IN THE COURT OF APPEAL OF NEW ZEALAND

CA32/05

	BETWEEN	BALLANCE AGRI-NUTRIENTS (KAPUNI) LIMITED Appellant
	AND	THE GAMA FOUNDATION Respondent

Hearing: 15 September 2005

Court: William Young, O'Regan and Robertson JJ

Counsel: R P Thomas and M B Beech for Appellant
B M Nathan for Respondent

Judgment: 9 November 2005

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved. If necessary the respondent should file a memorandum within ten days to which the appellant can respond in a further ten days.

REASONS

ROBERTSON J

Introduction

[1] On 2 November 2004 Chisholm J dismissed an appeal from an interim arbitral award delivered by E D Wylie QC on 19 May 2004. Ballance Agri-Nutrients (Kapuni) Ltd (Ballance) now appeal that judgment pursuant to leave granted by Chisholm J on 4 February 2005.

[2] The Judge was satisfied that two questions of law required determination. The first was whether s 112 of the Property Law Act 1952 gave the respondent standing to bring its arbitration claim. The second was whether s 4 of the Contracts (Privity) Act 1982 allowed the respondent to enforce covenants under the lease involved in the arbitration proceedings. On this latter issue, the Judge simply noted that, depending on the outcome as to the first issue, the second issue may well require consideration by the Court of Appeal.

[3] Both the arbitrator and the Judge answered these two questions in the affirmative.

[4] The respondent also relied on the further and subsidiary grounds of waiver and estoppel to support the judgments of the arbitrator and Chisholm J. They were not issues in the High Court. They cannot arise on an appeal on a question of law in this Court. Although in the circumstances of this case they might have substantial potency in the correct setting, they are not considered by this Court at all.

Factual background

[5] On 30 May 1995, Donjon Properties Ltd (Donjon) leased commercial premises it owned at 449 Blenheim Road, Christchurch, to Petrochem Limited (which is now called Ballance) for a term of one year. The lease was in the standard ADLS commercial lease form. The lease initially was subject to one right of renewal, but in the event was renewed from time to time on an ad hoc basis by deeds of renewal signed on 9 December 1996, 2 April 1998 and 6 September 1999. This final deed of renewal varied the lease by providing for Ballance to remain in occupation on the basis of a rolling six monthly tenancy terminable by either party on six months' written notice.

[6] On 30 June 2000, Donjon sold the freehold interest in the property to Gama Holdings Ltd (Holdings). This transaction was registered against the certificate of title under the Land Transfer Act 1952 on 19 March 2001.

[7] In April 2001, Ballance gave Holdings six months' notice of its intention to vacate the premises by the end of September 2001.

[8] On 10 June 2001, Holdings entered into an unconditional agreement for sale and purchase of the freehold premises to The Gama Foundation (Foundation), the current respondent. The arbitrator found that the Foundation had been established in May 1996, incorporated on 18 September 2000 and at the time of the transfer in June 2001 was the sole shareholder of Holdings. The agreement was a lay person's document providing for the transfer of six properties at a total price of $3,992,700. The date for settlement in this agreement was 1 August 2001. This transaction was not registered until 28 January 2002. Ballance was not notified of this agreement until December 2001, after it had quit the premises.

[9] Although the date for settlement was 1 August 2001, settlement of the transaction with Foundation did not occur until 1 December 2001. The arbitrator found that there had been no variation of the agreement. As Mr Nelson, a trustee of Foundation and a director of Holdings told the arbitrator, "it just didn't get done".

Considering the inter-relationship between Holdings and Foundation, there is nothing surprising about that.

[10] The evidence was that Ballance substantially vacated the premises by 31 October 2001 but long before that date issues had arisen concerning the condition of the building and the extent to which Ballance was required to reinstate or repair damage. Ballance disputed an obligation to do what the landlord required.

[11] On 21 October 2002, the parties signed an agreement to submit the dispute between them to arbitration. It could not have been more simple and straightforward.

[12] The arbitration agreement described Foundation as "the landlord" and Ballance as "the tenant". It recited a landlord and tenant relationship from 30 May 1995 and noted that, following the tenant's vacation of the property after 31 October 2001, disputes had arisen between the parties.

[13] The reference to arbitration noted the landlord sought:

(a) Reinstatement arising from various impact and other property damage;

(b) Reinstatement arising from corrosion caused by the storage of fertiliser and chemical products by the Tenant during the term of the Lease;

(c) The costs of reinstatement of the building and grounds;

(d) Damages, loss of income and expenses incurred by the Landlord as a consequence of damage and/or deterioration to the building;

(e) The maintenance obligations of the Tenant provided for in the Lease, in particular cl 10.1 of the Lease.

[14] The parties appointed Dr Wylie, a Christchurch silk, as single arbitrator.

[15] The document also included a number of standard form clauses and a schedule about procedural matters.

[16] The issues particular to this appeal were raised by the arbitrator at the outset of the hearing before him on 17 May 2004.

[17] An interim award was delivered on 19 May 2004 in which the arbitrator decided that Foundation had standing to maintain the proceedings.

The arbitrator's interim award

[18] The arbitrator found that Foundation acquired an equitable interest in the property as of 10 June 2001. He stated that Holdings held the legal interest on trust for Foundation until settlement occurred and the memorandum of transfer was registered.

[19] Foundation argued that it derived authority to bring the claim from s 112(1) of the Property Law Act 1952. That section provides:

> **112 Rent and benefit of lessee's covenants to run with reversion**
>
> (1) Rent reserved by a lease, and the benefit of every covenant or provision therein having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein, 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, notwithstanding severance of that reversionary estate, and may be 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. This subsection extends to a covenant to do some act relating to the land, notwithstanding that subject-matter may not be in existence when the covenant is made.

[20] The arbitrator found that the covenant sought to be enforced by Foundation had reference to the subject matter of the lease within s 112(1) of the Property Law Act 1952 and that it ran with the reversionary estate. He was satisfied that Foundation, having acquired an interest in the subject matter of the lease, was entitled to receive the income of the leased property when the lease was still on foot, and was, therefore, entitled to enforce the covenants.

[21] Dr Wylie could see nothing in s 112(1) which required the conclusion that its effect depended on registration of the legal title.

