OPTIONS OR COVENANTS TO PURCHASE OR RENEW IN REGISTERED TORRENS TITLE LEASES

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I INTRODUCTION

There has been a number of approaches to the protection offered in registered Torrens title leases to options or covenants to purchase and options for renewal of such leases. This article considers the position in New Zealand, all eight Australian jurisdictions (the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia), the Canadian Torrens and Torrens-like jurisdictions (Alberta, Canada — North West Territories, Manitoba, Saskatchewan, British Columbia and Ontario), Malaysia, Papua New Guinea and Singapore.

II THE STATUTORY PROVISIONS

1 *Options or Covenants to Purchase*

Although there are differences of detail within them, there are three approaches in the Torrens Acts of the various jurisdictions to the question of including an option or covenant to purchase the fee simple of land in a lease of the land. Some have positive provisions, others no provision and one has a negative provision.

We consider first the positive provisions.

The Northern Territory and South Australia simply provide that "a right for or covenant by the lessee to purchase the land . . . [in a lease] may be stipulated in such lease, and shall be binding."[1] The New Zealand and New South Wales provisions are a little more detailed.[2] New Zealand provides thus:

> A right for or covenant by the lessee to purchase the land may be stipulated in a memorandum of lease; and in case the lessee pays the purchase money, and otherwise observes his covenants expressed and implied in the instrument, the lessor shall be bound to execute a memorandum of transfer, and to perform all other necessary acts for the purpose of transferring to the lessee the said lands and the fee simple thereof.

The most elaborate form appears in the Australian Capital Territory,

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1 Northern Territory Real Property Acts 117; Real Property Act 1886-1980 (SA), s 117.

2 Land Transfer Act 1952 (NZ), s 118; Real Property Act 1900 (NSW), s 53(3). The New South Wales provision is slightly, but not materially, differently worded.

Papua New Guinea and Queensland.[3] The Australian Capital Territory provision typifies this group and enacts as follows:

> (1) In any lease other than a lease from the Commonwealth a right to purchase the fee-simple of the land thereby demised may be granted to the lessee, or a covenant to purchase the fee-simple of the land may be entered into by the lessee.
>
> (2) The true amount of the purchase money to be paid, the period within which the right may be exercised or within which the covenant is to be performed, and any other particulars necessary to explain the terms of the right or covenant, shall be stated in the lease.
>
> (3) If the lessee pays the purchase money stipulated and otherwise observes his covenants expressed and implied in a registered lease, the lessor shall execute a transfer to the lessee of the fee-simple, and perform all acts required by this Ordinance to be done for the purpose of transferring the fee-simple of the land.

The Canadian jurisdictions of Alberta, the Canadian federal parliament enacting for the Territories, Saskatchewan and the Malaysian National Land Code only provide for the inclusion of a *right* to purchase and do not refer to the inclusion of a *covenant* to purchase the leased land. With this substantial omission, Saskatchewan[4] follows the simple form of drafting of the Northern Territory and South Australia. Malaysia,[5] too, has a simple form which, additionally, provides that the option must be "exercisable at any time before the expiry of the term . . . [of the lease] or its sooner determination." Again, subject to the omission of the covenant to purchase, Alberta[6] and the Canadian federal statute[7] follow closely the New Zealand and New South Wales draftsmanship.

The Torrens jurisdictions which have no provisions are Manitoba, Tasmania, Victoria and Western Australia and to these can be added the Torrens-like or, more accurately, hybrid statutes of British Columbia and Ontario.

Singapore contains an interesting negativing provision worded as follows:[8]

> (1) Registration of a lease containing an option for renewal or for purchase does not give the option (whether in the form of a covenant or otherwise) any greater effect than it would have had without such registration.
>
> (2) The memorial of registration of a lease containing an option shall not refer to the option.
>
> (3) After the determination of a lease containing an option, and whether or not the determination has been registered or notified on the land register, a purchaser of land affected by the lease shall not be concerned to inquire whether any unregistered interest has been created in pursuance of the option.

3 Real Property Ordinance 1925 (ACT), s 83; Land Registration Act 1981 (PNG), s 58; Real Property Act 1861-1981 (Qld), s 53. There are minor, but not material, variations in wording and setting out in the three jurisdictions.

