Let Mortgagees and their Buyers Beware: *Figgins Holdings Pty Ltd* v *SEAA Enterprises Pty Ltd*[*]

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A registered mortgage of Torrens land is in the nature of a charge and does not operate as a transfer of the mortgagor's interest.[1] *However, the consequential provisions enacted in each jurisdiction to accommodate the rights and interests of the parties under the Torrens statutory mortgage are not identical. The recent decision of the High Court of Australia in Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd focuses on a statutory provision which appears only in the Torrens legislation of Victoria and Western Australia.*[2] *Under the relevant provision, a registered mortgagee of Torrens land has, during the currency of the mortgage and subject to a right in the mortgagor for quiet possession until default, the same rights and remedies at law and in equity as the mortgagee vested with legal title would have had or been entitled to have. The provision uses general law terminology in the context of a Torrens statute. The facts before the High Court required judicial interpretation of this obscure provision and resulted in a reversal of the decision of the Victorian Court of Appeal. This paper examines the various opinions expressed by the Court and concludes that the result, although correct in principle, is not necessarily a desirable one for either mortgagees or buyers at mortgagee's sales.*

THE FACTS OF FIGGINS HOLDINGS PTY LTD V SEAA ENTERPRISES PTY LTD

The appellant, Figgins Holdings Pty Ltd (Figgins) was a lessee under a written, unregistered four year lease granted by the registered proprietor in 1988 over two city arcade shops in Melbourne. The lease gave Figgins an option to renew for successive periods of four years. The rental was $63,665 per annum and Figgins was required to pay various outgoings and operating costs and contributions to the arcade in which the shops were located.

In 1989, the registered proprietor sold the property to Lamina Pty Ltd (Lamina). Lamina became the registered proprietor subject to a registered mortgage to the State Bank[3] (the Bank). In September 1990, Lamina

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1 See *Transfer of Land Act 1958* (Vic) s 74(2). This provision reflects the principle of the Torrens system that a registered mortgage is not to operate as a transfer but a charge upon the mortgagor's land. See concluding comments below.

2 See s 81(1) of the *Transfer of Land Act 1958* (Vic) and s 116 of the *Transfer of Land Act 1893–1978* (WA). Neither provision has been the subject of extensive judicial consideration. For example, s 116 of the Western Australian Act was last considered by the High Court in *Connolly* v *Ryan* (1922) 30 CLR 499.

3 The mortgage was originally granted to the State Bank of Victoria. However after January 1 1991 the State Bank ceased to exist and the Commonwealth Bank of Australia became mortgagee as its successor in law: see *Commonwealth Banks Restructuring Act 1990* (Cth) and the *State Bank (Succession of Commonwealth Bank) Act 1990* (Vic).

defaulted[4] under the mortgage. The Bank gave Lamina notice of its default in December 1990 but did not take the matter any further until 1993. In early 1991, Lamina and Figgins agreed on a variation of the 1988 lease to enable Lamina to obtain vacant possession without requiring Figgins to surrender the lease.[5] Subsequently, in February 1991, Lamina and Figgins executed a deed of variation of the lease under which Figgins would remain entitled to possession as lessee but would cease trading, vacate the premises and pay a new rent of $1 per month 'in full satisfaction of the obligation . . . to pay rent outgoings and all payments of every description whatsoever'. The deed of variation also contained an agreement that Figgins would, in given circumstances, deliver a deed of surrender of the lease to Lamina in return for $500,000. Figgins ceased trading, vacated the premises and paid Lamina the agreed new rent in accordance with the deed of variation. Lamina advised the Bank of the revised rental and surrender arrangements and the Bank took no action either to demand that Figgins pay the rent directly to itself or that it be paid at a higher or different rate. In July 1991, Figgins exercised its option to renew the lease for a further term of four years.[6]

In July 1993, the Bank appointed a receiver of the income of the property and after that Figgins paid the sum of $1 per month to the managing agents appointed by the receiver. In October 1993, the Bank brought proceedings in the Victorian Supreme Court against the tenant seeking a declaration that it was not bound by either the lease or the deed of variation.[7] Hayne J held that the Bank was bound by the original lease to Figgins but was not bound by the deed of variation. Pending the outcome of these proceedings, the Bank had exercised its power of sale under s 77 of the *Transfer of Land Act 1958* (Vic) and sold the property to the respondent, SEAA Enterprises Pty Ltd (SEAA) in December 1993. SEAA became registered proprietor in February 1994. At the time of the sale to SEAA, the Bank had not made a claim for the arrears.[8] As a condition of the contract of sale, SEAA had authorised the Bank to take

4 Lamina defaulted under the mortgage by its failure to pay an instalment of land tax.

5 Lamina was part of the Marriner Group of companies which controlled the leased property and various adjacent shops at 171 Collins Street Melbourne. Lamina wished to be in a position to obtain vacant possession of the whole building so that the subject property, together with the other properties it owned in the arcade, might be redeveloped as a casino.