[22] In addition, the arbitrator found that the same conclusion was compelled by cl 45(a) of the lease agreement. That clause defines "Landlord" as "where appropriate the executors, administrators, successors and permitted assigns of the Landlord." Since Foundation was a "permitted assign" of Holdings, it was "designated by name, description, or reference to a class", and was entitled to enforce the covenants to the lease agreement pursuant to s 4 of the Contracts (Privity) Act 1982.

The High Court decision

[23] The arbitration agreement signed by the parties contained a clause permitting appeals on questions of law to be made to the High Court under cl 5 of the Second Schedule to the Arbitration Act 1996. Ballance appealed the arbitrator's decision.

[24] Chisholm J stated the first issue at [21] as:

> Whether, before the property was vacated by the tenant on 31 October 2001, The Gama Foundation became – "… the person … entitled, subject to the term, to the income … of the land leased" – for the purposes of s 112(1).

[25] At [26] he found that the date of possession of 1 August 2001 was the critical date. The Judge held, in reliance on a passage from McMorland, *Sale of Land* (2ed) at [11.07], that it was possession which carried the right to receive income (such as rent or other profits) and also the obligation to pay any outgoings.

[26] The actual delay in taking possession could not alter the fact that as between Holdings and Foundation, "it was the Foundation who was "entitled" to the rental income from 1 August 2001. At that time the lease was still on foot."

[27] The Judge considered next whether notice to the tenant was a prerequisite for application of the section in the case of a purchaser with only an equitable interest. He concluded that if it was, Parliament would have said so expressly, especially in a

statute where it is not unusual for notice to feature as a requirement. Therefore, Chisholm J concluded that the arbitrator correctly decided that s 112(1) permitted Foundation to pursue its claim.

[28] The Judge also agreed with the arbitrator on the point concerning cl 45(a) of the lease agreement. He stated at [32] that "[c]learly The Gama Foundation is a *permitted* assignee of Gama Holdings Limited (which in turn was a permitted assign of Donjon Properties Limited)" (emphasis in original). He saw no justification for reading the clause down by adding a gloss that did not exist.

Submissions in this Court

[29] Ballance's submissions on the first issue were based in the main on the distinction between law and equity. It submitted that both the arbitrator and the Judge confused a purchaser's equitable entitlement to the net proceeds of the land (once the trustee vendor has taken reasonable expenses) with the legal right to recover and receive rentals. It argued that a corollary of the decisions reached by the arbitrator and the High Court Judge was that two entities could at the same time be entitled to the rental income and that this created uncertainty because a lessee would not know to whom payment should be made.

[30] Many of the arguments raised by Ballance were concerned with the "significant and far-reaching" policy consequences of Chisholm J's decision. These included: undermining the law of trusts; undermining the law of vendor and purchaser; and leaving the lessor in a vacuum, being obliged to perform under the lease but not entitled to the benefits, and not being able to sue, but being able to be sued.

[31] In terms of the second issue, Ballance argued that the word "assigns" was a word added out of an abundance of caution and in effect meant nothing. It was a "mere surplusage". It argued that the phrase "permitted assigns" must refer to a transfer of a lessee's interest to which the lessor has consented.

[32] Ballance also raised the same reciprocity argument that it raised concerning the first issue. It stated that it was problematic that two separate parties could simultaneously represent the landlord's interests.

[33] In response, Foundation supported the reasons given by both the arbitrator and Judge. It argued that s 112(1) did not distinguish between legal and equitable interests. In other words, registration did not make any difference to who was "entitled" to receive the rental income.

[34] Further, s 112(1) only applied to those who were "entitled" to receive the rental income. It did not require that rent actually be paid to that party. In the absence of notice, no tenant could be prejudiced by continuing to pay the rent to the registered landlord, but this fact did not alter the status of an unregistered purchaser who was "entitled" to receive the rent.

[35] On the second issue Foundation argued again that there was no justification for distinguishing between registered and unregistered assigns. Clause 45(a) used the words "permitted assigns" and there was no reason to read any sort of gloss into the clear words used.

[36] Foundation also raised the arguments based on waiver and estoppel. For the reason noted above at [4], I decline to consider those grounds.

The real world issue

[37] As was made plain to Mr Thomas at the commencement of the hearing, it is difficult to see what commercial imperative there is for the parties in this continuing round of litigation. Actual possession of the leased premises ceased almost four years ago. After the parties had been unable to resolve differences between themselves as to their respective rights and responsibilities under the lease, just on three years ago they appointed an arbitrator to determine the matters outstanding between them.

[38] It is difficult to envisage a situation in which, because of the timing of the transfer of a freehold title, legal rights will have been extinguished entirely or fallen into some large black hole. If Foundation is not the correct party in the arbitration, although it may be that procedural steps will be required to reinstate Holdings to the Companies Register, eventually the matter the parties want an answer to will be determined.

[39] I was singularly unimpressed by Mr Thomas's assertion that, if Holdings has to run the case, it may have lost nothing if the price at which it sold the premises to Foundation was not affected by any breach of the tenant's covenants. In my opinion, Courts will not permit clear legal rights to fall into black holes and be unenforceable in circumstances such as this. In any event, it is clear that, in a letter on 8 May 2001 and in a discussion on 16 May of that year, issues about remedial action had been raised by Holdings while it was in occupation. It must be seriously arguable that the sale to Foundation was on the basis that the covenants in the lease would be properly adhered to.

[40] Such pragmatic and practical issues aside, I turn to consider the strict legal issues which the High Court Judge was satisfied warranted the attention of this Court.

The meaning of s 112

[41] Recently the English Court of Appeal in *Scribes West Ltd v Relsa Anstalt (No 3)* [2005] 1 WLR 1847 had to consider a provision in the Law of Property Act 1925 (UK) similar to s 112 of the New Zealand Property Law Act 1952. Carnwath LJ in delivering judgment in that case articulated what he thought was the "natural reading" of the English section and proceeded to consider if that reading was precluded by previous authorities. I adopt a similar approach.

[42] The starting point is the words of s 112(1). Inasmuch as the section is relevant to the present case, it provides:

> the benefit of every covenant or provision [in a lease] having reference to the subject matter thereof, and on the lessee's part to be observed or performed,

> … shall go with the reversionary estate in the land … and may be … enforced … by the person from time to time entitled … to the income of the whole or any part … of the land leased.