4 Land Titles Act 1965 (Sask), s 119(3). The section numbering altered from s 112(3) in the 1960 revision of statutes. There has been a further revision in 1978 but this is not available yet in Canberra. It is hoped that the section has not done a chameleon.

5 National Land Code of 1965 (Malaysia), s 228(1).

6 Land Titles Act RSA 1970 (Alta), c 198, s 98(3).

7 Land Titles Act (Can), RS c 162, ss 88(2) and (3).

8 Land Titles Act (Singapore), Cap 276, s 73.

It will be noted that the Singapore section covers options to renew as well as options to purchase and perhaps that fact gives a clue as to its origins. In his *The Torrens System in New South Wales*[9] the late John Baalman, Torrens scholar without peer in his generation, indicated his slight disapproval of the option to purchase provision and the protection that the cases had decided it gave. He disapproved more strongly of the decision in *Pearson* v *Aotea District Maori Land Board*[10] which, as we shall see later, extended protection to options to renew. In private correspondence with the author he was very forthright on this (and many other things as well!) and a pale shadow of his view is indicated in these passages from his *The Singapore Torrens System*:[11]

> Options being entirely contractual in their operation, early authors of Torrens Statutes probably had misgivings about their impact on an indefeasible land-register which certified only the ownership of rights in rem. Because it was so convenient for the parties to a lease to include this purely contractual transaction in the instrument of demise, the authors apparently deemed it necessary to give options a cloak of respectability by making express provision . . . for the consequence of an optionee exercising his right.
>
> . . . [I]t has generally been considered that, by the registration of a lease containing an option to purchase the reversion, an element of indefeasibility is imparted to this purely contractual undertaking. . . . [*Pearson's* case] extended this doctrine in New Zealand to options of renewal. But the reasoning in the latter case has had neither the time nor the logic to attract the general approval which other jurisdictions seem to have accorded to [the option to purchase cases].

John Baalman drafted the Torrens statute for Singapore which he "claimed to be 'judge-proof' and 'bumble-proof'; an extravagant claim, of course, but such was the author's ambition."[12] So, given his views on options to purchase and options to renew, it is not surprising to find the section that we do in the Singapore statute. Let us allow the irrepressible Baalman himself indicate its purpose. The section[13]

> expressly repudiates the principle of an indefeasible option, whether for purchase or for renewal. It recognises the convenient practice of including options in leases, but keeps them where they belong — on a purely contractual level.
>
> They derive no added effect from being included in a registered instrument. Until an option has been exercised, it will rank as any other unregistered interest would rank *dehors* the land-register, and neither a purchaser of land, nor the Registrar, need be concerned with it.

It will be recalled that the Singapore formula is very similar to that used in relation to the noting on the Torrens register of restrictive covenants in those Australasian jurisdictions which allow that.[14]

9 (1951) 232-234.
10 [1945] NZLR 542.
11 (1961) 151.
12 Correspondence with the author January 1960.
13 *The Singapore Torrens System* (1961) 151.
14 See, for example, Property Law Act 1952 (NZ), s 126; Conveyancing Act 1919 (NSW), s 88; Land Titles Act 1980 (Tas), s 102; Transfer of Land Act 1958 (Vic), s 88 and Property Law Act 1958 (Vic), s 79A; and Transfer of Land Act 1893-1972 (WA), s 129A.

2 *Options to Renew*

In the foregoing passages on the Singapore Act we have anticipated slightly on options to renew contained in registered leases. We have seen that Singapore negates protection for options to renew in the same way that options to purchase are denied full indefeasibility.[15]

The only other of our jurisdictions which has a directly relevant provision is Singapore's neighbour Malaysia. There, the relevant part of the section enacts a positive protection by providing that[16]

> any lease, sub-lease or tenancy . . . may confer on the lessee, sub-lessee or tenant an option, exercisable at any time before the expiry of the term thereby created or its sooner determination . . . to require the grant to him of a lease, sub-lease or tenancy for a further term.

