SUPREME COURT OF QUEENSLAND

CITATION:	*Denham Bros Ltd v W Freestone Leasing P/L* [2003] QCA 376
PARTIES:	**DENHAM BROS LIMITED** ACN 009 658 075 (applicant/appellant) **v** **W FREESTONE LEASING PTY LTD** ACN 000 586 970 (respondent/respondent) **W FREESTONE LEASING PTY LTD** ACN 000 586 970 (applicant/respondent) **v** **DENHAM BROS LIMITED** ACN 009 658 075 (respondent/appellant)
FILE NO/S:	Appeal No 9855 of 2002 SC No 4964 of 2002 SC No 6857 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2003
JUDGES:	McMurdo P, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, McPherson JA and Holmes J concurring as to the orders made, McMurdo P dissenting in part
ORDERS:	**1. Appeal dismissed** **2. Appellant to pay respondent's costs of application and appeal from 26 July 2002** **3. Respondent to pay appellant's costs of the application at first instance up to and including 26 July 2002**
CATCHWORDS:	LANDLORD AND TENANT – ASSIGNMENT, SEVERANCE AND UNDERLEASE – ASSIGNMENT AND SEVERANCE OF REVERSION – RIGHTS OR LIABILITIES OF ASSIGNEE – where respondent purchased property leased by appellant – where original lease contained option for lessor to require lessee to purchase – whether option assignable – whether option passed with reversion REAL PROPERTY – GENERAL PRINCIPLES – REGISTRATION – WHAT IS CAPABLE OF

REGISTRATION – whether s 53 *Real Property Act* (Qld) 1861 enables registration of covenant to purchase

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSIDERATION – NECESSITY FOR CONSIDERATION – where deed subsequently entered into between original lessor and respondent assigning option for lessor to require lessee to purchase – whether future interest that could not be assigned without consideration – whether effective assignment

Real Property Act 1861 (Qld), s 53
B & B Constructions v Brian A Cheeseman (1994) 35 NSWLR 227 at 245, considered
Chan v Cresdon Pty Ltd (1989) 168 CLR 242, considered
Coastplace Ltd v Hartley & Anor [1987] QB 948, considered
Consolidated Development Pty Ltd v Holt (1986) 6 NSWLR 607, considered
Cooper v Micklefield Coal & Lime Co Ltd (1912) 107 LT 457, considered
Davenport Central Service Station Ltd v O'Connell [1975] 1 NZLR 755, considered
Devefy Pty Ltd v Mateffy Pearl Nagy Pty Ltd (1993) 113 ALR 225, considered
Esther Investments v Cherrywood Park Pty Ltd [1986] WAR 279, considered
Fels v Knowles (1906) 26 NZLR 604, considered
Frazer v Walker [1967] 1 AC 569, distinguished
Griffith v Pelton [1958] 1 Ch 205, considered
Griffith v Tower Publishing Company Ltd [1897] 1 Ch 21, considered
Kumar v Dunning & Anor [1989] QB 193, considered
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57, considered
London & South Western Railway Co v Gomm (1882) 20 Ch D 562, considered
Mercantile Credits Limited v The Shell Company of Australia Limited (1976) 136 CLR 326, considered
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, considered
C B Peacocke Land Co Ltd & Anor v Hamilton Milk Producers Co. Ltd [1963] NZLR 576, considered
Price v Murray [1970] VR 782, considered
Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd & Ors [1976] 1 NSWLR 5, considered
Shepherd v Federal Commissioner of Taxation (1965) 113 CLR 385, considered
Showa Shoji Australia Ltd v Oceanic Life Ld (1994) 34 NSWLR 548, considered
Tolhurst v Associated Portland Cement Manufacturers Ltd [1903] AC 414, considered
Woodall v Clifton [1905] 2 Ch 257, considered

COUNSEL: R I M Lilley, with P R Franco, for the appellant
B D O'Donnell QC for the respondent

SOLICITORS: Deacons for the appellant
McCullough Robertson for the respondent

[1] **McMURDO P:** I have had great assistance from the reasons for judgment of both McPherson JA and Holmes J in which the relevant facts and issues are comprehensively set out. I will repeat only those necessary to explain my reasons for also dismissing the appeal.

[2] The lease of the Clermont Plaza Shopping Centre, originally between SGIO as lessor and the appellant as lessee, was for an initial term of 15 years commencing on 22 October 1982; it was registered in April 1983. It contained options for the lessee to renew the lease for two further five year periods. In 1991, SGIO sold the land and improvements to the respondent. Clause 33 of the lease provided that if the lessee did not exercise its options to renew the 15 year lease by successive five year periods, then the lessee was required to purchase the premises at the option of the lessor on terms and conditions stipulated elsewhere in the lease. The appellant exercised the first but not the second option to renew. On 23 April 2002 the respondent gave notice under cl 33 purporting to exercise its option to require the appellant to purchase the premises. On 18 July 2002, SGIO[1] entered into a deed with the respondent which included the assignment of the cl 33 option. On 26 July 2002, the respondent notified the appellant of this assignment and of its exercise of the cl 33 option.

[3] Both parties applied[2] for declarations as to their positions. The learned primary judge declared that the respondent was entitled, as against the appellant, to exercise the option contained in cl 33 of the registered lease and that it validly exercised that option by notice in writing to the appellant dated 26 July 2002.

[4] I agree with Holmes J's reasons for concluding that the learned primary judge correctly held that the benefit of the cl 33 option was assignable by the lessor, SGIO, to the respondent.[3]

[5] I have however reached a different conclusion from her Honour as to whether the benefit of the cl 33 option passed with the reversion when the freehold of the leased land was transferred from SGIO to the respondent.

[6] In *Woodall v Clifton*[4] the English Court of Appeal held that, in a 99 year lease where the lessor had assigned the reversion and the lessee his interest in the lease, an option to purchase was not assigned with a mere assignment of the lease:

> "A contract in a lease giving an option of purchase might be good, … as binding the land in the hands of the heirs or assigns, provided it

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1 Now Suncorp.
2 The appellant on 31 May 2002; the respondent on 26 July 2002.
3 See Holmes J's reasons [36]-[60].
4 [1905] 2 Ch 257.

> did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease."[5]

The court found that this option to purchase was outside the relationship of landlord and tenant and did not run with the land; to rule otherwise would cause undesirable results including as to perpetuities.[6]

[7] That is not to say an option to purchase cannot be assigned with the reversion. In *Griffith v Pelton*[7] the lessee of premises who had an option to purchase under the 21 year lease[8] assigned the lease for the residue of the term of the lease in a document which contained no reference to the option. The court found that because of the construction of the lease, which defined lessee as including the lessee's assigns, the original lessor and lessee must be taken to have agreed that the option should be exercisable by the original lessee or any assignee of the term to whom she might assign. The court distinguished *Woodall v Clifton* where the lease was for a term of 99 years and the original lessor had assigned the reversion and the lessee had also assigned the lease; the period during which the option was exercisable there exceeded the limit imposed by the rule against perpetuities[9] and the option to purchase was void for remoteness; *Woodall v Clifton* was not authority for the proposition that if there had been no assignment of the reversion, the assignee of the term of the lease could not as a matter of contract have enforced the option against the original lessor or his personal representative; nor was it authority for the proposition that the lessee could not enforce the option because he was the assignee of the term. The court held in *Griffith v Pelton* that the original lessee was competent to assign the benefit of the option to the assignee so as to make it exercisable and enforceable by the assignee against the lessor or his personal representative.[10] The definition of lessee in the lease included the lessee's assigns and this meant that the assignment of the term, even without any reference to the benefit of the option, also assigned the benefit of the option.[11]

[8] *Griffith v Pelton* was followed in *Price v Murray*[12] where the five year lease did not expand the definition of lessee to include assigns but the option to purchase contained in the lease was nevertheless held to be both assignable and validly assigned with the assignment of the term of the lease.

[9] Similarly, in *Davenport Central Service Station Ltd v O'Connell*[13] an option to purchase the fee simple contained in the five year lease with an option for renewal for a further five years, although collateral to the relationship of landlord and tenant and not running with the land, was held to be assignable. The definition in that lease of lessor and lessee did not originally refer to assigns, but by means of deeds between the original lessor and lessee they agreed that the original lessee had assigned all its estate and interest with the lessor's consent to the new lessee and that

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5 At 278, per Romer LJ.

6 See *London and South Western Railway Co v Gomm* (1882) 20 ChD 562 which provides that an option to purchase beyond 21 years offends the rule against perpetuities.