[43] This section achieves two objectives. First, it provides that the benefit of covenants and provisions in a lease run with the reversionary estate. Secondly, it provides that the covenants may be enforced by the person from time to time entitled to the income of the land. In other words the beneficial owner of the land being "entitled" to the income may enforce covenants that go with the reversionary estate.

[44] I find nothing in the plain words of the section which indicates that the glosses argued for by Mr Thomas should be imported into this section. Particularly, there is nothing to indicate that the section distinguishes between the person legally, as opposed to equitably, "entitled" to the income of the land. In my view, both may from time to time be entitled to that income.

[45] Applying that general approach to the facts of this case, the covenants sought to be enforced include a covenant to repair undertaken by the lessee under the lease. It is beyond argument (and I did not understand Mr Thomas to dispute) that this is a covenant to be observed or performed by the lessee, and it has reference to the subject matter of the lease, namely the premises at 449 Blenheim Road, Christchurch. The benefit of that covenant goes with the reversionary estate in the land and is enforceable by the person from to time entitled to the income of the land. Balance, as equitable owner, is such a person.

[46] That, in my view, is the natural meaning of the words in the section. I now consider the challenges made and the authorities cited by Mr Thomas to see whether a different approach is required. I consider the appellant's challenge under five headings.

Legal and equitable ownership

[47] Critical to Mr Thomas's case was the difference between legal and equitable or beneficial ownership which he submits is of overwhelming importance in the

New Zealand context of registration of proprietary interests under the Land Transfer Act 1952. He referred to s 41 of that Act which provides:

> **41 Instruments not effectual until entry in register**
>
> (1) No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render any such land liable as security for the payment of money, but, upon the registration of any instrument **[**under this Act or the **[**Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002**]]**, the estate or interest specified in the instrument shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature.

[48] If, in terms of the Agreement for Sale and Purchase between Holdings and Foundation, Foundation was entitled to the benefit of the covenant as from 1 August 2001 (the date upon which settlement was due), it is Mr Thomas's contention that the Court would be sanctioning the transfer of an estate or interest before registration was effected which would be contrary to s 41. In other words, the appellant argues that, under s 41, estates and interests do not pass until registration and therefore Foundation did not obtain the reversionary estate until 28 January 2002. By that stage the lease with Ballance had come to an end and the reversionary estate did not have the benefit of the covenants under the lease.

[49] I am not attracted to this argument. It is well established that the land transfer system deals only with the registration of legal interests in land. It does not deal with equitable interests. As Blanchard J said in this Court in *Duncan v McDonald* [1997] 2 NZLR 669 at 681:

> Registration of an instrument under the Land Transfer Act is the event which creates or transfers a *legal* interest in registered land: s 41. Unregistered interests, other than tenancies for less than three years, are not legal interests and are dependent upon doctrines of equity. … Where an interest enforceable in equity already exists in a transferee the act of registration of a memorandum of transfer substitutes a legal interest for the equitable interest" (emphasis added).

[50] That approach is consistent with the earlier decision of this Court in *Re Universal Management Ltd* [1983] NZLR 462 which established that s 41 does not prevent a person who has given valuable consideration and who has a specifically enforceable contract, from obtaining an equitable interest in the land.

That position has been applied also in Australia in *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242.

[51] In contra distinction to that provision in the Land Transfer Act, s 112(1) of the Property Law Act does not distinguish between legal and equitable interests. It provides that covenants having reference to the subject matter of the land go with the reversionary estate. It does not restrict the benefits of those covenants to the owner of the legal estate. It necessarily includes the owner of the beneficial estate. As a result, s 41 of the Land Transfer Act does not preclude Foundation from taking the benefit of any covenant having reference to the subject matter of the lease which had effect when it became the beneficial owner of the fee simple.

[52] That conclusion, in my view, is a necessary corollary of the doctrine in *Walsh v Lonsdale* (1882) 21 Ch D 9. That conventional view is noted by the authors of *New Zealand Land Law* (Brookers, Wellington, 2005) where they note at 563 (footnote 781): "Section 112 Property Law Act 1952 extends to equitable leases."

[53] Mr Thomas sought support for his interpretation in the decisions of the English High Court and Court of Appeal in *Turner v Walsh* [1909] 2 KB 484, particularly where Farwell LJ said at 494 referring to the equivalent English statutory provision:

> [the section] makes no alteration of the rights of anyone, but merely alters procedure, so as to give the right of action to the person entitled to the proceeds of such action.

[54] I do not consider that this furthers Mr Thomas's case. It is not in dispute that the section provides for who may enforce the covenants in the lease, and does not alter who is entitled to the income of the land. But *Turner v Walsh* does not address the position of the purchaser of the reversion of a leasehold estate. In my view, such a person is "entitled" as that word is used in s 112(1).

[55] Mr Thomas referred to *Paramoor Nine Ltd v Pacific Dunlop Holdings (NZ) Ltd* (1990) 1 NZ ConvC 190,499 as authority for the proposition that "there can only be one party entitled to act as lessor, and enforce the terms of the lease." *Paramoor*

Nine involved a landlord and tenant dispute about payment of rent. After the rent became due, but before it sued for the rent, the landlord transferred the freehold estate to a third party with no reservation of rights. This transfer was registered before the proceedings for the unpaid rent were commenced. The tenant applied for the proceeding by the former owner of the land to be struck out and succeeded. Master Towle found that the landlord was no longer "entitled" to the rental income since it no longer had either a legal or an equitable interest in the reversion and therefore could not enforce the covenant. On the facts of this case, only one party was entitled to enforce the terms of the lease, but that does not mean that more than one party cannot, from time to time, be entitled to do so. In my view that is a matter of simple common sense.