None of the other jurisdictions has a provision for renewal akin to the option or covenant to purchase provisions permitting the inclusion in a registered lease of an option to renew. However, four jurisdictions, the Northern Territory, Papua New Guinea, South Australia and Western Australia, do have a provision from which it is possible to infer that there is an expectation that an option to renew may be a proper inclusion in such a registered lease. They each provide that no option for renewal[17] is to be valid against any subsequent purchaser of the reversion or other interest holder *unless the lease is registered* or protected by caveat.[18]

III The Option or Covenant to Purchase Provisions Interpreted

The interpretation of the option or covenant to purchase provisions is now canvassed. Singapore's negative provision, which has been considered already, has not thrown up any case law. In those jurisdictions where there are positive provisions,[19] two opposing views have been taken and nothing appears to have depended upon the difference in wording between the various jurisdictions.

On one side, the main was set for Australasia by Edwards J in *Rutu Peehi* v *Davy*[20] when he said:

> In my opinion the rights so acquired by the lessee are as much protected as the term granted by the lease. To hold otherwise would work the grossest injustice, and would strike a dangerous blow at the utility of the . . . [Torrens] Acts.

A doubt was expressed by Richmond J in *Katene Te Whakaruru* v *The Public Trustee*[21] about the effect of the option to purchase provision, but

15 Land Titles Act (Singapore), Cap 276, s 73.
16 National Land Code of 1965 (Malaysia), s 228(1).
17 And also no right or covenant to purchase.
18 Northern Territory Real Property Act, s 119; Land Registration Act 1981 (PNG), ss 28(2) and (4); Real Property Act 1886-1980 (SA), s 119; Transfer of Land Act 1893-1972 (WA), s 68.
19 Positive provisions for both rights and covenants exist in the Australian Capital Territory, New South Wales, New Zealand, the Northern Territory, Papua New Guinea, Queensland and South Australia and a positive provision for a right in Alberta, Canada, Saskatchewan and Malaysia.
20 (1890) 9 NZLR 134, 151.
21 (1893) 12 NZLR 651, 665.

in that case he was concerned with a covenent for renewal so it was unnecessary for him to reach a conclusion on the option to purchase provision. However, the principle enunciated in *Rutu Peehi* v *Davy*[22] was applied in *Fels* v *Knowles.*[23] In that case

> the defendants were trustees under a will and registered proprietors, by transmission, of a block of land. They granted to one H, under whose will the plaintiffs were appointed trustees, a lease of the land for fourteen years, in which was inserted an option to purchase the demised property for £6,000. H knew that the lessors granted the lease as trustees under a will, but neither he nor his solicitor knew or inquired whether the will gave the trustees power to include in the lease an option to purchase. Seven months before the expiry of the lease, notice was given to the lessors of the lessees' intention to exercise this right to purchase but the lessors refused to transfer, on the ground that they had no power to grant a lease containing an option to purchase, and that, if they did transfer, they would be guilty of a breach of trust.

In a suit for specific performance it was held by a majority of the Court of Appeal[24] that the defendants were bound by the option to purchase. Notwithstanding that the option may have been granted in breach of trust, the option had been included in a registered lease. The Court held that the right to purchase was an integral part of the lease itself, and that registration of the lease conferred indefeasibility, in the absence of fraud (which was not present in the case), upon the right claimed by the plaintiffs.

The decision in *Fels* v *Knowles* was approved of in *Horne* v *Horne*[25] and in *Rotorua and Bay of Plenty Hunt Club (Inc)* v *Baker.*[26] In the latter case Johnston J in fact found that an attorney did have authority under his power to grant the option to purchase that he granted. However, he went on to say that, even if he had held that the attorney had acted ultra vires, the fact that the option was contained in a registered lease to the Hunt Club, which had acted throughout in good faith, would have been sufficient to raise the principle in *Fels* v *Knowles* and give the full protection of indefeasibility to the Hunt Club.

There is an alternative view to that taken in this New Zealand line of authority. Stout C J in fact dissented in *Fels* v *Knowles* and it is interesting to note an intervention of his during argument. He said:[27] "A Court of equity will not enforce a breach of trust even under the . . . [Torrens] Acts." This reluctance to allow a registration statute to override an equitable rule in a case sufficiently clearly delineated in the statute is also seen in much of Stout C J's dissenting judgment in *Fels* v *Knowles.* It seems to have been the motivating force in the judgment of Stuart J in the Alberta case of *St Germain* v *Reneault*[28] in which he decided that an

22 Supra n 20.

23 (1906) 26 NZLR 604.

24 Denniston, Edwards, Cooper and Chapman JJ. Stout C J dissented although he did observe, ibid at 617, that he could not "say that . . . [he was] free from doubt in the opinion . . . [he] arrived at . . .".