7 [1958] 1 Ch 205.

8 A term which did not offend the rule against perpetuities: see *London and South Western Railway Co v Gomm*.

9 See fn 6.

10 At 227.

11 At 227-228.

12 [1970] VR 782.

13 [1975] 1 NZLR 755.

the original lease was varied by adding a proviso enabling the original lessee to transfer or assign the lease with the consent in writing of the lessor. Cooke J (as he then was) determined that in those circumstances the option to purchase was both assignable,[14] and was assigned by the deed of assignment and deed of variation.[15]

[10] Those cases all concerned the lessee's assignment of a lease containing a lessee's option to purchase the freehold. This case concerns the assignment of the reversion of premises subject to a lease containing an option of the type in cl 33, apparently more for the benefit of the lessor than the lessee and, whilst it is not suggested was penal in nature, it appears to have been intended to encourage the appellant to renew the lease; nevertheless, if the option was assigned with the reversion, the assignee would receive both the burden of the lessee's right of renewal together with the option to compel the non-renewing lessee to purchase.

[11] It is common ground here that the cl 33 option did not touch and concern or run with the land. The principles set out in *Griffith v Pelton* and the cases following it would seem to be equally applicable to this case.

[12] "Lessor" in cl 33 of the lease takes its meaning from cl 37 of the lease:

> "… except where the construction would be inconsistent with the context the words 'the Lessor' … shall … be construed to mean and include the said STATE GOVERNMENT INSURANCE OFFICE (QUEENSLAND) its successors and assigns. …"

By contrast, "lessee" in cl 37 is defined as: "DENHAM BROS. LIMITED and its successors and *permitted* assigns" (my emphasis). The lease did not require the appellant's consent for SGIO to assign the term.

[13] Clause 14B of the lease in its second proviso makes clear that in the event of the appellant subleasing, it is not released from its liability to perform its obligations to the lessor, including "to purchase the demised premises from the Lessor or the owner for the time being in accordance with the provisions herein contained.". This must refer to the lessee's obligations under the option in cl 33 of the lease.

[14] The terms of the original lease between SGIO and the appellant clearly indicated that each intended that if SGIO sold the premises or assigned the term of the lease, the appellant as lessee remained obliged to purchase the premises from the assignee in the event it did not renew the lease for the two successive five year periods. Unfortunately, the contract of sale of the premises from SGIO to the respondent has not been found. It is not suggested there is anything sinister in this; nor is it suggested that the contract referred to the option contained in cl 33; it can be inferred that, as in *Griffith v Pelton*, the contract was silent on the matter. The transfer signed on 14 February 1991, which is in evidence, simply indicates that the estate or interest transferred from SGIO to the respondent was the fee simple with the registered lease.

[15] In the absence of any proven contrary intention in the contract of sale between SGIO and the respondent for the sale of the land, I would be prepared to hold that, because of the terms of the lease, as in *Griffith v Pelton*, the benefit of the cl 33 option passed with the reversion, notwithstanding the omission of any reference to

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14 Following *Griffith v Pelton*, 757.

15 At 758.

the assignment of that clause in the contract of sale, but for the concern raised by McPherson JA in his reasons that the option was exercisable for a period of 25 years and, on its face, appears to breach the rule against perpetuities.[16]

[16] This leads to the respondent's second contention, (raised for the first time on appeal), that, at the time the lease was signed and registered, s 53 *Real Property Act* 1861 (Qld) overcame all concerns raised by the rule against perpetuities in *Woodall v Clifton* and made the option contained in cl 33 of the registered lease binding and indefeasible and the respondent was entitled to rely upon it. I agree with that contention and with McPherson JA's analysis of s 53 *Real Property Act* 1861 (Qld).[17]

[17] It follows that, in my view, the learned primary judge was right in concluding that here the assignment of the reversion to the respondent also assigned the benefit of the option in cl 33 of the lease[18] despite the difficulties with the rule against perpetuities because of the effect of s 53 *Real Property Act* 1861 (Qld).

[18] Even if I am wrong in this conclusion, I agree in any case with Holmes J's reasons for concluding that the cl 33 option was then assigned by the deed of 18 July 2002[19] of which the respondent gave notice to the appellant on 26 July 2002 and with McPherson JA's explanation as to the effect of s 210(3) *Property Law Act* 1974 on the rule against perpetuities.[20] The declarations were rightly made.

[19] Although the correctness of her Honour's conclusion that the sale of the premises in 1991 assigned the cl 33 option in my view turns on s 53 *Real Property Act* 1861 (Qld), which was not argued at first instance, I can see no reason to interfere with the costs order below.

[20] I would dismiss the appeal with costs to be assessed.

[21] **McPHERSON JA:** Except in relation to s 53 of the *Real Property Act* 1861, I agree with what Holmes J has written, which I have had the great advantage of reading. Her Honour's reasons may make it unnecessary to consider another issue; but since it emerged from the authorities cited on appeal, it is desirable to refer to it if only briefly. It concerns the impact, if any, of the rule against perpetuities on the validity of the covenant to purchase in cl 33 of the lease. Morris & Leach, in *The Rule against Perpetuities*, 2nd ed, at 220, explain it as follows:

> "An option to purchase land is specifically enforceable. This gives the option holder an equitable interest in the land; this interest is contingent upon his election to exercise the option. Contingent interests in land are void unless they must vest (if at all) within the perpetuity period. Therefore an option to purchase which may be exercised beyond the period is void to the extent that it creates an interest in land."

In *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, 76, Gibbs J accepted that a conditional contract to sell (which, following *Griffith v Pelton* [1958] Ch 205,

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16 See fn 6.
17 McPherson JA's reasons, [25] to [28].
18 Primary judge's reasons for judgment, [36].
19 Holmes J's reasons, [92]-[96].
20 McPherson JA's reasons, [30].

was the way in which his Honour construed an option to purchase) land would create a contingent equitable interest in the land. By parity of reasoning, the lessor's option in cl 33 of the lease to compel the lessee to purchase the reversion would also create such an interest in the fee simple reversion.

[22] In relation to the rule against perpetuities, the leading authority in this context is *London & South Western Railway Co v Gomm* (1882) 20 Ch D 562, which involved an option to purchase contained in a deed for reconveyance. The rule against perpetuities as laid down there was applied by the Court of Appeal in *Woodall v Clifton* [1905] 2 Ch 257, 278, 279, to avoid an option to purchase the freehold reversion on a lease for 99 years, the option being exercisable at any time during the term of the lease and hence potentially outside the applicable perpetuity period of 21 years. There has been some difference among the commentators about the ratio of the decision; but I read the Court of Appeal as having decided that the result in that case would have been different if an option to purchase the reversion had been a covenant that "touched and concerned" the land under the Grantees of Reversions Act 1540; 32 Hen 8, c 34, now s 117 of the *Property Law Act 1974* (Qld). However, differing in that respect from Warrington J at first instance ([1905] 2 Ch 257, 266), the Court of Appeal in *Woodall v Clifton* held it was not such a covenant as ran with the reversion and so fell within the scope of the perpetuities rule.

[23] We are concerned here not with the assignment of a lessee's option to acquire the reversion but with a lessor's option contained in a covenant by the lessee to purchase the reversion if required to do so by the lessor. It seems clear, however, that, like a lessee's option to purchase, a lessor's option of that kind does not "touch and concern" or relate to the land so as to pass with it on assignment of the reversion. That was the view expressed by Giles J in *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548, 556, 557, in relation to a "put" option for the sale of land. In that instance the particular covenant was directed to creating a new lease between the original lessor and lessee if the assignee from that lessee did not take it up; but it makes no difference of principle in the present case. In effect, a provision like that in cl 33 confers on the lessor an option to enforce purchase of the reversion by the lessee. There is no good reason why it should be regarded as touching and concerning the land, or as running with it, any more than in the more common case of an option or right to purchase the land conferred on the lessee.

[24] Here it was the reversion that was assigned and not the lease; but it remains true to say that the appellant Denham Bros as the original lessee and Freestone as the assignee of the reversion are mutually bound not by privity of contract but only by privity of estate. Consequently, unless the benefit of the covenant to purchase runs with the land, it would not, without more, have passed to the respondent Freestone automatically on the assignment to it of the reversion. The benefit of the covenant to purchase is nevertheless a chose in action which, like any other chose, is, as was recognised in *Griffith v Pelton* [1958] Ch 205, capable of being expressly assigned. That was what happened here when on 18 July 2002 the original lessor SGIO by Deed of that date assigned to Freestone the benefit of the covenant by the lessee Denham Bros contained in cl 33 of the lease.