[56] The Master in *Paramoor* placed reliance on comments of Diplock LJ in *Re King* [1963] 1 All ER 781, 798 (CA):

> I take the view that the effect of this section is that after the assignment of the reversion to a lease, the assignee alone is entitled to sue the tenant for breaches of covenants contained in the lease whether such breaches occurred before or after the date of the assignment of the reversion. The effect of the section is to enact a simple, rational and just rule of law. The measure of damages for breach of a covenant in a lease which runs with the land – the only kind of covenant with which the section is concerned – is the diminution in value of the reversion consequent on the breach and is sustained by the person entitled to the reversion [in this case, Foundation]. If upon an assignment of the reversion the benefit of such covenants, including the right to exercise remedies in respect of existing breaches, is transferred from the assignor to the assignee, justice is done to all three parties concerned. The assignor suffers no loss, for the sale price of the reversion will take account of the value of the rights of action or other remedies against the tenant for antecedent breaches of covenant which are transferred to the assignee; the assignee will be able to enforce these remedies against the tenant; the tenant will remain liable for the diminution in value caused by his breaches of covenant whenever committed.

[57] At first glance there might appear to be a dichotomy between that view and the approach adopted by Hosking J in *Orr v Smith* [1919] NZLR 818 at 828 - 829 where he said:

> This section does therefore seem to enable, amongst others, a complete equitable assignee or a beneficiary under a bare trust to recover rents. It does not, however, in my opinion, deprive the legal owner of his rights. I think it merely confers collateral rights on the beneficial owner.

[58] In *Orr v Smith*, the plaintiff brought an action against the assignee of the reversion who had re-entered the property (before registration of his interest) for non-payment of rent. In fact the rent had already been paid to the registered proprietor. The defendant cited the forerunner to s 112(1) as justifying the re-entry. Hosking J found that the section did give the defendant the right to enter, subject to his giving notice to the lessee that the rent should be paid to him. Since sufficient notice had not been given, the re-entry was declared void.

[59] I am of the view that these two cases can be read consistently. Diplock LJ in *Re King* was not saying that at all times only one person is "entitled" to enforce the covenants. He was dealing with a case where the person bringing the action no longer had any interest in the land since he had assigned the fee simple (it had been compulsorily acquired) and it had been registered.

[60] In contrast, *Orr v Smith* was a case where registration was yet to occur. Therefore, before registration, both transferor and transferee are "entitled" within the meaning of s 112(1) to the income of the land, and may, therefore, enforce the covenants to the lease. In *Orr v Smith*, this entitlement did not justify the re-entry because of the principle that the tenant could not be prejudiced for dealing with the registered proprietor before notice of the assignment was given to him.

[61] I am of the view that s 112(1) does not require a legal reversionary estate to be in existence before lease covenants can be enforceable by the owner of that estate. A beneficial estate will be sufficient.

Reversionary estate

[62] Mr Thomas's next line of attack related to the meaning of the words "reversionary estate" in s 112(1). He argued that the word "reversion" (which I note is not the phrase in the Act) necessarily required a lease to be on foot when the land leased is sold. Otherwise what is sold is not the reversionary estate but the full freehold title.

[63] In the course of argument, the Court drew to Mr Thomas's attention the ancient authority of *Throckmerton v Tracy* (1555) 1 Plowd 145; 75 ER 222. In that case Staunford J said at 160 (248):

> A reversion has two intendments, the one is an estate left continuing during the particular estate, which is the most common sense, the other is the returning of the land after the particular estate ended, which is the natural sense of the word, according to the definition of the Latin-tongue, so that the reversion of the land, and the land, when it reverts, is all one.

[64] Mr Thomas's position is based on the first of those two meanings. He submits that where a reversionary fee simple estate which is subject to a leasehold estate is transferred, the benefit of any covenants in the lease goes with that fee simple estate. Yet where the leasehold estate terminates before the reversionary fee simple estate is sold, it cannot be said that the covenant goes with the reversionary estate because the reversionary estate no longer exists. It has all become merged in the fee simple estate.

[65] There is a superficial attractiveness in this argument, but I am of the view that it is overly semantic. There is nothing in the words used by Parliament in s 112(1) which suggests a restriction of its application to cases where the lessor sells the land, to which unperformed covenants are attached, before the leasehold estate terminates. Such a distinction would be arbitrary and capricious and lead to consequences which are unacceptable and illogical. There is no reason why, when a leasehold estate terminates, the purchaser of the fee simple estate (as opposed to the reversionary estate) should not be entitled to the benefit of those covenants which, at that date, remain unperformed. As Diplock LJ noted in *Re King*, the value of the rights of action on the unperformed covenants will usually be a factor in the price settled upon for the assignment of the land.

[66] In the instant case it is clear that, at the time of the sale and purchase of the freehold, the lease was still on foot. Settlement date for the transaction was expressed to be 1 August 2001. Ballance was still in occupation at that date. By the terms of the unconditional agreement for sale and purchase on 1 August 2001, Foundation became the beneficial owner of the reversionary estate. Uncompleted

business involving the tenant did not simply evaporate at 31 October 2001 when the reversionary estate merged with the fee simple.

Entitled to the income of the land

[67] It was Mr Thomas's submission that Holdings, as the legal reversioner, was at all times up until 31 October the party entitled to income. He drew a distinction between the position of Foundation as the beneficiary of the "net proceeds of the income after deduction by the trustee of appropriate allowances and costs" and the position of the legal owner.

[68] I am not persuaded by the efficacy of this argument. First, it overlooks the fact that Foundation became the equitable reversioner before the expiry of the term of the lease. Secondly, I see no reason to read into s 112(1) before the word "entitled" the word "legally" or after it "in law". The section provides that the covenant may be enforced by the person entitled to the income of the land. That may be the person legally or beneficially entitled to that income.

[69] I am not persuaded that the distinction which Mr Thomas sought to draw between the fact that Foundation was not entitled to the income of the land, but only entitled to the proceeds of the income after deduction by the trustee of appropriate allowances and costs is efficacious. Mr Thomas relied on comments of Carnwath LJ in *Scribes West* where he said:

> The section is designed to extend the rights to enforce, without taking away existing rights; and in any event, anything done by RA could only be done as trustee for RB.

[70] In that case, the transferee of the reversion was held to be entitled to the income of the land and therefore its re-entry was valid. As in the present case, registration had not taken place until after the actions taken to enforce the provisions of the lease. I do not consider that the passage quoted above holds that RB was only entitled to the income once RA had deducted its reasonable expenses. It does nothing more than assert the self-evident proposition that had RA taken any action as

trustee under the transfer agreement, it would have had to account to RB for the profits.

