previous sections commencing from sec 84 confer certain powers and rights on a mortgagee who holds a mortgage in statutory form of land registered under the Act as if the rights and powers were inserted in the instrument itself in the first instance. Then the 93rd section comes in as a drag-net securing to the mortgagee in addition to his rights and powers under the instrument all the rights and remedies he would have had as owner of the legal estate under the old law, concurrently with a right in the mortgagor to enjoy the mortgaged land quietly until default. ... In ordinary mortgages under the old law the mortgagor is only tenant at sufferance to the mortgagee, and may be ejected without demand, and a stranger is in no better position than the mortgagor. If however the mortgage contains anything amounting to a re-demise the case is different, and during the time of the demise the mortgagor is entitled to the enjoyment of the land, and the mortgagee cannot bring an ejectment. If the mortgage contains a covenant to permit the mortgagor to have quiet possession till default and a term is fixed for payment, that covenant amounts to a re-demise to the mortgagor: it is different when no term for payment is fixed – in that case the covenant does not operate as a re-demise."

- 52 Somewhat similar provisions were introduced in Western Australia by ss 116 and 117 of the *Transfer of Land Act* 1893 (WA)⁵⁵. In the course of construing these provisions in *Connolly v Ryan*⁵⁶, Higgins J observed that in s 116 (as in s 81(1)) there was no express reference to a fixed day for payment or even to a demise. His Honour considered that it might be that the words of the section avoid the result at common law that the covenant for quiet enjoyment would not operate as a re-demise where no term for payment was fixed⁵⁷. It is unnecessary for the purposes of the present appeal to determine whether the reasoning of Higgins J should be accepted.

54 (1889) 15 VLR 572 at 577.

55 These were stated to apply not merely to first mortgages but to mortgages generally, and were described by Hogg as "illogical, since a second mortgagee cannot be in the position of a mortgagee with the legal estate under the general law": Hogg, *The Australian Torrens System*, (1905) at 961-962.

56 (1922) 30 CLR 498 at 506.

57 (1922) 30 CLR 498 at 507.

Conclusions

- 53 The vital considerations respecting the operation of s 81 upon the rights between SEAA and Figgins lie elsewhere. It will be observed that s 81(1) deems there to be a state of legal affairs which otherwise would not exist. It does so through the medium of the words "a first mortgagee shall ... have the same rights and remedies at law and in equity as he would have had if ...". When answering in the negative the question whether Lamina, as a mortgagor in default, had power to vary the Lease in a way that bound the Bank, Hayne J said⁵⁸:

"It was submitted on behalf of [Figgins] that until the [B]ank chose to take steps to enforce its rights the mortgagee might continue to exercise powers it had before the occurrence of the default. However, the mortgagor's right to quiet enjoyment is a right that subsists only until default and no notice or act on the part of the mortgagee is necessary to bring that right to quiet enjoyment to an end. Upon default the position of the mortgagor is that of (or similar to) a tenant at sufferance."

However, his Honour prefaced the statement of his reasons leading to that conclusion by saying⁵⁹:

"Section 81(1) provides that until the happening of certain events (*none of which has happened here*) a first mortgagee shall have the same rights and remedies at law and in equity as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee." (emphasis added)

- 54 By the time SEAA gave the Notice, which set in train the arbitration giving rise to the present appeal, one of the "certain events" mentioned by Hayne J had in fact occurred. The transfer upon the sale to SEAA had been registered. The point may be made by reference to a commentary upon the provision corresponding to s 81 which is made by *The Real Property Act* of Manitoba⁶⁰. Of that provision it

58 [1994] 2 VR 505 at 511.

59 [1994] 2 VR 505 at 510.

60 Ch 220 of the Revised Statutes of Manitoba, (1954). Section 112 states:

"A first mortgagee, for the time being, of land under this Act, shall, *during the currency of his mortgage*, have the same rights and remedies at law and in equity as he would have had, had the legal estate in the land or term mortgaged been vested in him, with a right in the owner of the land of quiet
(Footnote continues on next page)

has been said "a first mortgagee has these rights and powers only so long as the security is on foot as a security and the ownership of the land is consequently vested in the mortgagor"⁶¹. The state of legal affairs brought into existence by s 81(1), including the requirements of sub-s (3) of consent by the mortgagee to action by the mortgagor, comes to an end upon the registration of a transfer upon the sale⁶².

55 The result is that the declaration by the Supreme Court in the proceedings heard by Hayne J – that the Bank was unaffected, in respect of the tenancy of Figgins, by the Deed of Variation – was made upon the footing that none of the "certain events" to which Hayne J referred⁶³ had come to pass. It was that state of legal affairs constructed by s 81(1) which provided the foundation for the rights between the Bank and Figgins which were declared by the Supreme Court.

56 Reference has been made to the arrangements in the Contract between the Bank and SEAA pursuant to which SEAA purchased the Land. The Contract gave rise only to personal obligations between the Bank and SEAA with respect to entitlements which those parties regard as arrears owing by Figgins. Reference also has been made to the absence of privity of title and interest between the Bank and SEAA with respect to the title by registration taken by SEAA.

57 Quite apart from these matters and contrary to the submissions by SEAA, the earlier proceedings between the Bank and Figgins before Hayne J cannot control the outcome of the proceedings between SEAA and Figgins in this Court with respect to the correctness in law of the decision of the Court of Appeal in overturning the order of Harper J dismissing the challenge to the award. Also, it

enjoyment thereof until default in the payment of money secured thereby, or in the performance of a covenant expressed or implied therein." (emphasis added)

61 *Thom's Canadian Torrens System*, 2nd ed (1962) at 512. In Victoria, after the completion of foreclosure, s 87 of the Property Law Act operates, notwithstanding any stipulation to the contrary, to extinguish any action by the mortgagee to recover on the mortgagor's personal covenant the outstanding balance of the moneys secured. At general law, equity does not restrain such an action when brought after exercise of an express power of sale: see *Gordon Grant & Co v FL Boos* [1926] AC 781 at 785-786; *Cheah v Equiticorp Finance Group Ltd* [1992] 1 AC 472 at 476; Waldock, *The Law of Mortgages*, 2nd ed (1950) at 246-248; Sykes and Walker, *The Law of Securities*, 5th ed (1993) at 132-136.

62 See *Taylor v Wolfe & Co* (1892) 18 VLR 727, a decision with respect to ss 124 and 125 of the *Transfer of Land Act* 1890 (Vic).

63 [1994] 2 VR 505 at 510.

is clear that Hayne J in the proceedings before him was not asked to make any orders or to give any judgment with respect to any arrears of rent which might be alleged to be payable by the appellant. This Court was referred during argument to passages in the transcript of the proceedings before Hayne J, which need not be repeated but which do make it clear that there was a deliberate decision by the Bank not to seek any orders with respect to rent. The passages concluded with his Honour's observation to the parties that there was no prayer for a money claim and that the pleadings could not be regarded as sufficient to found such a claim. Counsel who appeared before Hayne J for the Bank (and who also appeared before this Court for the respondent) suggested to Hayne J that it might be better to leave open the question whether a money claim might be pursued until after his Honour decided the application and gave reasons for his decision. It may readily be inferred from the submissions of the parties to Hayne J and his Honour's response to them that the real concern of the parties, especially of the Bank, was to ensure that they would not be confronted with a contention in any subsequent proceedings that rent could not then be claimed, as any entitlement to it was a matter that could and should have been litigated in the earlier proceedings according to the principles stated in *Port of Melbourne Authority v Anshun Pty Ltd*⁶⁴.