[25] Mr O'Donnell QC for Freestone submitted on appeal that *Griffith v Pelton*, or various observations of Lord Jenkins in it, concluded the matter in favour of his client despite the decision in *Woodall v Clifton*. But in *Griffith v Pelton*, the lease,

and correspondingly the duration of the option to purchase, was for a term of 21 years and therefore did not offend the rule against perpetuities. Here the lease was for a term of 15 years with two consecutive options for renewal each of five years, one of which had already been exercised on 18 October 1996, adding up in all to a potential total of 25 years within which the covenant to purchase might have been exercised by the original lessor SGIO or its assignee Freestone. As such, it exceeded the common law perpetuity period of 21 years and so falls foul of the rule in *London & South Western Railway Co v Gomm* unless there is something else to save it from this fate.

[26] As to this, Mr O'Donnell QC relied on s 53 of the *Real Property Act 1861*, which was still in force at the time when the lease was executed and registered and also when it commenced on 22 October 1982. Section 53 provided so far as material:

> "In any such lease a right to purchase the fee simple of the land thereby demised may be granted to the lessee by a stipulation to that effect expressed in such lease or *a covenant to purchase the fee simple of the said land may be entered into by the lessee and in such case the true amount of the purchase-money to be paid the period within which such right may be exercised or such covenant is to be performed and such other particulars as may be considered necessary for explaining the terms of such right or covenant shall be stated on such lease* and in case the lessee shall pay the purchase-money stipulated and otherwise observe his covenants expressed and implied in such lease the lessor shall be bound to execute a memorandum of transfer to such lessee of the said land and the fee simple thereof and to perform all necessary acts by this Act directed to be done for the purpose of transferring to a purchaser any land and the fee simple thereof."

In speaking of "any such lease", it is clear that the opening words of s 53 refer to leases of the kind mentioned in the preceding s 52, all of which are leases in registrable form.

[27] I have italicised part of s 53 set out above because it was Freestone's submission on appeal that s 53 is directed not only to what has been described earlier in these reasons as the common case of an option to purchase conferred on a lessee, but also to a covenant by the lessee to purchase of the kind contained in cl 33; or, in other words, a lessor's option to insist on purchase by the lessee of the reversion. In my opinion, this submission is sound. Section 53 was evidently designed to confer a form of statutory enforceability not only on the former, but also the latter, so avoiding the need which existed in 1861 for separate proceedings in equity for specific performance against the lessee. The intention no doubt was that once the lessee established to the satisfaction of the Registrar that the purchase money had been paid and other covenants observed, he should be entitled to registration of a transfer of the fee simple. The similar, but slightly truncated, provision in s 53(3) of the Real Property Act 1900 (NSW) was considered in *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607, 617, where Young J held that one of its effects was to override any problems arising from the rule against perpetuities by conferring on an option to purchase in a registered lease the quality of indefeasibility under the Torrens system. Indefeasibility is not an issue here, but the relevant effect of that decision is that s 53(3) of the New South Wales Act of 1900

prevails over the common law rule against perpetuities applied in *Woodall v Clifton* [1905] 2 Ch 257, 278.

[28] I would not hesitate in the present case to follow the decision in *Consolidated Development Pty Ltd v Holt*. It is, however, submitted on behalf of Denham Bros that there is a critical difference between s 53 of the Queensland *Real Property Act 1861* and s 53(3) of the Act in New South Wales. It is that the former, but not the latter, requires that the true amount of the purchase money to be paid, as well as the period within which the covenant to purchase is to be performed, "shall be stated on the lease"; and that the lease here fails to satisfy these requirements. Holmes J in her reasons considers the omission in this instance to be fatal to reliance on s 53. Not without considerable doubt, I have come to a different conclusion. In my opinion those requirements are intended as directions to the Registrar, whose function it is to see that they are satisfied at the time of registration. His failure then to do so does not have the consequence that the option or covenant to purchase is unregistered or void. As was said in *Frazer v Walker* [1967] 1 AC 569, 579-580:

> "Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry … registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise".

Once an instrument is registered, the interest it creates takes effect according to its nature: cf *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Limited* (1971) 124 CLR 73, 77. In the case of an option to purchase, s 53(3) has the effect in New South Wales of creating under the Torrens system what Young J has described as an "indefeasible equitable interest by way of executory interest arising by springing use when the option is exercised": *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607, 617. There is, I consider, no compelling reason why s 53 of the Queensland Act should not operate on cl 33 to produce a similar result in the present case.

[29] Even, however, if this conclusion is wrong, there is another reason for saying that the covenant to purchase in cl 33 is not affected by the rule against perpetuities. Section 218(a) of the *Property Law Act 1974* provides that the rule is not to apply to an option to acquire an interest reversionary on the term of a lease if it is exercisable only by the lessee or successors in title. The statutory provision would not, however, apply to the lessor's option in the present case both because, when viewed from the standpoint of the lessee, cl 33 does not confer on the lessee an "option" or right, but imposes on the lessee an obligation to acquire the freehold reversion, which is exercisable not by the lessee but at the option of the lessor or its assignee. Section 218(a) therefore does not affect the position at common law.

[30] On the other hand, s 210(3) of the *Property Law Act 1974* has now altered the common law by providing that where a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition is to be treated, as regards any exercise of the right within the perpetuity period, as if it were not subject to the rule against perpetuities; and as void for remoteness only if and so far as the right is not fully exercised within that period. In the present case, the lease having commenced on 22 October 1982, SGIO later executed the Deed of 18 July 2002 assigning to Freestone the benefit of the option or covenant to purchase under cl 33 of the lease;

and on 26 July 2002 Freestone gave notice of its exercise of that option to compel Denham Bros to purchase the reversion. It was at latest then that the equitable interest in the freehold reversion ceased to be contingent and became an absolute interest in favour of Denham Bros. Those events took place within 20 years of the "disposition" conferring the option to enforce purchase of the freehold reversion. According to the "wait and see" principle introduced by s 210 of the Act of 1974, the option or its exercise in this case therefore did not offend the 21 year rule against perpetuities or remoteness of vesting.

[31] Finally, it was submitted on behalf of Denham Bros that the Deed of Assignment executed by SGIO on 18 July 2002 was ineffective to assign to Freestone the former's rights, title and interest under the lease including the lessor's option under cl 33 of the lease. This was said to be so because the subject-matter of the assignment was "future" property not yet acquired, for which, to render the assignment specifically enforceable, a deed is not enough but valuable consideration must be provided: *Re Lind* [1915] 2 Ch 345. *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 24.

[32] There is more than one fatal weakness in the submission. The first is that the subject-matter of the assignment of 18 July 2002 is not the equitable estate or interest in the reversion that would spring up in favour of the lessee Denham Bros when the lessor's option was exercised. It was the covenant contained in cl 33 of the lease that was assigned. The rights created or constituted by that instrument or covenant were contractual as well as proprietary, and contractual rights are legal choses or things in action, which are a form of existing or present property capable since the Judicature Act of being assigned at law under what is now s 199(1) of the *Property Law Act 1974*. That is so whether or not there is or was consideration for the assignment of which notice was given to Denham Bros on 26 July 2002.

[33] Another weakness in the submission is that s 200 of the *Property Law Act* has now made a voluntary assignment of property effective and complete in equity when and as soon as the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee: (a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and (b) provided that anything so remaining to be done is such as may afterwards be done without intervention or assistance from the assignor. The section is in substance a legislative codification of the rule adopted by Griffith CJ in *Anning v Anning* (1907) 4 CLR 1049, 1057. Here the only thing, if any, remaining after the assignment of 18 July 2002 to be done by Freestone to transfer to Denham Bros the equitable title to the freehold reversion in the land was for notice to be given by the lessor or its assignee Freestone of its exercise of the option under cl 33. Such notice was given to Denham Bros on 26 July 2002, and it was something which could be and was done without assistance from SGIO as the original lessor and the assignor of the chose in action under cl 33.

[34] It follows in my opinion that, for these reasons and those given by Holmes J, the declaration made in proceedings S4964/02 that Freestone was entitled to exercise the option in cl 33 of the lease and had validly done so on 26 July 2002, was correct; and that the application by Denham Bros in S6857/02 was rightly dismissed.