Chose in action

[71] Fourthly, Mr Thomas argued that if rental could be required to be paid to an assignee of the right to rent, that amounted to the assignment of a chose in action which by its nature can only be binding on a lessee once notice of the assignment is served.

[72] I do not find this point an obstacle to Foundation's position. Notice was given to Ballance on 5 December 2001 that the property had been transferred to Foundation. By that time, Ballance was no longer under an obligation to pay rent so no immediate issue arose as to who was the landlord to whom the rent should be paid. This point clearly never troubled these parties for at the time they entered into the agreement to submit the dispute to arbitration, which was 21 October 2002, Ballance had notice of the assignment of the covenant of repair that ran with the reversion to Foundation and they assumed its ability to enforce.

Policy issues

[73] Mr Thomas's final argument was that there were a number of policy issues which arise from Chisholm J's judgment which could have unsatisfactory consequences.

[74] First he argued that:

> What if the rentals must be paid to an unregistered purchaser under a long-term agreement, who then absconds with the rentals before taking title? Such rental payments could be significant and the lessor reliant on the income to meet significant outgoings on the land pending transfer of title.

[75] No-one could or has suggested that if a tenant has paid rent in good faith, the tenant could be called upon to pay again. The theoretical possibility does not arise in this case and was never the issue before the Court. It is unreal to assume that any

tenant required to make a payment to the unregistered purchaser would not first reach a commercial arrangement with the former landlord to protect against such a theoretical possibility arising.

[76] The second issue Mr Thomas raised was:

> If an unregistered purchaser can enforce the terms of a lease, a lack of reciprocity arises. The documentary lessor will be unable to sue for breach of the lease, despite (presumably) being able to be sued.

He posed the question:

> Should the documentary lessor be obligated to perform under the lease, even though (under the logic of Chisholm J), he or she is no longer entitled to the benefits?

[77] With respect to Mr Thomas, this argument overlooks s 113(1) of the Property Law Act 1952, which provides:

> **113 Obligation of lessor's covenants to run with reversion**
>
> (1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, in so 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 by conveyance, devolution in law, or otherwise; and, in so far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

[78] The effect of this section is that, like the entitlement to enforce the lessee's covenants, the lessor's obligation to perform covenants that have reference to the subject matter of the lease will go with the reversionary estate. There will not in reality be situations where a lessor can be sued by the tenant but cannot itself sue.

[79] The third point raised was:

> Although an unregistered purchaser may have a beneficial entitlement as against the vendor, under *Bevin v Smith* [1994] 3 NZLR 648 (CA), this reasoning depends on whether or not a decree of specific performance would be available. This is an issue known to those parties, and should not affect

> third party legal obligations regarding payment of rentals. As here, the existence of the agreement to purchase may be unknown to the lessee.

[80] The concerns raised in this hypothetical are answered by the principle noted by Hosking J in *Orr v Smith* that the tenant in any case will not be punished for dealing with the registered proprietor until it has notice of the assignment. In the words of Hosking J:

> A tenant shall not be prejudiced by the arising of a new title to the rent unless he shall have notice of it, "for otherwise he should be at mischief": *Birch v Wright* [1 TR 378 at 384-6].

[81] This principle may also be seen to be a corollary of s 183 of the Land Transfer Act 1952, or s 10 of the Administration of Justice Act 1705 (Imp), in force in New Zealand by virtue of s 3(1) of the Imperial Laws Application Act 1988. That provision states:

> **10 Proviso for payment of rent**
>
> Provided nevertheless that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee.

[82] The final point raised by Mr Thomas was that Chisholm J's decision:

> Undermines that law of trusts in so far as the beneficiaries should, as a matter of normal legal principle, act through the legal personality of the trustee, regarding third parties.

[83] Counsel argued that it was problematic that a beneficiary was entitled to demand actual receipt of the funds. He raised the question:

> What if the land is held under a discretionary trust, with a large pool of potential beneficiaries? Would all those beneficiaries be entitled to demand payment of the rentals, and enforce the lease terms?

[84] I am not convinced that Chisholm J's decision or this Court's confirmation of it in any way undermines the law of trusts in the way feared by counsel. This is not a case of an unregistered purchaser demanding that the tenant pay rent due without more. This is a case where the purchaser of the reversion is attempting to enforce a covenant which it is argued has been breached during the term of the lease and in respect of which Foundation was entitled to enforce the duty as it existed in favour

of Holdings. Actual issues of rent do not arise in the present case. Clearly Ballance would not be prejudiced if it had paid rent to Holdings before it received notice of the purchase by Foundation and before a direction was given that rent in the future would be paid to Foundation as the new landlord.

[85] This is not what this dispute was about. The case is nothing more than a situation where Foundation, during the currency of the lease, obtained an interest in the reversion in respect of which there is now dispute as to the extent of the lessee's obligation.

[86] My assessment of the meaning of s 112(1) of the Property Law Act 1952 is determinative of the appeal, but for completeness I refer briefly to the alternative argument.

Discussion on second ground

[87] Clause 45(a) of the lease provides:

> In this lease, "the Landlord" and "the Tenant" means where appropriate the executors, administrators, successors and permitted assigns of the Landlord and the Tenant."

[88] In the High Court, Chisholm J held at [32] that the definition of "Landlord" extends to the unregistered purchaser of the fee simple estate. He stated:

> Clearly The Gama Foundation is a *permitted* assignee of Gama Holdings Limited (which is in turn a permitted assignee of the original landlord, Donjon Properties Limited). There is nothing that would render it inappropriate to recognise the Foundation's status. I agree with Mr Nathan that there is no justification for reading down clause 45(a) by adding a gloss that does not exist. As he points out, the plaintiff's interpretation would produce an anomaly in situations where for any reason registration of the transfer was delayed or overlooked or in a situation where the was a long-term agreement for sale and purchase (emphasis in original).

[89] The arbitrator had earlier reached the same conclusion in terms of s 4 of the Contracts (Privity) Act 1982, in that compliance by the lessee with the terms of the lease conferred "a benefit on a person, designated by name description, or reference to a class, who is not a party to the deed or contract".