58 Nor is it determinative of the outcome of the proceedings in this Court that, although the arbitrator made an award in favour of Figgins, he did so on grounds which allowed for the treatment of SEAA as the privy of the Bank. The moving party before Harper J was SEAA, not Figgins, and SEAA sought unsuccessfully at that stage of the litigation to have the award set aside on questions of law arising out of the award. In this Court, the proper construction of s 81 and its place in the system of title by registration which is maintained by the Transfer of Land Act is central to an assessment of the reasoning in the Court of Appeal and of the submissions advanced by SEAA in this Court to preserve its success in the Court of Appeal.

59 It may be accepted that the relationship between the Bank, Figgins and Lamina was as stated in the declaration made by Hayne J and, without determining the question, that the rights of the Bank against Figgins with respect to payment of rent and outgoings were not controlled by the Deed of Variation. However, to accept those propositions does not determine the present litigation in favour of SEAA. Whilst s 81 is the linchpin in the legal structure which the respondent seeks to retain, the appellant is correct in its submissions, for the reasons indicated above, that, as between SEAA and Figgins, the operation of s 81(1) was spent upon registration of the transfer to SEAA on 14 February 1994.

64 (1981) 147 CLR 589.

60 The entitlement of SEAA to the arrears asserted in the Notice is subject to the operation of cl 2(ii) of the Deed of Variation. Under this provision, Lamina (and, by virtue of s 141 of the Property Law Act, SEAA) became obliged to accept the "new rent" from Figgins in full satisfaction of the obligations of Figgins to pay rent, outgoings and all other payments of every description whatsoever under the Lease from 1 February 1991. That which was held and transferred to SEAA "as proprietor by transfer", in the terms specified in s 77(4), was the estate and interest of Lamina as registered proprietor and the benefit of the covenants by Figgins ran with that estate and interest by operation of s 141. Moreover, that statutory transfer took effect so that SEAA was freed and discharged from all liability to account in respect of the Mortgage. In this way, s 77(4) is consistent with the scheme of title by registration and the nature of the statutory mortgage provided for in s 74(2), as well as with the conferral by s 81(1) of rights and remedies "as if" the reversion were vested in the mortgagee and until the happening of certain events.

61 The result is that the rights of SEAA against Figgins do not include the arrears claimed in the Notice. Those rights would not have been maintainable by Lamina at the time of the registration of the transfer to SEAA. An attempt by Lamina to assert against Figgins rights measured solely by the Lease in its original form would have involved Lamina in the denial of its own Deed of Variation. SEAA is now in no better position. The assertion by SEAA of rights against Figgins measured by reference to the Lease in its original form would be met by a defence by Figgins based upon the Deed of Variation, including the defence of a good discharge in respect to the "new rent". Harper J was correct in ordering that the "appeal" under s 38 of the Arbitration Act against the award in favour of Figgins be dismissed.

Orders

62 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside. In place thereof it should be ordered that the appeal to that Court should be dismissed with costs.

63 McHUGH J. The question in this appeal is whether a purchaser of Torrens title land in Victoria is entitled to recover arrears of rent, allegedly owing under a lease granted by a mortgagor, where the purchase is the result of the mortgagee's exercise of the statutory power of sale. The question arises in circumstances where, after the mortgagor had defaulted in performing its covenants under the mortgage, it purported to reduce the rent owing under the lease in consideration of the tenant giving to the mortgagor vacant, but not legal, possession of the premises. The purchaser contends that, without the consent of the mortgagee, the variation was of no force or effect and that, as the assignee of the reversion, it is entitled to recover the difference between the rent fixed by the lease and that fixed by the variation. In my opinion, this contention should be rejected.

64 Central to the determination of the appeal is the construction and effect of s 81 of the *Transfer of Land Act 1958* (Vic) ("the Act") which relevantly provides:

"(1) In addition to and concurrently with any rights and powers aforesaid a first mortgagee shall, until a discharge from the whole of the money secured or a transfer upon a sale or an order for foreclosure has been registered, have the same rights and remedies at law and in equity as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee with a right in the mortgagor of quiet enjoyment until default in payment of any principal or interest or a breach in the performance or observance of some covenant.

...

(3) A mortgagor shall not, either before or after default or breach as aforesaid, commence in his own name any action for or in respect of any cause of action for which a first mortgagee may sue under the foregoing provisions of this section without obtaining the consent in writing of such mortgagee ... to such action ... and after the giving of such consent such mortgagee shall not be entitled to bring in his name any action in respect of such cause of action."

65 The great difficulty of the case arises from the attempt by s 81 to confer on the mortgagee the rights and remedies of a mortgagee at common law when the nature of a Torrens system mortgage is fundamentally different from that of the common law mortgage. That difficulty is increased by the section's failure to define the liabilities of, and consequences for, the mortgagor as the result of conferring these common law rights and remedies on the mortgagee.

Background facts

66 The appellant, Figgins Holdings Pty Ltd ("Figgins"), is the tenant of shop space (shops G19 and G20) which is part of a property known as the "Shop of Shops", situated in Collins Street, Melbourne. It first leased the shops on

12 January 1988 from the then owner, Gembleng Pty Ltd. Gembleng sold the property to Lamina Pty Ltd ("Lamina"), with settlement taking place on 8 September 1989. On that date, Lamina became the registered proprietor and also gave the State Bank of Victoria ("the State Bank") a first mortgage over the property. By a deed of variation of lease dated 1 February 1991 ("the Deed of Variation"), Lamina and Figgins purported to vary the existing lease of shops G19 and G20. Upon Figgins vacating the shops but retaining legal possession of them, Lamina promised to reduce the rent and outgoings payable by Figgins to \$1 per month. The parties also agreed that Figgins would surrender possession of the shops to Lamina upon Lamina paying it the sum of \$500,000 together with interest. Entry into the Deed of Variation was part of a plan that Lamina had embarked on to obtain vacant possession of the property for the purpose of redevelopment. The mortgagee, by then the Commonwealth Bank ("the Bank")⁶⁵, was aware of the plan.

67 Figgins duly vacated the premises on 1 February 1991, but left certain shop fittings and other items on the premises. Payments of rent were thereafter made on the basis agreed to in the Deed of Variation. The Bank permitted Lamina to have physical possession of shops G19 and G20 and to receive the rent, as varied. In March 1991, Lamina gave the Bank a tenancy schedule which showed the rent of those shops to be \$1 per month and gave details of the surrender arrangements. In July 1991, Figgins exercised an option to renew the lease of the shops for a term of four years.