25 (1906) 26 NZLR 1208. *Fels* v *Knowles*, supra n 23, was in fact distinguished in *Horne* v *Horne* on the ground that the lease in the latter case was not properly registrable because the option included both Torrens land and non-Torrens land.

26 [1941] NZLR 669.

27 (1906) 26 NZLR 604, 605.

28 (1909) 2 Alta L R 371.

option in a registered lease is not necessarily fully protected. The facts of *St Germain* v *Reneault* were these:

> The administratrix of an estate granted a lease of an hotel belonging to the estate. In the lease an option to purchase was granted to the lessee at a fixed price. The lease was registered. An action was brought claiming inter alia a declaration that the option to purchase was void as being a breach of trust.

The Alberta statute had, and still has, a positive provision permitting the inclusion of an option to purchase in a registered lease. Stuart J put his view thus:[29]

> a Court of Equity will not enforce the purely equitable remedy of specific performance so as to make a trustee carry out a breach of trust.

Stuart J held that, despite the inclusion in the statute of the permissive option provision, and despite the registration of the lease, the option was not binding on the principle of trustee law that a fiduciary must exercise his discretion at the time when the discretion arises. Stuart J concluded that the special provision did not give the option any added protection and "that the option clause was and still is null and void and must be so declared."[30]

In Stuart J's judgment there is very little discussion of the option provision in the statute and none at all of the effect registration might have on the insertion of an option in a lease permitted under that special provision. In fact, Stuart J merely says in passing that the special option provision "in so far as it is material merely states that an option of purchase may be inserted in a registered lease."[31]

Thus, in *St Germain* v *Reneault* there is not such very full consideration of the effect of having such a provision in the statute as has occurred in the New Zealand line of authority. However, there are some comments on the effect of registration which are perhaps pertinent in considering the present authority of *St Germain* v *Reneault*. Stuart J had this to say:[32]

> [The original lessee] . . . would not, at least at any time before the registration of his lease, have been entitled to say that the clause giving the option was valid and effective in his favour. Up to that time, that is, up to the registration of his lease, there would have been no "registered dealings" with the land at all. Can it, then, be said that by merely registering his lease in the Land Titles Office he can make a clause in it which before was void, valid and binding in his favour? I feel quite sure that such is not the intention or result of the enactment in question. The purpose of the registration law is to protect people who find instruments registered or not registered, and who act upon the faith of such registration or non-registration, and not to enable a person who is a grantee under an invalid instrument to turn it into a valid one in his own interest merely by the registration of it.

29 Ibid at 375.
30 Ibid at 377.
31 Ibid at 374.
32 Ibid at 376-377.

The comments of Salmond J in his dissenting judgment in *Boyd* v *Mayor of Wellington*[33] were redolent of this when he said:[34]

> Is an instrument, when once registered, conclusively valid between the parties and thence-forward unexaminable in respect of any ground of invalidity whatever except fraud? In other words, can a purchaser who has registered a void instrument of transfer claim that, so long as he has acted without fraud, he has thereby succeeded in obtaining an indefeasible title?

Again, in the seductive epigram that influenced the Australian courts for a generation, Salmond J said:[35]

> The registered title of A cannot pass to B except by the registration against A's title of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it can pass by a valid instrument alone without registration.

These views of Salmond J were, of course, minority ones and have now been rejected. Indeed, it is appropriate, almost three-quarters of a century after *St Germain* v *Reneault* to put Stuart J's comments into the context of the more recent approach to indefeasibility. Three passages are cited.

First, in *Frazer* v *Walker*[36] the Privy Council decided that *Boyd's* case (which, we recall, concerned an allegedly void proclamation that had been registered)

> was rightly decided and that the *ratio* of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.

Again, Street J (as he then was) said in *Mayer* v *Coe*:[37]

> The Privy Council's decision [in *Frazer* v *Walker*] is direct and binding authority laying down that a registered proprietor who acquires his interest under an instrument void for any reason whatever obtains on registration an indefeasible title.

Thirdly, Barwick C J said in *Breskvar* v *Wall*:[38]

> The Torrens system of registered title . . . 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. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.