[90] Mr Thomas described the reasoning of Chisholm J and the arbitrator as "somewhat startling". Counsel submitted that the "normal meaning of the expression "assigns" should be adopted in this standard form lease." He cites *Jowitt's Dictionary of English Law* (2ed 1977) where it states:

> In a conveyance to "A … his executors, administrators, and assigns," etc, the word "assigns" is in reality a mere surplusage because the estate or interest passes without it …".

The thrust of the submission is that the word "assigns" is included out of an abundance of caution and should be given no meaning.

[91] Mr Thomas also argued that the use of the expression "permitted assigns" makes the point even clearer. "This expression must refer to a transfer of lessee's interest that (in the context of the use of this term) the lessor has consented to."

[92] The lease is in the standard ADLS commercial lease form. The expression "permitted assigns" should be given a meaning. I am satisfied it must refer to a person who receives an assignment of a landlord's interest in the land leased. The adjective "permitted" is used to exclude assigns who have taken possession by operation of law such as an assignee in bankruptcy or by compulsion of law.

[93] Support for this approach is found in *Stroud's Judicial Dictionary of Words and Phrases* (6ed 2000): "Assigns" in a lease, means voluntary assigns, and does not comprise assigns by operation of law, *eg* a trustee in bankruptcy, or persons claiming under him," citing *Doe dec'd; Goodbehere v Bevan* 3 M & S 353, 105 ER 644; and *Baily v De Crespigny* (1869) 4 LR (QB) 180.

[94] Foundation must come within cl 45(a) when these factors are considered. Foundation has received the voluntary assignment of the fee simple by way of the sale and purchase agreement. This makes it a "permitted assignee" of Holdings.

[95] Mr Thomas advanced an additional argument at the hearing that a distinction should be made between an assignee of the lease (whether legal or equitable) and the beneficial rights created on the conclusion of the agreement for sale and purchase. This appears to be a distinction without a difference. The legal position of someone

to whom a lease is assigned and someone who purchases a fee simple estate and thereby becomes the assignee of the lease, cannot be different.

[96] Mr Thomas submitted that the arguments raised in respect of s 112(1) of the Property Law Act 1952 concerning the problems with two parties being simultaneously entitled to exercise the lessor's remedies were also applicable here. As I noted in regard to the first ground, there is no problem with two parties being entitled to enforce the covenants of the lease during the period after the agreement for sale and purchase is concluded and before registration against the certificate of title.

[97] In respect of the application of the Contracts (Privity) Act 1982, Mr Thomas submits that the proviso to s 4 applies. That proviso states that "this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person." The definition of "Landlord" as including "permitted assigns" must give a "permitted assign" the right to bring an action for breach of lease covenants to the landlord's detriment. There is no other reason the include "permitted assigns" within the definition than to provide the right to enforce obligations under the lease.

[98] For these reasons, Foundation is a "permitted assign" within the meaning of cl 45(a) of the lease and may accordingly enforce the covenant pursuant to that clause, or alternatively, pursuant to s 4 of the Contracts (Privity) Act 1982.

[99] Nothing raised before this Court persuades me that either the arbitrator or the High Court Judge were in error when they found that Foundation had the legal standing to pursue that issue in the arbitral forum in the manner which the parties themselves had solemnly decreed was appropriate.

Conclusion

[100] Accordingly, the appeal is dismissed. Costs are reserved. If necessary the respondent should file a memorandum within ten days to which the appellant can respond in a further ten days.

WILLIAM YOUNG J

Overview

[101] The law would truly be an ass if it did not provide for Foundation to exercise the right of action associated with the presumed breach of covenant on the part of Ballance. For me, the only troubling feature about the case is my difficulty in discerning a legitimate purpose for this appeal.

[102] If Ballance were to prevail on the points argued before us, it may be that the arbitrator or a court would hold that the arbitration agreement it signed means that it is not permitted to challenge Foundation's right to pursue the claim. More importantly, even if Foundation were not able to enforce directly the claim, it could do so via Holdings, with Holdings (reinstated on the register of companies if necessary) suing for damages as its trustee, cf *Johnson v The Churchwardens and Overseers of the Parish of St Peter, Hereford* (1836) 4 Ad & E 520; 111 ER 883 at 527; 885 per Lord Denman CJ and *Darlington Borough Council v Wilshier Northern Ltd* [1995] 3 All ER 895 at 902 – 903 per Dillon LJ and at 908 per Waite LJ. On this point, reference can also usefully be made to *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 and two case notes which discuss this case: Duncan Wallace "Assignments of Rights to Sue: Half a Loaf" (1994) 110 LQR 42 and A Tettenborn "Loss, Damage and the Meaning of Assignment" (1994) 53 CLJ 24.

[103] At the hearing of the appeal, Mr Thomas was left in no doubt as to our concerns about the absence of any obvious merit on the part of his client and the apparent pointlessness of the appeal. He maintained, firmly and politely, that Ballance was entitled to have the questions it raised (and which it was granted leave in the High Court to pursue) answered by this Court. In that he was perfectly right. But the merits or otherwise of the overall position that Ballance has taken are material to what order for costs we should make, a point to which I will revert later.

[104] For the reasons which I am about to provide, I am satisfied that Foundation is entitled to pursue the claim against Ballance under both s 112 of the Property Law

Act 1952 and the Contracts (Privity) Act 1982. As well, I think that Foundation is probably entitled to pursue the claim by way of assignment implied in the agreement for sale and purchase. This last point was not the subject of formal argument but because it is closely related to the points upon which Foundation succeeds, I propose to record my views as to it.

Assignment implied in the agreement for sale and purchase

[105] It would have been open to Holdings, after the sale had been completed, to assign formally to Foundation the relevant right to sue for breach of the lease. As to this, reference can be made to the judgment of the House of Lords in the *Lenesta* case to which I have already referred, where such an assignment would have been effective but for a clause in the original agreement prohibiting assignment.

[106] There is no evidence of such an express assignment in the present case. Further, there are difficulties now in obtaining such an assignment as Holdings is apparently no longer on the register of companies. So Foundation can only be regarded as the assignee of Holdings, if an assignment to Foundation of Holding's contractual rights against Ballance was implicit in the sale to Foundation of the building.