68 Meanwhile in December 1990, the State Bank had given Lamina notice that it had defaulted under the mortgage by failing to pay a land tax instalment. However, the State Bank did not notify Figgins that Lamina had defaulted. In 1993, the Bank, as the successor of the State Bank, called up the loan. Lamina failed to repay the loan. On 13 July 1993, the Bank appointed a receiver of the income of the property. Figgins continued to pay the rent of \$1 per month to the agents appointed by the receiver. By s 109(2) of the *Property Law Act* 1958 (Vic), the receiver was deemed to be the agent of Lamina, as mortgagor. On 19 October 1993, the Bank commenced proceedings in the Supreme Court of Victoria seeking orders that it was not bound by the lease or by the Deed of Variation. In those proceedings⁶⁶, Hayne J found that Figgins was the lessee of shops G19 and G20 in accordance with the terms and conditions of the renewed lease. However, his Honour held that the Deed of Variation did not bind the Bank.

65 As from 1 January 1991, the Bank became the successor in law of the State Bank by the operation of the *Commonwealth Banks Restructuring Act* 1990 (Cth) and the *State Bank (Succession of Commonwealth Bank) Act* 1990 (Vic).

66 *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505.

69 In December 1993 the Bank exercised its power of sale. It sold the property "as the proprietor of [the mortgage] in exercise of the power of sale conferred by the mortgage and the Transfer of Land Act 1958."⁶⁷ The respondent, SEAA Enterprises Pty Ltd ("SEAA"), purchased the property and became the registered proprietor on 14 February 1994. One of the conditions of sale was that the Bank retained its right to recover arrears of rent and outgoings from Figgins up to the date of settlement and that SEAA authorised the Bank to take legal proceedings against Figgins in the name of SEAA⁶⁸. On 6 April 1994, the Bank, in SEAA's name and pursuant to an agreement between them, notified a dispute under the lease and sought to have it arbitrated. In substance, SEAA claimed that it had "inherited" the Bank's rights under s 81 of the Act and therefore was entitled to recover arrears of rent in relation to the entire period since execution of the Deed of Variation.

70 The arbitrator who heard the dispute rejected SEAA's claim of entitlement to arrears. He made an award in favour of Figgins. SEAA appealed to the Supreme Court of Victoria where Harper J affirmed the arbitrator's award. SEAA appealed to the Court of Appeal of the Supreme Court of Victoria (Winneke P, Brooking and Charles JJA)⁶⁹ which set aside the order made by Harper J. Pursuant to the grant of special leave to appeal, Figgins now appeals to this Court seeking restoration of the arbitrator's award.

The construction of s 81 of the Act

71 A mortgage of land under the Torrens system "is the creature of statute and its incidents depend upon the provisions of the statute and so much of the general law as is availed of by or under those provisions."⁷⁰ Under the Torrens system, a mortgage of land does not convey the legal estate to the mortgagee but operates as a charge on the land. Unlike a mortgage of land under old system title, the legal estate under the Torrens system remains in the mortgagor⁷¹. Section 74(2) of the Act expressly declares that a mortgage "shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged". Furthermore, a Torrens system mortgage, unlike a common law mortgage⁷², does not itself confer upon the mortgagee the right to possession

67 Special Condition 1.1.

68 Special Condition 2.

69 *SEAA Enterprises Pty Ltd v Figgins Holdings Pty Ltd* [1998] 2 VR 90.

70 *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302 at 323.

71 Sykes and Walker, *The Law of Securities*, 5th ed (1993) at 260-261.

72 *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 at 320.

of the land⁷³. However, s 81 of the Act gives the mortgagee the same rights and remedies as he or she would have as a mortgagee, if the land had been mortgaged at common law, that is, under "old system" title⁷⁴. But that does not mean that the effect of s 81 is to transfer the mortgagor's estate to the mortgagee during the term of the mortgage⁷⁵. Such a conclusion is not sanctioned by the language of s 81 and would sit oddly with the terms of s 74(2) of the Act. Nor does the grant of those remedies to the mortgagee mean that the reversion expectant upon any lease is replaced with a statutory or fictional reversion or that, upon default, the mortgagee automatically becomes the landlord of any tenant who has a lease of the land. This is so, notwithstanding that the terms of ss 81(1) and (3) indicate that, as against such a lessee, the mortgagee's rights may correspond with, and on default override, those of the mortgagor. While s 81 confers rights and consequential remedies on the mortgagee, it does not affect the content or *quantum* of the mortgagor's estate in the land after the execution of the mortgage. That this is so is clear from s 81(3) which provides that, without the consent in writing of the mortgagee, the *mortgagor* shall not commence an action in respect of any cause of action "for which a first mortgagee may sue under the foregoing provisions of this section". Furthermore, once consent is given, the *mortgagee* "shall not be entitled to bring in his name any action in respect of such cause of action." Sub-section (3) makes it clear that s 81(1) does not transform the Torrens system mortgage into an old system mortgage and that it leaves the legal estate vested in the mortgagor who, with the consent of the mortgagee, can pursue the same causes of action which the mortgagee has been given.

- 72 Nevertheless, s 81(1) directs that the mortgagee be treated as if he or she were a common law mortgagee and that direction appears to have the consequence that, for the purpose of the section, the statutory mortgage must be treated - in some respects at least - as if it were a common law mortgage. The difficulty of the present case arises from the failure of the section to spell out what those respects

73 *Partridge v McIntosh & Sons Ltd* (1933) 49 CLR 453 at 468, 470-471; *Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd* (1941) 41 SR (NSW) 285 at 289.

74 *Farrington v Smith* (1894) 20 VLR 90 at 92; *City Mutual Life Assurance Society Ltd v Lance Creek Meat Works Pty Ltd* [1976] VR 1 at 10.

75 Nor should the following passage in the judgment of Brooking JA in the Court of Appeal be thought to suggest that it does ([1998] 2 VR 90 at 95): "As a result of s 81(1), the [Bank] was to be taken to have the legal estate in the mortgaged land vested in it but to have granted a lease of the mortgaged land to [Lamina] for a term which was to endure only until default under the mortgage." I do not think that his Honour meant to say any more than that, for the purpose of the section, the mortgagee was to be treated in the same way as a common law mortgagee who had leased the land to the mortgagor.

are and what effect they have on the statutory title of the mortgagor. Given the nature of the Torrens system mortgage, it hardly seems possible to confer on the mortgagee all the rights and remedies of a common law mortgagee and, at the same time, to maintain that the mortgagor retains all the rights that are incidental to the ownership of the land under the Torrens system. Furthermore, given the terms of s 81(1), it seems difficult to conclude that the common law rights of a mortgagee apply only to the extent that they are consistent with the fundamental nature of the statutory mortgage. Plainly, the operation of s 81 must make considerable inroads into the legal rights attaching to the mortgagor's ownership of land under the Torrens system. It may be that the common law rights of a mortgagee conferred by s 81(1) extend so far as to apply even general law rights which the *Property Law Act* makes inapplicable to a Torrens system mortgage⁷⁶. Yet not only has the legislature expressly refused to transfer the estate of the mortgagor to the mortgagee, but s 81(3) suggests that s 81(1) does not destroy the rights of the mortgagor in respect of that estate. Reconciliation of these apparent conflicts between the imputed common law rights of the mortgagee and the statutory rights of the mortgagor is central to the determination of this appeal.