6 It is not entirely clear how many options to renew were granted in the lease executed on 26 October 1987. According to the judgment of Gaudron, Gummow and Callinan JJ this lease granted Figgins 'options to renew for successive periods of four years' and in July 1991, Figgins exercised 'its first option to renew the Lease': see para 4 at pp 385–386 and para 15 at p 388.

7 *Commonwealth Bank of Australia* v *Figgins Holdings Pty Ltd* [1994] 2 VR 505. Hayne J held that pursuant to s 81(1) of the *Transfer of Land Act 1958* (Vic), after default by the mortgagor under the mortgage, the mortgagor had no title sufficient to vary covenants touching and concerning the land and could not, by any agreement with the tenant, cut down the rights otherwise conferred on the mortgagee. The rights accorded to the mortgagee under s 81(1) were rights as if the reversion of the lease automatically vested in the mortgagee. Further, as the bank did not consent to the lease variation, although it knew something about it, it was at liberty to adopt or reject the lease variation and had chosen to reject it.

8 Hayne J made the appropriate order in favour of the Bank on 18 March 1994.

action in the name of SEAA against Figgins for any breach of covenant or non payment of rent or other monies owing to the Bank. The Bank agreed to indemnify SEAA against any judgment, order or costs awarded against the SEAA as a result of such action.

Accordingly, in February 1994, SEAA[9] exercised its rights as landlord under s 21 of the *Retail Tenancies Act 1986* (Vic) seeking an arbitrator's award that Figgins pay arrears of rent at the rate of $5,304 per month owing from 1 February 1991 to 14 February 1994 in the sum of $193,615.71 and arrears of outgoings owing within that period in the sum of $55,814.56.[10] Figgins argued that it had discharged its obligations to pay rent and outgoings under the lease by complying with the deed of variation entered into with the mortgagor (Lamina). The arbitrator determined that Figgins was not liable and SEAA applied for leave to appeal to the Supreme Court. Harper J gave leave to appeal but subsequently dismissed the appeal. SEAA then appealed to the Victorian Court of Appeal. SEAA argued that if the Bank was not bound by the deed of variation, it followed that as successor in title, SEAA enjoyed the same rights as the Bank was therefore entitled to the amount claimed as arrears of rent and outgoings. The Victorian Court of Appeal[11] allowed the appeal. Figgins successfully appealed to the High Court.

THE QUESTION BEFORE THE HIGH COURT

The question before the High Court was whether SEAA, as the newly registered owner who had purchased from the Bank exercising its rights as a statutory Torrens mortgagee, was bound by the intervening deed of variation of the lease even though the Bank itself was not bound by the variation. As noted earlier, the lease was between Figgins, the existing tenant, and Lamina, the landlord and defaulting mortgagor. All five judges allowed the appeal and found that under the relevant Torrens legislation, SEAA, the registered purchaser, was bound by the variation of lease. The court was conscious of the apparent conflict between the statutory rights of the parties under s 74(2) of the *Transfer of Land Act 1958* (Vic) and the extent of the imputed rights of the general law mortgagee granted under s 81(1) of the Act.

Section 81(1) of the Act provides that:

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

9 The Bank was authorised to bring this action and subsequent proceedings in the name of SEAA, in accordance with the special condition in the contract of sale between the Bank and SEAA.

10 SEAA also claimed other contributions and interest as provided in the lease.

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

Section 74(2) of the Act states that a mortgage 'shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged'.

Justice McHugh posed the problem in the following terms:

> The great difficulty of the case arises from the attempt of s 81 to confer on the mortgagee the rights and remedies of a mortgagee at common law when the nature of a Torrens system mortgage is fundamentally different from that of the common law mortgage. That difficulty is increased by the section's failure to define the liabilities of, and consequences for, the mortgagor as the result of conferring these common law rights and remedies on the mortgagee.[12]

Under a general law or common law mortgage which vested the legal estate in the mortgagee by way of conveyance, the mortgagee was entitled to immediate possession of the land and the mortgagor was a tenant at sufferance[13] of the mortgagee unless the mortgagee expressly or impliedly consented to the mortgagor remaining in possession. The mortgagor in this situation would become a tenant at will unless the mortgage also contained a provision under which the mortgagor became lessee of the mortgagee until the time for payment arrived. The effect of such a provision was that the mortgagee had no right to take possession until the mortgagor defaulted under the mortgage.

THE DECISION OF THE COURT OF APPEAL[14]

The Court of Appeal's decision in favour of SEAA was ultimately based on the Court's interpretation and application of s 81(1) of the *Transfer of Land Act 1958* (Vic). The reasons are contained in the judgment of Brooking JA with whom Winneke P and Charles JA agreed. Brooking JA applied the prevailing understanding of s 81(1) regarding the rights to possession to the mortgaged property. Accordingly, since the mortgagee is to be regarded as entitled to the same rights as if it held the legal estate, the legal estate (including a right to possession in the mortgaged land) vests in the mortgagee. However, under s 81(1) the mortgagee's interest is qualified by the mortgagor's concomitant right to quiet enjoyment until default. This reflects the practical reality that the mortgagor generally remains in possession of the mortgaged property. Since the Torrens mortgage does not operate as a transfer of land to the mortgagee, the mortgagor's possession is explained on the basis of an implied lease from the mortgagee for a term which will endure for the duration of the mortgage or until the mortgagor defaults under the mortgage. Further, if the mortgagor has previously leased the mortgaged property to a third party at the time the

[12] See para 65 at p 402.