[35] The appeal should be dismissed with costs. As regards the costs at first instance, I agree with Holmes J that the costs of the application should be borne by the

respondent Freestone up to and including the date on which the 26 July 2002 notice was given of the Deed of Assignment executed on 18 July 2002. The appellant has succeeded on the substantive issue whether, apart from that Deed, the covenant in cl 33 passed with the earlier assignment of the reversion, with the result that the appeal is not one "with respect to costs only" within the meaning of s 253 of the *Supreme Court Act 1995*.

[36] **HOLMES J:** In 1982 the appellant made an indenture with the State Government Insurance Office (Queensland) ("SGIO") by which they agreed that SGIO would purchase land in Clermont and on it build a shopping centre, and the appellant would lease the land and improvements from SGIO. The appellant also agreed to indemnify SGIO against any loss and to purchase the property in certain circumstances. A later indenture, also entered in 1982, allowed for the expansion of their plans: SGIO agreed to purchase more land and to build a department store on it as part of the shopping centre.

[37] The parties duly entered a lease of the land and improvements. It commenced on 22 October 1982 and was expressed to be for a term of 15 years. Clauses 30A and 30B provided for successive options to renew for five years. Crucially for present purposes, cl 33 of the lease provided as follows:

> "Should the Lessee not exercise its rights of renewal contained in Clauses 30A and 30B hereof THEN immediately upon the expiration of the original term hereby granted or the first option period hereby agreed to be granted whichever the case may be the Lessee shall purchase at the option of the Lessor the demised premises from the Lessor upon the same terms and conditions as is contained in Clause 14A and at the purchase price defined in Clause 31 hereof and in accordance with the terms and provisions hereof."

Clause 37 of the lease declared that, "except where the construction would be inconsistent with the context", "the Lessor" meant and included SGIO, its successors and assigns and "the Lessee" similarly meant and included the appellant and its successors and permitted assigns.

[38] In February 1991, SGIO sold the property to the respondent. Although the contract of sale can no longer be located, a memorandum of transfer was executed and was registered on 15 March 1991. On 24 June 1996, the appellant and respondent executed a deed of variation of the lease. It amended the existing cl 2(d) (dealing with the shopping centre's opening hours) and cl 14A (a covenant against assignment, which enabled the lessor to require the lessee to purchase the premises in the event of its breach, and set the terms and conditions for the purchase).

[39] The appellant exercised the first of its options to renew. The first option period ended on 21 October 2002. If the appellant wished to exercise its further option for renewal, cl 30B of the lease required it to give notice in writing of its desire to do so not later than one year prior to the expiration of the first option period; that is, by 21 October 2001. It did not do so. On 23 April 2002 the respondent's solicitors sent a letter giving notice, pursuant to cl 33, that the respondent exercised its option requiring the appellant to purchase the premises on the terms and conditions contained in cl 14A of the lease and at the purchase price set out in cl 31.

[40] On 31 May 2002 the appellant brought an application for declarations as to cl 33's lack of effect as between it and the respondent. On 18 July 2002 Suncorp Metway Insurance Limited (formerly SGIO) entered a deed with the respondent by which it assigned absolutely to the latter

> "all the rights title and interest of the Lessor under the said Lease including the Lessor's Option under Clause 33 of the said Lease."

On 26 July 2002, the respondent notified the appellant of the assignment and of its exercise of the clause 33 option, and on the same day filed an application for declarations as to the validity of its exercise of the cl 33 option. It was successful; Mullins J, the learned judge at first instance, dismissed the appellant's application and declared that the respondent was entitled to exercise, and had validly exercised, the cl 33 option. Those orders are the subject of this appeal.

The findings at first instance

[41] The findings of Mullins J with which issue was taken on appeal were: that the benefit of the cl 33 option was not personal to SGIO and was capable of being assigned to the respondent; that cl 33 of the lease was to be construed as involving a promise by the appellant to accept an exercise of the option to purchase either by SGIO or its assignee; that the assignment of the reversion carried with it the benefit of the cl 33 option; and that if the assignment of the reversion had not operated to pass the benefit of the cl 33 option, the deed of 18 July 2002 had done so.

The appellant's contention: the benefit of the option was not assignable

[42] It is well settled that an option to purchase freehold given in a lease is a chose in action which may, provided it is not personal to the grantor, be assigned by the grantee[21]. It was not disputed here that the cl 33 option was, similarly, a chose in action; but Mr Lilley, for the appellant, argued that the benefit of the cl 33 option was not capable of assignment because it was personal: the substitution of the respondent for SGIO made a significant difference to the obligation imposed on the appellant[22]. Mullins J had erred both in finding to the contrary, and in declining to have regard to extrinsic evidence (specifically, the indentures) in construing the provision. As to the second, there was, Mr Lilley said, ambiguity as to the meaning of the term "Lessor" in cl 33. It might mean only SGIO; it might mean SGIO and its successors in title. It was necessary to look beyond cl 33 in this regard. It required the lessee at the lessor's option to purchase the premises on the terms and conditions in cl 14A and at the purchase price defined in cl 31. Each of those clauses referred to the definition of "total capital outlay" in cl 1; and that expression was defined to include, among other things, the monies "paid by the Lessor in the acquisition of the lands hereinbefore described and the construction and erection thereon of the works and extensions as respectively defined in the Indentures".

[43] If "Lessor" in cl 1 were a reference to both SGIO and the respondent as its assignee, the purchase price to be paid by the appellant would be affected, because the amount the respondent had paid to acquire its interest in the premises would have to be entered into the equation. That would be alteration after the event of the appellant's obligations under cl 33. Similarly, cl 1(c) included in "total capital outlay" amounts outlaid by the lessor. Again, the difficulty arose as to the possible

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21 *Griffith v Pelton* [1958] Ch 205 at 225

22 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668.

extension of those amounts to include monies expended by the respondent as well as SGIO. At the very least, Mr Lilley said, there was ambiguity as to what was meant by "Lessor" in any given clause of the lease.

[44] Even if there were no ambiguity, Mr Lilley argued, the surrounding circumstances had in other cases[23] been considered to establish whether the position of an obligor was liable to be prejudiced by an assignment; and were, in any event, appropriately examined in order to determine the context in which the lease agreement was entered. He referred to the following comment of Mahoney JA in *B & B Constructions v Brian A Cheeseman*[24]:

> "The Court is not confined to the examination of the text of the document. It is entitled to know, by extrinsic evidence or otherwise, what was the context in which the document was executed and the problem or problems which were to be solved by it."

Ipp AJA quoted that comment with approval in *Brambles Holdings Ltd v Bathurst City Council*.[25]

[45] Finally in this regard, Mr Lilley argued that the lease did not embody the entire agreement between the parties, because the indentures continued to operate in conjunction with the lease. They were relevant to determining what amounted to "total capital outlay" under the lease; and they created obligations in the appellant to indemnify SGIO against any loss connected with it, and to purchase the land if it was in default under the indentures, notwithstanding anything to the contrary in the lease. Accordingly, they were part of one transaction with the lease and were to be read with it.

[46] Once recourse was had to the indentures, Mr Lilley submitted, it was apparent that: they were entered between SGIO and the appellant, and did not extend to assigns of SGIO; that SGIO had purchased the land and built the centre at the appellant's request and had operated as financier for the development; and that SGIO was concerned to ensure that it recouped its capital outlay. The cl 33 option was one of a number of means which enabled it to do that. Others were an option to purchase in the indenture itself, triggered by default under it; the option to purchase contained in cl 14A of the lease, triggered by assignment of it; an indemnity, in cl 13 of the indenture, triggered by default under the indentures or the leases; and an obligation created in the appellant, by cl 2 of the indentures, to pay interest on monies expended prior to the lease's commencement. Those provisions were personal to SGIO, as was the cl 33 option.

[47] Also relied on by Mr Lilley was the fact that the lease provided that a certificate from the "lessor" as to the amount of the total outlay was to be "conclusive evidence" and "final and binding on the Lessee". That suggested, he said, a particular relationship of trust reposed in SGIO, also evinced by a power contained in cl 7 of the indenture, enabling SGIO to spend any additional monies in its unfettered discretion.

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23 *Griffith v Tower Publishing Company Ltd* [1897] 1 Ch 21 at 24; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 424; *Cooper v Micklefield Coal & Lime Co Ltd* (1912) 107 LT 457.

24 (1994) 35 NSWLR 227 at 245.

25 (2001) 53 NSWLR 153 at 192.

[48] And, importantly to the question of prejudice, Mr Lilley raised this prospect, which he said arose if the cl 33 option were assignable: that the appellant would find itself liable, not only to indemnify SGIO under the indenture against any loss made on the sale, but at the same time to buy the centre from the respondent for at least $1,425,000. That was a clear prejudice to the appellant, which indicated against the assignability of the cl 33 option.