The rights of the mortgagee

73 The starting point in the present case must be to determine what would be the rights and remedies of the mortgagee (the Bank) if the mortgage had been a common law mortgage and the mortgagor (Lamina) had been entitled to stay in possession with a right of enjoyment until a relevant default. The view long accepted⁷⁷ in Victoria is that the first effect of the section is that "the mortgagee is to be treated as if he had the legal estate in the mortgaged land and, accordingly, the mortgagor, by reason of s 81(1) itself, is in the position of a tenant."⁷⁸ In my opinion, the second of these two propositions goes beyond the language of the section.

74 The words "with a right in the mortgagor of quiet enjoyment until default" in s 81(1) are part of the hypothesis that identifies the rights and remedies of the mortgagee. It is not a necessary consequence of those words or that hypothesis that the mortgagor should be treated as having some form of tenancy. Both the words and the hypothesis are consistent with a legislative intention of conferring powers on the mortgagee which override the mortgagor's statutory rights in the case of any inconsistency in those rights but without in any way affecting the

76 See e.g. s 86.

77 *Farrington v Smith* (1894) 20 VLR 90 at 92.

78 *Gunnion v Ardex Acceptance Pty Ltd* [1968] VR 547 at 549.

nature of the mortgagor's estate or interest in the land or converting him or her into a tenant of the mortgagee.

75 Furthermore, the doctrine of implied demise under s 81(1) is derived from common law principles. But the language of, and the concepts embodied in, s 81(1) are not the same as those which, if contained in a common law deed of mortgage, give rise to an implied demise of the premises to the mortgagor. At common law, where the mortgage deed *fixed a date for payment* of the sum secured and contained a *covenant* for quiet enjoyment, the deed operated as a redemise of the premises to the mortgagor until the date set for repayment⁷⁹. If the deed contained no date for repayment of the sum secured, however, no redemise could be implied⁸⁰. That was because at common law a lease had to be for a term that was "expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be."⁸¹ Section 81(1), however, does not make any reference to the date for repayment. Nor does it refer to a "covenant for quiet enjoyment". Instead, it refers to a "right ... of quiet enjoyment". Given the difference in language and concepts, I see no need to import any notion of implied demise into the operation of the section.

76 Moreover, the "right ... of quiet enjoyment" in the mortgagor exists even in those cases where the mortgage fixes no date for repayment. That being so, it makes it even more difficult to introduce the common law notion of implied demise into the section's operation. It is true that in *The Commercial Bank v Breen*⁸² and *Farrington v Smith*⁸³ the Supreme Court of Victoria assumed that the principle for which *Doe d. Parsley v Day*⁸⁴ is authority applies to s 81(1) so that there is no demise where the mortgage does not provide for the date of repayment. But in *Connolly v Ryan*⁸⁵, Higgins J said that "[i]t may be that the words of [s 81(1)] exclude the doctrine of *Doe d. Parsley v Day*⁸⁶." However, his Honour said that it was unnecessary to decide the point in the case before the High Court. I think that

79 *Wilkinson v Hall* (1837) 3 Bing (NC) 508 [132 ER 506].

80 *Doe d. Parsley v Day* (1842) 2 QB 147 [114 ER 58].

81 *Lace v Chantler* [1944] KB 368 at 370.

82 (1889) 15 VLR 572.

83 (1894) 20 VLR 90.

84 (1842) 2 QB 147 [114 ER 58].

85 (1922) 30 CLR 498 at 507.

86 (1842) 2 QB 147 [114 ER 58].

the tentative view of Higgins J was correct and that the doctrine of *Doe d. Parsley v Day* has no application to s 81. But that only reinforces the conclusion that there is no necessity to invoke any notion of implied demise in applying s 81. As appears below, the difficulties that arise from attempting to marry the doctrines associated with concurrent leases with the notion of an implied demise provide a further ground for holding that s 81(1) does not import any notion of an implied demise.

77 However, the view that s 81 gives rise to an implied demise has long prevailed in Victoria, and the parties to this appeal have accepted that view as correct, as did the arbitrator, Harper J and the judges in the Court of Appeal. In those circumstances and for the purpose of this appeal, upon the grant of the first mortgage to the Bank's predecessor in law on 8 September 1989, Lamina should be regarded as having become the lessee of the Bank for a term that was to continue until the occurrence of one of the events specified in the section, one of which was default on the part of Lamina. But what was the nature of the lease implied by s 81 in the present case?

78 In the Court of Appeal, Brooking JA, with whose judgment Winneke P and Charles JA agreed and to which I am much indebted, thought that the implied demise, in so far as it operated over shops G19 and G20, was a concurrent lease carved out of the reversion expectant upon the lease to Figgins⁸⁷. His Honour went on to say⁸⁸:

"When, upon default under the mortgage, that concurrent lease automatically came to an end, the mortgagor became a tenant at sufferance, or a person in a position similar to that of a tenant at sufferance. ... A tenant at sufferance cannot create a tenancy, not even a tenancy at will or at sufferance".

These considerations led his Honour to conclude⁸⁹ that "[i]t is the fact that the present mortgagor was, after default, no longer the holder of the reversion that made the deed of variation not binding on the mortgagee." Earlier in his reasons, his Honour had concluded⁹⁰ that, in paying and accepting \$1 on each rent day, "the parties were not professing to pay and accept the amount of rent due under the lease; they were paying and accepting the amount due under the deed." Consequently, the rent reserved under the lease was in arrears at the time of the sale to SEAA and that company, as assignee of the reversion, could recover the arrears of rent.

87 [1998] 2 VR 90 at 95.

88 [1998] 2 VR 90 at 95.

89 [1998] 2 VR 90 at 98.

90 [1998] 2 VR 90 at 96.

79 With great respect to the learned judges of the Court of Appeal, I do not think that the implied demise, assuming that it exists, can be classified as a concurrent lease. Such a lease assigns the reversion for the duration of the lease and the concurrent lessee becomes the lessor of the first lease⁹¹. In *Minister for Interior v Brisbane Amateur Turf Club*⁹², Latham CJ described the common law position of concurrent leases as follows:

"Where a concurrent lease is made by deed it operates at common law as an estoppel and as an assignment of the reversion upon the already existing term. But where it is not made by deed it is void as to any excess over the residue of an existing term. Where the parol lease is for a term less than the residue of an existing term it is void".

80 In the present case, Lamina was the owner of the reversion and the lessor of the first lease. It would be stretching the language of s 81(1) to hold that, upon the execution of the mortgage, the effect of the section was not only to assign the reversion to the Bank, making it momentarily the lessor of Figgins, but also to reassign the reversion to Lamina for the duration of the implied demise so that Lamina again became the lessor of Figgins by virtue of a concurrent lease. Although s 81(1) confers the same rights and remedies on the mortgagee "as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee", it should not be taken as changing the nature of the mortgagor's reversion. It is true that, by reason of s 81(1), the mortgagee has the same rights and remedies *as if* he or she were the legal owner of the reversion. Subject to the operation of the mortgagor's right of quiet enjoyment and the necessary consequences of that right⁹³, the mortgagee must, for example, have the same rights against any tenant of the mortgaged property as the mortgagor would have if there were no mortgage. The priority, which must be given to those rights and remedies of the mortgagee, must have a consequential impact on the rights which attach to the mortgagor's reversion. But it does not follow that the mortgagor either loses the reversion even momentarily or cannot in any circumstances exercise any

91 *Stewart v Goldman & Co Pty Ltd* (1947) 64 WN (NSW) 155 at 157; *Richardson v Landecker* (1950) 50 SR (NSW) 250 at 258.