[13] A tenancy at sufferance arises where the person in possession enters the property lawfully and remains in possession under an assumed right to do so. It terminates when the person entitled to possession, in this case the mortgagee, consents or dissents to the 'tenant's' occupation.

[14] [1998] 2 VR 90.

mortgage is created, as had happened on the given facts, it is the leasehold reversion that the mortgagee re-demises to the mortgagor. Brooking JA explained that the re-demise operates as a concurrent lease carved out of the reversion expectant on the pre-existing lease. This clearly entitled Lamina, as mortgagor in possession under the implied re-demise, to receive rents and profits from Figgins. Lamina could also sue the tenant for unpaid rents had that been necessary.

However, Lamina's entitlements changed as soon as it defaulted under the mortgage in September 1990 because it became 'a tenant at sufferance or a person in a position similar to one'. A major consequential change to the mortgagor's position after its default concerned its power to vary the lease. The defaulting mortgagor no longer had power to vary the lease between itself and its tenant.[15] Thus, Lamina could no longer do what it had then purported to do, namely, accept either a variation of the lease or a surrender of the lease.

Furthermore, after default, Lamina's right to receive rents and profits from the tenant became subject to the mortgagee's election. Brooking JA referred to English case law which established that a mortgagor landlord who occupies land as a tenant at sufferance without a legal right to possession may continue to receive rents which accrue unless and until the mortgagee elects to receive them himself. A mortgagor who continues to receive the rents in this way is not liable to account for them to the mortgagee.[16] In addition, while Lamina could continue to receive rents which accrued due unless and until the mortgagee bank elected to receive the rents itself, it retained the capacity to give its tenant 'a particular discharge of any particular amount of rent' until the mortgagee had exercised its election.[17] If the payments to the mortgagor did not account for the entire instalments due under the original lease, they would be regarded merely as contributions towards the amount falling due under this lease. Thus, when Figgins tendered and Lamina accepted the sum of one dollar on every rent day in accordance with the variation agreement this was no

[15] The Court noted that s 151(1) of *Property Law Act 1958* (Vic) applied to Torrens system leases. The relevant parts of s 151(1) state that '[W]here land is subject to a lease — (a) the conveyance of a reversion in the land expectant on the determination of the lease; ... shall be valid without any attornment of the lessee.' Thus there is no need for an express agreement with the tenant under the existing lease to enable the tenant to become the tenant of the mortgagee.

[16] See [1998] 2VR 90 at 99. Furthermore, in the absence of the mortgagee exercising its election, the defaulting mortgagor could sue the tenant for rent. However, s 81(3) of the *Transfer of Land Act 1958* (Vic) now provides that in the case of a registered mortgage of Torrens land, the defaulting mortgagor could not sue for rent without the written consent of the mortgagee.

[17] The mortgagor had the ability to give such a discharge because s 151(1) of the *Property Law Act 1958* (Vic) which was said to apply to Torrens system leases (but was nevertheless declaratory of the common law) permits the mortgagor landlord to continue to receive rent and the tenant to continue paying rent to the mortgagor landlord until the mortgagee intervenes by giving the tenant notice to pay the rent to the mortgagee. Further, under s 138 of the *Property Law Act 1958* (Vic) a lessee will not be prejudiced by payment of rent to the transferor (lessor) of the reversion before receiving notice from the transferee. The application of ss 138 and 151 to Torrens system land was not questioned by the Court of Appeal or by the High Court (see para 42 at p 395).

more than payment and acceptance of the amount due under the variation agreement.[18] Lamina was not in actual fact receiving the full rent due under the original lease and could not give a good discharge to Figgins in respect of the rent due under that lease.

The Court of Appeal therefore concluded that at the date SEAA became registered proprietor, there had been no effective discharge of the tenant's obligations to make payments which fell due under the original lease. Consequently, the rent reserved under that lease was in arrears and SEAA was entitled to the difference between the amounts that Figgins had paid to Lamina and the sums which would have been payable under the lease before the execution of the deed of variation.[19]