[107] The effect of the agreement for sale and purchase was that, with effect from 1 August 2001, Foundation, as between itself and Holdings, was entitled to the rent payable in relation to the premises and was responsible for outgoings. For this proposition is sufficient to refer to judgment of Sir George Jessel MR in *Earl of Egmont v Smith* (1877) 6 Ch D 469. In that case, the vendor was still in possession and the purchase had not been completed. It was held at 475 that the vendor in that situation acts as a:

> … trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee.

I accept that there are some difficulties with completely assimilating the position of such a vendor with a trustee, see for instance Meagher Gummow and Lehane,

Equity, Doctrines and Remedies, (4ed 2002) at [6-055]. But I do not regard these difficulties as material given that settlement eventually occurred.

[108] Given the timing of the possession date in relation to the intended expiry of the lease, it is clear that Foundation was intended to step into the shoes of Holdings under the lease.

[109] In those circumstances I would be inclined to treat the agreement for sale and purchase as assigning to Foundation, with effect from 1 August 2001, the rights of Holdings under the lease with such assignment being perfected at the very latest when title was transferred to Foundation. Once perfected, such assignment would be effective with retrospective effect and thus would permit Foundation to sue for any breach of covenant which occurred after 1 August 2001.

Section 112 of the Property Law Act 1952

[110] Section 112 of the Property Law Act 1952 provides:

> **112 Rent and benefit of lessee's covenants to run with reversion**
>
> (1) Rent reserved by a lease, and *the benefit of every covenant or provision* therein *having reference to the subject-matter thereof, and on the lessee's part to be observed or performed*, and every condition of re-entry and other condition therein, *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, notwithstanding severance of that reversionary estate, *and may be 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.* This subsection extends to a covenant to do some act relating to the land, notwithstanding that subject-matter may not be in existence when the covenant is made.
>
> (Emphasis added)

[111] The wording of s 112 comes largely from s 10 of the Conveyancing Act 1881 (UK) which in turn has legislative antecedents which go back to a statute of Henry VIII passed in 1540 to address downstream consequences of his dissolution of the monasteries. Given its legislative history, s 112 is to be construed in the context

of the common law rules as to privities of estate and contract and the position of assignees in relation to leasehold interests.

[112] If "reversionary estate" is construed as meaning the entire estate other than the interest created by the lease, then Foundation acquired the reversionary estate when title to the land was transferred to it in January 2002. If so, pursuant to the first part of the section which I have italicised, Foundation thereby acquired the right to sue for breaches of covenant which occurred prior to its acquisition of the reversionary estate, see *Re King* [1963] 1 All ER 781 (CA) where Diplock LJ stated at 798:

> Looked at purely as a matter of the meaning of the words used in [the equivalent of s 112), I take the view that the effect of this section is that *after the assignment of the reversion to the lease, the assignee alone is entitled to sue the tenant for breaches of covenants contained in the lease whether such breaches occurred before or after the date of the assignment of the reversion.*
>
> (Emphasis added)

[113] Mr Thomas argued that a purchaser acquires a reversion only if the lease is still extant at the time of acquisition. On this argument, the transfer of the legal interest in the land to Foundation was not a transfer of the reversionary estate because the lease had come to an end prior to January 2002. Whether Mr Thomas is right or not on this point raises some difficult issues upon which we did not hear full argument. In those circumstances, I prefer to decide the case by reference to the words used in the second part of the section which I have italicised.

[114] I take the view that with effect from 1 August 2001, the party entitled to the income of the property for the purposes of the section was Foundation which accordingly may sue for breach of the relevant covenant.

[115] This conclusion proceeds on the basis that an entitlement in equity is sufficient, see for instance *Turner v Walsh* [1909] 2 KB 484 and *Scribes West Ltd v Relsa Anstalt and others* (No 3) [2005] 1 WLR 1847. The only genuinely arguable question is whether Foundation's entitlement in equity to the income of the property from 1 August 2001 was sufficiently firm to engage s 112.

[116] *Scribes West* involved facts broadly similar to those of the present case save that the purchase had been settled (in that the purchase price had been paid) but legal title had not passed. On that basis, the conclusion that the purchaser was entitled in equity to the income of the property was straight-forward. In the present case, however, settlement did not take place until December 2001. This enabled Mr Thomas for Ballance to argue that Foundation's equitable entitlement to the income of the property from 1 August 2001 was conditional upon it settling the purchase.

[117] I see this so-called conditionality of entitlement as being of no moment. In part this is because Foundation did settle. Further, as at 1 August 2001, the entitlement was not just conditional. If settlement had not occurred, any financial wash-up which later occurred between the parties would have involved assessments of compensation calculated on the basis of what would be necessary to put the innocent party in the position which would have obtained if settlement had occurred and this would necessarily involve allowing for the entitlements to income from the premises under the agreement for sale and purchase. Foundation was thus on risk as to profits and losses associated with the premises from 1 August 2001. In those circumstances I think that s 112 is most sensibly applied by conferring on Foundation the entitlement to sue for post-1 August 2001 breaches.

[118] Mr Thomas complained that if this approach was right, it meant that Ballance was liable to two different landlords, a situation which he claimed was not possible. I do not see this as a controlling consideration. The theoretical possibility of double liability arises not infrequently in cases of assignment. A tenant who is genuinely in doubt as to whom to pay can always interplead, see Meagher Gummow and Lehane at [6-525].

The Contracts (Privity) Act 1982

[119] Section 4 of the Contracts (Privity) Act provides:

> **4 Deeds or contracts for the benefit of third parties**
>
> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference

> to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

[120] The promise relied on by Foundation was made to the lessor of the premises, as "Landlord", an expression defined as including, "where appropriate", the "successors and permitted assigns" of the original Landlord. I have no difficulty in holding that Foundation is a "successor" and/or "permitted assign" of Holdings and that it is "appropriate" to regard Foundation as being within the definition of "Landlord".

[121] I am of the view that "successors and permitted assigns" of the original Landlord constitute a "class" or persons on whom the lease confers benefits. The case is plainly not within the proviso to s 4.

[122] On this point I note the discussion of s 4 which appears in the judgment of Tipping J in *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363 at 381 - 383. I respectfully adopt the approach taken by Tipping J.