92 (1949) 80 CLR 123 at 148. See also per Dixon J at 162.

93 Thus, until default, it is the mortgagor who is entitled to sue in ejectment without the need to obtain the mortgagee's consent because the mortgagee, not being entitled to immediate possession, is not entitled to sue in ejectment: *Connolly v Ryan* (1922) 30 CLR 498.

of the rights that attach to that reversion⁹⁴. The terms of s 81(3) and the terms of s 66(2)⁹⁵ show that that is not so.

- 81 If, as the Victorian cases suggest, Lamina, after executing the mortgage, held under an implied demise, it is, I think, more in accord with the language of s 81(1) to treat that demise as a statutory creation⁹⁶ in no way dependent on the reversion. As I have already indicated, I see no need to impute the role of lessee to the mortgagor. But, accepting for the purposes of this case that there was an implied demise, it should be treated as *sui generis*. On that view, there is no need to resort to the doctrines that are applicable to concurrent leases. In that respect, the case bears some similarity to *Minister for Interior v Brisbane Amateur Turf Club*⁹⁷ where the Minister sought to reject a lessee's claim that it was entitled to compensation because, pursuant to regulations enacted under the defence power, the Commonwealth had occupied the property during the period of the lease. The Minister contended that no compensation was payable because, at the time that the owner had purported to grant the lease, the Commonwealth was in occupation, that in those circumstances a lease could only operate as a concurrent lease and that, for technical reasons, the purported lease of the property could not operate as a valid concurrent lease. In rejecting the Minister's contention, Dixon J said⁹⁸:

"These principles [concerning concurrent leases] are inapplicable to the present case. The Commonwealth was not the grantee of a term of years. It was in under a statutory right enabling it to occupy at will, that is at the Commonwealth's will. The period of occupation is undefined; there is no reversion expectant upon a recognized common-law interest. ... I see no reason why the right to possession should not be granted by a lease although the Commonwealth was in actual possession."

Latham CJ said⁹⁹:

94 For a contrary view, see Francis and Thomas, *Mortgages and Securities*, 3rd ed (1986) at 187.

95 "No registered lease of land subject to a mortgage or charge shall be valid or binding against the mortgagee or annuitant unless he has consented in writing to such lease."

96 cf the nature of pastoral leases as expounded by a majority of this Court in *Wik Peoples v Queensland* (1996) 187 CLR 1.

97 (1949) 80 CLR 123.

98 (1949) 80 CLR 123 at 162.

99 (1949) 80 CLR 123 at 148.

"The law with respect to concurrent leases is based on the simple fact that the owner of the land who has granted a lease for, say, three years, cannot effectively grant another lease to another person for the same three years. ... But in the present case the Commonwealth comes in by paramount right for an indefinite period without and independently of any grant by the owner. In my opinion there is no principle of law which prevents the owner granting a lease which will be subject to the rights of the Commonwealth under the regulations."

82 Similarly in the present case, the Bank's rights did not depend upon any grant by the owner. Until default by Lamina, the Bank's rights in respect of the property were very limited, perhaps confined to those rights necessary to protect its interest as mortgagee. But for the parties accepting that Lamina became a statutory tenant for the purpose of s 81, I would have thought that the correct application of that section to the facts of the case led to the conclusion that Lamina remained entitled to deal with the reversion. I would have thought that, subject to the operation of s 66(2) or the triggering of one or more of the rights and remedies conferred by s 81, Lamina was entitled to deal with the reversion as it pleased, both before and after any default on its part. On that view, any default on the part of Lamina merely enlivened the rights and remedies conferred by the section and, in the absence of those rights being invoked, did not affect the right of Lamina to deal with the reversion.

83 Even though the parties have accepted that there was an implied demise to Lamina, I do not think that the conduct of the case requires this Court to treat that demise as a lease of Lamina's reversion expectant on the lease to Figgins. That would be to pile fiction on fiction¹⁰⁰. The implied demise should be treated as a creature of statute, without the need to invoke any notion of a concurrent lease of the reversion of the mortgagor. On that view, default by the mortgagor entitles the mortgagee to invoke the rights and remedies that it would have at common law. The exercise of those rights and remedies must have an impact on the rights of the mortgagor that derive from its ownership of the reversion. But until they are exercised, the mortgagor remains entitled to exercise the rights derived from its title and the ownership of the reversion, subject of course to the operation of s 81(3) and s 66(2).

84 On 6 September 1990, Lamina defaulted under the mortgage by failing to pay the instalment of land tax levied on the property. By force of s 81(1), the right to quiet enjoyment, as against the mortgagee, ceased. The lease between the Bank and Lamina, which, given the conduct of the case, must be taken to have arisen by

100 cf *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696; *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65; *R v Bilick and Starke* (1984) 36 SASR 321 at 328; *Rheem Australia Ltd v Collector of Customs (NSW)* (1988) 78 ALR 285 at 301.

implication from that right, must also be taken to have come to an end with Lamina's default. Upon the cessation of the implied demise and Lamina's right of quiet enjoyment, the Bank became entitled to immediate possession of the land. But at no relevant stage did it seek possession. By reason of its right to possession, the Bank could also have elected to receive the rents. But does it follow from the Bank's right to possession and its right to the rents that Lamina had no power to vary the lease by the Deed of Variation?

85 Hayne J found that, as against the Bank, Lamina had no power to vary the terms of the lease with Figgins. That finding is not binding on the different parties in this case - for the reasons given below there is no privity of estate or interest between SEAA and the Bank. Furthermore, my analysis of s 81 leads me to doubt his Honour's conclusion which was based on the conventional understanding of that section. However, it is unnecessary to determine the point. Even if, for the purpose of this litigation between SEAA and Figgins, the order of Hayne J should be taken as a correct statement of the relationship between Lamina and the Bank, it does not follow that Lamina could not vary the lease so as to reduce the rent payable by Figgins.

86 No doubt the "as if" clause in s 81(1) gave the Bank the right to agree to vary the lease once Lamina defaulted. But it is not a necessary consequence of that conclusion that Lamina did not have the power to agree to a variation, subject to the variation having no effect on the Bank's rights. Subject to the operation of ss 138 and 151 of the *Property Law Act*, such a variation would not affect the Bank's entitlement to the rent specified in the lease. If Lamina had paid out the Bank, surely the variation would be binding on Lamina and Figgins and their successors and not merely as a matter of estoppel. Similarly, if Lamina had accepted a surrender of the lease, I think that it would be binding on Lamina and Figgins and their successors. I see no reason why Lamina could not have accepted a surrender of the lease before it defaulted¹⁰¹. After default, subject to questions of estoppel, such a surrender may not have bound the Bank. But if that is so, it is the consequence of the fiction that s 81(1) creates and not because the mortgagor has lost the reversion or the rights attached to it.