THE DECISION OF THE HIGH COURT

The High Court unanimously allowed the appeal. Gaudron, Gummow and Callinan JJ delivered a joint opinion and McHugh and Kirby JJ each delivered separate opinions. All five members of the High Court concluded that the effect of s 81(1) of the *Transfer of Land Act 1958* (Vic) was spent when SEAA became registered. In the court's opinion it was clear from a literal reading of the section that s 81(1) was no longer relevant once SEAA had registered. The relevant part of the section states that 'a first mortgagee shall, until . . . a transfer upon a sale . . . has been registered . . . have the same rights and remedies at law and in equity as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee . . .'. Furthermore, regardless of the Bank's rights against the mortgagor and its tenant, SEAA's subsequent registered title was not derived from the mortgagee vendor's title but the estate and interest of Lamina as provided under s 77(4) of the *Transfer of Land Act*. It followed that the rights and remedies conferred on a first mortgagee upon the default of a mortgagor under s 81(1) did not extend to a third party purchaser from the mortgagee who became the registered fee simple owner following the mortgagee's sale. It was irrelevant that the Bank was never bound by the lease variation. The mortgagee's rights against Lamina did not affect the obligations between Figgins and Lamina under the lease variation. When SEAA purchased the property, it became the new landlord and the deed of variation regulated the particular rights and liabilities operating between itself and Figgins, the existing tenant. Since Lamina and Figgins had agreed to a new rental in the deed of variation, SEAA, as successor in title to Lamina, was bound to treat the $1 monthly payments received from Figgins as a good discharge in respect of that new rental. Gaudron, Gummow and Callinan JJ concluded in the following terms:

[18] [1998] 2 VR 90, 96.

[19] The definition of rent under s 18(1) of the *Property Law Act 1958* was not confined to rent payments, but included 'a rent service or a rentcharge, or other rent toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land' but did not include mortgage interest. See [1998] 2 VR 90 at 96, 103.

The result is that the rights of SEAA against Figgins do not include the arrears claimed ... Those rights would not have been maintainable by Lamina at the time of the registration of the transfer to SEAA. An attempt by Lamina to assert against Figgins rights measured solely by the Lease in its original form would have involved Lamina in the denial of its own Deed of Variation. SEAA is now in no better position.[20]

WHY SEAA TOOK SUBJECT TO THE DEED OF VARIATION

The High Court clearly proceeded on the basis that the deed of variation was effective as between the original parties to the deed despite Lamina's relationship with the Bank. As noted above, SEAA was in no better position than Lamina regarding the deed of variation. There are two possible reasons as to why the High Court decided that upon registration, SEAA took subject to the deed of variation. On one view, it is arguable that SEAA was entitled only to the varied rental because of the statutory exception to indefeasibility afforded to tenants in possession under s 42(2)(e) of the Victorian *Transfer of Land Act*. The opinion of McHugh J clearly supports this basis. According to McHugh J, since Figgins was a tenant in possession under the terms of s 42(2)(e) of the *Transfer of Land Act*,[21] SEAA, as the new registered proprietor took subject to Figgins' rights under the existing lease. The existing lease at time of purchase, was the lease as amended by the deed of variation. This entitled SEAA to whatever rent was due under the variation and this happened to be $1 per month. Thus, SEAA's interest as registered proprietor was subject to the interest of the tenant in possession in accordance with s 42(2)(e) of the *Transfer of Land Act*.

Another view emerges from the opinions of Kirby J and that of Gaudron, Gummow and Callinan JJ who make no reference to s 42(2)(e) of the *Transfer of Land Act* but rely on the operation of s 141 of the *Property Law Act* under which rental covenants run with the reversionary estate. Gaudron, Gummow and Callinan JJ assessed SEAA's position in the light of s 141 of the *Property Law Act* under which all rents reserved in the lease and covenants in the lease are annexed to the reversionary interest and pass to the purchaser. According to Gaudron, Gummow and Callinan JJ 'that which was held and transferred to SEAA "as proprietor by transfer", in the terms specified in s 77(4), was the estate and interest of Lamina as registered proprietor and the benefit of the covenants by Figgins ran with that estate and interest by operation of s 141'. By operation of this provision, the benefit of the covenants which passed to SEAA at the time of the registration of the transfer to SEAA were assumed to be those contained in the deed of variation. Since the reversionary interest which was transferred on the sale was governed by the deed of variation,

[20] See para 61 at p 401.

[21] Section 42(2)(e) provides that the interest of a registered proprietor will be subject to 'the interest (but excluding any option to purchase) of a tenant in possession of the land'.

SEAA had no entitlement to any 'arrears of rent' under the original lease. Moreover, that statutory transfer [from the Bank to SEAA] took effect so that SEAA was freed and discharged from all liability to account in respect of the Mortgage.' Their Honours regarded this reasoning as reconciling s 77(4) 'with the scheme of title by registration and the nature of the statutory mortgage provided for in s 74(2), as well as with the conferral by s 81(1) of rights and remedies 'as if' the reversion were vested in the mortgagee and until the happening of certain events.'[22]

The two possibilities canvassed above appear to constitute alternative and independent reasons for holding SEAA bound under the deed of variation. This raises an interesting question concerning the application and inter-relationship between ss 42(2)(e) and 77(4) of the *Transfer of Land Act* and s 141 of the *Property Law Act*. It is suggested that McHugh J's reliance on s 42(2)(e) is the better view as it maintains the integrity of the indefeasibility provisions in so far as it enlists the operation of an identifiable and existing exception to indefeasibility. The majority view, which appears to ignore s 42(2)(e) effectively grafts a further category of exception to the indefeasibility provisions of the Torrens system.[23]