33 [1924] NZLR 1174.
34 Ibid at 1202.
35 Ibid at 1205.
36 [1967] NZLR 1069, 1078.
37 (1968) 88 WN (Pt 1) (NSW) 549, 558.
38 (1971) 126 CLR 376, 385-386.

Of course, in order to get this full protection an interest must be of the kind to attract the protective mantle of indefeasibility; but it is submitted that it is becoming very difficult to argue that an option to purchase is not such an interest.

Thus, given the scanty discussion of the option provision in the judgment of Stuart J in *St Germain* v *Reneault* and having considered the decision in that case against more recent approaches to indefeasibility, it is suggested that *St Germain* v *Reneault* might well be reconsidered if the point were to come up for re-decision in Canada.

The conclusion is thus suggested that, in all those jurisdictions which have a positive provision for the inclusion in their Torrens statute of an option or covenant to purchase, of whatever form, it is very likely that the full protection of indefeasibility will be accorded to it.

Nevertheless, the protection so afforded can be over-reached by a statute, as any other so-called indefeasible title may be over-reached.[39]

As we have seen, in the Australian Capital Territory, Papua New Guinea and Queensland the period within which the right may be exercised or within which the covenant is to be performed must be stated in the lease.[40] Malaysia provides that the option must be "exercisable at any time before the expiry of the term . . . [of the lease] or its sooner determination."[41] However, it is submitted that, even in the "positive provision" jurisdictions that do not provide in these terms, an option to purchase, in which there is no express limitation of time during which the option may be exercised, receives protection only during the currency of the lease.[42] Of course in these jurisdictions, a contrary intention, to permit the exercise of the option later, could be expressed in the lease.[43]

As submitted, an option or covenant to purchase receives the same protection as, but no greater protection than, other rights under the lease. Therefore, in practice, it is submitted that to protect his rights fully an optionee should lodge a caveat against the fee simple estate whence issues the lease in which he is given his option to purchase.

So far we have considered Singapore's negative provision and those jurisdictions in which there is a "positive protection" provision in the legislation. It is less certain whether the full protection which, it has been submitted, is given to an option or covenant to purchase in a registered

39 *Ford* v *Attorney-General* [1959] NZLR 1083 (CA). As Cleary J said in that case (at 1089), when delivering the judgment of the Court, in order to argue otherwise successfully "it would be necessary to say that a registered instrument cannot be affected by a subsequent statutory provision, but that is not so for the plainest of reasons."

40 Real Property Ordinance 1925 (ACT), s 83(2); Land Registration Act 1981 (PNG), s 58(2); Real Property Act 1861-1981 (Qld), s 53(2).

41 National Land Code of 1965 (Malaysia), s 228(1).

42 *Shearer* v *Wilding* (1915) 15 SR (NSW) 283, 286 per Harvey J. It was held in the English case of *Rider* v *Ford* [1923] 1 Ch 541 that an option to purchase, which contained no time limitation, could be exercised even after the term of the original lease had expired, so long as the relationship of lessor and lessee continued between the parties. Although it was not material to the decision in *Trustees Executors and Agency Co Ltd* v *Peters* (1960) 102 CLR 537, 553-554, Menzies J considered this view and that expressed in the text and supported by Harvey J, and said that his "own inclination . . . [was] towards the view taken by Harvey J".

43 *Trustees Executors and Agency Co Ltd* v *Peters* (1960) 102 CLR 537.

lease in these "positive provision" jurisdictions is also accorded in those jurisdictions[44] where there are no such provisions. The view that it almost certainly does so adhere in these jurisdictions as well has received some support in the decisions on the extent of the protection given to an option or covenant to renew contained in a registered lease and we turn to consider these.

IV THE OPTION OR COVENANT TO RENEW CASES

We have already discussed the Malaysian positive provision for the protection of an option to renew and the negation of protection for either an option or covenant to renew in Singapore. There has not yet been a reported case on either provision. However, the question has been litigated elsewhere and we consider the position in the sixteen jurisdictions which have no provision relating to an option or covenant to renew contained in a registered Torrens lease.

The question arose early in New Zealand in *Katene Te Whakaruru* v *The Public Trustee.*[45] In that case the simplified facts were these:

> A lease containing a right of renewal was registered. The whole validity of the lease, including the right to renewal, and its granting were attacked. It had come into the hands of a bona fide purchaser without fraud as Richmond J found.