Was there ambiguity?

[49] Mullins J was, with respect, correct in concluding that questions of ambiguity did not arise. By virtue of cl 37, "the Lessor" is to mean SGIO and its successors and assigns, except where it is inconsistent with the context. There is nothing in the context of cl 33 which would conflict with the notion of "Lessor" including assigns. When one comes to that part of cl 1 which deals with "total capital outlay" the reference to "Lessor" is quite clearly to SGIO alone. It speaks of sums paid by it "in the acquisition of the lands … and the construction and erection thereon of the works and extensions as respectively defined in the indentures". In the instance of cl 33, the context does not indicate against construing 'Lessor' as extending to assigns; in cl 1 it does. That does not mean that in either case there is ambiguity. There is simply a different meaning ascribed to the term in the two different clauses.

Was evidence of the indentures' content otherwise admissible?

[50] As to the proposition that extrinsic evidence should be considered, ambiguity or no, I do not think that Mahoney JA's dalliance with a more flexible approach in *B & B Constructions* provides a solid footing for Mr Lilley's submission. True, Ipp AJA in the *Brambles Holdings* case said that there was "much to be said for this approach"; but he added that there was in that case no need to rely on what he acknowledged would be an "extension of the established rule". That established rule was set out by Heydon JA in his judgment in the same case, citing *Codelfa Constructions Pty Ltd v State Rail Authority of NSW*[26]: "pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous".[27] The early twentieth century English cases[28] cited as exemplifying further inquiry hardly bear out an exception, arising on allegation of prejudice, to that rule.

Do the indentures and the lease form a single agreement?

[51] The present case has a good deal in common in terms of its factual background with *Chan v Cresdon Pty Ltd*[29], referred to by Mullins J at first instance, in which the parties had executed an agreement for lease to which was annexed a draft form of lease. The court declined to construe the lease as one with the agreement, although the lease had been entered into pursuant to the agreement. In the absence of any ambiguity in the lease there was no warrant for looking to the provisions of the agreement for the purpose of construing the lease.[30]

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26 (1982) 149 CLR 337 at 347-352.

27 (2001) 53 NSWLR 153 at 163.

28 *Griffith v Tower Publishing Company Ltd* [1897] 1 Ch 21 at 24; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 424; *Cooper v Micklefield Coal & Lime Co Ltd* (1912) 107 LT 457.

29 (1989) 168 CLR 242.

30 (1989) 168 CLR 242 at 247.

[52] At the highest for the appellant, cl 1 of the lease can be read as incorporating by reference the terms of the indentures to the extent that they are required to determine "total capital outlay". That does not make the indentures at large part of the agreement constituting the lease. Nor does the fact that the indentures continue to operate contemporaneously with the lease make them one with it. There is, in my view, no basis for the admission of evidence of the content of the indentures other than to the extent necessary to determine "total capital outlay". Accordingly, there is no warrant for considering the indemnity clause in the indentures, which is not a term referred to either expressly or by implication in cl 1 of the lease, in order to determine whether the covenant in cl 33 of the lease is personal.

What of assignability if the indentures are taken into account?

[53] Even if that were not so, the fundamental question remains, what was the intention of the parties as to assignability of the benefit of the cl 33 option. The statement in the judgment of Collins MR in *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, relied on by Mr Lilley, bears setting out:

> "The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit would seem in principle and common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it"[31] (underlining added).

[54] The issue, as may be seen from this passage, is, not whether the substitution of an assignee will operate adversely to the person obliged, because of the particular skills of, or the relationship of confidence he has with, the original contracting party, but whether he will, without his consent, be made worse off by assignment. Mr Lilley was able to demonstrate that in certain circumstances the assignment to the respondent of the benefit of the cl 33 option might impose on the appellant a greater financial burden because of its liability to indemnify SGIO as well as pay the purchase price to the respondent; and there was some reason to infer from the certification provision a degree of faith on the appellant's part, in SGIO's integrity. But if the latter amounted to personal confidence underlying the contract of such a degree as to preclude assignment, there is no reason to confine its effect to the cl 33 option. It should follow that none of the obligations and benefits under the lease were assignable; an improbable result. Nor is the possibility of a greater burden imposed on the respondent conclusive of the obligation's being owed to SGIO and none other. The question is one of the "true meaning and effect of the contract".[32]

[55] It is of some significance that the dealings between the parties here concerned commercial property, not the provision of some personal skill, as in an author-publisher contract. In *C B Peacocke Land Co Ltd & Anor v Hamilton Milk Producers Co. Ltd*,[33] it was argued that a milk supply contract created obligations on the part of the supplier so personal in nature that the parties could not have intended the contract to be assignable without consent. But by virtue of the fact that the agreement for sale of the milk was expressed to be made between the supplying farmer and his "executors, administrators and assigns" on the one hand and the milk

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31 [1902] 2 KB 660 at 668.

32 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 417.

33 [1963] NZLR 576.

supply association "and its successors and assigns" on the other, the court held the parties had expressly provided for assignment:

> "Doubtless, there are what are loosely called 'personal' contracts which are not assignable either at law or in equity. But those are contracts where the obligations are so obviously personal in character that it must be concluded that the common intention of the parties was that the obligations could be discharged only by the specific individuals between whom the contract was made…. We do not need to decide that there may not be particular contracts where the obligations are so personal in character that, notwithstanding the use of the word 'assigns' in the definition of the parties, the Court would say that, nevertheless, it was not intended that a party was bound to accept performance by an assignee of the other. But such cases must, if they exist at all, be rare, and certainly they do not include that with which we are concerned here, for this contract is in essence a commercial contract for the supply of a commodity and not an agreement for the rendering of services."[34]

[56] And, taking matters a little further in respect of the parties' capacity to agree on assignability, notwithstanding the personal quality of services to be provided, the Full Court of the Federal Court in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* set out some general propositions, including that:

> "[t]he benefits provided under a contract of personal services, which would otherwise not be assignable, may be assigned if (and to the extent to which) upon its proper construction the contract expressly or impliedly contemplates such an assignment." [35]

[57] There seems no reason to suppose that the situation should be otherwise where the third party affected by the assignment relies, not on any personal skill required by the contract, but on its confidence in the original contractor, or the greater burden on it should there be a change in the identity of the person to whom its obligation must be rendered.

[58] The learned authors of *Equity: Doctrines and Remedies* make a similar point:

> "a contract may in terms make provision for the assignment of benefits under it, or such a provision may be implied; where the contract defines a party by reference to that party and his assigns, the contract may be held so to provide. If so, then the benefit of the contract may be assigned, even if it would otherwise be 'too personal'".[36]

It was open to the respondent to accept the prospect of assignment of the cl 33 option, notwithstanding the possibility of prejudice to it. The wider meaning given to "Lessor" which, as I have concluded, was applicable in cl 33, amounts to an express contemplation of assignment.

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34 [1963] NZLR 576 at 581-582.

35 (1993) 113 ALR 225 at 235.

36 Meagher, Gummow & Lehane 2002 at p.274.

[59] And as counsel for the respondent, Mr O'Donnell QC, pointed out, a compelling factor against the proposition that the cl 33 option was intended to be personal and non-assignable appears in the form of cl 14B of the lease, the second proviso to which is to the effect that no sub-letting or licence will release the lessee from its liability to pay the rent and to perform the other covenants

> "including in particular the obligations of the Lessee to purchase the demised premises from the Lessor or the owner for the time being in accordance with the provisions herein contained."(underlining added).

[60] Mullins J was correct in holding that the benefit of the cl 33 option was not personal to SGIO, and hence was assignable. That leads to the next question: whether the conclusion that it was in fact assigned was also correct.

Did the benefit of the cl 33 option pass with the reversion?

[61] Until 1540 and the passing of the *Grantees of Reversions Act*[37], neither the benefit nor the burden of express covenants in a lease passed to the lessor's assignees. That was to be contrasted with the common law position in relation to assignment by the lessee; in that case the benefit of covenants touching and concerning the land did run with it for the benefit of an assignee. The reason for the difference is said by some commentators to be that "in the case of a reversion there is no corporeal thing to which the covenant can be regarded as annexed".[38]

[62] The *Grantees of Reversions Act* gave assignees of the reversion the same benefits as heirs of the lessor.[39] Its modern and local incarnation is to be found in ss 117 and 118 of the *Property Law Act,* which respectively preserve the benefit of and pass the burden of covenants in the lease "touching and concerning the land" so that they run with the reversionary estate. The position of the transferee of land under s 117 of the *Property Law Act* was summarised by McPherson JA in *Simmons v Lee*[40]:

> "The effect of assigning the freehold or fee simple reversion on a lease is, of course, that the lessee remains bound to the assignor by privity of contract but becomes liable to the assignee by privity of estate. The assignee becomes entitled to enforce in his favour the benefit of the lessee's covenants in the lease, provided that they 'touch and concern' the land."