THE PRINCIPLES AFFECTING A TORRENS MORTGAGE

The High Court acknowledged that the Torrens mortgage is a creature of statute which differed both in form and substance from a mortgage security over land as understood at common law.[24] The terms of s 74(2) of the *Transfer of Land Act* were clear in that once registered, the Torrens mortgage shall 'have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged'. Gaudron, Gummow and Callinan JJ recognised that s 81(1) deems a state of legal affairs which would otherwise not exist.[25] In defining what constitutes this state of affairs, their Honours took a somewhat different approach to the Court of Appeal. The starting point for the majority in the High Court was not the common law rules relating to mortgages, but the statutory provisions themselves which establish a system of title by registration and which adapt common law provisions. The specific events upon which the rights and powers of the first mortgagee under s 81(1) come to an end are, in their Honour's view, consistent with the nature of the Torrens mortgage as a charge as set out in s 74(2) and are also in accordance with the effect the statute gives to the purchaser's registered transfer in s 77(4). The material parts of s 77(4) provide:

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

[22] See para 60 at pp 400–1.
[23] It is beyond the scope of this paper to consider this matter further.
[24] Gaudron, Gummow and Callinan JJ (paras 19–22 at pp 388–9) and McHugh J (paras 71–72 at pp 403–4) reiterated the basic differences between Torrens and common law mortgages.
[25] See para 53 at pp 398–9.

> *discharged from all liability on account of such mortgage* ... and (except where such a mortgagor ... is the purchaser) of any mortgage charge or encumbrance recorded in the Register subsequent thereto except —
> (a) a lease easement or restrictive covenant to which the mortgagee ... has consented in writing or to which he is a party; or
> (b) a mortgage charge easement or other right that is for any reason binding upon the mortgagee ... (emphasis added).[26]

Their Honours were also conscious of the policy underscoring the Torrens system as a scheme of title by registration and quoted Barwick CJ in *Breskvar v Wall*:[27]

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

The majority concluded that 's 77(4) is consistent with the scheme of title by registration and the nature of the statutory mortgage provided for in s 74(2), as well as with the conferral by s 81(1) of rights and remedies "as if" the reversion were vested in the mortgagee and until the happening of certain events.'[28]

Kirby J specifically accepted the Court of Appeal's view that 'upon default, the first mortgagee has, under s 81(1) rights and remedies *as if* the reversion of the lease existing at the time of the mortgage had been vested in the mortgagee' such that the mortgagor was without title and was thus disabled from varying any covenants in the lease which touched and concerned the land.[29] His Honour noted the 'acute difficulties of making the hypothetical assimilation of rights at common law with the nature of statutory rights in Torrens title'.[30] Nevertheless, Kirby J's decision turned on the construction of the opening words of s 81(1) and his Honour reached the same conclusion as that reached by the other judges. The fact that the mortgagee might have been entitled to exercise other remedies under s 81(1) became theoretical once the mortgage was discharged because the mortgagee's rights and remedies under s 81(1) ceased once SEAA was registered. There was no need for a statutory provision to re-assign the deemed reversion back to the mortgagor prior to the sale because s 81(1) does not actually create a reversion, it merely creates rights *as if* the reversion were vested in the mortgagee.[31] Upon registration, SEAA's rights and obligations were determined by s 77(4) which not only released it from any liability under the mortgage, but also invested SEAA with the mortgagor's registered title.

[26] As quoted in para 26 at p 391.
[27] (1971) 126 CLR 265, 275.
[28] Para 60 at pp 400–401.
[29] Per Kirby J, para 110 at p 415.
[30] Per Kirby J, para 108 at p 414.
[31] Para 116 at p 416.

McHugh J also decided that the effect of s 81(1) was spent once SEAA registered its transfer. His Honour provided some conceptual justification for this conclusion by saying that 's 81(1) confers rights and consequential remedies on the mortgagor, without affecting the content or *quantum* of the mortgagor's estate in the land after execution of the mortgage'.[32] His Honour noted that s 81(1) makes considerable inroads into the legal rights attaching to the mortgagor's ownership of land and may even extend to apply general law rights which provisions such as s 86 of the *Property Law Act* exclude, but it does not destroy the ownership rights of the mortgagor.[33] This conclusion is substantiated by the terms of s 81(3) whereby the legal estate remains vested in the mortgagor subject to rights conferred on the mortgagee. Section 81(3) contemplates that the mortgagor and mortgagee can pursue the same causes of action but that the mortgagor must first obtain the mortgagee's permission to do so.