Richmond J held that, although the validity of the lease in the hands of the original lessee would have been open to attack (a proposition that, it is suggested, would not now be sustainable),[46] as it had, in fact, come into the hands of a registered bona fide purchaser for value without fraud he had acquired an indefeasible title. He was more doubtful about the right of renewal contained in the lease and left the matter open saying that "[a]s to the right of renewal which the lease purports to create, there will be no declaration. No present decision is called for."[47]

Apart from a short reference in *Roberts* v *District Land Registrar at Gisborne*,[48] where Edwards J rather assumed that the option to purchase decisions in *Rutu Peehi* v *Davy*[49] and *Fels* v *Knowles*[50] also applied to options for renewal, there the matter rested until *Pearson* v *Aotea District Maori Land Board.*[51] In *Pearson's* case, in which the question of the extent of the protection to be afforded a right of renewal arose directly, the facts were these:

44 There are no special option or covenant provisions in British Columbia, Manitoba, Ontario, Tasmania, Victoria and Western Australia.

45 (1893) 12 NZLR 651.

46 *Katene's* case was, of course, decided before *Assets Company Ltd* v *Mere Roihi* [1905] AC 176, but Richmond J was somewhat influenced by the other very recent case of *Gibbs* v *Messer* [1891] AC 248 which held that the registration of a forgery did not confer a good title on the immediate holder. *Frazer* v *Walker* [1967] NZLR 1069 and *Breskvar* v *Wall* (1971) 126 CLR 376 ended the controversy in favour of immediate indefeasibility.

47 (1893) 12 NZLR 651, 665.

48 (1909) 28 NZLR 616, 617.

49 (1890) 9 NZLR 134.

50 (1906) 26 NZLR 604.

51 [1945] NZLR 542.

> Maori land legislation was contravened by the inclusion in a lease of a perpetual right of renewal and the lease was registered. Later, the lessee's interest therein was transferred to a bona fide purchaser for value. The first term of the lease having expired, a new lease was executed by the defendant Board as lessor and by the transferee of the former lease; but it did not contain the provision for perpetual renewal, a fact that was not realised at the time by the transferee, the lessee under the new lease. The lessee under the new lease brought an action against the lessor claiming rectification of the lease by the lessor's accepting a surrender and granting a new lease containing the provision for perpetual renewal.

Finlay J stated that the lessee's rights must be decided on the general Torrens principle that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. He then continued:[52]

> The question then resolves itself into one as to whether or not registration of a right of renewal is a proper subject of registration under the statute. It is not expressly authorized in the sense that there are no words in the statute specifically authorizing its registration. In this respect it differs from a right of purchase, registration of which is expressly authorized . . . . A right of renewal is something which affects and is, in a sense, definitive of the term of a lease. It constitutes a covenant which runs both with the land and with the reversion . . . . In that sense the right of renewal is adjectival in relation to the term granted. It constitutes a material qualification of the term, and is therefore something more than a mere ancillary right. It is, in other words, an integral part of the estate shown by the Register as vested in the lessee. Its registration is, I think, in consequence authorized under . . . [the Torrens statute]. That a right of renewal also creates an equitable estate in the land is in my view merely coincidental.

In the result it was held that the plaintiff lessee had an indefeasible right to the renewal sought and rectification of the lease to include the right of renewal was ordered.

Pearson's case involved an extension of the principles of protection enunciated in the New Zealand line of authority on the "positive protection" of options to purchase provision. The cases in that line extended the protection of registration to the contents of instruments which conferred rights, in cases where creation of the rights was specially authorised by the express provisions of the Torrens Act itself. However, in *Pearson's* case protection was extended to an equitable right to have a registered estate in the future where the creation of the right was not so specially authorised by the Act.

In *Travinto Nominees Pty Ltd* v *Vlattas*[53] the High Court of Australia considered the protection to be afforded to a registered lease containing an option to renew which was clearly in contravention of section 88B of the Industrial Arbitration Act 1940 (NSW). The High Court held that the renewal was not enforceable. Barwick C J had this to say:[54]

> The other matter with which I need deal is the effect of the registration of the lease under the . . . [New South Wales Torrens statute] upon the validity or enforceability

52 Ibid at 550-551.
53 (1973) 129 CLR 1.
54 Ibid at 16-18.

> of the option to renew . . . . [I]n this case quite clearly, in my opinion, . . . the option to renew if exercised would have been incapable of being ordered to be specifically performed because of the provisions of s.88B of the *Industrial Arbitration Act*. It is not, in my opinion, the fact that the statute made the option void which is of consequence in this connexion. It is the fact that it made it illegal; and therefore incapable of specific performance which is the critical circumstance. I therefore find it unnecessary . . . to decide whether *Roberts* v. *District Land Registrar at Gisborne* and *Pearson* v. *Aotea District Maori Land Board* ought to be followed.