[63] At first instance counsel for the respondent conceded that the option in cl 33 of the lease was not a covenant touching and concerning the land, so that s 117 of the *Property Law Act* 1974 had no application.

The respondent's Griffith v Pelton argument

[64] The respondent argued, however, here and at first instance relying on the authority of *Griffith v Pelton*[41], that the benefit of cl 33 passed with the assignment of the reversion to the respondent. It contended that that case showed that parties to a

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37 32 Hen. 8, c .34.

38 Cheshire & Burn's, *Modern Law of Real Property*, 16th Ed, p 481; see also P Butt, *Land Law*, 4th Ed, p 328.

39 *In re King,* d*ecd* [1963] Ch 459.

40 [1998] 2 Qd R 671.

41 [1958] Ch 205.

lease could alter the usual outcome that the benefit of covenants would not pass with the reversion, by agreeing that the benefit of a covenant could and would be assigned by assignment of the reversion, notwithstanding that the covenant did not touch or concern the land; and that was what had occurred in the present case.

[65] Mullins J accepted the *Griffith v Pelton* argument. She distinguished the earlier decision in *Woodall v Clifton*[42] (which is authority for the proposition that an option to purchase does not run with the reversion) on the basis that it concerned whether the lessor's assignee bore the burden of the covenant; not the benefit, as was contended for here. *Griffith* was, the learned judge concluded, authority for reading cl 33 as a promise by the appellant to accept an exercise, either by SGIO or by its assignee, of the option to require the lessee to purchase the land, the assignment of the reversion carrying with it the benefit of the option.

[66] In *Woodall,* the leases in question gave the lessee and his heirs or assigns options to purchase. An assignee of the original lessee sought to exercise the option against the defendants, who were the assignees of the lessor. Romer LJ, giving the judgment of the Court of Appeal, observed that it was possible for a contract in a lease to give an option of purchase binding the land in the hands of the heirs or assigns, subject to the rule against perpetuities; but there was nothing of that sort in the case before the court. The covenant did not concern the tenancy or its terms; rather it was directed at creating in the future the relationship of vendor and purchaser of the reversion as between the owner and tenant. It was not a covenant touching or affecting the land so as to achieve statutory protection.

[67] In *Griffith v Pelton,* the lease contained a proviso giving the 'lessee", an expression which included, subject to context, her "executors, administrators and assigns", an option to purchase. The lessee assigned the property comprised in and demised by the lease to the plaintiff by a document which did not refer to the option, but subsequently sought by deed expressly to assign the benefit of the option to the plaintiff. The Court of Appeal accepted as "well settled" the principle that "neither the benefit nor the burden (as the case may be) of a lessor's covenant runs with the land unless it touches or concerns the thing demised"[43]; nevertheless it held that the executrix of the original lessor was bound by the option, the benefit of which had been assigned to the plaintiff. On its construction of the proviso in the original lease, the lessor and lessee were taken to have agreed that the option was exercisable by the lessee or any assignee, and that a mere assignment of the term would operate also as an assignment of the benefit of the option to the assignee of the term. If, on the contrary, the assignment of the lease was not effective to pass the benefit of the option, the subsequent assignment by deed was.

[68] Mr O'Donnell, for the respondent, contended that *Griffith v Pelton,* though it concerned assignment of the term of the lease, had equal application to assignment of the reversion. He argued that the extended meaning of the term "Lessor" given by cl 37 indicated that the benefit of the cl 33 option was available not only to SGIO but also to its assigns; and that the nature of the long term registered lease was in itself an indication that the lessee's covenants would continue to operate notwithstanding change in ownership of the land. Clause 33 was to be construed as having the effect that assignment of the reversion carried with it the benefit of the lessee's covenant contained in it. Thus, the assignee of the reversion would receive

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42 [1905] 2 Ch 257.

43 [1958] Ch 205 at 217.

not only the burden of the right of renewal available to the lessee but also the benefit of the option to compel purchase which was associated with it.

[69] Mr O'Donnell pointed to three cases in which *Griffith v Pelton* had been followed as to assignments of the term of a lease effecting assignment of an option to purchase conferred by the lease on the lessee. In *Price v Murray*[44], the lease in question did not give the term "tenant" an extended definition, unlike "lessee" in the *Griffith v Pelton* lease. Nonetheless, Anderson J took the view that as there was nothing in the lease to indicate that the option to purchase was personal to the lessee, it should be regarded as assignable despite the absence of specific reference to assigns. He concluded that assignment of the tenants' right, title and interest in the agreement to lease transferred "the sum of the rights of [the tenants] in the document", including the option to purchase which it contained. A later express assignment merely put the matter beyond doubt.

[70] *Davenport Central Service Station Ltd v O'Connell & Ors*[45] involved an almost identical set of circumstances, the only significant difference being that the lease in its original form had contained a covenant against assignment, but had been varied so as to permit assignment with consent. Cooke J cited *Griffith v Pelton* for the proposition that an option to purchase the fee simple was assignable unless it was expressly restricted to the original lessee, and adopted the reasoning in *Price v Murray* to conclude that an assignment by the lessee of "all its interest as lessee", on the natural and ordinary meaning of the words, included its interest in the option to purchase contained in the lease.

[71] In *Esther Investments v Cherrywood Park Pty Ltd*[46], differing views were expressed as to the effect of an assignment by which the lessee assigned "all of [its] estate and interest… in the leased premises". Brinsden J took the view that it would not suffice to pass the benefit of an option to purchase, because such an option was independent of, and not an incident to, the relationship of landlord and tenant; but a further component of the assignment by which the lessee assigned "the whole of [its] rights … under the lease for the residue now unexpired of the term" would be effective, because it encompassed the lessee's rights under the written lease, including the benefit of the option. Burt CJ, on the other hand, considered that the benefit of the option was part of the assignor's "interest…in the leased premises". In the event, however, all members of the court decided that there had been no assignment of the option because it had, at the relevant time, ceased to exist.

[72] Mr O'Donnell particularly drew the attention of the court to a fourth case, not involving an option to purchase, *Coastplace Ltd v Hartley & Anor*[47], because in that case *Griffith v Pelton* was applied where the question was whether the benefit of a covenant went with the reversion, not the term. The defendants as sureties had covenanted with the lessors and their successors that the lessees would pay the rents under a lease. The lessors assigned the reversion to the plaintiffs without expressly assigning the benefit of the surety covenant. French J rejected an argument that the surety covenant touched and concerned the land. But he decided that what he identified as the principle in *Griffith v Pelton* applied, and adapted its wording to the case before him to reach this conclusion:

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44 [1970] VR 782.
45 [1975] 1 NZLR 755.
46 [1986] WAR 279.
47 [1987] QB 948.

> "the original parties to the covenant must be taken to have agreed that the covenant of surety should be enforceable by the landlord or by the persons for the time being entitled to the reversion immediately expectant upon the determination of the term; and that the mere transfer of the reversion should operate as an assignment of the benefit of the covenant." [48]

Consequently, the benefit of the covenant passed to the plaintiffs without express assignment.

[73] French J was referred to, but did not in his judgment advert to, an earlier single judge decision from New South Wales, *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd & Ors*[49]. In that case the lease was executed by guarantors who covenanted with the lessor to guarantee the payment of monies and the performance of the lessee's obligations. The expression "the lessor" was defined to mean and include "the lessor, its successors and assigns". The lessor transferred the reversion to the plaintiff, but there was no express assignment of the benefit of the guarantees. The plaintiff argued that no express assignment was necessary, because the definition of "lessor" extended to it, as transferee of the reversion. Thus it was entitled, although not a party to the original lease, to enforce the provisions of the guarantee. Yeldham J distinguished *Griffith v Pelton* firstly, as involving a "very special class of dealing" (the option to purchase); secondly, as involving an express assignment of the lease; thirdly, on the basis that it was decided before clear statements by the House of Lords[50] that a party to a contract though named as a beneficiary could not sue to enforce it; and fourthly, that it had not been regarded by Asprey JA in *International Leasing Corporation (Vic) Ltd v Aiken*[51]as having any bearing in consideration of whether the benefit of a guarantee had been assigned.