McHugh J expressed doubts about the long accepted view in Victoria about s 81(1). He did not believe that the language of s 81(1) warranted a construction that gives rise to an implied demise to put the mortgagor in the position of a tenant of the mortgagee. His Honour favoured a restrictive interpretation of the words in s 81(1) 'with a right in the mortgagor of quiet enjoyment until default'. He stated that the words are part of the 'hypothesis that identifies the rights and remedies of the mortgagee' and '[I]t is not a necessary consequence of those words or that hypothesis that the mortgagor should be treated as having some form of tenancy.'[34] In his view, the words and hypothesis were consistent with a legislative intention of giving the mortgagee rights overriding those of the mortgagor in the case of inconsistency without affecting the mortgagor's estate or interest in the land and without converting the mortgagor into a tenant of the mortgagee. McHugh J was of the view that the doctrine of implied demise probably does not apply to s 81(1) because the doctrine was imported into s 81(1) from common law principles based on different language and proceeding from a different conceptual basis to s 81(1). While s 81(1) gave the mortgagee the same rights against a tenant of the property as the mortgagor would have if there was no mortgage, s 81(3) and s 66(2)[35] made it clear that the mortgagor does not lose the reversion, even momentarily, and is not precluded from exercising rights attaching to the reversion in all circumstances. For example, default by the mortgagor entitles the mortgagee to invoke the rights and remedies it would have at common law and until the mortgagee does so, subject to s 81(3) and s 66(2), the mortgagor remains entitled to exercise

[32] Para 71 at pp 403–4.

[33] Section 86 of the *Property Law Act 1958* (Vic) states that only certain sections relevant to mortgages (ie ss 87 (foreclosure), 102 (duties of a receiver), 109 (duties of receiver), 110 (insurance monies and receiver), 111 (bankruptcy and appointment of receiver) and 112 (effect of advance on joint account)) will apply to instruments mortgages created under the *Transfer of Land Act 1958* (Vic).

[34] Para 74 at p 405.

[35] Section 66(2) of the *Transfer of Land Act* provides that '[N]o registered lease of land subject to a mortgage or charge shall be valid or binding against the mortgagee or annuitant unless he [sic] has consented in writing to such a lease.'

the rights derived from its title and the ownership of the reversion. McHugh J's analysis of the rights of the Torrens mortgagor at least explains why Lamina had the power to execute the deed of variation that ultimately decided why SEAA was not entitled to the arrears claimed.

DOCTRINAL AND PRACTICAL IMPLICATIONS OF THE DIFFERENT APPROACHES

The outcome of the final appeal may be devastating for a bona fide purchaser at a first mortgagee's sale of Torrens land who buys property subject to a leasehold. Once registered, the purchaser will find that the mortgagee's rights against the tenant were quite different to those rights which the purchaser subsequently acquires as the new registered owner.[36] The decision also has inevitable and serious implications for registered mortgagees of Torrens land. If a defaulting mortgagor landlord of Torrens land and his or her tenant are permitted to vary the provisions of an existing lease to the detriment of a subsequent registered purchaser from the mortgagee, this necessarily undermines the resale value of the property and hence the value of the mortgagee's security.[37] Furthermore, the registered mortgagee becomes exposed to risks which it may only be able to control by using complex legal strategies. These risks might well be increased where the mortgagor and tenant are commercially or personally related. Furthermore, the situation may arise regardless of whether the lease between the tenant and the mortgagor is executed before or after the mortgage is entered into.

The Court of Appeal's reasoning necessarily imported common law principles which had been traditionally relied upon to clarify s 81(1) and to explain how this section affected the relationship between the mortgagor and mortgagee under a statutory mortgage. These common law principles removed the

[36] This result would seemingly consolidate the effect of *Downie* v *Lockwood* [1965] VR 257 which decided that the interest of the 'tenant in possession' under section 42(2)(e) of the *Transfer of Land Act 1958* (Vic) includes an equity of rectification. The decision has been criticised for over extending the protection given to tenants of Torrens land beyond what is necessary: see recommendation of Victorian Law Reform Commission, (1987), Report No 12, page 11. At any rate protection given to tenants in Victoria is greater than in other jurisdictions because tenants of both registered and unregistered leaseholds (regardless of duration) are protected even though leases for longer than 3 years can be registered under section 66 of the Act: see Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (2nd ed,1997, LBC Information Services) at 4–39.

[37] The High Court assumed on the facts that the variation of the lease was a bona fide commercial transaction. However, the result is unlikely to be different even if the variation between the tenant and mortgagor was not bona fide. The operation of the Torrens system is such that a finding of equitable fraud or even fraud affecting the transaction between these two parties would not benefit the purchaser. The fraud must relate to the fraud of the current registered proprietor or the agent of the current registered proprietor: see majority view in *Bahr* v *Nicolay* (1988) 164 CLR 604 (cf: Mason CJ and Dawson J's view at p 606). On the other hand, personal dishonesty on the part of the vendor mortgagee would give the purchaser grounds for setting aside the sale: *Macquarie Bank Ltd* v *Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

mortgagor's power to vary the lease with the effect that the actual position of SEAA after registration was fundamentally aligned to its expectation that it was entitled to the arrears claimed. By comparison, in the High Court, SEAA's rights were determined by construing the Torrens statutory provisions and adhering to the broad policy considerations attributed to the Torrens scheme of title by registration. For example, having stated that the 'true construction of s 81 is crucial to the outcome'[38] of the appeal, the majority opinion stopped short of providing a detailed analysis of the nature of a registered Torrens system mortgage in the light of s 81(1) and its interaction with other provisions such as the indefeasibility provisions.[39] Such an analysis may have helped reconcile the conclusion of the majority in the High Court with the implications of the approach and conclusion of the Court of Appeal.