87 In the Court of Appeal, Brooking JA concluded that, after default, Lamina was no more than a tenant at sufferance or a person in the same position as a tenant at sufferance. His Honour pointed out that such a tenant cannot create a tenancy¹⁰². That led his Honour to conclude that Lamina had no power to vary the rent.

¹⁰¹ Section 69 of the Act prohibits the mortgagor of a leasehold interest from surrendering the lease without the consent of the mortgagee. But that provision does not apply to the acceptance of a surrender of a lease by the mortgagor of land which is the subject of a lease.

¹⁰² [1998] 2 VR 90 at 95.

However, my analysis of the section means that Lamina was more than a tenant at sufferance, even if there had been an implied demise which terminated upon default. The primary lease remained one between Lamina and Figgins and the reversion continued to remain in Lamina. The default of Lamina did not assign the reversion to the Bank. To confer on the Bank the rights and remedies of a common law mortgagee is not to transfer to it the estate of the mortgagor. Once again, I think that it would be stretching the language of s 81 to hold that, upon a mortgagor's default, all the rights that attached to its title and, in the case of a lease, the reversion come to an end. I see no reason why, with the consent of the mortgagee, a mortgagor could not bring an action for ejectment after it had defaulted. The terms of s 81(3) are consistent with that conclusion. But if the mortgagor can bring such an action, it is because in fact it is entitled to immediate possession, notwithstanding that, by reason of the default, the mortgagee is given the same right by a statutory fiction.

88 Furthermore, at common law, after default the mortgagor may lawfully receive the rents of any lease until the mortgagee elects to receive them and is not later bound to account for them to the mortgagee¹⁰³. There is no reason why those principles should not apply to s 81. Indeed, because the reversion remains in the mortgagor, the case for applying them is even stronger than exists at common law. Here the Bank did not elect to receive the rents. That being so, I can see no reason why Lamina could not have sued for any rent owing, at all events if it had the consent of the Bank. But again the existence of such a right under the Torrens system must derive from the mortgagor's title to the reversion.

89 In my opinion, even if the Deed of Variation could not affect the Bank's rights - and I think that it probably could - it varied the lease in point of law and consequently the rights attached to the reversion. That means that, subject to the statutory rights which the Bank had, the Deed of Variation bound Figgins and Lamina and their respective successors in title. Immediately prior to the sale of the property, Lamina was entitled to rent in accordance with the lease as varied by that deed. SEAA, as Lamina's successor, was in no better position than Lamina.

90 By reason of the operation of s 77(4) of the Act, upon registration of the transfer, Lamina lost its title to the land and SEAA became the registered proprietor freed of all liability under the mortgage but otherwise with an estate no greater than that possessed by Lamina. Section 77(4) relevantly provides:

"Upon the registration of any transfer under this section *all the estate and interest of the mortgagor* ... as registered proprietor of the land mortgaged ... shall vest in the purchaser as proprietor by transfer, freed and discharged from all liability on account of such mortgage ... and (except where such a

103 *Moss v Gallimore* (1779) 1 Doug 279 [99 ER 182].

mortgagor ... is the purchaser) of any mortgage charge or encumbrance recorded in the Register subsequent thereto except-

- (a) a lease easement or restrictive covenant to which the mortgagee ... has consented in writing or to which he is a party; or
- (b) a mortgage charge easement or other right that is for any reason binding upon the mortgagee ... " (emphasis added)

By operation of this sub-section, SEAA took the land free of the mortgage but subject to the terms and conditions of the lease between Lamina and Figgins including the reduction of the rent in accordance with the Deed of Variation¹⁰⁴. Although the lease was not registered, the parties to this appeal accepted that the Act did not require its registration. As a result, the unregistered lease is protected by s 42(2)(e) of the Act and is binding on SEAA.

- 91 As the assignee of the reversion, SEAA was entitled to any arrears of rent which were attached to the reversion. But because of the Deed of Variation, no

104 Section 141 of the *Property Law Act* relevantly provides:

- "(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed ... shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease ...
- (2) Any such rent, covenant or provision shall be capable of being recovered, received, enforced and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part as the case may require, of the land leased.
- (3) Where that person becomes entitled by conveyance or otherwise, such rent, covenant or provision may be recovered, received, enforced or taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable ... "

Section 142(1) of the *Property Law Act* relevantly provides:

"The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested ... "

arrears of rent existed. Immediately before the registration of the transfer, pursuant to the power of sale, Lamina could not have sued for the rent under the terms of the original lease, and, by reason of s 77(4), SEAA was in no better position than Lamina.

92 SEAA's claim to arrears of rent at the "old" rate is predicated on the assumption that it is not bound by the Deed of Variation executed by Lamina and Figgins. It claims that the finding of Hayne J in the earlier proceedings between the Bank and Figgins established that the Bank was not so bound and that, as a result, it cannot be bound by the variation. But, quite apart from s 77(4) of the Act, this claim to the arrears depends upon the interest of SEAA being directly derived from, and coextensive with, that of the Bank upon exercise of the power of sale. That claim must be rejected. There is no privity of estate or interest between the Bank and SEAA. SEAA succeeded to Lamina's estate; it did not obtain the "interest in [the] land" that the Bank had as mortgagee by reason of s 74(2) of the Act. Upon the registration of the sale, SEAA became vested with "all the estate and interest of the mortgagor ... as registered proprietor of the land mortgaged".¹⁰⁵ What flowed to SEAA upon registration of the transfer were not the s 81 rights and remedies of the Bank but the entitlements that Lamina had while it was registered proprietor. These included the benefit of the lease to Figgins *as varied* by the Deed of Variation.

93 It is unnecessary in this litigation to determine whether, as at the date of the transfer to SEAA, the Bank had an accrued entitlement to rent in accordance with the lease before variation and whether that entitlement has survived the transfer. The basic purpose of s 81 is to confer rights in aid of the mortgage security. Those rights continue *until* any of several specified occurrences takes place. One of the occurrences that will extinguish a mortgagee's rights under s 81(1) is "a transfer upon a sale". The transfer to SEAA was registered on 14 February 1994. By force of the section, the rights which s 81 conferred on the Bank, as mortgagee, came to an end on that date. As between the Bank and Figgins, as the result of the decision of Hayne J, the Deed of Variation is not binding. Subject to the effect of ss 138 and 151 of the *Property Law Act*, and the effect of s 81 of the Act, the Bank may be entitled to the rent to the date of transfer if its s 81 rights survived the discharge of the mortgage. Whether it is may depend on the legal relevance of the fact that the Bank neither exercised its right to enter into possession and receive for itself the rents and profits flowing from the property nor directed Figgins to pay the rent to it. But if the Bank is entitled to the rent, it is the Bank's right and not that of SEAA. The contract of sale authorised¹⁰⁶ the Bank "to take action at the cost of the [Bank] against Figgins in the name of [SEAA] for any breach of covenant or non payment of rent or any other money owing to the [Bank] by Figgins ... as at

¹⁰⁵ Section 77(4) of the Act.