This question did fall for decision by the High Court of Australia in *Mercantile Credits Ltd* v *Shell Co of Australia Ltd*[55] in which the simplified facts were as follows:

> A registered lease contained provisions under which the lessee had an option to renew for three further terms of five years each. The lessor later mortgaged the land and thus the mortgagee took subject to the lease which included the options. One of the options to renew was exercised. The mortgagee then gave notice of its intention to exercise its power of sale under the mortgage. The question was whether the mortgagee was bound by the renewal or whether it could sell the land freed from the renewal.

The High Court of Australia held that the mortgagee was bound by the renewal and, in so doing, conferred protection on the right of renewal that had been contained in the prior registered lease. Stephen J put it this way:[56]

> To confer indefeasibility upon rights of renewal contained in registered leases does violence neither to the general scheme of the Act nor to the objects which it seeks to attain. The existence of such rights of renewal will be apparent upon any inspection of the register and those who deal in the land may thus learn of the extent to which the reversion is thereby contingently affected.

Barwick C J summed up his views in this passage:[57]

> My conclusion that the Act gives priority and indefeasibility to the right of renewal contained in the registered memorandum of lease in this case conforms to the line of decision in New Zealand on the counterpart provisions of the . . . [New Zealand Torrens Act]. In this connexion I refer to *Rutu Peehi* v. *Davy* . . .; *Fels* v. *Knowles* . . .; *Horne* v. *Horne* . . . to the extent to which it adopted *Fels* v. *Knowles*; *Roberts* v. *District Land Registrar at Gisborne* . . .; and *Pearson* v. *Aotea District Maori Land Board* . . .; all of which cases, in so far as they decided 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, were, in my respectful opinion, correctly decided.

Gibbs J agreed in the result and said:[58]

> It does not appear ever to have been found necessary in Australia to decide whether *Roberts* v. *District Land Registrar at Gisborne* . . . and *Pearson* v. *Aotea District Maori Land Board* . . . should be followed and that question was left open by

55 (1976) 136 CLR 326.
56 Ibid at 352.
57 Ibid at 340-341.
58 (1976) 136 CLR 326, 345-346.

> members of this Court in *Travinto Nominees Pty. Ltd.* v. *Vlattas* . . . . The present case, unlike those two New Zealand cases, is not one in which the grant of the right of renewal was illegal or void and we are concerned not with a question of indefeasibility but with one of priority; although the two questions appear to depend on the same considerations, it is unnecessary to consider what the position would have been if the covenant had been void before the registration of the lease. In my opinion the judgment of Finlay J. in *Pearson* v. *Aotea District Maori Land Board* . . ., so far as it is relevant to the present case, was correct. The right of renewal is so intimately connected with the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease, and on registration is entitled to the same priority as the term itself.

Perhaps this passage points the way to areas where doubt may still exist.

V Conclusions

There are still some doubtful areas concerning the enforceability of options and covenants to purchase or renew in registered Torrens leases. It is also true that some of the clarifying decisions have not yet been applied by the courts of all jurisdictions with similar legislative provisions. Nevertheless, it is hoped that, in the cause of the continued development of a universal body of Torrens system law, there will not be different interpretations between jurisdictions where the statutory bases are similar even if they are not identical. Subject to these doubts, it is suggested that the current position can be summed up in these propositions:

(a) In Singapore registration of a lease containing an option or covenant for renewal or for purchase does not give the option any greater effect than it would have had without such registration.[59]

(b) In Malaysia where there is a positive provision for the protection of an option to renew[60] it is probable that the courts will follow the option to purchase principles indicated below.