The High Court majority view was that it was of no consequence to the subsequent purchaser from the mortgagee that, up until that purchaser's registration, the defaulting mortgagor was regarded as a tenant at sufferance as against the mortgagee. The significant factor was that the mortgagor was in default and the mortgagee was simply exercising its rights as a registered mortgagee of Torrens land. Accordingly, the mortgagor's default entitled the mortgagee to sell the property. In selling the property, the mortgagee transferred the mortgagor's interest to the new purchaser. The fact that the mortgagor was also a landlord of the secured property at the time of sale was a secondary consideration. The relationship between the mortgagor and its tenant was governed by a different set of legal rules and was basically unaffected by the relationship created under s 81(1) between the mortgagee and mortgagor. This situation places at risk the unfortunate party who purchases the fee simple estate from the mortgagee in circumstances where the mortgagor had conducted its affairs in a similar way to Lamina. A purchaser from a mortgagee exercising its power of sale might well have assumed that the mortgagor's interest which was due to vest in the registered purchaser was the sum total of the mortgagor's obligations at the time of its purchase rather than at the time of its registration.

Gaudron, Gummow and Callinan JJ appear to have been informed and influenced by somewhat broad policy considerations fundamental to a system of title by registration. Ironically, a primary goal of the Torrens registration scheme was to confer benefits on innocent purchasers upon registration. However, in the given circumstances, SEAA's registration did not improve its position but actually diminished its rights against the tenant. Furthermore, their Honours did not explore any specific policy considerations which might have originally steered the legislative framers of the Torrens system towards what was then a new form of mortgage which carried no intrinsic or ancillary rights under the mortgage until the mortgagor defaulted. It is arguable that the

[38] Para 50 at p 397.

[39] In other Torrens jurisdictions, these are generally considered to be sections equivalent to the following sections in the Victorian Act *Transfer of Land Act 1958* (Vic): s 42 (the leading section) and ss 43–44 of the, see also *Breskvar* v *Wall* (1971) 126 CLR 265. The Honours' apparent lack of attention to indefeasibility is consistent with their silence regarding the operation of s 42(2)(e): see text to n 28.

provision of a registered charge was another fundamental change introduced with the concept of a registered Torrens title. The Torrens mortgage supposedly replaced '... the conception of 'mortgage' as understood in relation to land under the general law. The terminology is the same in the two systems, but the ideas connoted by the word 'mortgage' are entirely different.'[40] It is a matter for speculation whether their Honours would have nevertheless applied their strict literal approach to s 81(1) which tended to isolate this provision from the indefeasibility provisions, had they specifically addressed the question as to why, in devising the Torrens mortgage, the legislature chose neither to replicate the common law structure under which the mortgagor's ownership was conveyed to the mortgagee nor totally preserve the pure hypothecation nature of the charge. It is possible to imagine that the legislature was not only concerned to exclude the application of complex equitable rules which had evolved to protect mortgagors in common law mortgages, but was also concerned to protect an otherwise vulnerable mortgagee from the potentially weakening effects on its security should the mortgagor, as registered proprietor, create third party interests. The inclusion of a provision such as s 81(1) would certainly support this view.

The opinion of McHugh J demonstrates that his Honour is fully aware of the statutory environment which accommodates the Torrens system of title. In view of the understanding of the litigating parties and the long prevailing view in Victoria that s 81(1) does give rise to an implied demise, McHugh J was prepared to put aside his reservations as to whether s 81(1) gave rise to an implied demise between the mortgagor and mortgagee. For the purposes of the appeal he adopted the view of the Court of Appeal and treated the mortgagor as a lessee of the mortgagee. Nevertheless he regarded the nature of the implied lease differently to the Court of Appeal. His Honour was not prepared to concede that the lessee's interest was a concurrent lease carved out of the reversion expectant upon the existing lease. The nature of lessee's reversion was not changed by the mortgagee's interest. If one accepted that the lessee's interest was carved out of the reversion, then it would be necessary to imply a reassignment of the reversion to the mortgagor for the duration of the implied demise to enable the mortgagor to remain lessor to the tenant under the existing lease. His Honour was not prepared to 'pile fiction on fiction' and thus rejected this analysis.[41] McHugh J's alternative solution was to treat the implied statutory lease as a hybrid, demise — a *'sui generis'* demise created by the Torrens statute. On this analysis, Lamina's default under the mortgage did not affect the reversionary estate. Lamina's default entitled the mortgagee to invoke rights and remedies that it would have at common law while at the same time permitting Lamina to deal with the reversion as it pleased, both before and after any default on its part. Any default on the part of Lamina 'merely enlivened the rights and remedies conferred by the section and, in the

[40] D Kerr, *The Principles of the Australian Lands Titles (Torrens) System* (1927, LBC), 355.
[41] Para 83 at p 408.

absence of those rights being invoked, did not affect the right of Lamina to deal with the reversion.'[42]