¹⁰⁶ Special Condition 2.9.2.

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the Settlement Date." But that provision has no application because it assumes SEAA has a cause of action against Figgins by reason of SEAA acquiring the reversion. But SEAA has no such cause of action. If the Bank is entitled to the rent, it is because s 81 gave it that right and it survived the discharge of the mortgage.

Order

94 The appeal should be allowed.

- 95 KIRBY J. This appeal comes by special leave from orders of the Supreme Court of Victoria (Court of Appeal)¹⁰⁷.

The facts

- 96 SEAA Enterprises Pty Ltd ("the respondent") is successor in title to the interest of the Commonwealth Bank of Australia ("the Bank")¹⁰⁸ in land in Collins Street, Melbourne contained in Certificates of Title Vol 9530 Folio 153 and Vol 9569 Folio 716 ("the Property"). The provisions of the *Transfer of Land Act* 1958 (Vic) apply to the land.

- 97 On 12 January 1988, Figgins Holdings Pty Ltd ("the appellant") became the lessee from Gembleng Pty Ltd of two shops ("the Premises") in the Property. The Property was subsequently sold to Lamina Pty Ltd. At the same time, Lamina Pty Ltd granted the State Bank of Victoria (the successor in law of which was the Commonwealth Bank of Australia) a first registered mortgage over the Property. On 6 September 1990, Lamina Pty Ltd defaulted under the mortgage by failing to pay an instalment of land tax levied on the Property.

- 98 On 1 February 1991, the appellant and Lamina entered into a deed of variation of lease ("the Deed of Variation"), as part of a lease surrender agreement, by which it was agreed, relevantly:

"1. Lamina HEREBY ACKNOWLEDGES that this Agreement is made for the convenience and benefit of Lamina and without prejudice to the rights of Figgins under the Lease of the demised premises and specifically reserving to Figgins all of its right and interest in and to the Lease and the demised premises.

2. IN CONSIDERATION of the premises and of Figgins at the request of Lamina agreeing to cease the conduct of its business from the demised premises and to vacate the demised premises within seven (7) days of the date hereof, Lamina HEREBY AGREES that it will as and from 1st February, 1991:-

- (i) accept from Figgins rent for the demised premises at the rate of one dollar (\$1.00) per calendar month ("the new rent") in lieu of the rent and

¹⁰⁷ *SEAA Enterprises Pty Ltd v Figgins Holdings Pty Ltd* [1998] 2 VR 90 (Winneke P, Brooking and Charles JJA).

¹⁰⁸ On 1 January 1991, the Commonwealth Bank of Australia became the successor in law of the State Bank of Victoria as a result of the combined operation of the *State Bank (Succession of Commonwealth Bank) Act* 1990 (Vic) and the *Commonwealth Banks Restructuring Act* 1990 (Cth).

outgoings and all other payments of every description whatsoever payable by Figgins under the Lease".

99 Pursuant to the agreement, the appellant ceased to conduct its business at the Premises. It vacated the Premises. It was thus deprived of the income and profit which might have been generated had it continued to trade. In return, it paid rent at the reduced rate of \$1 per month between 1 February 1991 and 14 February 1994 (the date upon which the respondent became the registered proprietor of the premises from the Bank).

100 On 7 July 1993, the Bank demanded payment by Lamina Pty Ltd of the sums secured by the mortgage. After the appointment of a receiver, the Bank commenced proceedings against the appellant, seeking orders that the lease, or alternatively the Deed of Variation, did not bind it. In the Supreme Court of Victoria, Hayne J found that the Bank was unaffected by the Deed of Variation¹⁰⁹. The Bank, although not in possession of the Property, exercised its rights as mortgagee. It sold the Property to the respondent. However, it retained any entitlement to recover arrears of rent and outgoings from the appellant under the lease up to and including the settlement date. The respondent authorised the Bank to take action against the appellant in its name.

The proceedings

101 In April 1994 the Bank, in the name of the respondent, served a notice of dispute upon the appellant pursuant to s 21 of the *Retail Tenancies Act* 1986 (Vic), seeking the difference between the amount paid and the rents, outgoings and other moneys due under the lease in its original form in respect of the period from 1 February 1991 to 14 February 1994. The respondent's entitlement rested upon two propositions. First, that the Bank was not bound by the Deed of Variation. Secondly, that the respondent, as successor in title to the Bank, was in the same position as the Bank. It followed that the appellant was in arrears under the lease. Those arrears were now payable to the respondent. The appellant has always disputed each of these propositions.

102 The claim was heard by an arbitrator (Professor M C Pryles). He published an award in favour of the appellant, concluding that it was not liable to pay the claim because it had not been notified to pay the rent to the Bank. In his reasons, the arbitrator dismissed the appellant's defence founded on estoppel. That decision is not the subject of contest in this Court.

109 *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505.

103 An appeal against the award was taken by the respondent, by leave, to the Supreme Court of Victoria. On 20 December 1995, Harper J dismissed that appeal.

104 However, a further appeal by the respondent to the Court of Appeal was successful¹¹⁰. The Court of Appeal held that the case turned on the meaning and operation of s 81(1) of the *Transfer of Land Act*. Brooking JA, delivering the principal reasons of the Court, concluded that:

"[A]fter default under the mortgage the mortgagor, as tenant at sufferance, had no power to vary the lease. It could give the tenant a particular discharge by accepting payment made (by any means recognised by the law) of any particular amount of rent which fell due under the lease before notice to pay given by the mortgagee to the tenant. Its ability to give the discharge was derived from s 138 and s 151(1) of the [*Property Law Act* 1958 (Vic)], which are in this respect declaratory of the common law. But what took place on each rent day after the variation agreement did not constitute payment of the instalment of rent due under the lease. Each time the amount of one dollar was tendered and accepted, the parties were not professing to pay and accept the amount of rent due under the lease; they were paying and accepting the amount due under the deed."¹¹¹

105 The Court of Appeal accordingly set aside the award of the arbitrator in favour of the appellant. In lieu of the arbitrator's award, the Court of Appeal made an award in terms reflecting those sought in the notice of dispute. It is from those orders of the Court of Appeal that the present appeal comes to this Court.

106 Contrary to the respondent's submissions, the earlier proceedings between the Bank and the appellant before Hayne J do not determine the outcome of the proceedings in this Court. The issue concerning what arrears of rent, if any, could be claimed by the Bank against the appellant was not argued before Hayne J¹¹². Moreover, as Lord Reid said in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*¹¹³, it is essential that the party estopped by privity must have some kind of interest, legal or beneficial, in the previous litigation or its subject matter. As Gaudron, Gummow and Callinan JJ have demonstrated in their reasons, the interest of the respondent, as successor in title to the Bank, differs in substance and

110 *SEAA Enterprises Pty Ltd v Figgins Holdings Pty Ltd* [1998] 2 VR 90.

111 [1998] 2 VR 90 at 96.

112 *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505 at 513.