(c) In all jurisdictions, including Malaysia, an option or covenant to renew which is illegal does not gain any protection by registration, for the parties could not call in aid the court's power to grant specific performance or the equivalent remedy.[61]

(d) Except in Singapore, an option or covenant to renew which is merely void is probably protected[62] by having its defects cured on registration under the principle of immediate indefeasibility.[63]

(e) Except in Singapore, where *any* flaw will remain even after registration, an option or covenant to renew which is neither illegal nor void is fully protected on registration.[64]

(f) The effect of an option or covenant to purchase in those jurisdictions

59 Land Titles Act (Singapore), Cap 276, s 73.

60 National Land Code of 1965 (Malaysia), s 228(1).

61 *Travinto Nominees Pty Ltd* v *Vlattas* (1973) 129 CLR 1.

62 *Mercantile Credits Ltd* v *Shell Co of Australia Ltd* (1976) 136 CLR 326.

63 *Frazer* v *Walker* [1967] NZLR 1069; *Breskvar* v *Wall* (1971) 126 CLR 376. This is even more strongly submitted for those jurisdictions (the Northern Territory, Papua New Guinea, South Australia and Western Australia) which have provisions that suggest that an option to renew is a proper inclusion in a registered lease.

64 *Mercantile Credits Ltd* v *Shell Co of Australia Ltd* (1976) 136 CLR 326.

(British Columbia, Ontario, Manitoba, Tasmania, Victoria and Western Australia) where there is no specific provision authorising their inclusion in a lease, should probably follow the principles that apply to options to renew.

(g) A covenant to purchase in those jurisdictions (Alberta, Canada for the Territories, Malaysia and Saskatchewan) where there is a specific provision authorising the inclusion of a right or option to purchase but no provision authorising the inclusion of a covenant requiring purchase, should probably follow the principles that apply to options to renew in relation to the *covenant* for purchase but the following principles for the *right* or *option* to purchase.

(h) In the seven jurisdictions (the Australian Capital Territory, New South Wales, New Zealand, the Northern Territory, Papua New Guinea, Queensland and South Australia) where there are special provisions authorising the inclusion of both an option or covenant to purchase, if such an option or covenant involves illegality it should not be afforded protection by registration as the parties could not call in aid the power of the court to grant specific performance or the equivalent remedy.[65]

(i) In these same seven jurisdictions an option or covenant to purchase which is merely void is probably protected[66] by having its defects cured by registration.[67]

(j) In these same seven jurisdictions an option or covenant to purchase which is neither illegal nor void is certainly fully protected on registration.[68]

(k) Finally, it is submitted that, except in Singapore where there are special negativing statutory provisions, it would be best if the courts of the other seventeen jurisdictions adopted consistent interpretations for both options and covenants for purchase and renewal included in registered Torrens title leases. Given the burden of authority in the present decisions, it is respectfully suggested that this interpretation should favour protection being given (unless there is some clear illegality involved) which would call for the court to order specific performance or some similar remedy.

65 On analogy with *Travinto Nominees Pty Ltd* v *Vlattas* (1973) 129 CLR 1. Of course *St Germain* v *Reneault* (1909) 2 Alta LR 371, would also support this result but it has been suggested that that case should now be regarded as being doubtful on other grounds.

66 *Rutu Peehi* v *Davy* (1890) 9 NZLR 134; *Fels* v *Knowles* (1906) 26 NZLR 604; *Rotorua and Bay of Plenty Hunt Club (Inc)* v *Baker* [1941] NZLR 669.

67 *Frazer* v *Walker* [1967] NZLR 1069; *Breskvar* v *Wall* (1971) 126 CLR 376. It may be possible to argue against this that, as there may be a need to call in aid the court's powers to grant specific performance, there may be some circumstances where the court would not enforce something contrary to statute where there was merely a void option or covenant. To be successful, this argument would need to overcome the principle of indefeasibility. Of course this same argument could occur in relation to conclusion (d) above concerning options or covenants to renew.

For this conclusion to be valid for the Canadian jurisdictions mentioned in conclusion (g) it involves an acceptance of the argument advanced in the text that *St Germain* v *Reneault* (1909) 2 Alta LR 371 would now be overruled in Canada.

68 *Rutu Peehi* v *Davy* (1890) 9 NZLR 134; *Fels* v *Knowles* (1906) 26 NZLR 604; *Rotorua and Bay of Plenty Hunt Club (Inc)* v *Baker* [1941] NZLR 669.