[74] *Coastplace v Hartley* was considered in *Kumar v Dunning & Anor*[52]which also concerned whether, in the absence of express assignment, the benefit of a surety covenant could be enforced by the assignee of the reversion. Browne-Wilkinson V-C, with whom the other members of the Court of Appeal agreed, considered that *Coastplace v Hartley* was wrongly decided to this extent: such a covenant was one which touched and concerned the land, and was thus enforceable by an assignee of the reversion. Given that conclusion, it was not necessary for Browne-Wilkinson V-C to consider submissions advanced as to the effect of *Griffith v Pelton*; but he said, rather tersely,

> "Since I have considerable difficulty in understanding what *Griffith v Pelton* did decide I express no view on it."

Should Griffith v Pelton be applied here?

[75] *Griffith v Pelton* does present particular conceptual difficulties. It is one thing to say that the parties to the original lease could reach agreement as to the assignability of the benefit of a particular covenant, but quite another to say that they could also agree to effect the assignment on the happening of a specified event, the assignment of the term. The distinction between the reasoning in *Griffith* and that in the three

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48 [1987] QB 948 at 961.
49 [1976] 1 NSWLR 5.
50 In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 and *Beswick v Beswick* [1968] AC 58.
51 (1966) 85 WN (Pt 1) (NSW) 766.
52 [1989] QB 193.

option to purchase cases relied on by Mr O'Donnell, *Price v Murray*[53], *Davenport Central Service Station Ltd v O'Connell & Ors*[54] and *Esther Investments v Cherrywood Park Pty Ltd*[55], is that in each of those cases the respective judges looked first to the terms of the lease to determine assignability, and then to the terms in which the lease was assigned to determine whether the benefit of the option had passed with it; whereas in *Griffith* the court managed to deduce assignability and assignment from the original lease.

[76] It is difficult indeed to understand how the lease, to which, to state the obvious, the assignee was not a party, could determine the subject matter of what was assigned to him by the lessee. The eminent writer and academic, Professor H. W. R. Wade, in a journal note[56], written very shortly after the decision, identified the problem:

> "It is submitted …that, in the present case, the original lease was relevant only in showing that the lessor had entered into an assignable option. Whether there then was or was not an effective assignment to the plaintiff was surely a matter which the lease itself could not predetermine, except in the negative sense that it could limit the lessor's liability. In default of that, the scope of the assignment can be determined from the assignment alone."

[77] There is of course, no document in this case from which the terms of the assignment of the reversion might be construed, so as to overcome this apparent difficulty in the reasoning in *Griffith*. But in any case it seems unlikely that the logic in the option to purchase cases could apply. Holding that the assignment of rights under a lease includes assignment of rights under an option to purchase contained in the same document is rather a different thing from holding that the transfer of the lessor's interest in the fee simple could somehow incorporate and pass rights under the lease to which it was subject.

[78] I would not be prepared to apply *Griffith v Pelton* as to assignment (as opposed to assignability). There is nothing to show that the transfer of the reversion encompassed any rights under the lease (other than in respect of those covenants running with the land.) The learned judge at first instance was, in my respectful view, in error in concluding that the cl 33 option passed with the reversion to the respondent as transferee.

The respondent's contention: indefeasibility by registration

[79] But Mr O'Donnell had a further argument, not advanced at first instance, based on the operation of s 53 of the *Real Property Act* 1861 on the lease as a registered lease. It overcame, he said, the effect of *Woodall v Clifton*, rendering covenants such as cl 33 binding and indefeasible even where assignees of the reversion, were concerned. Omitting those parts not necessary to his argument, s 53 provides:

> "In any such lease … a covenant to purchase the fee simple of the said land may be entered into by the lessee and in such case the true amount of the purchase-money to be paid the period within which such right may be exercised or such covenant is to be performed and

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53 [1970] VR 782.
54 [1975] 1 NZLR 755.
55 [1986] WAR 279.
56 [1957] CLJ 148.

> such other particulars as may be considered necessary for explaining the terms of such … covenant shall be stated on such lease and in case the lessee shall pay the purchase-money stipulated and otherwise observe his covenants expressed and implied in such lease the lessor shall be bound to execute a memorandum of transfer to such lessee of the said land and the fee simple thereof …".

The reference in s 53 to "any such lease" is a reference to leases identified in the preceding section: leases for a life or lives or any term exceeding three years.[57]

[80] The respondent's contention rested on this statement by Edwards J in the majority judgment in *Fels v Knowles*, approved by the Judicial Committee in *Waimiha Sawmilling Co. Ltd v Waione Timber Co. Ltd*[58] and quoted by Gibbs J in *Mercantile Credits Limited v The Shell Company of Australia Limited*[59]:

> "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the rights registered."

Mr O'Donnell's argument was that these words in s 53, "in any such lease… a covenant to purchase the fee simple of the said land may be entered into by the lessee", amounted to a statutory authorisation to include the lessee's covenant to purchase in a lease to be registered. Once such a covenant was included in the lease as authorised by s 53, it acquired indefeasibility.

[81] Mr O'Donnell pointed to *Mercantile Credits Limited* as containing compelling dicta as to the protection accorded by registration to options to purchase, the first of the interests with which s 53 is concerned. In that case the High Court was considering whether a right of renewal contained in a registered lease obtained priority over a mortgagee's interest by virtue of its registration under the *Real Property Act* 1886 (SA). Section 117 of that Act provided

> "… a right for or covenant by the lessee to purchase the land therein described may be specified in such lease, and shall be binding."

In considering the position of the option to renew Gibbs J adverted to the effect of s 117, describing it as "necessary to make it clear that the protection of the Act extends to a right for or covenant to purchase the land described in a lease". Registration would not, independent of the provision, necessarily confer any priority or indefeasibility upon the covenant giving the right to purchase.

[82] Mr O'Donnell also relied on a reference in the judgment of Barwick CJ in *Mercantile Credits Limited* to his agreement with a line of New Zealand cases deciding

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57 Section 52 of the *Real Property Act* provides: "When any land under the provisions of this Act is intended to be leased for a life or lives or for any term of years exceeding three years the proprietor shall execute a lease in the prescribed form and every such lease shall refer to the description that is given in the grant or certificate of title of the land or shall give such other description as may be necessary to identify such land and shall be attested by a witness."

58 [1926] AC 101 at 106.

59 (1976) 136 CLR 326 at 343.

> "that a memorandum of lease may contain a right of purchase or of renewal and that such rights, having no illegality in their creation, obtain priority and indefeasibility by the registration of the memorandum".[60]

Three of the five cases to which Barwick CJ referred - *Rutu Peehi v Davy*[61], *Fels v Knowles*[62] and *Horne v Horne*[63] concerned options to purchase, and contained statements to the effect that equivalent provisions to s 117 of the South Australian Act and s 53 of the *Real Property Act* rendered a lessee's rights under an option to purchase an integral part of the lease, entitled to the same protection upon registration as the lease itself.

[83] For the appellant, Mr Lilley argued that s 53 was intended for the protection of lessees, not lessors. In contrast to s 117 of the South Australian Act, s 53 does not provide for any such right or covenant to be binding in general terms, but rather binds only the lessor in the event of the lessee's meeting its obligations to transfer the land. There is no equivalent obligation imposed on the lessee to meet its covenant to purchase. The provision does not require it to pay the purchase-money and observe the covenant; rather it provides that if it does those things, the lessor is bound to execute a memorandum of transfer. And Mr Lilley adverted to various statements as to the purpose of s 53 being the protection of the lessee's interest in an option to purchase.[64]

Was registration of the cl 33 option "authorised"?

[84] I think, however, that Mr O'Donnell is right in saying firstly, that those statements are simply the product of options to purchase being far more common than covenants to purchase, and secondly, that the issue for present purposes is, not the specific protection given by the section to complying lessees wishing to purchase, but rather whether it authorises registration of the covenant to purchase. The question is, of what is it that registration is authorised? Section 53 enables the insertion, in a lease to be registered, of a right to purchase or a covenant to purchase. But "in such case", the amount of the purchase-money to be paid, the period within which the right is to be exercised or the covenant is to be performed, and any other particulars necessary to explain the terms of the right or covenant, must be stated.

[85] No such stipulation as to purchase-money, period for performance and other necessary particulars requirement existed in the South Australian provision under consideration in *Mercantile Credits Limited*; nor in s 87 of the *Land Transfer Act* under consideration in *Fels v Knowles*. As Mr O'Donnell noted in his submissions, these requirements seem to be unique to Queensland legislation. They are not met here. "The true amount of the purchase-money to be paid" is not stated on the lease.