Costs

[123] As I have indicated, I am troubled by the appeal. If Ballance's appeal is properly regarded as involving game playing behaviour, the case may warrant an award of solicitor and own client costs.

[124] For that reason, I would reserve costs, leaving it the parties to make submissions in writing on the issue.

O'REGAN J

[125] I agree with that the appeal should be dismissed, though I take a different view on the application of s 112 of the Property Law Act 1952 to the present facts.

[126] This case illustrates the difficulties which often arise when one issue is severed off and dealt with before the decision maker has considered all of the circumstances and made findings of fact. The result is that this Court is faced with preliminary issues which have to be dealt with in the absence of important factual findings and in circumstances where available arguments cannot be considered because they were not the subject of rulings by the arbitrator. If it was felt necessary to appeal the arbitrator's ruling on the preliminary issue which is now before us, the sensible course may have been to file an appeal as a holding position, but continue with the arbitration so that all necessary factual matters were canvassed and dealt with and any legal issues which the parties wished to place before the High Court could be dealt with comprehensively and in one hearing.

[127] However, we must deal with the issue before us as best we can, and leave aside the estoppel and waiver arguments which may well have made it unnecessary to consider the issues now before us. We do not have a finding of fact as to when the lease terminated, or even whether it has yet terminated (it appears that the respondent contended that the lease continued until the appellant met its obligations). That means we do not know whether the lease was still on foot when the appellant was notified of the transfer of the property from Gama Holdings Limited to The Gama Foundation.

[128] I interpret s 112 more restrictively than Robertson J and William Young J. In my view the reference in that section to "the person…entitled…to the income of the whole or any part…of the land leased" means a person who has a legally enforceable right to recover the rent due under the lease from the lessee. In the present case Gama Foundation clearly had a right to the income of the land as between itself and Gama Holdings i.e. it could require Gama Holdings to account to it for the amount Gama Holdings received by way of rent. But, in my view, the entitlement to the income of the land must be an enforceable entitlement to receive that income from the tenant, rather than to receive an account of the amount received by the assignor after the tenant has met its lawful obligation to pay rent to the assignor.

[129] In my view, a transferee of a reversionary estate in land will meet that requirement if either of the two following conditions are met:

(a) The transfer of the reversionary estate has been perfected by registration so that the transferee has legal title to the reversionary estate; or

(b) The transferor has assigned the right to receive rent directly from the tenant to the transferee and notice of that assignment has been given to the tenant under s 130 of the Property Law Act, making the tenant liable to pay rent directly to the transferee.

[130] In my view the decision in *Scribes West Limited v Relsa Anstalt (No 3)* [2005] 1 WLR 1847 is an example of the second category set out above. In that case Carnwath LJ said that the person entitled to income for the purposes of the English provision corresponding with s 112 could include a beneficial owner as well as a legal reversioner. He described the position as follows: (at [12])

> The word "entitled" does not of itself import a distinction between legal and equitable interests. It connotes simply an enforceable right to the relevant income. An equitable assignee of the right to rent has such an enforceable right as against the assignor and, *at least following notice*, against the lessee (whether or not, as [counsel] suggests, the assignor procedurally has to be a party). Thus in the present case, [the equitable assignee of the reversionary interest] is for the time being "the person…entitled to the income…of the land leased".
>
> (Emphasis added)

[131] In the present case it is not clear that notice of the assignment of the right to receive rent was given to the appellant as the tenant, and in my view that distinguishes the present case from the *Scribes West* case. It is notable that earlier in the judgment, at [9], Carnwath LJ set out three propositions, one of which was to the effect that an equitable assignment of a chose in action requires no more than an expression of intention to assign, coupled with notice to the debtor, to impose on the latter an obligation to pay the assignee. He also records at [10] that, in the *Scribes West* case, notice had been given to the lessee.

[132] If, as it appears from the material before us, the tenant was not given notice before the termination of the lease, then it seems to me that Gama Foundation was not entitled to receive rent from the appellant as tenant in the present case and

therefore not within s 112(1). In the absence of a factual finding that notice was given to the appellant as tenant during the currency of the lease, I would not be prepared to decide the case on the basis that s 112 applied.

[133] I accept that there is a later statement in the *Scribes West* judgment which provides support for the position taken by Robertson J and William Young J: Carnwath LJ said at [12]:

> Nor does it see to me to matter if this theory results in [the assignee of the reversion] having that right [the entitlement to rent] concurrently with [the assignor] as legal owner.

[134] On the face of it, that statement appears to indicate that notice to the tenant is not crucial, and that a right on the part of an assignee to receive the rent from the assignor rather than directly from the tenant suffices for the purposes of s 112. In my view, however, s 112 is better interpreted in the way I have indicated above and if *Scribes West* suggests a broader interpretation, I would not follow it. I think the more limited interpretation provides appropriate certainty without compromising the objective of the section. In particular, it ensures that, at any one time, there is only one party to whom rent must be paid and one party who can enforce the covenants in the lease.

[135] That leaves the question of the transfer of the legal title to the reversion. The argument put to us was that, while the agreement to transfer the relevant property could properly be described as an agreement to transfer the reversion (since the lease to the appellant was on foot at the time of the agreement), the transfer of legal title upon registration in January 2002 occurred after termination of the lease at a time when the fee simple estate could no longer be described as a reversionary estate. I do not believe that the fee simple estate as it existed after the termination of the lease can be described as the reversionary estate. That of course raises the issue on which we have no finding of fact, namely when the lease terminated. But assuming it terminated before the date of registration of the transfer of the property from Gama Holdings to Gama Foundation, I do not think that transfer could be described as a transfer of the reversionary estate.

[136] In my view, therefore, the case falls to be determined on the assignment and Contracts Privity Act point. I agree with my colleagues that, in the present case, Gama Foundation can properly be described as a person for whose benefit the covenants given by the tenant in the lease have been given, and I can see no reason why the proviso to s 4 of the Contracts (Privity) Act 1982 should apply. Even if this were not the case, I agree with William Young J that, once it was restored to the register, there would be nothing to stop Gama Holdings assigning its right of action to Gama Foundation, or pursuing the claim against the appellant as trustee for Gama Foundation. All of this emphasises the apparent futility of the present appeal.

[137] I would also reserve costs, for the same reasons as given by William Young J.

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