113 [1967] 1 AC 853 at 910. See Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed (1996), §231.

form from that of the Bank which was the subject of the declaration made by Hayne J.

Analysis of the legislation

107 Counsel for the respondent, correctly in my view, acknowledged in argument, "[i]n a sense the beginning and end of the matter is s 81 [of the *Transfer of Land Act*]". Section 81(1) provides that:

"In addition to and concurrently with any rights and powers aforesaid a first mortgagee shall, until a discharge from the whole of the money secured *or a transfer upon a sale* or an order for foreclosure has been registered, have the same rights and remedies at law and in equity as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee with a right in the mortgagor of quiet enjoyment until default in payment of any principal or interest or a breach in the performance or observance of some covenant." (emphasis added)

108 Under s 81(1), until the happening of certain events, a first mortgagee shall have the same rights and remedies at law and in equity as it would have had if the legal estate in the mortgaged land had been vested in it as mortgagee, concurrent with a right in the mortgagor to enjoy the mortgaged land quietly until default¹¹⁴. In this way, s 81(1) requires that the position of the parties approximate the position applying under the general law applicable to mortgages¹¹⁵. However, whereas under the general law the mortgage operates as a transfer of title in the land to the mortgagee¹¹⁶, under the provisions of the *Transfer of Land Act* the mortgage has the effect of a security only and as an interest in the land. The acute difficulties of making the hypothetical assimilation of rights at common law with the nature of the statutory rights in Torrens title land is explained by McHugh J in his reasons. I agree with him. However, a court must do its best to carry into effect the statutory command.

109 Section 74 of the *Transfer of Land Act* states:

114 *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505 at 510. The question whether the right in the mortgagor of quiet enjoyment until default constitutes a statutory redemise does not arise in this case because the default has occurred before any of the relevant events. This question was raised and left open in *Connolly v Ryan* (1922) 30 CLR 498.

115 *Farrington v Smith* (1894) 20 VLR 90 at 92; *City Mutual Life Assurance Society Ltd v Lance Creek Meat Works Pty Ltd* [1976] VR 1 at 10.

116 *Santley v Wilde* [1899] 2 Ch 474; *Waldron v Bird* [1974] VR 497 at 501.

"(1) The registered proprietor of any land –

- (a) may mortgage it by instrument of mortgage in an appropriate approved form;
- (b) may charge it with the payment of an annuity by instrument of charge in an appropriate approved form.

(2) Any such mortgage or charge shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged or charged."

110 It follows that, upon default, the first mortgagee has, under s 81(1), rights and remedies *as if* the reversion of the lease existing at the time of the mortgage had been vested in the mortgagee. On this understanding, the respondent argued, the mortgagor had no title sufficient to vary covenants touching and concerning the land. It could not, by any agreement with its tenant, cut down the rights otherwise conferred by law on the mortgagee, being rights as if the reversion of the lease which the mortgagor seeks to vary were vested in the mortgagee. This was the conclusion which found favour with the Court of Appeal. However, that conclusion does not determine the matter in favour of the respondent, as successor in title to the Bank.

111 This appeal falls to be determined by reference to the language of the legislation and its application to the situation which now exists upon the exercise of the power of sale. Section 81(1) provided the foundation for the rights between the Bank and the appellant as declared by Hayne J in the Supreme Court. The rights of the mortgagee are based on the assumption that notwithstanding the vesting of the actual legal estate in the mortgagor, the mortgagee can exercise rights and remedies *as if* the legal estate were vested in the mortgagee. However, by the operation of s 81(1), the rights and remedies conferred upon a first mortgagee subsist only "until a discharge from the whole of the money secured or *a transfer upon a sale* or an order for foreclosure has been registered" (emphasis added). Upon the happening of one of these events, that assumption, which otherwise would not in law exist, ceases. On 14 February 1994, prior to serving the notice of dispute, the transfer upon the sale to the respondent was registered. Upon that transfer, the Bank's rights and remedies under s 81(1) ceased. The language of the provision leads inevitably to that result.

112 What, then, is the effect to be given to the transfer to the respondent in exercise of the Bank's power of sale? The answer to this question is found in s 77(4) of the *Transfer of Land Act*. Relevantly, the sub-section states:

"Upon the registration of any transfer under this section all the *estate and interest of the mortgagor* ... as registered proprietor of the land mortgaged ... shall vest in the purchaser as proprietor by transfer, *freed and discharged*

from all liability on account of such mortgage ... and (except where such a mortgagor ... is the purchaser) of any mortgage charge or encumbrance recorded in the Register subsequent thereto except –

- (a) a lease easement or restrictive covenant to which the mortgagee ... has consented in writing or to which he is a party; or
- (b) a mortgage charge easement or other right that is for any reason binding upon the mortgagee". (emphasis added)

113 According to this provision, the registration of the transfer from the mortgagee pursuant to the statutory power of sale passed to and vested the fee simple in the respondent *freed from the mortgage*. That is, with respect to the mortgage between the Bank and the mortgagor (Lamina Pty Ltd), the respondent was "freed and discharged from all liability on account of such mortgage".

114 Moreover, s 77(4) provides that upon registration it is the estate or interest of the *mortgagor* that shall pass to and vest in the purchaser. The result, in this case, is that the estate or interest of the mortgagor (Lamina Pty Ltd) as registered proprietor vested in the respondent.

115 By the operation of s 141 of the *Property Law Act*, the rent reserved by the lease and the benefit of every covenant ran with that estate or interest. This entitled the respondent, upon transfer, to claim any rent which was accrued and due before the assignment of the reversion and which remained unpaid¹¹⁷. According to cl 2(i) of the Deed of Variation, the mortgagor agreed to accept from the appellant the "rent for the demised premises at the rate of one dollar (\$1.00) per calendar month ("the new rent") in lieu of the rent and outgoings and all other payments of every description whatsoever payable by [the appellant] under the Lease". This was to be "in full satisfaction of the obligation of [the appellant] to pay rent outgoings and all other payments of every description whatsoever under the Lease"¹¹⁸. The discharge for the rent was binding as between the mortgagor and the appellant¹¹⁹. The respondent, which acquired the estate and interest of the mortgagor, is subject to that discharge.

116 The fact that the mortgagee might have been entitled to exercise other remedies under s 81(1) becomes hypothetical once the mortgage is discharged upon sale. There is no statutory provision which assigns the "deemed" reversion, created under s 81(1), back to the mortgagor prior to the mortgagee's sale pursuant

117 *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764 at 783-784.

118 Deed of Variation, cl 2(ii).

119 *Corbett v Plowden* (1884) 25 Ch D 678 at 681.

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to s 77(4). The operation of s 77(4) is consistent with s 74(2) and with the view that s 81(1) does not create a reversion at all. It merely confers rights and remedies *as if* the reversion were vested in the mortgagee. Those rights and remedies cease upon transfer. The rights of the respondent against the appellant did not, therefore, include a right to the arrears of rent claimed. The arbitrator and Harper J were correct to so hold. The Court of Appeal erred in disturbing their conclusion.

Orders

- 117 Accordingly, the appeal must be allowed. I agree in the orders proposed by Gaudron, Gummow and Callinan JJ.