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60 (1976) 136 CLR 326 at 341.
61 (1890) 9 NZLR 134.
62 (1906) 26 NZLR 604.
63 (1906) 26 NZLR 1208.
64 Baalman, *The Torrens System in New South Wales* 2nd edn at p263; Whalan *The Torrens System in Australia* at p115; *Fels v Knowles* (1906) 26 NZLR 604.

Clause 33 requires purchase at the purchase price defined in cl 31; cl 31 in turn defines "purchase price" as meaning the greater of the sum of $1,425,000 or the "total capital outlay"; "total capital outlay" is defined in cl 1 to mean the aggregate of certain prescribed amounts, including the amounts paid by the lessor to acquire the lands, the costs of construction work, and other monies paid by the lessor as specified in the indentures. It is, in short, impossible to determine the purchase price from the face of the lease.

[86] It is also questionable whether "the period within which…such covenant is to be performed" can be said to be stated on the lease. Clause 33 requires purchase by the lessee "immediately upon the expiration of the original term …or the first option period….whichever the case may be." Clause 14A, which provides the terms and conditions of the purchase, is of dubious assistance, because while it does set time frames for payment of deposit and settlement, it does so by reference to a "material date" which, as defined, has no application to the circumstances contemplated by cl 33. And it seems to me that there are particulars, not provided in the lease, which would reasonably be considered as "necessary for explaining the terms of … [the] covenant": that it arises only when an option to renew is not exercised, and that it is dependent on the lessor's exercise of its option to require compliance.

[87] Mr O'Donnell said, however, that these were not part of the statutory authorisation, but were rather additional requirements, failure to comply with which would not invalidate the registration of the lease containing the covenant. He argued that the purpose of specifying matters to be stipulated was to ensure that the important terms of the covenant to purchase could be ascertained upon inspection of the instrument on the register. In any event, he said, registration still conferred the benefit of indefeasibility whether it was regular or not, citing for that proposition *Frazer v Walker*[65].

[88] *Frazer v Walker* was concerned with the indefeasibility of an instrument of a type which was registrable under the Act, but was in fact void because the signature upon it of one of the registered proprietors had been forged. The argument referred to in the passage quoted by Mr O'Donnell was that because the document had not been executed and attested as the Act required, it could not validly be registered. Here what is at issue is not authenticity, but whether the covenant in cl 33 met the requirements of s 53 so as to be registrable under the *Real Property Act* at all. Not all covenants in a lease acquire indefeasibility, notwithstanding registration of the principal instrument[66]; and the question then must be whether the right is either part of the leasehold estate itself, or – as is contended here – a right whose registration is authorised by the Act. In this case the covenant to purchase in cl 33 was not in the form prescribed by s 53; and it was not, in consequence "authorised" by that provision. It follows that, like the non- registrable covenant in *Horne v Horne*, it "stands on the basis of a contract unfortified by registration."[67]

The respondent's contention: the appellant consented to assignment by its agreement to variation

[89] Mr O'Donnell argued that the appellant's execution of the deed of variation of the lease in June 1996 amounted to an attornment, resulting in privity of contract

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65 [1967] 1 AC 569.

66 *Mercantile Credits Limited v The Shell Company of Australia Limited* (1976) 136 CLR 326 at 343.

67 (1906) 26 NZLR 1208.

between appellant and respondent. The appellant had accepted the respondent as lessor, and in effect had consented to the assignment to it and acknowledged its entitlement to all its rights contained in the lease, including those in cl 33. *Davenport Central Service Station v O'Connell* was cited for the proposition that the benefit of an option which is restricted to the original lessor may be assigned if the lessee consents.

Did the variation agreement entitle the respondent to the benefit of cl 33?

[90] But the deed of variation in *Davenport Central Service Station v O'Connell* was significantly different. The deed recited the assignment by the original lessee of its interest in the lease to the new lessee and that the parties had agreed to vary the terms of a particular clause. After varying the terms of that clause it added this provision:

> "In all other respects the said lease and all of the terms, covenants and conditions thereof shall remain in full force and effect."

That was an express and unequivocal agreement that the lessee should have the benefit of the covenants in the existing lease, so as to amount to a consent to an assignment. Here the agreement is to vary the terms of the lease by deletion and replacement of specific clauses, and nothing further.

[91] Assuming Mr O'Donnell's characterisation of the variation agreement as an attornment to be correct, it could hardly operate to confer on the respondent benefits not conferred on it by the transfer of the reversion. If the benefit of cl 33 remained vested in SGIO, no amount of acceptance by the appellant could transfer it to the respondent. Nor could SGIO and the respondent simultaneously exercise the rights under it. If no assignment had taken place by the time of variation in 1996 – as I have concluded it had not – the respondent had no entitlement under cl 33 for the appellant to consent to. The variation of the lease cannot avail the respondent.

The appellant's contention: the assignment by deed was not effective

[92] Mr Lilley argued that Mullins J erred in concluding that if the cl 33 option were not assigned by the assignment of the reversion, it was assigned by the deed of 18 July 2002. His argument was this: by July 2002 SGIO was no longer the registered proprietor of the property, and had it required the lessee to purchase it, it could not have conveyed it. Its rights under the cl 33 option were thus conditional on a possible future event, its own re-purchase of the property. Thus the cl 33 option was a future right which it could enjoy only if it reassumed ownership of the property. As such it could only be assigned for valuable consideration: *Norman v Federal Commissioner of Taxation*.[68]

[93] It was held by the High Court in *Norman* that a future interest could not be assigned without consideration. What was involved in *Norman* was an assignment of dividends and interest to which the assignor might become entitled. At the date of the relevant deed, no interest had accrued, and no dividend had been declared. Whether a dividend eventuated depended on the affairs of the relevant companies. The members of the court were agreed that the contemplated dividends might never be declared, and amounted to property not in existence and incapable of being assigned. There was division as to the status of the interest, the accruing of which

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[68] (1963) 109 CLR 9.

depended on whether the loan continued in existence. It might in fact be repaid. The majority concluded that the future interest was "the merest expectancy or possibility having no existence in contemplation of law".[69] Windeyer J, in contrast, took the view that the right was to be paid interest at a future date on the money lent, unless in the meantime the loan was repaid, and was an existing right. But all agreed with Windeyer J's analysis that all that could be given in respect of property not yet in existence was a promise which might or might not in the event be performed; which equity would not, in the absence of consideration, enforce.

Was the cl 33 option merely an expectancy as at July 2002?

[94] But I think Mr Lilley's argument here risks confusion between two different things: the freehold interest in the demised premises, which SGIO no longer possessed, and might or might not be able to regain, and its right under cl 33, which as I have concluded, remained vested in it. The circumstances of the present case seem to me closer to those in *Shepherd v Federal Commissioner of Taxation*[70] than those in *Norman.* In *Shepherd*, the majority of the court held that what had been assigned was a right to royalties rather than royalties themselves. Whether any royalties were paid depended on whether the licensee of the patent involved there ever managed to sell any castors, but the promise was of an existing right; and as Barwick CJ pointed out,

> "That a promise may not be fruitful does not make it incapable of assignment."[71]

Kitto J used the metaphor of tree and fruit, the tree being the right to royalties and the fruit the royalties themselves.

[95] In this case, if SGIO had not previously assigned the benefit of the cl 33 option, it had as at July 2002 an existing right to require the appellant to take steps required of it under cl 33. Whether it could itself complete the transaction would remain to be seen. The right to compel the purchase, in the event that the option to renew was not exercised, was the tree. Whether the fruit, in the form of the purchase itself, could be harvested by SGIO was another matter. But there was an existing right capable of assignment; and there was nothing to prevent its assignment by the deed of July 2002.

[96] It follows that the appeal must fail, because the cl 33 option was assigned to the respondent, and the declarations made by Mullins J as to the respondent's entitlement to exercise the option were properly made. I would dismiss the appeal and award the respondent's costs of it against the appellant.

[97] However there is one respect in which the appellant should have its costs, and the order below, which was that the appellant pay the respondent's costs of its application, should be varied. The respondent could not, on the view I have taken, have succeeded but for the 2002 deed of assignment, of which it gave notice to the appellant on 26 July 2002. The respondent should pay the appellant's costs of the application at first instance up to and including that date.

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69 (1963) 109 CLR 9 at 16.
70 (1965) 113 CLR 385.
71 (1965) 113 CLR 385 at 393.