CONCLUSION

It is clear that the Torrens registered mortgage was intended to operate as a statutory charge over the mortgagor's title without transferring the mortgagor's interest to the mortgagee. Yet, in order to keep the commercial wheels turning at their optimum, it was also necessary to enumerate and incorporate certain essential rights and powers to protect the registered mortgagee. These rights and powers are almost the same as the incidents of title acquired at common law by a legal mortgagee upon execution of a deed of conveyance. In all Australian jurisdictions except Victoria and Western Australia, the rights and powers of the Torrens registered mortgagee (other than the mortgagee's power to deal or insure the security interest) are only exercisable upon default. However, the Victorian and Western Australian Torrens statutes went further by including a statutory provision which protects registered mortgagees' rights prior to default by purporting to give them the benefit of the legal title held by a legal mortgagee of general law land. The relevant statutory provision has understandably been described as 'obscure'.[43] The decision of the High Court of *Figgins Holdings Pty Ltd* v *SEAA Enterprises Pty Ltd* has certainly highlighted this. The provision neither gives the mortgagee the legal estate nor does it deprive the mortgagor of the legal estate. Understandably, the provision was intended to ensure that registered Torrens mortgagees should be in no worse position than mortgagees under the general law such that Torrens mortgagees, despite the different nature of the Torrens security interest, have similar rights to those acquired by first mortgagees of general law land.[44] However, the approach of the High Court has not furthered this purpose. The Court's interpretation of the statutory provision effectively endangers the mortgagee's interest when the mortgagor has leased the mortgaged property. This approach exposes the mortgagee to a risk which potentially undermines the value of the mortgagee's security if the mortgagor persuades the tenant to vary the provisions of the lease. The registered purchaser from the mortgagee is not protected by the provision, and the legal consequences against the mortgagor's tenant are not the same as the mortgagee's because the purchaser is the assignee of the landlord, not the mortgagee.

[42] para 82 at p 408. The difference in the approach of the majority and that of McHugh J could have unforeseen consequences. For example, the different analysis applied to the nature of the implied lease may make a fundamental difference to the nature of the statutory mortgagee's right to possession. This in turn may have a significant impact where the mortgagor's title is extinguished through adverse possession.

[43] See JJ Hockley, *Fox, Annotated Transfer of Land Act* (2nd ed, 1989 LBC) 82.

[44] In *Farrington* v *Smith* (1894) 20 VLR 90 at 92, Holyroyd J described s 81 as ' ... providing for the remedies of the mortgagee, and care is taken that he shall lose no advantage which he might have enjoyed under the old system of conveyancing.' See also S Robinson, *Transfer of Land Act in Victoria* (1979, LBC) 334–5 discussing s 81(1) of the *Transfer of Land Act 1958* (Vic).

The Court of Appeal's approach maintains the integrity of the mortgagee's security and is sympathetic to the policy issues attributed to the mortgage provisions of the Torrens statutes. In 1986, in delivering his judgment in *Alliance Acceptance Co Ltd* v *Ellison*,[45] Young J noted that the rights of the mortgagee and mortgagor under a Torrens registered mortgage had never been properly defined 'despite the fact that it is now 125 years since the legislation came into existence'.[46] This suggests a strong policy basis in support of the conclusion reached by the Court of Appeal. On appeal from Young J's decision, the New South Wales Court of Appeal[47] considered the nature and effect of a registered mortgage under the New South Wales Torrens legislation.[48] The Court acknowledged that the legal (or juridical) analysis pertaining to registered Torrens mortgages and legal mortgages under the general law was different, 'although for financial and commercial purposes the two types of mortgages have the same effect.'[49] After reviewing a number of sections of the New South Wales Torrens Act,[50] the court concluded that 'the security given by the Act to the mortgagee is intended to be a security over the whole of the mortgagor's rights as registered proprietor as they appear on the register at the time of execution ... and registration of the mortgage.'[51] The emphasis on the economic parity of mortgage transactions under general law and Torrens schemes, and the 'added' protection which s 81(1) purports to give a registered mortgagee, provide convincing reasons for preserving rather than diminishing the mortgagee's rights and those of the mortgagee's purchaser.

[45] (1986) 5 NSWLR 102. A registered proprietor of land granted a registered mortgage to A and later granted an equitable profit à prendre to V to mine sandstone and sand. The mortgagor subsequently defaulted and when the mortgagee entered into possession, V lodged a caveat to protect his profit à prendre. For a very brief note, see Peter Butt, 'The Nature of a Torrens title mortgage' (1987) 61 *Australian Law Journal* 249–250.

[46] (1986) 5 NSWLR 102, 105.

[47] *Vukicevic* v *Alliance Acceptance Co Ltd* (1987) 9 NSWLR 13. Despite the different parties in the case names, this decision is the judgment of the Court of Appeal in the case of *Alliance Acceptance Co Ltd* v *Ellison*. For a brief note, see Peter Butt, 'Rights of support and the Torrens system' (1988) 62 *Australian Law Journal* 375.

[48] *Real Property Act* 1900 (NSW).

[49] (1987) 9 NSWLR 13, 15.

[50] The provisions for the purposes of this discussion are substantially the same in all Australian jurisdictions.

[51] (1987) 9 NSWLR 13, 16.